

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 21, 2006**

**CALIFORNIA MENTAL HEALTH
COMMITMENT REGIMENS:
NGI, MDO, SVP**

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CALIFORNIA MENTAL COMMITMENT REGIMENS

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INTRODUCTION

This is a very brief primer identifying the principal categories of California mental health commitments (and appeals). It is not intended as a comprehensive discussion of the types of appellate issues those cases commonly present.

The great majority of mental health appeals arise from involuntary mental hospital commitments (or extensions of commitments) under three distinct regimens – not guilty by reason of insanity (NGI), the Mentally Disordered Offender (MDO) law, and the Sexually Violent Predators (SVP) Act. All of these are nominally “civil” commitment regimens, which nonetheless spring out of the criminal justice system. (And, in most counties, these commitment/extension cases retain the same superior court docket number as the original criminal case.)

Although the precise requirements vary from the statute to statute, under each of these laws, the showing required for a commitment (or extension of a commitment) consists of two primary components: a mental illness or disorder and current dangerousness.

Under each of these commitment regimens, the defendant receives many, though not all, of the core procedural rights associated with criminal trials – including the right to jury trial, a unanimous verdict, proof beyond a reasonable doubt, and representation by counsel (including appointment of counsel, both at trial and on appeal, for indigents). The “players” are generally the same. Under each regimen, it is the District Attorney’s office which files and prosecutes the commitment or extension petition, and defense counsel is generally appointed via the identical system as for criminal defendants. Administratively, most courts (both superior courts and appellate courts) process NGI, MDO, and SVP cases on the “criminal side” (rather than on the “civil side” as with LPS conservatorships). Thus, in mental health appeals, appellate defense counsel use the same familiar tools as in conventional criminal appeals in completing and augmenting the appellate record, obtaining extensions, etc.

But there are also crucial substantive distinctions. Due to the nominally civil character of an involuntary mental hospitalization, there is no Fifth Amendment privilege not to take the stand. (See, e.g., *People v. Leonard* (2005) 128 Cal.App.4th 794.) Indeed, *the prosecutor is allowed to call the defendant to the stand during the*

prosecution's case-in-chief. However, just like a witness in any proceeding, civil or criminal, a defendant retains the right to assert the Fifth Amendment privilege as to any lines of questions which could potentially incriminate him. He cannot refuse to testify about his underlying offense, because, due to the NGI verdict or (for SVP's and MDO's) the conviction, he is no longer subject to any future prosecution for that crime. But he can refuse to testify as to any unadjudicated matter which is or could be the subject of a prosecution – e.g., an allegation that he assaulted someone while in the hospital.

Under each regimen, the trial often consists of a duel between psychological and psychiatric experts. Additionally, those accustomed to conventional criminal trials will be shocked at the volume of hearsay information communicated to the jurors – usually under the guise of explaining the bases for the experts' opinions. (Evid. Code § 801(b), 802.) The Sixth Amendment confrontation clause (like the full Fifth Amendment self-incrimination privilege) is limited to criminal trials. However, a watered-down version of confrontation applies in mental commitment trials, via the due process clause. (Cf. *People v. Otto* (2001) 26 Cal.4th 200, 209-215.) Nonetheless, as reflected in the *Otto* opinion (discussed further in the context of SVP), this due process analysis permits admission of hearsay which would plainly fail muster under the confrontation clause. (E.g., *People v. Angulo* (2005) 129 Cal.App.4th 1349 [*Crawford v. Washington* not applicable to civil commitment trials].)

I. NGI

A. Background: NGI Adjudications and Maximum Term of Commitment

Most NGI-related appeals do not involve review of a criminal trial in which the jury rejected an insanity defense and returned a verdict of conviction. In fact (and contrary to popular opinion), full blown trials involving an insanity defense are rare (and the insanity defense is rarely successful in those few contested cases that do go to trial). In most NGI cases, there is no dispute as to defendant's insanity at the time of the original adjudication. Instead, NGI appeals usually arise from either extension or restoration proceedings many years after the original NGI finding.

In the typical NGI case, the NGI plea actually operates as a de facto guilty plea as to everything except the sanity question. That is, unless the defendant separately asserts a not-guilty plea, his NGI plea operates as an admission of all the elements of the charged offense, but it negates his criminal culpability and precludes a prison sentence or other criminal punishment. (Cf. *People v. Ferris* (2005) 130 Cal.App.4th 773, 774.)

When a defendant enters an NGI plea, the trial court is required to appoint two psychologists or psychiatrists to evaluate him and submit written reports to the court. (Pen. Code § 1027(a)) Most NGI findings occur in cases in which both examining doctors agreed that the defendant met the test for insanity. In that situation, the prosecution and the defense typically agree to submit the sanity question to the court on the basis of the reports, and the court proceeds to find the defendant NGI.

When a defendant is found NGI (by either jury verdict or by the judge), the court must refer him for an evaluation of a suitable disposition (§ 1026(c)) – and that disposition is almost always a commitment to a state mental hospital. The court is required to set a “maximum period of commitment” – equal to the greatest sentence the defendant could legally receive if convicted on all counts and enhancements. (§ 1026.5(a).)

B. NGI Extensions (Pen. Code § 1026.5(b))

Most NGI-related appeals involve extensions beyond the original maximum period of commitment. That is, when the defendant is about to complete the originally pronounced “maximum period of commitment,” the state can petition to extend the hospital commitment for an additional two years. (Pen. Code § 1026.5(b).) As with the other commitment regimens discussed here (MDO & SVP), the extension petition is filed in the superior court from which the underlying criminal case and NGI adjudication originated, not in the county in which the defendant is currently institutionalized.

During an NGI extension trial, the defendant has the same panoply of rights discussed earlier – jury trial, unanimous verdict, proof beyond a reasonable doubt, right to counsel, etc. The prosecution must prove: (1) that the defendant has “a mental disease, defect, or disorder”; and (2) that, because of that mental condition, he “presents a substantial danger of physical harm to others.” (§ 1026.5(b)(1).) If the jury sustains the petition, the defendant’s maximum period of confinement is extended for an additional two years. That is, the two-year extension period runs from the date the previous commitment (or extension) was set to expire, not from the date the current extension trial concludes.

The prosecution can petition for successive two-year extensions. The procedure is the same as for the initial extension petition. That is, when the initial extension is about to expire, the state hospital can submit a report requesting an extension, the District Attorney can file an extension petition, and the defendant is entitled to jury trial and the other procedural rights described above. Consequently, as a practical matter, regardless of the length of the originally pronounced “maximum period of commitment,” any NGI plea carries the possibility of a de facto life commitment,

because, as long as the defendant is perceived as still dangerous, the state can seek an indefinite number of two-year extensions.

C. NGI Restoration-to-Sanity Petitions (Pen. Code § 1026.2)

There is also a procedure under which an NGI defendant can petition for release prior to the expiration of his maximum period of commitment (or prior to the expiration of the current extension). (Pen. Code § 1026.2.) Upon a defendant's filing of a restoration-to-sanity petition, the Director of the State Hospital is required to submit a report to the court evaluating the defendant's progress and suitability for release. (There are also provisions under which the State Hospital itself can initiate such proceedings, but these materials will focus on the contested cases which are likely to be subjects of trials and later appeals.)

Section 1026.2 contemplates a two-stage procedure in which a defendant can be released from the NGI regimen – release from the State Hospital to outpatient supervision; and (following a year or more on outpatient status) release from outpatient supervision.

Trial on Release to Outpatient Status. There is no right to jury trial during this first phase of the restoration-to-sanity process. (*People v. Tilbury* (1991) 54 Cal.3d 56.) Instead, when a still-hospitalized NGI defendant files a petition, the court is required to conduct a “hearing” (not a “trial”) on his suitability for release to outpatient status. (*People v. Soiu* (2003) 106 Cal.App.4th 1191.) As with an NGI extension trial, the defendant is entitled to appointment of counsel. However, in contrast to an extension trial, it is the defendant, as the petitioner, who bears the burden of proof by a preponderance of the evidence. (§ 1026.2(k).) His burden is to establish that he would not be “a danger to the health and safety of others, due to mental defect, disease, or disorder, if under community supervision and treatment.” (§ 1026.2(e).) As with an extension of a commitment under section 1026.5(b), an adverse verdict in a section 1026.2 restoration-to-sanity trial is appealable.

Release from Outpatient Supervision. A defendant who is granted outpatient status is released into the community under the supervision of the county conditional release program (CONREP). It is only after a defendant has been on outpatient status for at least one year that he is entitled to a trial on his restoration to sanity and suitability for complete release from the NGI regimen. During this second phase, the defendant does have a right to jury trial on his restoration to sanity. (*Barnes v. Superior Court* (1986) 186 Cal.App.3d 969.) The question for the jury is whether the defendant is “no longer a danger to the health and safety of others, due to a mental defect, disease, or disorder.” (§ 1026.2(e).) In other respects, the procedure is similar to that on a

petition for outpatient release, with the defendant bearing the burden of proof by a preponderance.

D. Common Issues in NGI Extension and Restoration-to-Sanity Appeals

- Computation of maximum period of commitment. Although the trial court is required to set a “maximum period of commitment” equal to the greatest prison sentence the defendant could have received for convictions on all counts, the limitations on such sentences, such as Pen. Code § 654, limitations on subordinate consecutive terms, etc, apply equally to calculation of maximum period of commitment. (See *People v. Hernandez* (2005) 134 Cal.App.4th 1232.) (Note: Although *Hernandez* was an appeal from the original NGI commitment, section 654 and similar “unauthorized” sentence issues should also be cognizable, via a habeas petition, at the time of subsequent restoration-to-sanity or extension petitions. Because an “unauthorized” disposition such as this is “in excess of jurisdiction,” it is subject to correction at any time, despite the failure to raise it on appeal from the original commitment order.)
- Sufficiency of consequence advisements on original NGI plea. In taking an NGI plea, the court is required to advise the defendant of the possibility of successive extensions beyond the initial “maximum period of commitment.” (*People v. Lomboy* (1981) 116 Cal.App.3d 67.) This too is a potential habeas issue, if counsel discovers the issue in the course of a 1026.2 or 1026.5 appeal. However, laches-type principles apply to *Lomboy* claims, and the defendant must raise the issue promptly upon discovery. (Compare, e.g., *People v. Superior Court (Wagner)* (1989) 210 Cal.App.3d 1146 (barring challenge to defective NGI plea based on unjustified delay in bringing claim); with *In re Robinson* (1990) 216 Cal.App.3d 1510 (finding defendant adequately explained failure to bring claim earlier).)
- Evidence and instructions re defendant’s willingness to take medication, if released. The defense is entitled to present evidence on the effect of medication in controlling a defendant’s dangerousness and on his willingness to take the medications himself, even in an unsupervised environment. However, this is comparable to an affirmative defense to an NGI extension petition, and the defense bears the burden on that issue, by a preponderance of evidence. The defense is also entitled to instructions on the materiality of medication in controlling dangerousness and the defendant’s willingness to self-medicate. (*People v. Bolden* (1990) 217 Cal.App.3d 1591.)

- Existence and nature of mental illness. Due process prohibits continued commitment of an NGI acquittee based on dangerousness alone; a current mental illness or disease is required for commitment. (*Foucha v. Louisiana* (1992) 504 U.S. 71.) However, subsequent California cases have held that whether a particular diagnosis qualifies as a mental illness is a question of fact, not law, and (contrary to defense interpretations of *Foucha*) those cases have allowed commitments based on “antisocial personality disorder.” (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202.)

II. MENTALLY DISORDERED OFFENDER (MDO) COMMITMENTS (Pen. Code § 2960 et seq.)

The Mentally Disordered Offender (MDO) program, Pen. Code § 2960 et seq., is probably the least well-known of the three commitment regimens discussed here. In some ways, the MDO regimen, enacted in 1986, was a precursor of the Sexually Violent Predator Act (enacted in 1995). An NGI acquittee never sustains a criminal conviction and sentence. Instead, the NGI finding absolves him of criminal culpability for his offenses and effectively diverts him into a hospital commitment, in lieu of a prison sentence. However, like the later-enacted SVP program, MDO is a post-prison civil commitment. The defendant is convicted of one or more of the violent offenses listed in the statute (§ 2962(e)) and receives a conventional determinate prison sentence. It is only when the defendant is about to complete his prison term, that the MDO regimen comes into play.

As discussed below, upon an administrative determination that the defendant meets the MDO criteria, the defendant is paroled into the MDO program. That is, rather than release him outright, CDC essentially paroles the prisoner into the supervision of the State Hospital, and the defendant remains under a hospital commitment throughout his parole period. When the defendant is due to be released from parole, the state can petition to extend his MDO commitment for an additional year. And, as with NGI and SVP extensions, the state can file successive petitions for further such extensions, raising the prospect that, despite his completion of a determinate prison sentence, the defendant may ultimately be hospitalized for life. (Note, however, that, in contrast to the two-year extensions of NGI and SVP commitments, MDO extensions are for one-year each.)

A. Key definitions.

Compared with the NGI and SVP laws, the MDO law has more specific definitions of a qualifying mental disorder and also of the concept of “remission”:

“The term ‘severe mental disorder’ means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term ‘severe mental disorder’ as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.” (§ 2962(a), emphasis added.)

“The term ‘remission’ means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person ‘cannot be kept in remission without treatment’ if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.” (§ 2962(a) emphasis added.)

B. Parole into the MDO Regimen and Section 2966 Trials.

The criteria for MDO treatment are: (1) the prisoner has a “severe mental disorder” that is not in remission or cannot be kept in remission without treatment (§ 2962(a)); (2) the severe mental disorder was a cause or aggravating factor in the commission of his original conviction offense (§ 2962(b)); (3) the conviction was for one of the violent offenses designated in section 2962(e), and the defendant received an indeterminate prison term; (4) the prisoner has been in treatment for the disorder for 90 days or more within the year immediately preceding his parole or release (§ 2962(c)); and (5) psychologists or psychiatrists of the Department of Corrections (CDC) and Department of Mental Health (DMH) certify that, because of the severe mental disorder, the prisoner poses a substantial danger of physical harm if released.

The initial MDO determination is an administrative process, involving both CDC and DMH, prior to the defendant’s scheduled release on parole. If the psychiatrists or psychologists determine that the prisoner meets all the commitment criteria, the prisoner will be required to undergo MDO treatment in a state hospital as a condition of parole. In other words, rather than being released into the community, the defendant will be “paroled” into a state hospital commitment, and he will ordinarily

serve his entire parole period in the hospital.

The prisoner may challenge the MDO determination both administratively and judicially. First, the defendant may request a hearing before the Board of Prison Terms on whether he meets the MDO criteria. In the event of an adverse determination, the prisoner may request a superior court jury trial on the same issue, under section 2966. In effect, section 2966 gives a defendant a right, upon request, to a de novo judicial review of the administrative determination that he is an MDO. Although it is the defendant who requests the trial and “the hearing shall be a civil hearing,” the prosecution bears the burden of proof beyond a reasonable doubt, and the defendant is entitled to a jury trial and a unanimous verdict. (§ 2966(b).)

Note, however, that the determination to require an MDO commitment as a condition of parole becomes the subject of a superior court trial only if the defendant affirmatively requests it. (In contrast, extensions of MDO commitments, as described below, require the prosecution to file a superior court petition, on which the defendant similarly has the right to jury trial.)

Another key difference between section 2966 trials on the initial decision to parole a prisoner into the MDO regimen and section 2972 trials on extensions of MDO commitments (discussed below) is that a section 2966 trial is retrospective and focuses strictly on the defendant’s condition at the time of the administrative determination. “Evidence offered for the purpose of proving the prisoner’s behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered.” (§ 2966(b).)

C. Extensions of MDO Commitment and Section 2972 Trials.

When an MDO defendant’s parole period is about to expire, DMH may ask the prosecution to petition for an extension of the MDO commitment. The DMH report is supposed to be submitted 180 days prior to the scheduled expiration of parole or release from prison. (§ 2970.) The district attorney (in the county of the original conviction) may then file a petition seeking a one-year extension of the MDO commitment. As with an NGI extension, an MDO proceeding is a jury trial, and the prosecution bears the burden of proof beyond a reasonable doubt. The statute provides that the trial is to begin no later than 30 days before the scheduled release date. (§ 2972(a))

In contrast to the provisions concerning MDO parole – which place the onus on the defendant to request a trial – it is the prosecution which must petition to extend MDO treatment beyond the expiration of parole or to obtain later commitment extensions.

In our experience, most MDO appeals have been from extension trials (under § 2972), rather than trials on the initial administrative determination of MDO status at the time of parole (under § 2966).

D. Common MDO Issues:

- Qualifying offense. Whether the original conviction was for an offense qualifying under the MDO statute (§ 2962(e)), including whether it falls into the “catchall provisions” for any offense “in which the prisoner used force or violence, or caused serious bodily injury...” (§ 2962(e)(2)(P)) or “expressly or impliedly threatened another person with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used” (§ 2962(e)(2)(Q)). See *People v. Anzalone* (1999) 19 Cal.4th 1074.)
- Severe mental disorder. § 2962(a); see, e.g., *People v. Starr* (2003) 106 Cal.App.4th 1202 (finding that pedophilia qualifies as a “severe mental disorder” for MDO purposes).
- Remission. Adequacy of evidence that defendant is not in remission or cannot be kept in remission without treatment, including whether the defendant voluntarily failed to follow treatment plan. (§ 2962(a); see, e.g., *People v. Beeson* (2002) 99 Cal.App.4th 1393.)
- Burden of proof re control of dangerousness with medication. In contrast to NGI extension trials, where control through medication is deemed an affirmative defense on which the defendant bears a preponderance burden of proof, *it is error to place the burden of proof on the medication issue on the defendant in an MDO trial.* The MDO definition of “remission” incorporates the concept that the defendant’s dangerousness will be controlled through medication. (§ 2962(a).) Because an MDO finding requires proof that the defendant is not in remission or cannot be kept in remission without MDO treatment, the prosecution bears the burden of proving, beyond a reasonable doubt, that “if released, the defendant will not take his or her prescribed medication and in an unmedicated state, the defendant presents a substantial danger of physical harm to others.” (*People v. Noble* (2002) 100 Cal.App.4th 184, 190.)
- Treatment during period prior to initial MDO determination. Adequacy of evidence that “the prisoner has been in treatment for the mental disorder for 90 days or more within the year prior to the prisoner’s parole or release.” (§

2962(c); see, e.g., *People v. Del Valle* (2002) 100 Cal.App.4th 88; *People v. Sheek* (2004) 122 Cal.App.4th 1606.)

- Violation of statutory timelines. In general, the timelines specified in the MDO law have been deemed “directory,” rather than “mandatory” or “jurisdictional.” (*People v. Williams* (1999) 77 Cal.App.4th 436.) Delays in bringing an MDO defendant to trial are generally evaluated under a due process test balancing the reasons for the delay against the prejudice to the defendant, and such challenges have rarely been successful. (Cf. *People v. Kirkland* (1994) 24 Cal.App.4th 891 (no due process violation where trial commenced only 6 days before scheduled commitment expiration date (rather than 30 as provided in statute), but concluded before the expiration).) However, *Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026, found a due process violation where the extension petition was not even *filed* until three weeks *after the expiration* of the prior MDO commitment.
- Jury waivers. In marked contrast to criminal trials, there is no requirement that any jury waiver be entered personally. (*People v. Montoya* (2001) 86 Cal.App.4th 825.) Because an MDO trial is “civil” and the right to a jury trial is statutory rather than constitutional, defense counsel may waive a jury. Indeed, one case even allows counsel to waive a jury over the defendant’s objection. (*People v. Otis* (1999) 70 Cal.App.4th 1174.)

III. SEXUALLY VIOLENT PREDATOR (SVP) ACT (Welf. & Inst. Code § 6600 et Seq.)

Like MDO, SVP is a post-prison commitment regimen, rather than one which diverts the defendant from criminal punishment altogether, like an NGI finding. Also, like MDO, the process begins with DMH psychological evaluations, certifying that the defendant meets the statutory criteria for commitment. As with other regimens, there is a right to jury trial on an SVP petition, and the prosecution bears the burden of proof beyond a reasonable doubt. An SVP commitment is for two-years (like an NGI extension), and the prosecution may seek successive two-year extensions of that commitment.

A. Key Definitions

The most noteworthy difference between MDO and SVP lies in the breadth and flexibility of SVP’s definition of a qualifying mental disorder:

- Commitment standard: “‘Sexually violent predator’ means a person who has

been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (Welf. & Inst. Code § 6600(a)(1), emphasis added.)

- Qualifying disorder: “‘Diagnosed mental disorder’ includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” (*Id.* § 6600(c), emphasis added.)
- Predicate offenses: As reflected in the definition above, an SVP commitment requires convictions of “sexually violent offenses” against “two or more victims.” The convictions need not have occurred in the same proceeding, and a prisoner with the requisite two prior convictions may be eligible for SVP commitment even though his current about-to-expire prison term was for a non-qualifying offense. “‘Sexually violent offense’ includes a conviction of any of the major sexual assault offenses (rape, oral copulation, sodomy, foreign object penetration) “when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” (*Id.* § 6600(b).)

However, any offense against a victim under the age of 14 qualifies as a “sexually violent offense” if it involved “substantial sexual conduct,” *id.* § 6600.1(a), which is defined as “penetration of the vagina or the rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.” (*Id.* § 6600.1(b).)

In the case of offenses against adult victims, the elements of the statute of conviction usually establish whether the crime involved force, violence or duress, qualifying it as a sexually violent offense under section 6600(b). Consequently, as a practical matter, issues regarding the predicate offense most commonly arise in connection with prior convictions for non-forcible lewd acts against minors (Pen. Code § 288(a)); in those cases, it is necessary to establish that the underlying conduct involved “substantial sexual conduct” under the SVP definition.

- Nature of prior “conviction.” An offense in another jurisdiction which includes all of the elements of a “sexually violent offense” qualifies as a

“conviction.” A sexual offenses which resulted in an NGI adjudication or in a commitment under the now-defunct Mentally Disordered Sex Offender (MDSO) program also qualifies as a “conviction.” (Welf. & Inst. Code. § 6600(a)(2).) One of the two required predicate sexual offenses may be a juvenile adjudication which resulted in a CYA commitment for a minor 16 years or older, but a more limited definition of “a sexually violent offense” applies. (*Id.* § 6600(g).) However, although the SVP law allows several types of prior adjudications not resulting in a prison sentence to serve as prior predicate offenses, the defendant must be in the custody of CDC nearing the completion of a prison term or a parole revocation term in order for the state to initiate the SVP process. (*Id.* § 6601(a)(1).) However, the expiring prison term need not be for a sexual offense; it is sufficient that the defendant is a current prison inmate and has two qualifying prior sexual offense.

B. The SVP Process

Administrative screening and evaluation. Like MDO commitments, the SVP process begins with administrative screening and evaluations prior to the expiration of the defendant’s prison term. Two psychologists and/or psychiatrists designated by the Department of Mental Health evaluate whether the prisoner satisfies the criteria for SVP commitment. If the two DMH-designated evaluators agree the defendant is an SVP, DMH will refer the case to the district attorney for filing of an SVP commitment petition. If the two evaluators *disagree*, there is a procedure for the DMH director to refer the matter to two *independent* evaluators. In that instance, a referral for filing a petition can occur only if the two independent evaluators concur that the defendant is an SVP. (Welf. & Inst. Code. § 6601.)

Filing of SVP petition/probable cause hearing. Any SVP commitment beyond the expiration of a defendant’s prison term requires the prosecution to file an SVP petition in superior court. (In this respect, the SVP regimen requires a judicial process at an earlier stage than MDO, where the initial decision to parole the defendant into a hospital commitment is essentially an administrative determination, and it is up to defendant to seek judicial review.)

In contrast to the other commitment processes, the SVP framework also includes a pre-trial judicial screening procedure which fulfills a similar function as a preliminary hearing in a criminal case. The court is required to conduct a “probable cause” hearing on an SVP petition. (Welf. & Inst. Code § 6602(a).) The “probable cause” hearing is not a mere “paper” review but a full evidentiary hearing. (*In re Parker* (1998) 60 Cal.App.4th 1453.) However, errors at the “probable cause” hearing will rarely provide grounds for a post-trial appeal because the courts have imported into

the SVP context the *Pompa-Ortiz* rule that preliminary hearing errors are not reversible unless the defendant can show that the error affected the fairness of the later trial. (Cf. *People v. Talhelm* (2000) 85 Cal.App.4th 400, 405.)

Trial. Like the other commitment regimens discussed here, the SVP process is nominally civil, but includes many (though certainly not all) of the attributes of a criminal trial, including the right to jury trial, a unanimous verdict, appointment of counsel, and proof beyond a reasonable doubt.

C. Leading SVP Authorities:

Overall constitutionality:

- *Kansas v. Hendricks* (1997) 521 U.S. 346. Upheld basic constitutionality of “sexual predator” statutes against ex post facto and due process challenges.
- *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138. The California Supreme Court rejected asserted distinctions between California’s SVP statutes and the Kansas regimen addressed in *Hendricks*. It upheld California’s SVP law against similar ex post facto and due process claims and also rejected parallel state constitutional challenges.

“Volitional” impairment:

- *Kansas v. Crane* (2002) 534 U.S. 407. The U.S. Supreme Court has rejected the assertion that a sexual predator commitment requires a finding that the defendant completely lacks control over his criminal behavior. However, in an apparent gloss on *Hendricks*, the *Crane* majority stated that there must be proof of “serious difficulty in controlling behavior.”
- *People v. Williams* (2003) 31 Cal.4th 757. But the California Supreme Court later rejected a claim that jury instructions must explicitly require a finding of serious difficulty in controlling behavior. “[A] commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one’s criminal sexual violence, as required by *Kansas v. Crane* [citation]. Accordingly, separate instructions or findings on that issue are not constitutionally required [fn.]...” (*Id.* at p. 777.)

“Predatory”: The SVP statutes provide a unique definition of “predatory” as “an act ... directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been

established or promoted for the primary purpose of victimization.” (Welf. & Inst. Code § 6600(e).) But there initially was uncertainty regarding how the “predatory” definition fit into the elements required for an SVP finding:

- *People v. Torres* (2001) 25 Cal.4th 680. It is not necessary to establish that the prior “predicate” sexual offenses were “predatory” in nature.
- *People v. Hurtado* (2002) 25 Cal.4th 1179. But it is necessary to establish that the defendant poses a risk of committing “predatory” sexual offenses in the future. That is, the instructions must require the jury to find that the defendant is likely to commit “predatory” sexual offenses if released from custody.

“Likely”: *People v. Roberge* (2003) 29 Cal.4th 979. The definition of “likely” does not require a finding of “more likely than not” to re-offend. Instead, “likely” requires only that the defendant presents “a substantial danger, that is, a serious and well-founded risk of committing such crimes if released from custody.” Because the meaning of “likely” in the SVP context is not plain or unambiguous, the trial court must instruct sua sponte on this definition.

Predicate sexual offenses and hearsay issues.

- With most sexual assault offenses against adult victims (e.g., rape, forcible oral copulations, etc.), the statute defining the offense establishes that it was committed with the requisite “force, violence, duress, etc.” to qualify as a “violent sexual offense,” under section 6600(b). However, a non-forcible offense against someone under the age of 14 – i.e., a Penal Code section 288(a) conviction – also qualifies as a predicate offense if it involved “substantial sexual conduct,” as defined in section 6600.1. (Cf., e.g., *People v. Chambliss* (1999) 74 Cal.App.4th 773 (construing “masturbation” for purposes of whether prior 288(a) offense involved “substantial sexual conduct”).)
- Use of Penal Code section 288(a) convictions as predicate sexual offenses poses problems of proof comparable to *Guerrero*-type issues regarding whether certain priors qualify for “strikes” or other enhancements. However, the SVP law includes a unique hearsay exception: “The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State

Department of Mental Health.” (Welf. & Inst. Code § 6600(a)(3), emphasis added.)

- In *People v. Otto* (2001) 26 Cal.4th 200, the Supreme Court construed section 6600(a)(3) as allowing admission of multiple level hearsay (e.g., victims’ statements) recounted in probation reports and other documents specified in the statute. The Court also rejected a constitutional challenge to the admission of hearsay in this context. It concluded that victim statements included in probation reports possess sufficient indicia of reliability to satisfy due process, where the defendant was convicted of the sexual offense (whether by trial or plea).
- Note that *Otto* does not resolve all potential hearsay issues arising from documentary evidence concerning alleged prior sexual crimes. First, *Otto* involved a type of document specifically enumerated in section 6600(a)(3). Admission of documents not specifically listed could pose more difficult issues. (But see *People v. Angulo* (2005) 129 Cal.App.4th 1349 (allowing admission of *police reports* as proof of details of predicate offenses).) Second, section 6600(a)(3) applies only to documentary evidence of the details of *prior convictions*. It has no application where the prosecution seeks to introduce hearsay regarding charges which did *not* result in conviction of a sexual offense.

D. Other Common Issues in SVP Appeals.

Improper Prosecutorial Use of Prior SVP Findings. *People v. Salomon Munoz* (2005) 129 Cal.App.4th 421. In an SVP extension trial, it is improper to admit evidence of the prior SVP adjudication(s), to argue that the prior jury has already made the crucial determinations, or to suggest that the current jury’s task is simply to determine “whether anything has changed since the last determination, such that the defendant is no longer an SVP.” (*Id.* at p. 430.) Such evidence and arguments tend to shift the burden of proof to the defendant and to undercut the prosecution’s burden to prove beyond a reasonable doubt that the defendant’s *current* condition meets the criteria for SVP commitment. “[E]ach recommitment requires [the prosecution] independently prove that the defendant has a currently diagnosed mental disorder making him or her a danger. The task is not simply to judge changes in the defendant’s mental state.” (*Ibid.*) The *Salomon Muniz* holding merits particular scrutiny since this is one of very few published cases which actually *reversed* an SVP adjudication.

Sua Sponte Instruction on Necessity of Custodial Treatment: *People v. Grassini*

(2003) 113 Cal.App.4th 765. The Supreme Court has observed that “a determination of the likelihood of future dangerousness ... must also take into account the potential SVP’s *amenability to voluntary treatment* upon release.” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256, emphasis added.) Accordingly, where there is substantial evidence of such amenability to voluntary treatment, the trial court must “instruct the jury that it is to determine whether *custody in a secure facility* is necessary to ensure that the individual is not a danger to the health and safety of others.” (*Grassini, supra*, at p. 777, emphasis added.)

Delay in bringing defendant to trial. In a number of cases, there have been delays of years in bringing SVP cases to trial, so that the trial does not occur until well into, or even after, the two-year period for which the extension is being sought. Unlike other commitment regimens (e.g., MDO), the SVP law does not include any specific timelines (even “directory” ones) for when the trial must occur in relation to expiration of the existing commitment. Frequently no one in the process, including defense counsel, takes action to ensure a speedy trial. Several opinions have decried these delays and have admonished judges, prosecutors, and defense attorneys to bring SVP cases to trial in a timely fashion. However, to date none of those opinions has found any jurisdictional error or due process violation in such delays. (Cf. *Orozco v. Superior Court* (2004) 117 Cal.App.4th 170; *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156.)

IV. “CROSS-CUTTING” ISSUES IN MENTAL COMMITMENT APPEALS.

Although the precise elements necessary for a commitment and the commitment procedures vary from regimen to regimen, there are some broad categories of issues which frequently arise in appeals from all three kinds of commitments.

“Civil” vs. “criminal” label. NGI, MDO, and SVP are all nominally “civil” rather than “penal” commitment regimens, and that characterization is vital to the courts’ rejection of ex post facto, double jeopardy, and other constitutional challenges to these regimens. But, in several respects, courts continue to look to criminal law principles in setting the minimum standards for the conduct of commitment trials and appeals.

- Right to counsel. Although the Sixth Amendment right to counsel does not apply to a “civil” commitment, each of these regimens provides a statutory right to counsel. Additionally, even without those statutes, federal due process principles would likely confer this right. (*United States v. Buddell* (9th Cir. 1999) 187 F.3d 1137.) The courts have generally assumed (usually with little discussion) that traditional criminal law doctrines flowing from the right to

counsel apply equally to commitment trials. (E.g., *People v. Pretzer* (1992) 9 Cal.App.4th 1078, 1086 (ineffective assistance of counsel); *People v. Leonard* (2000) 78 Cal.App.4th 776, 784-788 (*Marsden* hearing); *Leonard, supra*, at p. 788 (also assuming right to self-representation in SVP trial); but compare *Conservatorship of Joel E.* (2005) 132 Cal.App.4th 429 (refusing to apply self-representation right to LPS conservatorship trial).)

- *Chapman* harmless error. Because the liberty interest at stake in commitment trials is comparable to that in a criminal trial, the California Supreme Court has applied the *Chapman* “harmless beyond a reasonable doubt” standard in assessing the prejudicial effect of instructional errors on commitment criteria and other constitutional errors in commitment trials. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1192-1194.)
- Availability of *Wende* review? Until recently, appellate courts have generally conducted *Wende* reviews, when requested, in NGI, MDO, and SVP appeals, as well as in appeals from truly “civil” commitments under the Lanterman-Petris-Short Act. (*Conservatorship of Margaret L.* (2001) 89 Cal.App.4th 675 [LPS].) However, several recent decisions have questioned the applicability of the *Wende* procedure to any of these regimens. The California Supreme Court has granted review of the issue in an LPS case (*Ben C.*) and has also “granted and held” an MDO case on the same issue. (*Conservatorship of Ben C.* (2004) 119 Cal.App.4th 119 Cal.App.4th 710, review gr. Sept. 15, 2004 (S126664); see also *People v. Smith* (2005) 127 Cal.App.4th 896, review gr. July 13, 2005 (S133593) [MDO]; cf. *People v. Torres* (2005) 133 Cal.App.4th 1359 [SVP], pet. for review pending.)

Excessive hearsay in connection with expert testimony.

- Revelation of *other experts’* opinions. Although an expert may describe hearsay materials on which he relied in forming his opinion, *it is error to admit opinions of non-testifying experts.* (See *People v. Campos* (1995) 32 Cal.App.4th 304.)
- Reliability of hearsay bases of expert testimony. “A qualified expert ... may base that opinion [as to whether defendant satisfies statutory commitment criteria] on information that is itself inadmissible hearsay if the information is reliable and of the type reasonably relied upon by experts on the subject. [Citation.] *A trial court, however, may not admit an expert opinion based on information supplied by others that is speculative, conjectural or otherwise fails to meet a threshold requirement of reliability.* [Citations.]” (*People v.*

Dodd (2005) 133 Cal.App.4th 1564, 1569, emphasis added.) “An expert opinion cannot reasonably be based on nonspecific and conclusory hearsay that does not set forth any factual details of an act necessary for the opinion. [Citations.]” (*Id.* at p. 1570.)

- Interplay between hearsay and sufficiency issues. “‘Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.’ [Citation.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) In *Dodd, supra*, 133 Cal.App.4th 1564, the prosecution relied on pedophilia as the “severe mental disorder” for an MDO commitment. A parole report’s vague reference to a “reported” molestation incident, which had never been the subject of a conviction or a parole violation adjudication, was vital to the expert’s conclusion that the defendant’s history satisfied the diagnostic criteria for pedophilia. The *Dodd* court concluded that the parole report contained so little information on the factual basis or details of this reported molestation that it lacked sufficient reliability to support the expert’s opinion. Without consideration of that unsubstantiated incident, “there was no substantial evidence to support the finding that [Dodd] suffered from pedophilia. [Citation.]” (*Id.* at p. 1569.)

Improper discussion of consequences of verdict or length of commitment term. By analogy to the principle barring jurors’ consideration of the length of a prison sentence in the event of a criminal conviction, it is improper to inform jurors of the precise consequences of their verdict on a mental commitment petition, i.e., that a “true” finding will result a further two-year (NGI & SVP) or one-year (MDO) hospital commitment and a “not true” finding in the defendant’s release from custody. (Cf. *People v. Collins* (1992) 10 Cal.App.4th 690, 695-696.)

V. OTHER MENTAL COMMITMENT ISSUES.

As noted in the Introduction, the great majority of mental health appeals are from commitments or extensions of commitments under the NGI, MDO, or SVP laws. This section will just briefly note some other kinds of mental health proceedings which occasionally result in appeals requiring the appointment of counsel.

A. LPS Conservatorships

The Lanterman-Petris-Short Act (Welf. & Inst. Code § 5000 et seq.) provides the framework for truly civil commitments, which do not have anything to do with the criminal justice system. The most common LPS proceeding is a *one-year conservatorship* based on the patient’s “grave disability” (*id.* § 5350 et seq.) – defined

as an inability to provide for one's basic needs of food, shelter, and clothing (*id.* § 5008(h)(1)(A)). A proposed conservatee is entitled to appointment of counsel, a jury trial, a unanimous verdict, and proof beyond a reasonable doubt. (See generally *Conservatorship of Roulet* (1979) 23 Cal.3d 219.)

B. Competency and Involuntary Medication.

Penal Code section 1368 et seq. establishes the mechanism for determining whether a criminal defendant is mentally competent to stand trial. When a defendant is found incompetent, he is committed to a mental hospital pending restoration to competency. In *Sell v. United States* (2003) 539 U.S. 166, the U.S. Supreme Court addressed the constitutional standards under which the state may administer anti-psychotic medications, against the defendant's will, for purposes of restoring him to competency. In response to *Sell*, the Legislature recently amended Penal Code section 1370 to incorporate the *Sell* criteria and to authorize a superior court hearing on an the state's application for involuntary medication. An order authorizing involuntary medication for competency restoration purposes is appealable, and a few such appeals are currently pending. (See *People v. O'Dell* (2005) 126 Cal.App.4th 562.)

C. Other Involuntary Medication Issues.

The California Supreme Court has recently construed the California Constitution and related statutes concerning the rights of mental patients as giving a defendant committed under the MDO regimen the right to refuse administration of anti-psychotic medications, subject to certain limitations. In non-emergency situations, an MDO can be required to undergo involuntary medication with anti-psychotic drugs, only if a court determines that the defendant is *mentally incompetent* to refuse medication or that he is a danger to others within the meaning of the LPS act (Welf. & Inst. Code § 5300). (*In re Qawi* (2004) 32 Cal.4th 1.) (Note that this is a more rigorous test of dangerousness than required for an MDO commitment and requires evidence of violence or threats within the preceding year.)

Although *Qawi* involved an MDO patient, its rationale applies equally to those committed as SVP's. (*In re Calhoun* (2004) 121 Cal.App.4th 1315.)