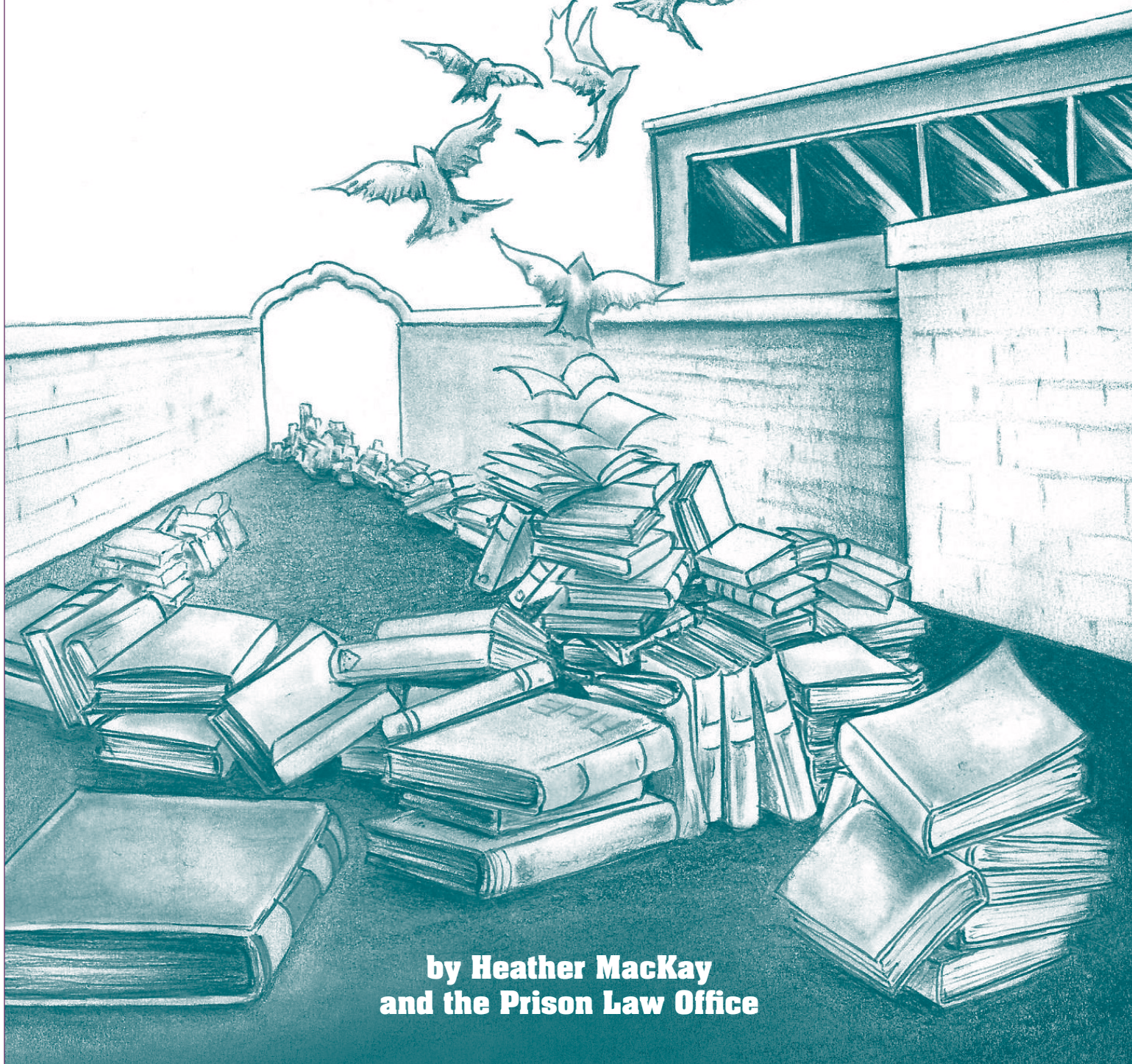


The California Prison and Parole Law Handbook



**by Heather MacKay
and the Prison Law Office**

THE CALIFORNIA PRISON & PAROLE LAW HANDBOOK

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THE PRISON LAW OFFICE

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YOUR RESPONSIBILITY WHEN USING THIS HANDBOOK

When we wrote *The California Prison and Parole Law Handbook*, we did our best to provide useful and accurate information because we know that people in prison and on parole often have difficulty obtaining legal information and we cannot provide specific advice to everyone who requests it. However, the laws are complex change frequently, and can be subject to differing interpretations. Although we hope to publish periodic supplements updating the materials in the Handbook, we do not always have the resources to make changes to this material every time the law changes. If you use the Handbook, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in a prison law library or in a public county law library.

CHAPTER 12

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12.1 Introduction

This chapter discusses the Mentally Disordered Offender (MDO) and Sexually Violent Predator (SVP) laws. These laws create two types of civil commitments that can be used to send a person to a psychiatric hospital at the end of their prison term. The MDO and SVP laws have different eligibility criteria, processes for commitment, and procedures for release.

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A person who meets the MDO criteria can be sent by the Board of Parole Hearings (BPH) to the custody of the Department of State Hospitals (DSH) as a condition of parole.¹ Once a person who meets the MDO criteria has served all of the parole term, the DSH can continue the involuntary commitment, potentially for life.

A person who is found to be an SVP will also be committed to the custody of the DSH at the end of the prison term. A person facing a commitment is entitled to a jury trial. An SVP commitment will last until the person can successfully prove to a court or jury that further hospitalization is not necessary to protect public safety. Thus, an SVP commitment might last for the rest of a person's life.

People in prison or on parole should be aware that there are other types of civil commitments for people with mental illness who are a danger to themselves or others or who have grave disabilities. The state can seek to involuntarily hospitalize a person on parole under these other provisions if the SVP or MDO criteria are not met.²

MENTALLY DISORDERED OFFENDER (MDO) COMMITMENTS

12.2 Overview of the MDO Law

The intent of the MDO law is to provide treatment to “dangerous” people with mental illness by preventing such people from being released to the community at the end of their prison terms in the interests of public safety.³ The criteria and process for committing a person as an MDO are described in Penal Code §§ 2960 through 2981 and in 15 CCR §§ 2570 through 2580. The MDO law has changed often since the passage of the original MDO legislation in 1986. Anyone researching MDO issues should be careful to review the current statutes and most recent court cases.

The courts have held that MDO commitments are not “punishment,” and do not violate the constitutional bar against double jeopardy. For the same reason, new MDO statutes can be applied to people who were convicted previously without violating the constitutional ban on ex post facto laws.⁴

The CDCR staff screen all people in prison for MDO eligibility. The BPH then reviews each person who is referred by CDCR staff and decides whether they meet all of the MDO criteria and should be committed to the DSH for mental health treatment as a condition of parole.⁵ The MDO must be held in custody in a DSH hospital unless the DSH staff reasonably believe that the person on parole can be safely and effectively treated as an outpatient in the community.⁶ The MDO commitment may be renewed annually for the entire parole term. Furthermore, the DSH can keep custody of an MDO after the parole term ends if the local district attorney files a court petition asking

¹ The Department of State Hospitals used to be called the Department of Mental Health (DMH).

² Penal Code § 2974.

³ *People v. Robinson* (1998) 63 Cal.App.4th 348 [74 Cal.Rptr.2d 315].

⁴ *People v. Butler* (1999) 74 Cal.App.4th 557, 561 [88 Cal.Rptr.2d 210]; *People v. Robinson* (1998) 63 Cal.App.4th 348, 350-352 [74 Cal.Rptr.2d 315]; see also U.S. Constitution, Article 1, § 10 and California Constitution, Article I, § 9 (ex post facto); U.S. Constitution, Fifth Amendment; California Constitution, Article I, § 15 (double jeopardy).

⁵ Penal Code § 2960 et seq.

⁶ Penal Code § 2964.

that the MDO be re-committed for continued treatment.⁷ Such MDO commitments can be renewed annually for as long as the court continues to find that the person has a severe mental disorder and that commitment to a state hospital is necessary for public safety.⁸

12.3 Criteria for MDO Commitment

There are specific criteria that must be met in order for a person to be eligible for commitment as an MDO:

- ◆ The person must have a “severe mental disorder” that is not in remission or cannot be kept in remission without treatment.⁹ A “severe mental disorder” is “an illness or disease or condition that substantially impairs the person’s thoughts, 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.”¹⁰ It does not include personality or adjustment disorders, epilepsy, mental retardation or drug addiction or abuse.¹¹ A severe mental disorder “cannot be kept in remission without treatment” if during the previous year the person has been physically violent (except in self-defense), has made a serious threat of substantial physical harm against another person, has intentionally caused property damage, or has not voluntarily followed the treatment plan.¹²
- ◆ The severe mental disorder was a cause or an aggravating factor of a crime for which the person was sentenced.¹³

⁷ Penal Code § 2970.

⁸ The DSH has the authority to grant compassionate release to a person who has been committed or re-committed as an MDO if they are (a) either terminally ill or medically incapacitated and (b) release would not pose a threat to public safety. Penal Code § 2977; Welfare & Institutions Code § 4146

⁹ Penal Code § 2962(a)(1).

¹⁰ Penal Code § 2962(a)(2).

¹¹ Penal Code § 2962(a)(2).

¹² Penal Code § 2962(a)(3); *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407-1408 [32 Cal.Rptr.3d 729].

¹³ Penal Code § 2962(b). A court can consider only a person’s commitment offenses; it may not consider other possible uncharged crimes that occurred during the same course of events. *People v. Kortemaki* (2007) 156 Cal.App.4th 922, 926-927 [67 Cal.Rptr.3d 706].

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- ◆ The person has been treated for the severe mental disorder for 90 days or more during the year prior to the end of the prison term.¹⁴ The treatment must be for the mental disorder that is the basis for the MDO petition and not for some other disorder.¹⁵
- ◆ Because of the severe mental disorder, the person represents a substantial danger of physical harm to others.¹⁶ AND
- ◆ The person received a determinate sentence for one of the following types of crimes:¹⁷
 - one of specified crimes involving the use of a weapon or great bodily force; OR
 - a crime in which the person used force or violence or caused serious bodily injury;¹⁸ OR
 - a crime in which the person expressly or impliedly threatened the victim with use of force. Many crimes that one might not consider to be violent can fall into this category, depending on the specific facts of the case.¹⁹

12.4 CDCR Screening and Evaluation for MDO Eligibility

At the start of the prison term, CDCR staff members are required to evaluate people for severe mental disorders and provide them with appropriate mental health treatment.²⁰ Later, prior to release

¹⁴ Penal Code § 2962(c). Outpatient treatment at a private facility prior to incarceration does not count toward the 90-day treatment requirement. *People v. Del Valle* (2002) 100 Cal.App.4th 88 [121 Cal.Rptr.2d 889] (disapproved on other grounds in *People v. Achrem* (2013) 213 Cal.App.4th 153 [151 Cal.Rptr.3d 915]). Treatment at a county jail prior to conviction does count toward the treatment period. *People v. Martin* (2005) 127 Cal.App.4th 970 [26 Cal.Rptr.3d 174]. Treatment at a parole outpatient clinic can also satisfy the requirement. *People v. Achrem* (2013) 213 Cal.App.4th 153 [151 Cal.Rptr.3d 915].

¹⁵ *People v. Sheek* (2004) 122 Cal.App.4th 1606 [19 Cal.Rptr.3d 737] (defendant could not be committed as MDO for disorder of pedophilia when he had received treatment only for depression, which could be kept in remission).

¹⁶ Penal Code § 2962(d)(1). This does not require proof of a recent dangerous act. Penal Code § 2962(g).

¹⁷ Penal Code § 2962(e). If a person was convicted of multiple crimes, non-controlling concurrently-sentenced offenses may be considered. *People v. Pace* (1994) 27 Cal.App.4th 795, 799 [33 Cal.Rptr.2d 352]. After a person has been committed as an MDO, re-designation of the qualifying offense as a misdemeanor under Proposition 47 does not prohibit MDO re-commitment. *People v. Goodrich* (2017) 7 Cal.App.5th 699 [212 Cal.Rptr.3d 788].

¹⁸ A conviction for use of force against property does not qualify a person for MDO commitment. *People v. Green* (2006) 142 Cal.App.4th 907 [48 Cal.Rptr.3d 464]. Also, reckless arson does not qualify as a crime of violence or force under the MDO law, but willful and malicious arson does qualify. *People v. Hayes* (2003) 105 Cal.App.4th 1287 [129 Cal.Rptr.2d 885].

¹⁹ *People v. Itehua* (2014) 227 Cal. App. 4th 356 [173 Cal.Rptr.3d 614] (stalking was an implied threat satisfying MDO commitment the criteria); *People v. Labelle* (2010) 190 Cal.App.4th 149, 152 [117 Cal.Rptr.3d 882] (felony vandalism was MDO-qualifying crime where defendant shattered window while aware that an officer was standing next to it); *People v. Kortsmaki* (2007) 156 Cal.App.4th 922, 928 [67 Cal.Rptr.3d 706] (possession of flammable liquid with intent to set fire to property was an MDO-qualifying offense, where a defendant told customers about to enter a store that he was going to set fire to a nearby dumpster); *People v. Butler* (1999) 74 Cal.App.4th 557 [88 Cal.Rptr.2d 210] (stalking was a crime involving threat of force under MDO law); but see *People v. Green* (2006) 142 Cal.App.4th 907 [48 Cal.Rptr.3d 464] (felony vandalism not an MDO-qualifying offense where defendant kicked out window of police car).

²⁰ Penal Code § 2960. See Chapter 7 for more information about CDCR mental health care.

on parole, the CDCR will screen people to determine whether they have severe mental disorders that are not in remission or cannot be kept in remission without treatment, whether they have received mental health care in prison, and whether they have any MDO-qualifying criminal offenses. If these basic criteria are met, the person will be evaluated for MDO status by both the CDCR mental health clinician and a DSH psychiatrist or psychologist.²¹

If both mental health evaluators agree that the person qualifies as an MDO, then the prison's chief psychiatrist will notify the BPH that the person has been "certified" as an MDO.²²

If the CDCR and DSH evaluators disagree about whether a person qualifies as an MDO, the CDCR chief psychiatrist may still certify a person as an MDO. The BPH must then have two independent mental health professionals evaluate the person. If one of the independent mental health professionals agrees with the MDO certification, then MDO proceedings will continue.²³

The BPH will review the MDO paperwork to verify the MDO certification.²⁴ The CDCR staff will then notify the person that they have been certified as an MDO, that inpatient treatment by the DSH will be a required condition of parole, and that the person may request further evaluations and a hearing to challenge the MDO certification.²⁵ Refusing to sign the conditions of parole will be futile because the person's parole will be revoked and, after the parole term ends, the person still may be deemed to be an MDO and kept in DSH custody.²⁶

The MDO evaluation and certification usually must be completed prior to release on parole. However, if there is good cause to do so, the BPH may order that a person be kept in custody for no more than 45 days beyond the scheduled release date to complete the evaluation and certification. Good cause means a recalculation or restoration of credits, a re-sentencing, or some other unusual circumstance that results in there being less than 45 days to do the evaluations prior to the release date.²⁷ Where there is good cause, the BPH may file the extension order after the release date has passed, so long as the certification is completed with 45-days after the scheduled release date.²⁸

12.5 BPH Certification Hearing

A person who is certified as an MDO has the right to request two more independent mental health evaluations and a BPH hearing to challenge the MDO designation.²⁹ The Notice of Right to a

²¹ Penal Code § 2962(d)(1).

²² Penal Code § 2962(d)(1).

²³ Penal Code § 2962(d)(2)-(3).

²⁴ 15 CCR § 2573.

²⁵ 15 CCR § 2574.

²⁶ 15 CCR § 2574; Penal Code § 2970.

²⁷ Penal Code § 2963.

²⁸ *People v. Gerard* (2015) 243 Cal.App.4th 242, 247 [196 Cal.Rptr.3d 278].

²⁹ Penal Code § 2966; Penal Code § 2978; 15 CCR § 2576.

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Certification Hearing is BPH Form 1410; the form the person must fill out to request evaluations and a hearing is BPH Form 1410-A.³⁰

The hearing will be in front of a BPH deputy commissioner.³¹ The burden is on the CDCR to prove by a preponderance of the evidence that the person meets the MDO criteria.³² A lawyer will be appointed for the person in prison; the person cannot waive a lawyer and represent themselves.³³ The person in prison has the right to review all non-confidential documents that will be used to justify the MDO certification, to be present at the hearing and speak on their own behalf, and to present supporting documents.³⁴

It is unlikely that the BPH deputy commissioner will reverse the findings of the mental health professionals who determined that the person meets the MDO criteria. If the deputy commissioner determines that the person is an MDO, the deputy commissioner must notify the person of the right request a trial and, upon request, provide the appropriate petition form and filing instructions.³⁵ However, if the BPH deputy commissioner finds that the person on parole is not an MDO, normal parole procedures should be followed.³⁶

12.6 Court or Jury Trial

After the BPH hearing, a person has the right to a trial in the local superior court to challenge the MDO certification. To seek a trial, the person must file a petition; the BPH should provide them with the petition and instructions for filing it. The petition may be filed any time before the initial MDO certification expires.³⁷

The person has a right to a trial by jury and representation by an appointed attorney.³⁸ A court trial can be conducted if the person personally waives the right to a jury and the waiver is voluntary and intelligent.³⁹ The person's attorney may waive the right to a jury trial over the defendant's objection only if there is substantial evidence that the person is incompetent to make a knowing and voluntary waiver.⁴⁰

³⁰ DOM § 84090.1.1.

³¹ 15 CCR § 2576(b)(9).

³² Penal Code § 2966(a); 15 CCR § 2576.

³³ 15 CCR § 2576(b)(4).

³⁴ 15 CCR §§ 2247-2249; 15 CCR § 2576(b)(3).

³⁵ Penal Code § 2966(a); 15 CCR § 2576(b)(10-11); *People v. Tate* (1994) 29 Cal.App.4th 1678 [35 Cal.Rptr.2d 250].

³⁶ 15 CCR § 2573(d)(2).

³⁷ *People v. J.S.* (2014) 229 Cal.App.4th 163, 170 [176 Cal.Rptr.3d 816, 820] (holding that “a petition filed before the initial commitment term expire—regardless of when it is heard—is timely and not subject to dismissal on grounds of mootness”).

³⁸ Penal Code § 2966(b).

³⁹ *People v. Blackburn* (2015) 61 Cal.4th 1113, 1116 [191 Cal.Rptr.3d 458, 271]; *People v. Blancett* (2017) 15 Cal.App.5th 1200 [223 Cal.Rptr.3d. 631].

⁴⁰ *People v. Blackburn* (2015) 61 Cal.4th 1113, 1131 [191 Cal.Rptr.3d 458, 271].

The court is supposed to hold the trial within 60 days after the petition is filed, unless the person waives time (agrees to a delay) or the district attorney shows good cause for the delay; however, any violation of the timeline does not make the trial invalid unless the delay amounts to a due process violation.⁴¹ The person will remain in custody (most likely a local jail) while the trial is pending.⁴²

The issue for trial is whether the person met the MDO criteria as of the date of the BPH hearing.⁴³ The person is entitled to representation by an attorney.⁴⁴ The standard of proof is the same as at a criminal trial; the state has the burden of proving “beyond a reasonable doubt” that the person meets the MDO criteria. The jury verdict must be unanimous to commit a person as an MDO.⁴⁵

The trial will be conducted similar to a criminal trial. The person has a right to avoid self-incrimination, and cannot be required to testify unless the state shows that requiring an MDO to testify is necessary to further a compelling state interest.⁴⁶

The state may use documentary evidence to prove the existence or nature of a qualifying commitment offense, even if the document is hearsay (such as a probation officer’s report).⁴⁷ However, a mental health expert may not opine on whether the defendant committed a qualifying offense.⁴⁸

An expert witness at an MDO trial may rely on notes made by hospital staff and testimony about the notes (under the business records exception to the hearsay rule) to prove other factors such as whether the defendant’s severe mental disorder was one of the causes of or an aggravating factor in the commission of the crime.⁴⁹ Although an expert may rely on hearsay in forming an opinion about whether a person is an MDO, the hearsay must not be speculative, conjectural, or otherwise

⁴¹ Penal Code § 2966(b); *People v. Bona* (2017) 15 Cal.App.5th 511 [223 Cal.Rptr.3d 649]. Under a prior version of the law, MDOs were unsuccessful in challenging commitments where the trial started later than time set in the statute. *People v. Fernandez* (1999) 70 Cal.App.4th 117 [82 Cal.Rptr.2d 469]; *People v. Williams* (1999) 77 Cal.App.4th 436 [92 Cal.Rptr.2d 1]; *People v. Kirkland* (1994) 24 Cal.App.4th 891 [29 Cal.Rptr.2d 863].

⁴² Penal Code § 2966(b).

⁴³ Penal Code § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678 [35 Cal.Rptr.2d 250] (jury or court cannot consider evidence regarding treatment or remission that happened after the BPH hearing). The state does not have to prove that the CDCR and BPH followed the correct procedures in making the MDO determination. *People v. Harrison* (2013) 57 Cal.4th 1211 [164 Cal.Rptr.3d 167].

⁴⁴ Penal Code § 2966(b).

⁴⁵ Penal Code § 2966(b).

⁴⁶ *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1453 [203 Cal.Rptr.3d 335]; *People v. Aljassar* (2017) 8 Cal.App.5th 880, 887-888 [214 Cal.Rptr.3d 186]; see also *People v. Collins* (1992) 10 Cal.App.4th 690 [12 Cal.Rptr.2d 768] (Fifth Amendment violated when MDO defendant required to testify about offense); but see *People v. Clark* (2000) 82 Cal.App.4th 1072 [98 Cal.Rptr.2d 767].

⁴⁷ Penal Code § 2962(f); see also *People v. Woods* (2016) 3 Cal.App.5th 457, 460-462 [207 Cal.Rptr.3d 622] (guilty plea resisting an executive officer “by the use of force and violence” established that the offense involved the actual use of force or violence); see also *People v. Baker* (2012) 204 Cal.App.4th 1234 [139 Cal.Rptr.3d 594] (court could rely on probation report as evidence that defendant’s crime met MDO commitment criteria, where defendant did not object).

⁴⁸ *People v. Stevens* (2015) 62 Cal.4th 325, 329 [195 Cal.Rptr.3d 762].

⁴⁹ *People v. Nelson* (2013) 209 Cal.App.4th 698, 703 [147 Cal.Rptr.3d 183]; *People v. Stevens* (2015) 6 Cal.4th 325, 329 [195 Cal.Rptr.3d 762].

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unreliable.⁵⁰ Also, an expert cannot be used to relay case specific facts obtained through what would otherwise be inadmissible hearsay.⁵¹

The jury is not supposed to be informed that an MDO commitment will result in mandatory DSH treatment rather than release on parole.⁵²

If the court or jury finds that the person is not an MDO, normal parole procedures are followed. If the court determines that the person's mental disorder was not an aggravating factor in the offense, or that the offense was not a crime involving violence or threats, that issue can never be raised again. Thus, the person cannot ever be committed as an MDO based on that offense.⁵³

On the other hand, the issue of whether the person has a "severe mental disorder" that is not in remission or cannot be kept in remission without treatment can be re-litigated at future proceedings.⁵⁴ Thus, if the mental health of a person on parole deteriorates, the state can revoke parole, file a new MDO petition, and request a new trial to determine whether the person has become an MDO.⁵⁵

12.7 MDO Commitment to the DSH for Treatment

The court does not have any authority over where an MDO will be housed. The law requires that an MDO must be committed to a mental hospital for inpatient treatment unless the DSH certifies to the BPH that there is reasonable cause to believe the person can be safely and effectively treated as an outpatient.⁵⁶ If necessary, the DSH may place an MDO in a CDCR Psychiatric Services Unit (PSU) due to assaultive or sexually inappropriate behavior.⁵⁷

The DSH must provide each MDO with mental health treatment.⁵⁸ MDOs may be forced to take medications involuntarily in an emergency situation for a period of up to three days without a hearing.⁵⁹ For longer involuntary medication, the DSH must show that either the person committed as an MDO is incompetent and incapable of making decisions about their medical treatment or that the person presents a demonstrated danger to self or others because they have attempted, inflicted, or

⁵⁰ *People v. Dodd* (2005) 133 Cal.App.4th 1564 [35 Cal.Rptr.3d 692] (reversing MDO commitment where experts relied on unreliable hearsay in diagnosing defendant as a pedophile).

⁵¹ *People v. Bona* (2017) 15 Cal.App.5th 511 [223 Cal.Rptr.3d 649]; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 408-412 [211 Cal.Rptr.3d 378]; *People v. Roa* (2017) 11 Cal.App.5th 428 [217 Cal.Rptr.3d 604].

⁵² *People v. Collins* (1992) 10 Cal.App.4th 690 [12 Cal.Rptr.2d 768].

⁵³ *People v. Crivello* (2011) 200 Cal.App.4th 612 [132 Cal.Rptr.3d 655]; *People v. Francis* (2002) 98 Cal.App.4th 873 [120 Cal.Rptr.2d 90].

⁵⁴ *People v. Hannibal* (2006) 143 Cal.App.4th 1087 [49 Cal.Rptr.3d 645].

⁵⁵ 15 CCR § 2616(a)(14); *People v. Coronado* (1994) 28 Cal.App.4th 1402 [33 Cal.Rptr.2d 835].

⁵⁶ Penal Code § 2964.

⁵⁷ Welfare & Institutions Code § 7301; *People v. Gram* (2012) 202 Cal.App.4th 1125, 1138-1139 [135 Cal.Rptr.3d 914].

⁵⁸ Penal Code § 2972(f).

⁵⁹ Welfare & Institutions Code § 5150.

made a serious threat of substantial physical harm.⁶⁰ A person committed as an MDO has no right to a jury trial to determine whether involuntary anti-psychotic medication may be administered. However, they are entitled to a court hearing in front of a judge.⁶¹ They will be represented by an attorney and have the right to be present unless they have a “demonstrated inability to attend” or if they personally waive the right to attend.⁶²

Any time after spending 60 days in DSH custody, a person committed as an MDO may demand a “placement hearing” on whether they must remain in a hospital or can be treated as an outpatient.⁶³ If they request a hearing, the matter will be heard by a BPH deputy commissioner. The burden is on the DSH to establish by a preponderance of the evidence that the MDO requires inpatient treatment.⁶⁴

12.8 Re-Commitment to the DSH During the Parole Term

As with other people on parole, the BPH must conduct early discharge reviews for people committed as MDOs.⁶⁵ If the BPH recommends that the MDO commitment continue, the person may be re-committed for another year. The re-commitment process is somewhat similar to the original commitment process. The person is entitled to a hearing in front of a BPH deputy commissioner, who must determine whether the person still qualifies as an MDO and whether they should be in inpatient or outpatient treatment.⁶⁶ The burden of proof is on the DSH to show by a preponderance of the evidence that the person’s mental disorder is not in remission or cannot be kept in remission without treatment.⁶⁷ The person is entitled to representation by a lawyer and cannot waive that right.⁶⁸ They also have the right to request evaluation by two independent evaluators.⁶⁹

If the BPH decides that the person still meets the MDO criteria, the MDO can request a jury trial in superior court to challenge the continued commitment.⁷⁰

⁶⁰ *In re Qawi* (2004) 32 Cal.4th 1, 27 [7 Cal.Rptr.3d 780]; Penal Code § 2602; Penal Code § 2972(g); Welfare & Institutions Code § 5300.

⁶¹ *People v. Fisher* (2009) 172 Cal.App.4th 1006, 1015-1016 [91 Cal.Rptr.3d 609]; see also *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, 541 [223 Cal.Rptr. 746].

⁶² *People v. Fisher* (2009) 172 Cal.App.4th 1006, 1013-1014 [91 Cal.Rptr.3d 609].

⁶³ Penal Code § 2964; 15 CCR § 2578.

⁶⁴ Penal Code § 2964.

⁶⁵ 15 CCR § 2535; 15 CCR § 2580. See § 11.5 regarding early discharge reviews.

⁶⁶ 15 CCR § 2580(b).

⁶⁷ 15 CCR § 2580(c)(1)-(2).

⁶⁸ 15 CCR § 2580(c)(4).

⁶⁹ 15 CCR § 2580(c)(6).

⁷⁰ 15 CCR § 2580(c)(10).

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If at any time during the parole period, the person's severe mental disorder is in remission and can be kept in remission without treatment, the Director of the DSH must notify the BPH.⁷¹ Normal parole release procedures should then be followed.

12.9 Referral and Petition for Continued Commitment at End of Parole Term

As discussed in the preceding sections, MDO commitment during the parole period is a condition of parole recommended by the BPH. Once the parole period has expired, the DSH must obtain a new court order if it wants to continue the MDO commitment.⁷²

If the DSH staff believe that an MDO still meets all the MDO criteria at the end of the parole period, the DSH will send an "evaluation of remission" to the local district attorney. The DSH referral is supposed to be made at least 180 days prior to the end of the parole term.⁷³ However, courts have found that this deadline is not mandatory, and that failure to meet the deadline does not invalidate an MDO commitment.⁷⁴

After receiving the evaluation of remission, the district attorney may file a petition in the local superior court, asking the court to order another year of MDO commitment.⁷⁵ The petition must be accompanied by an affidavit from the DSH stating that the person on parole has received continuous treatment over the past year and still meets the MDO criteria.⁷⁶ The district attorney has no authority to seek continued commitment unless DSH staff has referred the person for a further MDO commitment.⁷⁷ However, one court has held that a district attorney may file a petition where there are differences of opinion among the DHS staff as to whether the person should be re-committed or poses a danger to others.⁷⁸

The district attorney must file the re-commitment petition before the prior MDO commitment period expires. If this deadline is not met, the petition must be dismissed.⁷⁹

⁷¹ Penal Code § 2968.

⁷² See § 11.4 for information on the length of parole terms.

⁷³ Penal Code § 2970. The referral may be made by the Director of the CDCR if the person on parole refused to sign the conditions of parole and thus served their entire parole term in prison.

⁷⁴ Penal Code § 2970; *People v. Fernandez* (1999) 70 Cal.App.4th 117 [82 Cal.Rptr.2d 469]; *People v. Williams* (1999) 77 Cal.App.4th 436 [92 Cal.Rptr.2d 1]; *People v. Kirkland* (1994) 24 Cal.App.4th 891 [29 Cal.Rptr.2d 863].

⁷⁵ Penal Code § 2970(b).

⁷⁶ Penal Code § 2970(b).

⁷⁷ *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347 [62 Cal.Rptr.3d 796]; *People v. Marchman* (2006) 145 Cal.App.4th 79 [51 Cal.Rptr.3d 369]; *People v. Garcia* (2005) 127 Cal.App.4th 558 [25 Cal.Rptr.3d 660].

⁷⁸ *People v. Superior Court (Salter)* (2011) 192 Cal.App.4th 1352 [121 Cal.Rptr.3d 873] (holding that the prosecution was entitled to a jury trial in order to resolve conflicting medical opinions regarding whether the defendant was in remission or not); *People v. Hernandez* (2011) 201 Cal.App.4th 483 [133 Cal.Rptr.3d 817] (district attorney may file MDO petition even if the DSH evaluation concludes that release would not pose a danger to others and does not recommend re-commitment, so long as DSH staff find that the severe mental disorder is not in remission or cannot be kept in remission without treatment).

⁷⁹ Penal Code § 2972(e); *People v. Allen* (2007) 42 Cal.4th 91 [64 Cal.Rptr.3d 124].

12.10 Trial on Continued Commitment at End of Parole Term

A person who is faced with an MDO re-commitment petition at the end of the parole term is entitled to a jury trial.⁸⁰ The trial should start no later than 30 days prior to the parole discharge date.⁸¹

Some of the evidentiary issues related to MDO trials are discussed in § 12.6.

The person facing the re-commitment has a right to be represented by an attorney. The standard of proof is whether the state has proven beyond a reasonable doubt that the person meets the MDO criteria.⁸² However, the person facing the MDO commitment cannot challenge the “static commitment criteria” that a severe mental disorder was a cause or aggravating factor of the underlying crime, that the person was treated for at least 90 days during the last year of the prison term, and that the underlying crime was a qualifying offense.⁸³ If the trial is by a jury, the person can be re-committed as an MDO only if there is a unanimous verdict in favor of commitment.⁸⁴

If the court or jury finds that the person meets the MDO criteria, the person will be re-committed to the DSH for a one-year term.⁸⁵ The court or jury will also determine whether the person is suitable for outpatient treatment.⁸⁶ To obtain an outpatient placement, the MDO must show that there is reasonable cause to conclude that outpatient treatment is appropriate.⁸⁷

12.11 Subsequent Annual Re-commitments

An MDO commitment may be renewed each year, potentially for the rest of the person’s life. The process is basically the same as the initial post-parole re-commitment (see §§ 12.9-12.10). At the request of the DSH, the district attorney may file an annual petition for re-commitment.⁸⁸ The petition must be filed prior to the end of the current commitment period; a late petition must be dismissed

⁸⁰ *People v. Blackburn* (2013) 215 Cal.App.4th 809 [156 Cal.Rptr.3d 106]. The person’s attorney may waive the right to a jury trial over the defendant’s objection only when there is reason to doubt that the MDO is capable of determining whether a bench or jury trial is in their best interests.

⁸¹ Penal Code § 2972(a). If the MDO extension petition is filed before the end of the parole term, but the trial does not start until after expiration of the parole term, the person may be entitled to release pending trial on the petition if there is no good cause to keep them in custody. *People v. Cobb* (2010) 48 Cal.4th 243, 252 [106 Cal.Rptr.3d 230].

⁸² Penal Code § 2972(a). However, the court does not need to instruct the jury to presume that the defendant is not an MDO. *People v. Beeson* (2002) 99 Cal.App.4th 1393 [122 Cal.Rptr.2d 384].

⁸³ *Lopez v. Superior Court* (2013) 50 Cal.4th 1055 [116 Cal.Rptr.3d 530]. Note that if a person on parole has effectively refused MDO treatment by refusing to sign the conditions of parole, they are still considered to have been in continuous treatment. *People v. Kirkland* (1994) 24 Cal.App.4th 891 [29 Cal.Rptr.2d 863].

⁸⁴ Penal Code § 2972(a).

⁸⁵ Penal Code § 2972(c). Note that time spent on outpatient status does not count toward the one-year commitment period.

⁸⁶ Penal Code § 2972(d); *People v. May* (2007) 155 Cal.App.4th 350 [65 Cal.Rptr.3d 873].

⁸⁷ *People v. Gregerson* (2011) 202 Cal.App.4th 306 [135 Cal.Rptr.3d 188].

⁸⁸ *People v. Marchman* (2006) 145 Cal.App.4th 79 [51 Cal.Rptr.3d 369]; *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347 [62 Cal.Rptr.3d 796].

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and the MDO commitment must end.⁸⁹ The person is then entitled to a court or jury trial to determine whether the MDO commitment should continue.⁹⁰

There is a special re-commitment procedure for people who have served a year on outpatient status. In such cases, the state does not need to file an annual re-commitment petition. However, the court must schedule a hearing no later than 30 days after the end of the re-commitment period to consider whether to discharge the person from the MDO commitment, order confinement in a treatment facility or continue the commitment as an outpatient. The court will consider the report and recommendations of the person's community program director. If the report recommends further commitment, the MDO shall be provided an attorney and can demand a jury trial.⁹¹

12.12 Legal Challenges to MDO Commitments

If a court or jury commits a person as an MDO, the MDO defendant can file a direct appeal. The process for filing a notice of appeal and for the rest of the appeal process is similar to appeals in criminal cases (see Chapter 14). Many different types of issues might be raised, including claims that there was insufficient evidence to support the commitment order, arguments that the procedural rules were not followed, or attacks on the lawfulness of the commitment statutes or how they were applied.

As with criminal cases, a person with an MDO commitment can file a state court habeas corpus petition if the challenge to the commitment is based on information that was not presented to the trial court or involves an issue that was not raised in the appeal (see Chapter 15).

Finally, a person who exhausts all state court procedures may be able to challenge the MDO commitment in a federal petition for writ of habeas corpus (see Chapter 16).

SEXUALLY VIOLENT PREDATOR (SVP) COMMITMENTS

12.13 Overview of the SVP Law

The Sexually Violent Predator (SVP) laws allow the state to send certain people with sex offenses to mental hospitals at the end of their prison terms. The criteria and process for SVP commitment are described in Welfare and Institutions Code §§ 6600-6609.3. The statutes were extensively revised in November 2006 as part of Proposition 83 (“Jessica’s Law”),⁹² so anyone researching these topics should be careful to rely on the current statutes and cases.

Although people have raised many constitutional challenges to SVP statutes, the courts have generally upheld SVP laws. Courts have held that SVP commitments do not violate the prohibition

⁸⁹ *People v. Allen* (2007) 42 Cal.4th 91, 104 [64 Cal.Rptr.3d 124]. Note that even if the MDO commitment cannot be renewed, the person might be subjected to other types of civil commitment proceedings, depending on the circumstances.

⁹⁰ Penal Code § 2972(e).

⁹¹ Penal Code § 2972.1; *People v. Morris* (2005) 126 Cal.App.4th 527 [23 Cal.Rptr.3d 881].

⁹² Courts have held that Proposition 83 does not violate California’s single-subject rule for ballot initiatives, because its changes all relate to the common purpose of strengthening laws related to people with sex offenses. *People v. Kisling* (2011) 199 Cal.App.4th 687 [131 Cal.Rptr.3d 869]; see also *People v. McDonald* (2012) 214 Cal.App.4th 1367, 1383 [154 Cal.Rptr.3d 823].

on double jeopardy because they are civil commitments for the purpose of providing treatment and protecting public safety, rather than for punishment.⁹³ For the same reason, new SVP laws can be applied to people who were convicted of crimes before the laws were enacted without violating the constitutional bans on ex post facto laws.⁹⁴ Likewise, the SVP law has been found not to violate due process.⁹⁵ The courts have also held that although people committed as SVPs are similarly situated to MDOs in many ways, there are rational reasons for providing SVPs with fewer procedural protections and subjecting them to presumptively indeterminate commitments; thus these differences do not violate the constitutional guarantee of equal protection.⁹⁶

12.14 Criteria for SVP Commitment

There are two criteria that must be met for a person to be committed as an SVP. First, the person must have a prior or current conviction for a “sexually violent” offense. Second, the person must have a current mental disorder that makes it “likely that they will engage in sexually violent criminal behavior.”⁹⁷

Welfare & Institutions Code § 6600 defines the “sexually violent” crimes and juvenile adjudications that can make a person eligible for an SVP commitment. The sexually violent crime need not be one of the offenses for which the person is currently incarcerated, and there is no limit on using old offenses as the basis for an SVP commitment. Prior convictions for which the person received probation can qualify a person as an SVP, as do convictions obtained by guilty or no contest pleas and prior commitments as not guilty by reason of insanity.⁹⁸ The crime does not have to be “predatory,” which means that the victim does not have to be a stranger, casual acquaintance or person with whom the person developed a relationship solely for the purpose of victimization.⁹⁹

⁹³ *People v. McDonald* (2012) 214 Cal.App.4th 1367, 1383 [154 Cal.Rptr.3d 823, 835]; see U.S. Constitution, Fifth Amendment; California Constitution, Article 1, § 15.

⁹⁴ *Taylor v. San Diego County* (9th Cir. 2015) 800 F.3d 1164 (holding that denial of SVP defendant’s Equal Protection and Due Process claims was not an unreasonable application of federal law); *Seeboth v. Allenby* (9th Cir. 2015) 789 F.3d 1099 (California’s differential treatment of people with SVP commitments from other people with civil commitments with respect to recommitment trials does not violate the Equal Protection Clause); see U.S. Constitution, Article 10; California Constitution, Article 1, § 9.

⁹⁵ *Seling v. Young* (2001) 531 U.S. 250 [121 S.Ct. 727; 148 L.Ed.2d 734]; *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072; 138 L.Ed.2d 501]; *People v. Hubbard* (2001) 88 Cal.App.4th 1202 [106 Cal.Rptr.2d 490]; see also *Hubbard v. Knapp* (9th Cir. 2004) 379 F.3d 773; *Young v. Weston* (9th Cir. 2003) 344 F.3d 973; U.S. Constitution, Fourteenth Amendment; California Constitution, Article 1, § 7.

⁹⁶ *People v. McKee* (2010) 47 Cal.4th 1172 [104 Cal.Rptr.3d 427]; *Hubbard v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42]; *People v. Kisling* (2014) 223 Cal. App. 4th 544 [167 Cal.Rptr.3d 339]; *People v. Gray* (2014) 229 Cal. App. 4th 285 [176 Cal.Rptr.3d 837]; *People v. Nguyen* (2013) 218 Cal.App.4th 1363, 1378 [160 Cal.Rptr.3d 868, 879]; *People v. McCloud* (2013) 213 Cal.App.4th 1076 [153 Cal.Rptr.3d 10]; *People v. Landau* (2013) 214 Cal.App.4th 1[154 Cal.Rptr.3d 1]; *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1376 [154 Cal.Rptr.3d 823]; *People v. McKnight* (2012) 212 Cal.App.4th 860 [151 Cal.Rptr.3d 132]; *People v. McKee (McKee II)* (2012) 207 Cal.App.4th 1325, 1347 [144 Cal.Rptr.3d 308, 324]; *People v. Buffington* (1999) 74 Cal.App.4th 1149 [88 Cal.Rptr.2d 696]; see U.S. Constitution, Fourteenth Amendment; California Constitution, Article 1, § 7.

⁹⁷ Welfare & Institutions Code § 6600(a).

⁹⁸ Welfare & Institutions Code § 6600(a)-(b), (g).

⁹⁹ *People v. Torres* (2001) 25 Cal.4th 680 [106 Cal.Rptr.2d 824]; see Welfare & Institutions Code § 6600(e).

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The second criteria for SVP commitment is that the person must have a current mental disorder that makes them likely to engage sexually violent criminal behavior. A personality disorder, mental retardation, or drug addiction or abuse may be a qualifying mental disorder. There are no requirements that the mental disorder have been a cause or aggravating factor of the violent sex offense, that the person have received mental health treatment in prison, or that they have committed any recent dangerous act.¹⁰⁰ Sexually violent behavior is defined more broadly than the prior crimes that make a person eligible for SVP commitment, and can include such crimes as sexual battery involving unlawful restraint.¹⁰¹

12.15 CDCR Screening and Evaluation for SVP Eligibility

SVP commitment proceedings can be started only against people who are in CDCR custody serving a criminal sentence or parole revocation term.¹⁰² If a person's current conviction is reversed or reduced to a misdemeanor before an SVP petition is filed, the state cannot go ahead with SVP proceedings.¹⁰³ If the current conviction is reversed while an SVP petition is already pending, the petition must be stayed pending an opportunity for the state to re-try the case. If the state does not timely re-try the case and obtain a new conviction, then the SVP proceedings must be dismissed.¹⁰⁴

If CDCR staff believes that a person may qualify for an SVP commitment, they should refer the person for an evaluation no less than 180 days prior to their release date.¹⁰⁵ The CDCR and BPH then will evaluate the person's social and criminal history and behavior in prison. If the CDCR and BPH staff decides that the person is likely to qualify as an SVP, they will refer the person to the DSH for further evaluation.¹⁰⁶

If a person is scheduled to be released prior to completion of a full evaluation, the BPH may order that they be held up to 45 days past the scheduled release date.¹⁰⁷ The BPH regulations do not provide for a hearing before a hold is placed.¹⁰⁸ However, there is "good cause" for a hold only in exigent circumstances which result in there being less than 45 days prior to the scheduled release date

¹⁰⁰ *People v. Felix* (2008) 169 Cal.App.4th 607, 620-621 [87 Cal.Rptr.3d 482]; see also Welfare & Institutions Code § 6600(d). A "recent overt act" is defined as "any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior." Welfare & Institutions Code § 6600(f).

¹⁰¹ *People v. White* (2016) 3 Cal.App.4th 433, 446-453 [208 Cal.Rptr.3d 1].

¹⁰² Welfare & Institutions Code § 6601(a)(1). Courts do not have authority to hold SVP commitment proceedings if a person has a criminal term with years left to serve. *People v. Putney* (2016) 1 Cal.App.5th 1058 [205 Cal.Rptr.3d 600]. Note there is no requirement that the SVP proceedings be fully completed before the person's release date. *People v. Talhelm* (2000) 85 Cal.App.4th 400, 406 [102 Cal.Rptr.2d 150].

¹⁰³ *In re Franklin* (2008) 169 Cal.App.4th 386, 392 [86 Cal.Rptr.3d 702].

¹⁰⁴ *In re Smith* (2008) 42 Cal.4th 1251, 1269-1271 [73 Cal.Rptr.3d 469].

¹⁰⁵ Welfare & Institutions Code § 6601(a)(1). A referral for an SVP evaluation can be made less than 180-days before the release date if the person arrives in the CDCR with less than nine months to serve or if the release date is modified so that the person has less than 180 days left to serve.

¹⁰⁶ Welfare & Institutions Code § 6601(a)(1).

¹⁰⁷ Welfare & Institutions Code § 6601.3; 15 CCR § 2600.1(e); see *In re Hovanski* (2009) 174 Cal.App.4th 1517 [95 Cal.Rptr.3d 370] (person can be subject to 45-day hold for an SVP evaluation even though he had been scheduled to be fully discharged from his sentence prior to end of the 45-day period).

¹⁰⁸ 15 CCR § 2600.1.

for the evaluation; exigent circumstances include a last-minute recalculation or restoration of credits, a re-sentencing, or arrival of the person into custody with a short amount of time to serve that leaves less than 45 days for the evaluation.¹⁰⁹

12.16 DSH Evaluation for SVP Eligibility

If the CDCR and BPH refer a person for an SVP evaluation by the DSH, then the DSH must appoint two mental health professionals (either two psychiatrists or a psychologist and a psychiatrist) to evaluate the person. The DSH does not have to provide a person with notice prior to the required mental health evaluations, and the person does not have a right to consult with an attorney during the evaluation process.¹¹⁰

The mental health evaluators must determine whether the person has a serious mental disorder that creates a substantial danger, meaning “a serious and well-founded risk,” that the person will commit future crimes if released.¹¹¹ If both mental health evaluators agree that the person has a qualifying mental disorder, the DSH will refer the case to the district attorney in the county where the current prison conviction occurred.¹¹²

If only one of the evaluators believes that the person qualifies as an SVP, the DSH will arrange for evaluation by two more mental health professionals; the DSH cannot refer the case to the district attorney unless both of these additional evaluators agree that the person has a qualifying disorder.¹¹³ If the two additional evaluators do not find that the person has a qualifying mental disorder, the SVP proceedings will be over and the person will be released.¹¹⁴

¹⁰⁹ Welfare & Institutions Code § 6601.3(b); *People v. Hydrick* (2016) 1 Cal.App.5th 837, 841 [205 Cal.Rptr.3d 154] (delaying for full evaluation includes time for District Attorney to decide whether to file petition); *In re Lucas* (2012) 53 Cal.4th 839 [137 Cal.Rptr.3d 595] (invalidating BPH regulations to the extent they allowed a hold based only on “some evidence” that the person met the SVP criteria, rather than good cause for delay in evaluation); *Orey v. Superior Court* (2013) 213 Cal.App.4th 1241 [152 Cal.Rptr.3d 878]; see also *Brown v. Superior Court* (2013) 213 Cal.App.4th 61 [151 Cal.Rptr.3d 818].

¹¹⁰ Welfare & Institutions Code § 6601(c).

¹¹¹ *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888 [119 Cal.Rptr.2d 1]; see also *Reilly v. Superior Court* (1013) 57 Cal.4th 641 [160 Cal.Rptr.410] (if evaluator uses invalid assessment protocol, person entitled to dismissal of SVP action only if the error was material); *Rabuck v. Superior Court* (2013) 221 Cal.App.4th 1334 [165 Cal. Rptr.3d 354, 360] (SVP commitment upheld against claim that evaluation was based on invalid assessment protocol); *People v. Superior Court (Troyer)* (2015) 240 Cal.App.4th 654 [192 Cal.Rptr.3d 820] (not legal error for evaluator to copy substantial portions prior evaluations). A person has no right to prevent disclosure of their medical records for the DSH evaluation. Any interest that the person has in privacy is outweighed by the government’s interest in protecting the public. *Seaton v. Mayberg* (9th Cir. 2010) 610 F.3d 530; see also *Hubbs v. Alamao* (C.D. Cal. 2005) 360 F.Supp.2d 1073.

¹¹² Welfare & Institutions Code § 6601(d). Each county designates either the district attorney or the county counsel to be responsible for prosecuting SVP petitions. Welfare & Institutions Code § 6601(i).

¹¹³ Welfare & Institutions Code § 6601(e)-(f). The DSH cannot avoid the requirement to get two additional evaluations by “undesignating” the original evaluator who found the person not to be an SVP and appointing a substitute evaluator. *In re Snyder* (2017) 12 Cal.App.5th 744 [219 Cal.Rptr.3d 171].

¹¹⁴ There is an exception to this requirement. If the Director of the DSH believes that one of the evaluators has misunderstood the legal criteria for SVP commitment, the Director may still ask the district attorney to file a petition. The person can then challenge the validity of the petition. *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912 [119 Cal.Rptr.2d 1].

12.17 SVP Petition Filed by the District Attorney

When the required number of evaluators agree that a person has a qualifying mental disorder, the DSH will ask the district attorney for the county of the current commitment offense to file an SVP commitment petition.¹¹⁵ The district attorney will decide whether to follow the recommendation.

The petition must be filed before the end of the lawful prison commitment or, if a 45-day hold has been placed, before the hold expires. However, a late-filed SVP petition will not be dismissed if there is a later determination that the person's custody was unlawful and the unlawful custody was due to a good faith mistake of fact or law.¹¹⁶

12.18 Probable Cause Screening and Hearing

After the district attorney files an SVP commitment petition, the trial court must screen the petition to decide if it presents probable cause to believe that the person is likely to engage in sexual violent criminal behavior on release. If the petition passes this screening, the person will be held in custody pending further SVP proceedings.¹¹⁷ A person who is facing SVP proceedings after the end of the prison term must be kept in a "secure facility," but the conditions must be non-punitive and the person must be "confined separately and distinctly" from people awaiting criminal trials or sentenced for crimes. The person can be held in administrative segregation so long as that does not involve any deprivation of privileges beyond that necessary to protect other people in prison and staff.¹¹⁸

The judge must hold a formal probable cause hearing within 10 days after the preliminary screening.¹¹⁹ At the hearing, the burden is on the state to convince the judge a reasonable person could have a strong suspicion that the person meets all the SVP criteria, including a "serious and well-founded risk" that the person will commit sexually violent criminal acts of a predatory nature.¹²⁰ The person has the rights be represented by a lawyer (who will be appointed by the court if the person cannot afford one), to present evidence, and to cross-examine the state's witnesses.¹²¹ However,

¹¹⁵ If a person is incarcerated due to convictions from more than one county, the SVP petition may be filed and heard in any of those counties. *Cheek v. Superior Court* (2002) 103 Cal.App.4th 520 [126 Cal.Rptr.2d 820]; *People v. Krab* (2003) 114 Cal.App.4th 534 [7 Cal.Rptr.3d 853].

¹¹⁶ Welfare & Institutions Code § 6601(a)(2); *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301 [71 Cal.Rptr.3d 462]; see *People v. Superior Court (Sokolich)* (2016) 248 Cal.App.4th 434, 446-451 [204 Cal.Rptr.3d 526] (applying good faith exception where CDCR mistakenly told district attorney wrong release date); *People v. Hubbard* (2001) 88 Cal.App.4th 1202 [106 Cal.Rptr.2d 490] (no good faith exception allowed where delay not due to good faith mistake).

¹¹⁷ Welfare & Institutions Code § 6601.5.

¹¹⁸ Welfare & Institutions Code § 6602(a); Penal Code §§ 4001-4002; *Jones v. Blanas* (9th Cir. 2004) 393 F.3d 918.

¹¹⁹ Welfare & Institutions Code § 6601.5. Failure to hold the probable cause hearing in a timely fashion may not result in any relief to the defendant if a trial is held and the jury finds beyond a reasonable doubt that the SVP criteria were met. See *People v. Hayes* (2006) 137 Cal.App.4th 34 [39 Cal.Rptr.3d 747].

¹²⁰ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252 [127 Cal.Rptr.2d 177, 195]; *In re Kirk* (1999) 74 Cal.App.4th 1066, 1076 [88 Cal.Rptr.2d 648, 655].

¹²¹ *In re Parker* (1998) 60 Cal.App.4th 1453 [71 Cal.Rptr.2d 167].

hearsay statements contained in probation reports are admissible at the probable cause hearing to prove that the defendant's offenses were sexually violent.¹²²

If the judge does not find probable cause to continue the proceedings, the SVP petition will be dismissed and the person will be paroled.¹²³ A judge who does find probable cause will order that the person be held in a secure facility pending a full trial; at this point the person can be moved to one of the state mental hospitals.¹²⁴

12.19 Court or Jury Trial

The next step in an SVP proceeding is a full civil commitment trial. There is no set deadline for starting or completing the trial. However, unjustified extensive delays in the trial of SVP cases may violate the right to due process.¹²⁵

¹²² *People v. Howard* (1999) 70 Cal.App.4th 136, 152-155 [82 Cal.Rptr.2d 481].

¹²³ Welfare & Institutions Code § 6602.

¹²⁴ Welfare & Institutions Code §§ 6602-6602.5.

¹²⁵ *People v. Evans* (2005) 132 Cal.App.4th 950 [34 Cal.Rptr.3d 35]; *People v. Talbelm* (2000) 85 Cal.App.4th 400, 404-405 [102 Cal.Rptr.2d 150]; *People v. Litmon* (2008) 162 Cal.App.4th 383 [76 Cal.Rptr.3d 122] (delay of more than three years in holding a trial on re-commitment petitions required dismissal.); but see *People v. Landau* (2013) 214 Cal.App.4th 1 [154 Cal.Rptr.3d 1] (no denial of due process where delays of over seven years were at the person in prison's request); *People v. Sanders* (2012) 203 Cal.App.4th 839 [137 Cal.Rptr.3d 830] (person facing SVP commitment waived right to speedy trial by admitting SVP allegations).

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At trial, the state has the burden of proving beyond a reasonable doubt that the person meets the SVP criteria.¹²⁶ The person has the right to request trial by a jury.¹²⁷ If the case is heard by a jury, the person cannot be committed as an SVP unless the jury unanimously agrees on the verdict.¹²⁸

The person facing an SVP commitment has the right to be represented by an attorney at trial, and to receive effective assistance of counsel.¹²⁹ A person also has a due process right to be present at the trial; counsel may not waive this right over the person's objection.¹³⁰ However, a person who is mentally incompetent does not have the right to have the SVP proceedings stayed or suspended.¹³¹

A person facing an SVP commitment has a due process right to testify at trial over the objection of their attorney.¹³² On the other hand, a person has a right not to be forced by the prosecution to testify in an SVP trial, which can be overcome only if necessary to further a compelling state interest.¹³³

The person has the right to hire experts to perform further psychological evaluations.¹³⁴ If a person is indigent (has no money), the court must appoint an expert mental health professional for

¹²⁶ Welfare & Institutions Code § 6604.

¹²⁷ Welfare & Institutions Code § 6603(a).

¹²⁸ Welfare & Institutions Code §§ 6603(a), 6604; *People v. Roberge* (2003) 29 Cal.4th 979 [120 Cal.Rptr.2d 861] (jurors should be instructed that they may not find person to be an SVP based solely on prior convictions); *People v. Hurtado* (2002) 28 Cal.4th 1179 [124 Cal.Rptr.2d 186]. The standard used in determining the likelihood that a defendant will commit future acts of sexual violence is the same as that used by the DSH evaluators and by the judge at the probable cause hearing. See e.g., *People v. Flores* (2006) 144 Cal.App.4th 625 [50 Cal.Rptr.3d 567] (jury finding of dangerousness was supported despite evidence of voluntary surgical and chemical castration); *People v. Sumabit* (2005) 128 Cal.App.4th 347 [27 Cal.Rptr.3d 233] (SVP cannot challenge sufficiency of evidence that he lacks ability to control behavior when he has refused to be interviewed by the state's experts). Although it seems confusing and contradictory to conclude "beyond a reasonable doubt" that the person is "likely" to re-offend, this standard has been held to be constitutional. *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42]; *People v. Hubbart* (2001) 88 Cal.App.4th 1202 [106 Cal.Rptr.2d 490]; *People v. Buffington* (1999) 74 Cal.App.4th 1149 [88 Cal.Rptr.2d 696]. In deciding whether a person is likely to re-offend, it is necessary for the jury to determine that the person has serious difficulty controlling their behavior. *Kansas v. Crane* (2002) 534 U.S. 407 [122 S.Ct. 867; 151 L.Ed.2d 856]; *Rose v. Mayberg* (9th Cir. 2006) 454 F.3d 958; but see *People v. Williams* (2003) 31 Cal.4th 757 [3 Cal.Rptr.3d 684]; *People v. Paniagua* (2012) 209 Cal.App.4th 499, 529 [146 Cal.Rptr.3d 871]; *Brock v. Selig* (9th Cir. 2004) 390 F.3d 1088 (court is not required to instruct jury that a qualifying mental disorder requires a serious lack of ability to control behavior; impaired ability to control oneself is presumed once the person is found to have mental disorder which makes them likely to commit future sexually violent acts). When evidence is presented that a person is amenable to post-release treatment, the court must instruct the jury that it must find it necessary that the person be confined in a secure facility for treatment. *People v. Calderon* (2004) 124 Cal.App.4th 80 [4 Cal.Rptr.3d 92]; *People v. Grassini* (2003) 113 Cal.App.4th 765 [6 Cal.Rptr.3d 662].

¹²⁹ Welfare & Institutions Code § 6603(a); *People v. Hill* (2013) 219 Cal.App.4th 646 [162 Cal.Rptr.3d 3] (person facing SVP proceedings may make motion asking for new appointed attorney due to ineffective assistance or conflict). Unlike criminal trials, there is no right to self-representation in SVP proceedings. *People v. Fraser* (2006) 138 Cal.App.4th 1430 [42 Cal.Rptr.3d 424].

¹³⁰ *People v. Nguyen* (2013) 218 Cal.App.4th 1363, 1378 [160 Cal.Rptr.3d 868].

¹³¹ *Moore v. Superior Court* (2010) 50 Cal.4th 802 [114 Cal.Rptr.3d 199].

¹³² *People v. Allen* (2008) 44 Cal.4th 843 [80 Cal.Rptr.3d 183].

¹³³ *People v. Field* (2016) 1 Cal.App.5th 174, 195-197 [204 Cal.Rptr.3d 548]; *People v. Curlee* (2015) 237 Cal.App.4th 709, 721-722 [188 Cal.Rptr.3d 421].

¹³⁴ Welfare & Institutions Code § 6603.

the person at court expense.¹³⁵ The court is required to hire only one court-appointed expert for the person, so long as the person is “fully able to present his side of the story” to the court or jury; this is so even though the state is allowed to present two expert witnesses.¹³⁶

The person facing an SVP commitment has the right to have access to all relevant psychological records and reports that are in the possession of the state.¹³⁷ During the proceedings, the district attorney can request that the DSH update an evaluation to provide the most recent information about the person’s mental health condition and treatment or replace an evaluation done by a clinician who is no longer authorized to perform evaluations or is unavailable to testify.¹³⁸

Both sides may seek discovery of information by deposing potential witnesses and subpoenaing records.¹³⁹ Also, a person in prison who makes a timely request is entitled to contact information for the prosecution’s witnesses even if they were victims of the underlying crimes.¹⁴⁰

The details of prior convictions may be proven through documentary evidence, including hearsay statements in probation and sentencing reports.¹⁴¹

An expert may rely on hearsay in forming an opinion about whether a person is currently mentally ill and is likely to commit sexually violent behavior; however, the expert may not relay the details of the hearsay statements.¹⁴² An expert’s opinion about whether a person has a diagnosed mental health disorder must be supported by substantial evidence.¹⁴³ An expert cannot testify that the

¹³⁵ Welfare & Institutions Code § 6603.

¹³⁶ *People v. Dean* (2009) 174 Cal.App.4th 186, 205 [94 Cal.Rptr.3d 478].

¹³⁷ Welfare & Institutions Code § 6603.

¹³⁸ Welfare & Institutions Code § 6603(c); *Albertson v. Superior Court* (2001) 25 Cal.4th 796 [107 Cal.Rptr.2d 381]. If the updated or replaced evaluation results in a split of opinion over whether the person is eligible for an SVP commitment, the DSH must obtain two more evaluations; however, the petition need not be dismissed even if the update or replaced evaluations do not agree that the person is eligible to be listed as a SVP. *Reilly v. Superior Court* (1013) 57 Cal.4th 641 [160 Cal.Rptr.410].

¹³⁹ *Leake v. Superior Court* (2001) 87 Cal.App.4th 675 [104 Cal.Rptr.2d 767] (depositions); *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1123-1130 [99 Cal.Rptr.3d 712]; see Code of Civil Procedure § 1985 (subpoenas) *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980 [114 Cal.Rptr.2d 760] (judge may limit scope of discovery to whether the defendant has committed the listed sexually violent crimes and has a mental disorder which makes them dangerous and likely to re-offend); *Gilbert v. Superior Court* (2014) 224 Cal. App. 4th 376, 379 [168 Cal.Rptr.3d 224] (district attorney sought broad variety of person’s records, but court held DA may only access records related to the mental evaluation). Requests for admissions, however, are not permitted. *Murillo v. Superior Court* (2006) 143 Cal.App.3d 730 [49 Cal.Rptr.3d 511].

¹⁴⁰ *People v. Dixon* (2007) 148 Cal.App.4th 414, 442-444 [56 Cal.Rptr.3d 33].

¹⁴¹ Welfare & Institutions Code § 6603(a)(3); *People v. Otto* (2001) 26 Cal.4th 200 [109 Cal.Rptr.2d 327]; *Carty v. Nelson* (9th Cir. 2006) 426 F.3d 1064.

¹⁴² *People v. Landau* (2016) 246 Cal.App.4th 850 [201 Cal.Rptr.3d 684].

¹⁴³ *People v. Wright* (2016) 4 Cal.App.5th 537 [208 Cal.Rptr.3d 686] (reversing SVP commitment due to lack of evidence supporting diagnosis of hebephilia).

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defendant's crime was a sexually violent offense for purposes of the SVP Act.¹⁴⁴ Also, an expert cannot be used to relay case specific facts obtained through what would otherwise be inadmissible hearsay.¹⁴⁵

A person's confidential communications to a therapist during parole-mandated therapy sessions generally cannot be admitted against them in SVP proceedings; there is an exception if circumstances show that the patient is dangerous to themselves or to the person or property of another and disclosure is necessary to prevent the harm.¹⁴⁶

There have been many other cases discussing what evidence may be admitted at the SVP trial and what types of questions the prosecution can ask the witnesses.¹⁴⁷

The California Supreme Court is currently considering whether an expert retained by the prosecution can review otherwise confidential treatment information under Welfare and Institutions Code § 5328 and whether the district attorney is entitled to review medical and psychological treatment records that might otherwise be deemed confidential treatment information.¹⁴⁸

¹⁴⁴ *People v. Burroughs* (2016) 6 Cal.App.5th 378, 403 [211 Cal.Rptr.3d 378].

¹⁴⁵ *People v. Burroughs* (2016) 6 Cal.App.5th 378, 408-412 [211 Cal.Rptr.3d 378]; *People v. Roa* (2017) 11 Cal.App.5th 428 [217 Cal.Rptr.3d 604].

¹⁴⁶ *People v. Gonzales* (2013) 56 Cal.4th 353 [154 Cal.Rptr.3d 38]; see Evidence Code § 1024.

¹⁴⁷ *People v. Shazier* (2014) 60 Cal.4th 109 [175 Cal.Rptr.3d 774] (evidence that person planned to live near parks or schools was allowed); *People v. Poulson* (2013) 213 Cal.App.4th 501 [152 Cal.Rptr.3d 563] (evidence of recent parole violations allowed to show person lacks the ability to control behavior); *People v. Lowe* (2012) 211 Cal.App.4th 678 [149 Cal.Rptr.3d 860] (expert may give opinion about ultimate issue of whether person is likely to engage in predatory sexually violent offenses, as long as explanation shows why person meets SVP criteria); *People v. Paniagua* (2012) 209 Cal.App.4th 499 [146 Cal.Rptr.3d 871, 894] (court may exclude evidence about systemic DSH bias in labelling people as SVPs); *People v. McRoberts* (2009) 178 Cal.App.4th 1249, 1256-1258 [101 Cal.Rptr.3d 115] (court may refuse to allow testimony by lay witnesses about person's willingness to change, since the ultimate issue is not the desire to change but the capacity for change); *People v. Krab* (2003) 114 Cal.App.4th 534 [7 Cal.Rptr.3d 853] (evidence of parole conditions that would be placed is not relevant to whether it is likely that person will engage in sexually violent criminal acts); *People v. Superior Court State County of Los Angeles* (2015) 240 Cal.App.4th 654 [192 Cal.Rptr.3d 820] (alleged deficiencies contained in evaluation reports do not constitute material legal error). *People v. Buffington* (2007) 152 Cal.App.4th 446 [62 Cal.Rptr.3d 223] (district attorney generally may not cross-examine psychologists about the facts of other cases in which they opined that the defendants were not SVPs); but see *People v. Shazier* (2014) 60 Cal.4th 109 [175 Cal.Rptr.3d 774] (district attorney did not engage in prosecutorial misconduct during questioning of defense psychologist by reciting facts of prior SVP cases in which the psychologist had testified for the defense).

¹⁴⁸ *People v. Superior Court (Smith)*, No. S225562, review granted on May 20, 2015.

12.20 Commitment to the DSH for Treatment

If the judge or jury decides a person meets the SVP criteria, that person will be committed to the custody of DSH for an indeterminate term.¹⁴⁹

SVPs must be completely segregated from other people held in CDCR prisons who are receiving treatment in the DSH.¹⁵⁰ The DSH must provide, treatment to all people with SVP commitments that is consistent with the “current institutional standard for the treatment of sex offenders.”¹⁵¹ However, there is no requirement that the treatment be effective.¹⁵²

During the commitment, the DSH must provide the court with an annual report on the person’s mental condition.¹⁵³ Also, a person with an SVP commitment is entitled to request an independent examination of their mental condition once a year. The person with an SVP commitment can either hire an independent expert or have the court appoint one.¹⁵⁴ The expert shall have access to all records concerning the person with an SVP commitment.¹⁵⁵

12.21 Petition for Unconditional Discharge from SVP Commitment

The law requires the DSH to seek a writ of habeas corpus in the court of commitment any time there is reason to believe that a person no longer meets the SVP commitment criteria.¹⁵⁶ If the

¹⁴⁹ Welfare & Institutions Code § 6604. Prior to the passage of Proposition 83 (“Jessica’s Law”) in November 2006, people with SVP commitments were committed for two-year terms, which could be renewed only if new SVP trials were held. Proposition 83’s indeterminate commitment provision now applies even to people who were originally committed as SVPs prior to Proposition 83. *People v. McKee* (2010) 47 Cal.4th 1172, 1194 [104 Cal.Rptr.3d 427] (applying indefinite terms to people originally committed as SVPs prior to Proposition 83 does not violate the constitutional ban on ex post facto laws (U.S. Constitution, Article I, § 10); see also *People v. Taylor* (2009) 174 Cal.App.4th 920, 932-934 [94 Cal.Rptr.3d 756]; *People v. Litmon* (2008) 162 Cal.App.4th 383, 407-413 [76 Cal.Rptr.3d 122]; *People v. Whaley* (2008) 160 Cal.App.4th 779, 798 [73 Cal.Rptr.3d 133]; *People v. Carroll* (2007) 158 Cal.App.4th 503, 512-515 [69 Cal.Rptr.3d 816]; *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288-1289 [68 Cal.Rptr.3d 142]; *People v. Shields* (2007) 155 Cal.App.4th 559 [65 Cal.Rptr.3d 922]; but see *People v. Castillo* (2010) 49 Cal.4th 145, 155, 158 [109 Cal.Rptr.3d 346] (enforcing stipulation by which district attorney agreed to seek two-year SVP commitments in cases where petitions were filed before November 8, 2006).

¹⁵⁰ *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42].

¹⁵¹ Welfare & Institutions Code § 6606(a), (c).

¹⁵² Welfare & Institutions Code § 6606(b); *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1164-1165 [81 Cal.Rptr.2d 42].

¹⁵³ Welfare & Institutions Code § 6604.9(a).

¹⁵⁴ Welfare & Institutions Code § 6605(a).

¹⁵⁵ Welfare & Institutions Code § 6604.9(a).

¹⁵⁶ Welfare & Institutions Code § 6605(f). See also *People v. LaBlanc* (2015) 238 Cal.App.4th 1059 [189 Cal.Rptr.3d 886] (person with an SVP commitment raised non-frivolous question regarding validity of diagnosis of paraphilic coercive disorder, made a non-frivolous, colorable showing that his advanced age and medical condition significantly reduced likelihood he would reoffend; refusal to participate in treatment for people with sex offenses did not render petition frivolous).

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court grants the writ, the person will be unconditionally discharged,¹⁵⁷ meaning that no further DSH supervision or treatment will be required.

Alternatively, if the DSH annual report concludes that the person with an SVP commitment's condition has changed so that they no longer meet the definition of an SVP, then DSH must authorize the person with an SVP commitment to petition for unconditional discharge.¹⁵⁸ To pursue discharge, the person with an SVP commitment must file a petition with the court and serve it on the office of the district attorney.¹⁵⁹ Upon receiving the petition, the court must hold a show cause hearing at which it can consider the petition and any documentation provided by the DSH, the district attorney or the person with an SVP commitment. If the court finds probable cause to believe that the person with an SVP commitment no longer poses a substantial danger to others if released, then the court must set the case for a full hearing.¹⁶⁰ At the hearing, the person has the same rights as at the original commitment trial and the burden of proof is on the state to prove beyond a reasonable doubt that the person still has a dangerous mental disorder.¹⁶¹ Failure to participate in or complete treatment may be considered as evidence that the person's condition has not changed, but refusal to participate in treatment does not necessarily prove that the person is still dangerous.¹⁶²

If the court denies the petition, the person with an SVP commitment must wait one year before filing another petition for unconditional discharge.¹⁶³

Since a finding of probable cause to conduct an SVP commitment trial tolls the CDCR parole term (meaning it does not run concurrently), a person who is discharged from an SVP commitment presumably still has to serve the remaining parole term.¹⁶⁴ Also, even after unconditional discharge from the SVP commitment and parole, people with former SVP commitments are subject to strict laws that require them to register as people with sex offenses and may restrict their employment.¹⁶⁵ Their names and addresses will also be listed on the "Megan's Law" website.¹⁶⁶

12.22 Petition for Conditional Release from SVP Commitment

There are three ways that a petition for conditional release can be initiated. First, if the Director of the DSH determines that the person with an SVP commitment's condition has changed so that they are not likely to commit sexually violent predatory acts while under community supervision and

¹⁵⁷ Welfare & Institutions Code § 6605(f).

¹⁵⁸ Welfare & Institutions Code § 6604.9(d); *People v. Landau* (2011) 199 Cal.App.4th 31 [130 Cal.Rptr.3d 683] (DSH must authorize person with an SVP commitment to file petition even if DSH Director disagrees with evaluator's conclusion that the person no longer poses a danger).

¹⁵⁹ Welfare & Institutions Code § 6604.9(d).

¹⁶⁰ Welfare & Institutions Code § 6605(a).

¹⁶¹ Welfare & Institutions Code § 6605(a).

¹⁶² Welfare & Institutions Code § 6605(a); *People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1077-1078 [189 Cal.Rptr.3d 886].

¹⁶³ Welfare & Institutions Code § 6605(b).

¹⁶⁴ Penal Code § 3000(a)(4).

¹⁶⁵ Penal Code § 290 (sex offender registration); Penal Code § 290.95 (job restrictions).

¹⁶⁶ Penal Code § 290.46.

treatment, then the Director of the DSH shall forward the report and recommendation for conditional release to the district attorney, the attorney for the person with an SVP commitment and the court.¹⁶⁷ Second, if the DSH annual evaluation report concludes that conditional release is in the best interest of the person with an SVP commitment, and conditions can be imposed to adequately protect the community, then DSH must authorize the person with an SVP commitment to petition the court for conditional release.¹⁶⁸ Third, even if the DSH does *not* recommend conditional release, a person who has been committed as an SVP can petition the court for conditional release any time after the first year of commitment.¹⁶⁹

If the Director of the DSH has not recommended conditional release, the court will screen the petition. The court may dismiss the petition without a hearing if it is frivolous, meaning that it is totally and completely without merit or for the purpose of harassment.¹⁷⁰ The court can also dismiss the petition as frivolous if the court has denied a prior petition and the new petition does not contain facts upon which the court could find that the SVP's condition has changed significantly.¹⁷¹

If the case is allowed to continue, the court must conduct some special procedures if there is any uncertainty about whether the person with an SVP commitment's county of commitment is the same as the county of domicile (where the person had a true fixed, and permanent home and principal residence). The person is entitled to assistance of counsel at the location of domicile hearing.¹⁷² If the court decides that the county of domicile is different from the county of commitment, there is a process to determine which county district attorney will represent the state at the hearing on the conditional release petition.¹⁷³

¹⁶⁷ Welfare & Institutions Code § 6607.

¹⁶⁸ Welfare & Institutions Code § 6604.9(d); *People v. Landau* (2011) 199 Cal.App.4th 31 [130 Cal.Rptr.3d 683] (DSH must authorize person with an SVP commitment to file petition even if DSH Director disagrees with evaluator's conclusion that the person no longer poses a danger).

¹⁶⁹ Welfare & Institutions Code § 6604.9(d)-(e); Welfare & Institutions Code § 6608; *People v. Smith* (2013) 212 Cal.App.4th 1394, 1404-05 [152 Cal.Rptr.3d 142] (procedure that applies is determined by whether the reduced form of custody has or has not been recommended by the DSH evaluator); also see *People v. Superior Court (Rigby)* (2011) 195 Cal.App.4th 857 [124 Cal.Rptr.3d 744] (during five-year period in which a SVP commitment had expired under the now-defunct law authorizing only two-year SVP commitments, but person with an SVP commitment was detained awaiting hearings on re-commitment petitions, person was not allowed to petition for conditional release).

¹⁷⁰ Welfare & Institutions Code § 6608(a); *People v. Smith* (2013) 216 Cal.App.4th 947, 953 [157 Cal.Rptr.3d 208]; *People v. Olsen* (2014) 229 Cal. App. 4th 981 [177 Cal.Rptr.3d 791] (trial court failed to apply correct "totally and completely without merit" standard to determine whether petition was frivolous); *People v. Collins* (2003) 110 Cal.App.4th 340 [110 Cal.Rptr.3d 641]; *People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1069-1078 [189 Cal.Rptr.3d 886] (court abused discretion by denying petition as frivolous where it was disputed whether petitioner's diagnosis of paraphilic coercive disorder was a valid mental disorder for people with SVP commitments, court did not consider evidence of the passage of time, defendant's advanced age, and his medical condition, and court deemed failure to participate in treatment for people with sex offenses to be dispositive). The discretion to deny a § 6608 petition without a hearing does not violate the constitutional guarantee of due process. *People v. McKee* (2010) 47 Cal.4th 1172, 1192 and fn.6 [104 Cal.Rptr.3d 427]. However, one court of appeal has opined that this provision may violate equal protection in some instances. *People v. McCloud* (2013) 213 Cal.App.4th 1076 [153 Cal.Rptr.3d 10].

¹⁷¹ Welfare & Institutions Code § 6608(a).

¹⁷² Welfare & Institutions Code § 6608(a).

¹⁷³ Welfare & Institutions Code § 6608(b)-(d); Welfare & Institutions Code § 6608.5.

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The person with an SVP commitment is then entitled to a hearing on whether they would pose a danger to the public if conditionally released into a state-operated community treatment program for one year.¹⁷⁴ If the DSH has not recommended conditional release, prior to the hearing the court must obtain the DSH's recommendation and a community program director's report as to whether the petitioner can be appropriately placed in a conditional-release program.¹⁷⁵ The petitioner may also be subjected to evaluations by the state's experts and may also request that the court appoint independent experts to conduct an evaluation.¹⁷⁶

At the hearing, the petitioner will be represented by an attorney.¹⁷⁷ The burden of proof depends on whether the DSH recommends conditional release. If the DSH annual report concluded that conditional discharge would be in the petitioner's best interests and that the public could be adequately protected, then the burden of proof is on the state to prove by a preponderance of evidence that conditional release is inappropriate.¹⁷⁸ If conditional release has not been recommended by the DSH, the burden is on the person seeking release to show that conditional release is in their best interest and that conditions can be imposed to adequately protect the community.¹⁷⁹

A person must wait one year after a denial before filing a new petition for conditional release.¹⁸⁰

If the court grants conditional release, the DSH community program director will submit a report as to which conditional release program is most appropriate for supervising and treating the release. The court can accept or reject this recommendation.¹⁸¹ The person must be released to the county of residence unless a court finds that extraordinary circumstances justify placement elsewhere.¹⁸² The county of domicile must assist the DSH in locating appropriate housing.¹⁸³

After one year of conditional release and outpatient treatment, the person with a former SVP commitment may petition the court for unconditional discharge, with or without the recommendation of the DSH. The court will then follow the procedures described in § 12.21 to determine whether unconditional discharge should be granted.¹⁸⁴

¹⁷⁴ Welfare & Institutions Code § 6608(d).

¹⁷⁵ Welfare & Institutions Code § 6608(e)-(f).

¹⁷⁶ Welfare & Institutions Code § 6608(g); see *People v. McKee* (2010) 47 Cal.4th 1172, 1192-1193 [104 Cal.Rptr.3d 427].

¹⁷⁷ Welfare & Institutions Code § 6608(a).

¹⁷⁸ Welfare & Institutions Code § 6608(i).

¹⁷⁹ Welfare & Institutions Code § 6608(i); *People v. McKee* (2010) 47 Cal.4th 1172, 1191 [104 Cal.Rptr.3d 427] (placing burden of proof on petitioner does not violate due process); see also *People v. Rasmussen* (2006) 145 Cal.App.4th 1487 [52 Cal.Rptr.3d 598] (petition for release improperly denied where petitioner met burden of proof); *People v. Superior Court (Karsai)* (2013) 213 Cal.App.4th 774, 779 [153 Cal.Rptr.3d 116] (court not barred from ordering conditional release even though person with former SVP commitment would be homeless).

¹⁸⁰ Welfare & Institutions Code § 6608(j).

¹⁸¹ Welfare & Institutions Code § 6608(h).

¹⁸² Welfare & Institutions Code § 6608.5(a)-(c).

¹⁸³ Welfare & Institutions Code § 6608.5(d)-(e).

¹⁸⁴ Welfare & Institutions Code § 6608(m).

12.23 Legal Challenges to SVP Commitments

If a court or jury commits a person as a SVP, the defendant can file a direct appeal. A denial of a petition for unconditional discharge or conditional release may also be appealed, even if the court screened out the petition as frivolous.¹⁸⁵ The process for filing a notice of appeal and for the rest of the appeal process is similar to appeals for criminal cases.¹⁸⁶ (See Chapter 14.) Many different types of issues might be raised, including claims that there was insufficient evidence to support the commitment, arguments that the procedural rules were not followed, or attacks on the lawfulness of the commitment statutes or how they were applied.

As with criminal cases, a defendant facing SVP commitment can file a state court habeas corpus petition if the challenge to the commitment is based on information that was not presented to the trial court or involves an issue that was not raised in the appeal.¹⁸⁷ (See Chapter 15).

A person who exhausts all state court procedures may be able to continue challenging the SVP commitment in a federal petition for writ of habeas corpus (see Chapter 16).

As a related matter, people with SVP commitments may file state petitions of habeas corpus or federal civil rights lawsuits concerning conditions of confinement. For example, a class of people with SVP commitments was allowed to proceed with a federal civil rights suit raising complaints about the conditions at Atascadero State Hospital (ASH), including claims that DSH staff had retaliated against them for filing lawsuits, conducted retaliatory and arbitrary property seizures and body searches, and used excessive force.¹⁸⁸

¹⁸⁵ *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408 [105 Cal.Rptr.3d 560].

¹⁸⁶ As with criminal appeals, a person appealing an SVP commitment has no right to self-representation on appeal, although the court has discretion to permit self-representation. *People v. Sokolsky* (2010) 188 Cal.App.4th 814 [115 Cal.Rptr.3d 794]. Unlike a criminal appellant, a person appealing from an SVP commitment does not have a right to have the court of appeal independently review the record for issues if appellate counsel does not identify any legal errors. *People v. Kisting* (2015) 239 Cal.App.4th 288, 291 [190 Cal.Rptr.3d 800].

¹⁸⁷ *People v. Johnson* (2015) 235 Cal.App.4th 80, 88-89 [185 Cal.Rptr.3d 135] (habeas corpus is proper action for claim that newly discovered evidence undermines state's experts and renders their testimony false evidence); see also *People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405 [102 Cal.Rptr.2d 150] (petition for writ of habeas corpus is the appropriate means to challenge findings made at an SVP probable cause hearing).

¹⁸⁸ *Hydrick v. Hunter* (9th Cir. 2007) 500 F.3d 978.