HOT TOPICS IN MENTAL HEALTH

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INTRODUCTION

Mental health issues can arise in any criminal case. There might be a doubt as to the defendant's competence. The defendant might have entered a plea of not guilty by reason of insanity. There are appeals from mental health commitments. It is important to understand the elements of the commitment proceeding, the procedures that are followed, and the issues that might arise on appeal. Evidentiary and instructional issues can arise from any case. Even in those situations, it is important to realize that except for the initial commitment as not guilty by reason of insanity, commitment proceedings are generally considered to be civil. Thus, the Bill of Rights and familiar features of criminal procedure do not always apply.

NOT GUILTY BY REASON OF INSANITY (NGI) - Penal Code section 1026 et seq.

Perhaps the oldest concept in criminal law is that some criminal defendants are "insane" when they commit the crime. Insanity has been viewed as rendering the defendant not legally responsible for his or her actions. The definition of insanity was expanded in the 1960's and 1970's, but California has returned to one of the oldest and most restrictive definitions.

" ' . . . California courts framed this state's definition of insanity, as a defense in criminal cases, upon the two-pronged test adopted by the House of Lords in *M'Naghten's Case* (1843) 10 Clark & Fin. 200, 210 [8 Eng. Rep. 718, 722]: "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.' [Citations.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 532.) "The relevant inquiry regarding sanity is whether the defendant was incapable of distinguishing right from wrong, that is, of realizing that his crimes were morally wrong." (*Id.* at p. 535.)

"The 'sanity trial is but part of the same criminal proceeding as the guilt phase' [citation] but differs procedurally from the guilt phase or trial 'in that the issue is confined to sanity and the burden is upon the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense' [citation]. As in the determination of guilt, the verdict of the jury must be unanimous." (*People v. Hernandez* (2000) 22 Cal.4th 512, 520-

521.) The defendant has the burden of proving insanity. (*Ibid.*)

Penal Code "Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state." (*People v. Coddington* (2000) 23 Cal.4th 529, 582.)

There are three ways to be released: (1) the patient shows sanity has been restored under Penal Code section 1026.2, (2) the court approves outpatient treatment upon recommendation of the medical director under Penal Code section 1600 et seq., and (3) the patient reaches the maximum confinement time. (*People v. Soiu* (2003) 106 Cal.App.4th 1191, 1194-1195; *People v. Sword* (1994) 29 Cal.App.4th 614, 620.)

(1) Release under Penal Code section 1026.2 is a two-step process. First, the defendant petitions for a hearing in order to show he would not be a danger because of mental illness if he is released under the supervision and treatment of the community. Second, after conditional release for typically a year, a trial is held to determine if he is no longer a danger because of mental illness. (*People v. Soiu* (2003) 106 Cal.App.4th 1191, 1196.) The defendant has the burden of proof. (See *People v. Bartsch* (2008) 167 Cal.App.4th 896, 903.)

(2) A defendant may be placed in outpatient treatment upon the recommendation of the state hospital and the community program director with the court's approval after a hearing. (Pen. Code, § 1603; *People v. Sword* (1994) 29 Cal.App.4th 614, 620.) However, " '[o]utpatient treatment is not a privilege given to the [offender] to finish out his sentence in a less restrictive setting; rather it is a discretionary form of treatment to be ordered by the committing court only if the medical experts who plan and provide treatment conclude that such treatment would benefit the [offender] and cause no undue hazard to the community.' [Citation.]" (*Ibid.*) The "defendant has the burden of proving, by a preponderance of the evidence, that he is either no longer mentally ill or not dangerous." (*Id.* at p. 624.)

There are two procedures for revoking outpatient status. The director of the program can petition the court for revocation because the patient requires extended inpatient treatment or because he refuses to accept further outpatient treatment and supervision. (Pen. Code, §§ 1608, 1610; *People v. DeGuzman* (1995) 33 Cal.App.4th 414, 420-421 [whether patient posed a danger was irrelevant].) Alternatively, the prosecution can petition the court on the ground the patient poses a danger to others. (Pen. Code, §§ 1609, 1610.)

(3) The maximum confinement time is the longest sentence the defendant could serve

for the crimes.

NGI Extension. Penal Code section 1026.5, subdivision (b)(1) permits two-years extensions beyond the maximum confinement time if the prosecution can show beyond a reasonable doubt that (A) the defendant's mental illness (B) causes a substantial risk of physical danger to others. (Pen. Code, § 1026.5, subd. (b)(8); *People v. Tilbury* (1991) 54 Cal.3d 56, 63.) The defendant is entitled to a jury trial, the right can be waived by trial counsel without a personal waiver from the defendant, at least when it appears the defendant consented to the waiver. (*People v. Givan* (2007) 156 Cal.App.4th 405, 411.)

INCOMPETENT TO STAND TRIAL (IST) - Penal Code section 1367 et seq.

Another mental health commitment procedure that most criminal attorneys are familiar with are proceedings to determine if a person mentally incompetent to stand trial. It violates due process to try a person who is incompetent because he or she is not able to properly prepare a defense. (*Drope v. Missouri* (1975) 420 U.S. 162, 171-172.)

The term "mentally incompetent" means that "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367, subd. (a); *Drope v. Missouri* (1975) 420 U.S. 162, 171; *Dusky v. United States* (1960) 362 U.S. 402, 402-403 (per curiam).) The defendant has the burden of proving incompetence by the preponderance of the evidence. The commitment is no longer than three years. (Pen. Code, § 1370.1, subd. (c).) Afterwards, the person may be committed under the LPS Act, called a "Murphy conservatorship" if the person is charged with a felony involving death, serious bodily harm, or a serious threat to the physical well-being of another person and the charges are not dismissed. (Welf. & Inst. Code, § 5008, subd. (h)(1)(B); *People v. Karriker* (2007) 149 Cal.App.4th 763, 774-775.)

Trial counsel has broader authority in civil commitment proceedings than in criminal cases. The right to a jury trial can be waived by trial counsel without a personal waiver from the defendant. (*People v. Lawley* (2002) 27 Cal.4th 102, 132.) Trial counsel can argue the defendant is incompetent over the defendant's objection. (*People v. Jernigan* (2003) 110 Cal.App.4th 131, 135-136.) The court is not required to obtain a personal waiver from the defendant of his right to be present during the proceedings. (*Id.* at p. 137.)

LANTERMAN-PETRIS-SHORT (LPS) - Welfare and Institutions Code sec. 5000 et seq.

The standard method of treating mentally ill people not necessarily in the criminal justice system is through the LPS Act. It replaced the old system of simply locking away

indefinitely those who were deemed to be mentally ill. The Act is designed to provide immediate intensive care with the goal of releasing the person as soon as possible. Only when long-term care is required (more than six months) is the person entitled to a jury trial.

"The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program. (§ 5001.)" (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008-1009.)

"The act limits involuntary commitment to successive periods of increasingly longer duration, beginning with a 72-hour detention for evaluation and treatment (§ 5150), which may be extended by certification for 14 days of intensive treatment (§ 5250); that initial period may be extended for an additional 14 days if the person detained is suicidal. (§ 5260.) In those counties that have elected to do so, the 14-day certification may be extended for an additional 30-day period for further intensive treatment. (§ 5270.15.) Persons found to be imminently dangerous may be involuntarily committed for up to 180 days beyond the 14-day period. (§ 5300.) After the initial 72-hour detention, the 14-day and 30-day commitments each require a certification hearing before an appointed hearing officer to determine probable cause for confinement unless the detainee has filed a petition for the writ of habeas corpus. (§ 5256, 5256.1, 5262, 5270.15, 5275, 5276.) A 180-day commitment requires a superior court order. (§ 5301.)" (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009.)

"The act authorizes the appointment of a conservator for up to one year for a person determined to be gravely disabled as a result of a mental disorder and unable or unwilling to accept voluntary treatment.[fn.] (§ 5350.) The proposed conservatee is entitled to demand a jury trial on the issue of his or her grave disability, and has a right to counsel at trial, appointed if necessary. (§§ 5350, 5365.)" (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009.)

To establish a Murphy conservatorship, the government must prove that "[a]s a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner" (§ 5008, subd. (h)(1)(B); *People v. Karriker* (2007) 149 Cal.App.4th 763, 774-775.)

DEVELOPMENTAL DISABILITY - Welfare and Institutions Code section 6500 et seq.

A separate system was established for people not necessarily in the criminal justice system who are developmentally disabled. This is generally defined as someone with an IQ of less than 70 due to a condition that existed in childhood. Some statutory language continues to use the word "retarded."

Under the Lanterman Act, a person can be committed if he or she "(1) is mentally retarded; (2) is a danger to himself or others; and (3) has serious difficulty controlling his dangerous behavior because of his mental retardation." (*People v. Sweeney* (2009) 175 Cal.App.4th 210, 216; Welf. & Inst. Code, § 6500.) Due process requires that, for the person to be committed, the "retardation" must cause the person serious difficulty in controlling dangerous behavior. (*People v. Sweeney* (2009) 175 Cal.App.4th 210, 216, 222-225.)

MENTALLY DISORDERED OFFENDER (MDO) - Penal Code section 2962 et seq.

The MDO Act was designed to confine as mentally ill prisoners who were about to be released when it is deemed they have mental illness which contributed to them committing a violent crime. By statute, the defendant is entitled to a jury trial. The jury must unanimously agree it was proven beyond a reasonable doubt that the allegations of the petition were proven. The right to a jury trial can be waived by trial counsel over the defendant's objection. (*People v. Fisher* (2006) 136 Cal.App.4th 76, 81.)

Penal Code "Section 2962 lists six criteria that must be met for the initial MDO certification. 'The trial court must consider whether 1) the prisoner has a severe mental disorder; 2) the prisoner used force or violence in committing the underlying offense; 3) the severe mental disorder was one of the causes or an aggravating factor in the commission of the offense; 4) the disorder is not in remission or capable of being kept in remission without treatment; 5) the prisoner was treated for the disorder for at least 90 days in the year before his release; and 6) by reason of his severe mental disorder, the prisoner poses a serious threat of physical harm to others. (§ 2962, subds. (a)-(d)(1).)' [Citations]" (*People v. Cobb* (2010) 48 Cal.4th 243, 251-252; see also *People v. Anzalone* (1999) 19 Cal.4th 1074, 1077.)

An MDO commitment is for one year, but the commitment can be extended. (Pen. Code, § 2972, subd. (c).) The patient is statutorily entitled to a jury trial at the hearing where the prosecution must prove beyond a reasonable doubt that a commitment is appropriate. "At an extension proceeding, the questions are: Does the defendant continue to have a severe mental disorder? Is the disorder in remission? Does the defendant continue to represent a substantial danger of physical harm to others? (§ 2972, subd. (c).)" (*People v. Cobb* (2010) 48 Cal.4th 243, 252.)

SEXUALLY VIOLENT PREDATOR (SVP) - Welf. & Inst. Code, § 6600 et seq.

Enacted in 1996, the SVP Act permits the confinement of sex offenders about to be released from prison when they have suffered from a mental illness which causes them to be a danger to the safety of others. The defendant is entitled to a jury trial, and the jury must unanimously agree that the allegations were proven beyond a reasonable doubt.

The state must prove "[1] a person who has been convicted of a sexually violent offense against [at least one] victim[] and [2] who has a diagnosed mental disorder that [3] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." (*Cooley v. Superior Court (Martinez)* (2002) 29 Cal.4th 228, 246; Welf. & Inst. Code, § 6600, subd. (a)(1).)

The danger of reoffending must be, in part, because the mental disorder impairs the person's volitional or emotional control. (*Kansas v. Crane* (2002) 534 U.S. 407, 413; *People v. Williams* (2003) 31 Cal.4th 757, 768, 774, 777.) "Likely" to reoffend does not mean more likely than not, but instead means a "substantial danger" or a "serious and well-founded risk" of reoffending. (*People v. Superior Court (Ghilotti*) (2002) 27 Cal.4th 888, 916; accord, *People v. Roberge* (2003) 29 Cal.4th 979, 988 & fn. 2.)

If the defendant asserts he could be safe with treatment on his own, the court must instruct the jury to consider this. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777.) One should consider (1) the availability, effectiveness, practicality, and safety of community treatment for defendant's disorder; (2) whether the mental disorder leaves the defendant with volitional control to do treatment; (3) the intended and collateral effect of voluntary treatment and reasonable expectations of pursuing it; (4) defendant's progress; (5) the defendant's expressed intentions; and (6) anything else about his sincerity including whether doing treatment at the hospital].) (*People v. Superior Court (Ghilotti*) (2002) 27 Cal.4th 888, 916.)

Originally, an SVP commitment was for two years. In 2006, the Act was amended to create a lifelong commitment or until it is shown the defendant no longer poses a danger to others. The amendments made other changes to the Act. (See *People v. McKee* (2010) 47 Cal. 4th 1172, 1185-1187.)

GENERAL CONCERNS

Except for the *initial* NGI trial, the commitment procedures are **civil** in nature and are are considered not to be punitive. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 361 [Kansas SVP]; *Selig v. Young* (2001) 531 U.S. 250, 261 [Washington SVP]; *Allen v. Illinois* (1986) 478 U.S. 364, 369; *People v. McKee* (2010) 47 Cal.4th 1172, 1193-1195 [amended SVP Act]; *People v. Allen* (2008) 44 Cal.4th 843, 861-862 [amended SVP Act]; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171-1172 [original SVP Act]; *Baqleh v. Superior*

Court (2002) 100 Cal.App.4th 478, 490 [IST]; *People v. Francis* (2002) 98 Cal.App.4th 873, 877 [MDO]; *People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 488 [NGI extension].)

Thus, the Civil **Discovery** Act (Code Civ. Proc, § 2016 et seq.), not Penal Code section 1054 et seq., generally applies to civil commitments. (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 804 [SVP]; *In re Gary W.* (1971) 5 Cal.3d 296, 302, 309 [juvenile commitment extension (Welf. & Inst. Code, § 1800 et seq.)]; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 489-493 [IST]; but see *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 738-740 [under due process, the government cannot propound a request for admissions on the defendant because this could potentially deprive him of a right to a trial].)

The parties are entitled to only **six peremptory challenges**. (*People v. Stanley* (1995) 10 Cal.4th 764, 807 [IST]; *People v. Calhoun* (2004) 118 Cal.App.4th 519, 523-524 [SVP]; *Conservatorship of Gordon* (1989) 209 Cal.App.3d 364, 368-369 [LPS].)

The Bill of Rights does not directly apply. A defendant does have a **due process** right to certain protections under the Fourteenth Amendment to the United States Constitution. The general test is to balance the following: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirements would entail." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335; *People v. Allen* (2008) 44 Cal.4th 843, 862; *People v. Litmon* (2008) 162 Cal.App.4th 383, 395-399.)

A person in a civil commitment proceeding has a due process right (or statutory right) to **counsel**, but it is not a Sixth Amendment right. (*Vitek v. Jones* (1980) 445 U.S. 480, 494-497.) It appears the defendant has the same right to effective assistance of counsel. (See *Humphrey v. Cady* (1972) 405 U.S. 504, 512 [assumed]; *Conservatorship of David L.* (2008) 164 Cal.App.4th 701, 710 [statutory right to counsel created a due process right to effective assistance in LPS case]; *People v. Leonard* (2000) 78 Cal.App.4th 776, 784 [assumed in SVP case]; *Woodward v. Mayberg* (N.D. Cal. 2003) 242 F.Supp.2d 695, 707 [assumed in SVP case].)

The Sixth Amendment right to **confront** witnesses applies only in criminal cases. There is at most a due process right in civil cases where a liberty interest exists. (*Vitek v. Jones* (1980) 445 U.S. 480, 494-497; *People v. Otto* (2001) 26 Cal.4th 200, 214 [SVP]; *People v. Carlin* (2007) 150 Cal.App.4th 322, 342-343 [SVP].) Some statutes provide the

defendant has the same rights as in criminal proceedings. (See, e.g., Pen. Code, § 1026.5, subd. (b)(7) [NGI extension]; Welf. & Inst. Code, § 1801.5 [juvenile commitment extension].)

The Sixth Amendment **right to jury** trial does not apply to civil proceedings. The Seventh Amendment right to jury trial in civil law cases does not apply to the states. (*Dohany v. Rogers* (1930) 281 U.S. 363, 369.) And it would not apply to special proceedings in any event. The right is statutory. When the statute does not expressly provide for the right to a jury trial, California courts have sometimes found a right under the equal protection clause or due process clause. (See, e.g., *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [LPS]; *People v. Thomas* (1977) 19 Cal.3d 630, 644 [CRC]; *People v. Feagley* (1975) 14 Cal.3d 338, 376 [former MDSO procedure.)

In involuntary commitment schemes, the federal constitution requires a finding only by **clear and convincing evidence** (*Foucha v. Louisiana* (1992) 504 U.S. 71, 86; *Addington v. Texas* (1979) 441 U.S. 418, 431-433), except a lower burden of proof is permitted in NGI and IST proceedings. California's requirement of proof beyond a reasonable doubt is based on statutes and the state's due process and equal protection clauses. (See, e.g., *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [LPS]; *People v. Thomas* (1977) 19 Cal.3d 630, 644 [CRC]; *People v. Feagley* (1975) 14 Cal.3d 338, 376 [unanimity for MDSO]; *People v. Burnick* (1975) 14 Cal.3d 306, 322 [beyond a reasonable doubt for MDSO].)

Attorney misconduct can exist in civil cases, but only to the extent it violates a civil right, such as the right to a fair jury trial. (See, e.g. *Cassim v. All-State Ins. Co.* (2004) 33 Cal.4th 780, 796-798.)

In civil trials, such as commitment proceedings, there is not the same constitutional requirement for the court to **instruct sua sponte** on certain points of law. There is a sua sponte responsibility to properly instruct on the elements of a civil commitment: "The rules governing a trial court's obligation to give jury instructions without request by either party are well established. 'Even in the absence of a request, a trial court must instruct on general principles of law and that are . . . necessary to the jury's understanding of the case.' " (*People v. Roberge* (2003) 29 Cal.4th 979, 988; *People v. Grassini* (2003) 113 Cal.App.4th 765, 777-778.) Penal Code section 1259, preserving certain instructional errors in criminal cases, does not automatically apply in civil cases such a commitment proceedings. It has been applied to MDO commitments and extensions. (See, e.g., *People v. Noble* (2002) 100 Cal.App.4th 184, 189; *People v. Collins* (1992) 1 Cal.App.4th 690, 695.) In civil cases, the defendant is deemed to have excepted to court "giving an instruction, refusing to give an instruction, or modifying an instruction requested . . . . " (Code Civ. Proc, § 647; *Suman*

v. BMW of North America, Inc. (1994) 23 Cal.App.4th 1, 9; *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 428.)

The standard of **prejudice** under *Chapman v. California* (1967) 386 U.S. 18, 24 applies to instructional error in commitment proceedings where the element of the commitment standard is misstated or omitted. (*In re Howard N.* (2005) 35 Cal.4th 117, 137 [juvenile commitment extension]; *People v. Roberge* (2003) 29 Cal.4th 979, 989 [SVP]; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1194 [SVP]; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274-1278 [IST]; *People v. Noble* (2002) 100 Cal.App.4th 184, 191 [MDO]; *Conservatorship of Buchanan* (1978) 78 Cal.3d 241, 288, disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255 [LPS].) It has been applied to trial errors in commitment proceedings which violate the federal Constitutional. (See, e.g., *People v. Allen* (2008) 44 Cal.4th 843, 872 [defendant not allowed to testify in SVP trial violated due process]; *People v. Carlin* (2007) 150 Cal.App.4th 322, 344 [an evidentiary error in an SVP trial that violated the due process right to confrontation].)

The ***Wende*** procedure does not fully apply in an appeal from some civil commitments. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538, 544 [LPS]; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1437-1438 [NGI restoration]; *People v. Taylor* (2008) 162 Cal.App.4th 304, 312-313 [MDO]).

For more information, go to www.sdap.org. Under Research, go to Criminal Law. See "Constitutional Rights Available in Proceedings Other Than Criminal Trials" from the 2007 SDAP seminar and "Deciphering Psychological Evaluations" from the 2005 SDAP seminar.