CIVIL COMMITMENT: A ROAD MORE TRAVELED

Jean Matulis, Attorney at Law

The Founders of our Constitution put into place numerous protections for individuals facing government intrusion through criminal prosecution. However, "civil commitment" has become an increasingly wide loophole for the State to limit the rights and freedoms of individuals without technically violating these protections. This is our battleground.

Here are some of the latest issues being addressed in the civil commitment arena.

LENGTH OF COMMITMENT

People v. McKee (2010) 47 Cal. 4th 1172

The California Supreme Court was asked to consider the constitutionality of indefinite civil commitment in the context of Welfare and Institutions Code sections 6600 et seq. ("Sexually Violent Predators" or "SVP"). Previously, a person had the right to a new trial every two years at which the State had the burden of proving beyond a reasonable doubt that the person met the commitment criteria, until Proposition 83 passed on November 7, 2006, providing for an indefinite term.

Held: Indefinite commitment under section 6600 does not violate Due Process.
The fact that after the once the initial commitment has been established, the person must bear the burden of proving he or she no longer meets the commitment criteria is consistent the federal rule in *Jones v. United States* (1983) 463 U.S. 354, which held that a person could be committed indefinitely as Not Guilty by Reason of Insanity, even beyond the length of the maximum criminal term.

Held: Indefinite commitment under section 6600 is not an Ex Post Facto violation
Although parts of Proposition 83 evince a punitive purpose, the provision extending the length of commitment under section 6600 is not punitive and therefore is not an ex post facto law. Addressing the factors identified in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, the Court found that civil commitment has historically been imposed nonpunitively, the purpose is treatment, not punishment, there is a rational connection with those purposes, and the commitment is designed to last only as long as the person meets the section 6600 criteria.

Held: Indefinite commitment under section 6600 might violate Equal Protection
Because other California civil commitment schemes involve limited terms of

confinement, the Court recognized that there may be an equal protection violation. The court specifically found that people committed under sections 6600 are similarly situated to those committed under the Mentally Disordered Offender Law (Penal Code sections 2960 et seq.)[1] However, the Court stopped short of reaching a definitive conclusion, remanding the case to the San Diego Superior Court to make a determination as to whether "notwithstanding the similarities between SVPs and MDOs, the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society." This may involve the taking of expert testimony on issues such as whether the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely, or that SVP's pose s greater risk to a particularly vulnerable class such as children, or some other justification.

People v. Castillo (2009) 170 Cal. 4th 1156, review granted (S171163)
Review is pending in the California Supreme Court as to whether a stipulation between the District Attorney and the Public Defender, approved by a judge of the Superior Court of Los Angeles, that section 6600 petitions filed prior to the enactment of Proposition 83 would result in only two-year commitments, is binding. According to the Supreme Court's website: "The issue to be briefed and argued is limited to the following: Did the Court of Appeal err by increasing the term of defendant's commitment under the Sexually Violent Predator Act from two years to an indeterminate term pursuant to the 2006 amendments to Welfare and Institutions Code section 6604, when the Los Angeles County District Attorney had stipulated that only the two-year commitment term would be sought?"

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[1]Under the Mentally Disordered Offender ("MDO") Act, extended periods of commitment are for one year. (Pen. Code, § 2972, subd. (c).)

A person who has been found Not Guilty by Reason of Insanity ("NGI"), is subject to extensions for two years. (Pen. Code, § 1026.5, subd. (b)(8).)

Mentally Disordered Sex Offenders ("MDSO") are similarly subject to extensions of two years. (Former Welf. & Inst. Code, § 6316.2)

Conservatorships under the Lanterman-Petris-Short (LPS) Act must be renewed after one year. (Welf. & Inst. Code, § 5361.)

Commitment of a person based on "mental retardation" and dangerousness under Welfare and Institutions Code section 6500 is established in one year increments.

A commitment based on a finding that the person is Incompetent to Stand Trial ("IST") is limited to three years. (Pen. Code, § 1370.1, subd. (c).) A person who has not recovered competence within three years may be then be committed through LPS Conservatorship under Welfare and Institutions Code sections 5508 (h)(1)(B) and 5350 et seq.

In *People v. Sokolsky* (March 23, 2010. B212437) ___ Cal. App. 4th ___ 2010 Cal. App. Lexis 378, the Court of Appeal held that the Los Angeles stipulation was not enforceable, which may also result in a grant of review.)

Langhorne v. Superior Court (2009) 179 Cal. App. 4th 225
After the passage of Proposition 83, the Santa Clara Superior Court incorrectly converted previously established two-year commitments under section 6600 to indefinite commitments without conducting new trials. These retroactively imposed indeterminate commitments were later reversed (see, e.g., *People v. Whaley* (2008) 160 Cal. App. 4th 779), but in the case of *Langhorne* and others, timely recommitment petitions were never filed prior to the termination of the two-year commitments. Petitioners sought dismissal of the untimely recommitment petitions.

Held: The untimely petitions could go forward because the District Attorney made a good faith mistake of law in failing to file the timely petitions. The trial court had granted the motions to convert the commitment terms, and there had been no published decisions to the contrary at the time.

OTHER ISSUES RELATING TO SECTION 6600 COMMITMENTS

Invalid Assessment Protocol

In re Ronje (2009) 179 Cal. App. 4th 509
The Court of Appeal, Fourth Appellate District, Division Three held that the assessment protocol used to evaluate the petitioner was an invalid underground regulation, and that Ronje was not required to establish prejudice to obtain relief in a pretrial writ petition. However, dismissal was not required because use of the invalid protocol did not deprive the court of fundamental jurisdiction. The petitioner was entitled to new evaluations and a new probable cause hearing under Welfare and Institutions Code section sections 6601 and 6602. Courts have been holding that raising the issue after the judgment of commitment requires a showing of prejudice. (*People v. Taylor* (2009) 174 Cal.App.4th 920, 938; *People v. Medina* (2009) 171 Cal.App.4th 805, 820.)

Mental Competence to Stand Trial in Civil Commitment Proceedings

Moore v. Superior Court (2009) 174 Cal. App. 4th 856, review pending (S174633)
The California Supreme Court granted review on the following issue: "Can the trial in a commitment proceeding under the Sexually Violent Predator Act be held while the defendant is incompetent?" In *Wilson v. Superior Court* (March 22, 2010, B216212) ___ Cal. App. 4th ___ 2010 Cal. App. Lexis 369, the Court of Appeal, Second Appellate

District, Division Seven held that a person cannot be tried under section 6600 if the person is incompetent.

Petitions for Post-Commitment Release

People v. Reynolds (2010) 181 Cal. App. 4th 1402
Under section 6608, subdivision (a), a committed person may petition for conditional or an unconditional release notwithstanding the lack of recommendation or concurrence by the Director of the Department of Mental Health. However, upon receipt the court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (§ 6608, subd. (a).) In *Reynolds*, the Court of Appeal interpreted section 6608 to require the defendant to allege facts in his petition that will show he is not likely to engage in sexually violent criminal behavior due to a diagnosed mental disorder, without supervision and treatment in the community, if that is the relief requested. There was no abuse of discretion to for the trial court to dismiss the petition, because counsel for the defendant conceded that there were no change of circumstances such that a court might conclude that the defendant was no longer a danger to others. The Court also held that because the petition was frivolous, there was no ineffective assistance of counsel. In doing so, the court applied the definition of frivolous found in Code of Civil Procedure section 128.5, subdivision (b)(2): "totally and completely without merit" or "for the sole purpose of harassing an opposing party." (See also *People v. McKee* (2010) 47 Cal.4th 1172.)

Note: A case is currently pending in the Second Appellate District, Division Six, pertaining to the 2000 foot residency restriction under Proposition 83 as it applies to conditional release under Welf. & Inst. Code section 6608. (*People v. Ross W.* (B202840).) This case may be distinguished from the recent California Supreme Court case in *In re E.J.* (2010) 47 Cal. 4th 1258, which found the law was not retroactive or an ex post facto law as to parolees released after the passage of Proposition 83 who moved to restricted areas. Unlike the petitioners in *E.J.*, Ross W.'s release was delayed for many months due to the new law, and he was then released as homeless. Ross W. is arguing that a choice between continued incarceration and homelessness, a form of banishment, is a punitive effect of Proposition 83, and therefore implicates the ex post facto clauses of the state and federal constitutions. (U.S. Const. Art. I, § 10, Cal. Const. Art. 1, § 9; see also *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144.)

RIGHT TO SELF-REPRESENTATION IN CIVIL PROCEEDINGS

People v. Sokolsky (March 23, 2010, B212437) ___ Cal. App. 4th ___, 2010 Cal. App.

Lexis 378:
The Second Appellate District, Division Four, held there is no right to self-representation on appeal of a section 6600 commitment. The court cited the earlier decision in *People v. Fraser* (2006) 138 Cal. App. 4th 1430 that held there is no Sixth Amendment or Due Process Right to self-representation at the trial court. If any statutory right exists (see *People v. Williams* (2003) 110 Cal. App. 4th 1577 [MDOs have a statutory right to self-representation]), it is subject to review for abuse of discretion. (See also *Conservatorship of Joel E*., (2005) 132 Cal. App. 4th 429 [court has discretion to allow self-representation in conservatorship proceedings, but there is no constitutional or statutory requirement].)

RIGHT TO BE PRESENT IN CIVIL PROCEEDINGS

Conservatorship of John L. (2010) 48 Cal. 4th 131
The California Supreme Court was asked to consider whether a person's presence at proceedings relating to a civil commitment must be personally waived or can be waived by counsel. The LPS Act governs the involuntary detention, evaluation, and treatment of persons who, as a result of mental disorder, are dangerous or gravely disabled, which includes conservatorship for people on the basis of grave disability. (Welf. & Inst. Code sections 5000 et seq.) Under Probate Code section 1825, subdivision (a), a potential conservatee must be produced at the hearing unless the person is out of state when served, is unable to attend by reason of medical inability or where the court investigator has reported to the court that the person has expressly communicated that he or she (1) is not willing to attend the hearing, (2) does not wish to contest the establishment of the conservatorship, and (3) does not object to the proposed conservator or prefer that another person act as conservator. In *John L*., the person had told the court investigator that he did not want a conservator and thought he did not need any assistance. However, on the day of the hearing, counsel for John L. told the court that he had met with John L. who had told him he was not at that time contesting the conservatorship and did not want to be in court. The court excused his presence and proceeded without him.

Held: Although a person has a statutory right to be present at a conservatorship hearing, neither Due Process nor Equal Protection require a personal waiver. Even though certain rights implicated in civil proceedings are substantial, they may be waived by an attorney with the client's express consent.

People v. Fisher (2009) 172 Cal. App. 4th 1006
The Second Appellate District, Division Six held that a person has a Due Process right to be present at an involuntary medication hearing, and that a personal waiver is required. However, applying the *Chapman* standard of prejudice, the court found no harmless

error.
Fisher involved a hearing under *In re Qawi* (2004) 32 Cal. 4th 1 to determine whether an MDO could be involuntarily medicated.[2] The person was excluded from the hearing because there had been a failure to transport him and his counsel agreed the hearing could go forward as a convenience to the doctor who had come to testify against him.

RIGHT TO JURY TRIAL AND WAIVER

People v. Barrett (2010) 181 Cal. App. 4th 196, review granted (S180612).
The Court of Appeal, Sixth Appellate District held that in a proceeding to commit a person under Welf. & Inst. Code section 6500 on the ground of "mental retardation" and dangerousness, although the person has a nonstatutory, constitutional right to a jury trial, Due Process and Equal Protection do not require the court to affirmatively advise the person of the right, and because the commitment proceedings are civil in nature, the right may be waived by failure to request a jury. This decision is at odds with other cases holding the court has an affirmative duty to advise the person of the right to a jury trial

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[2]In *In re Qawi* (2004) 32 Cal. 4th 1, the California Supreme Court held that statutes providing that Mentally Disordered Offenders (MDO) who are civilly committed after their parole period has expired are granted the same rights that are afforded involuntary mental patients under California's general civil commitment scheme, were "in keeping with the scheme's non-punitive purpose." The *Qawi* court concluded that the LPS Act provides for institutional security by authorizing involuntary medication in an emergency situation, or through the provisions of sections 5300, et seq, "after a particularized showing that the person is a "demonstrated danger" and that he or she was recently dangerous, as defined by that statute." (*In re Qawi, supra,* 32 Cal. 4th at 19, 20.) The *Qawi* court also recognized that the rights of LPS patients to refuse medications are "virtually identical" to the rights possessed by mentally disordered state prisoners. (*Id*. at p. 20; see *Keyhea v. Rushen* (1987) 178 Cal. App. 3d 526; *Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal. App. 3d 1303.)

In *In re Calhoun* (2004) 121 Cal. App. 4th 1315, the Court of Appeal, Second Appellate District, held that people committed under Welf. & Inst. Code sections 6600 et seq. were similarly situated to MDO's and that outside of an emergency, there are two potential grounds for authorizing involuntary medication: (1) the person is determined by a court to be incompetent to refuse medical treatment; and (2) the person is determined by a court to be a danger to others within the meaning of section 5300.

In *Sell v. United States* (2003) 539 U.S. 166, the United States Supreme Court extended rights to be free of unnecessary involuntary medication for people found incompetent to stand trial. (See also Pen. Code, § 1370, subd. (A)(2)(B).)

and that failure to advise the person of that right and to obtain a valid waiver requires reversal. (See *People v. Alvas* (1990) 221 Cal. App. 3d 1459; *People v. Bailie* (2006) 144 Cal. App. 4th 841.)

Compare: In *People v. Rowell* (2005) 133 Cal. App. 4th 447, the Court of Appeal, Third Appellate District held that although a defendant in a section 6600 proceeding has the right to a jury trial under the California Constitution, no personal waiver is required. The trial court may accept defense counsel's declaration that the defendant wants a court trial.

Note: In *People v. McMahan* (March 2010) 2010 Cal. App. Unpub. Lexis 1553, in an **unpublished decision**, the Court of Appeal, Fourth Appellate District, Division Two, reversed a commitment under section 6600 following a court trial because the record was void on any evidence indicating that he was ever personally advised of his right to a jury trial. A request for publication is pending.

People v. Fisher (2009) 172 Cal. App. 4th 1006
The Court of Appeal, Second Appellate District, Division Six held there is no right to a jury trial to determine whether a person may be involuntarily medicated.

JURISDICTIONAL ISSUES

People v. Cobb (2010) 48 Cal. 4th 243
The California Supreme Court held that a statutory deadline for extending commitment of an MDO under Penal Code section 2972 was directory rather than mandatory, and thus did not deprive the court of jurisdiction to proceed. The MDO Law requires that trial on an extension shall begin at least 30 calendar days before the time the person would otherwise be released. Not only was a 30-day deadline for trial commencement missed, but the court began the trial 23 days after the person's scheduled release date. The Supreme Court decided that although the trial court retained jurisdiction, the person was entitled to release pending the new trial. However, the fact that Cobb was not released pending trial did not affect the validity of the eventual extension order.

People v. Lara (2010) 48 Cal. 4th 216
The California Supreme Court held that a statutory deadline for filing a petition to extend an NGI commitment under Penal Code section 1026.5 is directory rather than mandatory, so long as the petition is filed before the expiration of the current commitment. Failure do comply with the deadline did not require dismissal, but the person would be entitled under Due Process to release pending trial, subject to possible proceedings under the LPS Act. However, Lara was not denied a fair trial because he had not been released.

Compare: Although the commitment law under Welf. & Inst. Code section 6600 has few time limits, reviewing courts "have implied that the only act that could divest the court of subject matter jurisdiction and trigger a dismissal is the People's failure to file a petition for recommitment before the prior commitment expires." (*Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, see also *People v. Whaley* (2008) 160 Cal. App. 4th 779.)

People v. Superior Court (*Sharkey*) (March 25, 2010, B219011) 2010 Cal. App. Lexis 389.

The Court of Appeal, Second Appellate District, Division Three was asked to consider whether CDCR regulations pertaining to a good cause extension for filing an initial petition under section 6600 was valid. Welf. & Inst. Code sections 6601 and 6601.3 provide that a potential committee shall be referred for evaluation at least six months prior to the individual's scheduled release from prison, but that the person's release date and evaluation time may be extended for 45 days for good cause. Under California Code of Regulation, title 15, section 2600.1, good cause exists when "either the inmate or parolee in revoked status is found to meet all the following criteria: (1) Some evidence that the person committed a sexually violent offense … which resulted in a conviction or a finding of not guilty by reason of insanity … [and] (2) Some evidence that the person is likely to engage in sexually violent predatory criminal behavior." The defendant argued that this criteria violated Due Process because it lacks any provision to determine whether the delay was justified and whether CDMH and the Parole Board exercised due diligence.

Held: The regulation was valid because it was reasonably necessary to effectuate the purpose of the commitment law, namely to identify persons who have certain diagnosed mental disorders that make them likely to engage in acts of sexual violence and to confine them for treatment of their disorders as long as the disorders persist.

Blakely v. Superior Court (2010) 182 Cal. App. 4th 1445

The Court of Appeal, Fourth Appellate District, Division Three held that failure to comply with statutory deadlines in the MDO law required reversal of a determination of the Board of Parole Hearings that the person met the MDO criteria. Under the MDO Law, a person may be evaluated and certified for MDO commitment under the State Department of Mental Health as a condition of "parole." However, such evaluation and certification must take place "[p]rior to release on parole." (Penal Code section 2962, subd. (d)(1).) In the Blakely case, the CDCR calculated the person''s release date as the same day of incarceration due to various custody credits. Yet, Blakely was not released but was kept in custody beyond the release date, and evaluated and certified for MDO commitment, and the Board determined she met the MDO criteria. Blakely filed a

petition in the trial court and made a motion challenging the Board's determination under section 2962, subdivision (b). The motion was denied. The Court of Appeal granted Blakely's petition for writ of mandate, directing the trial court to vacate the order denying the motion, and to enter an order granting the petition challenging the Board's determination that petitioner was an MDO. The Court of Appeal, also determined that any continued commitment could be accomplished, if applicable, by following the procedures in the LPS Act.