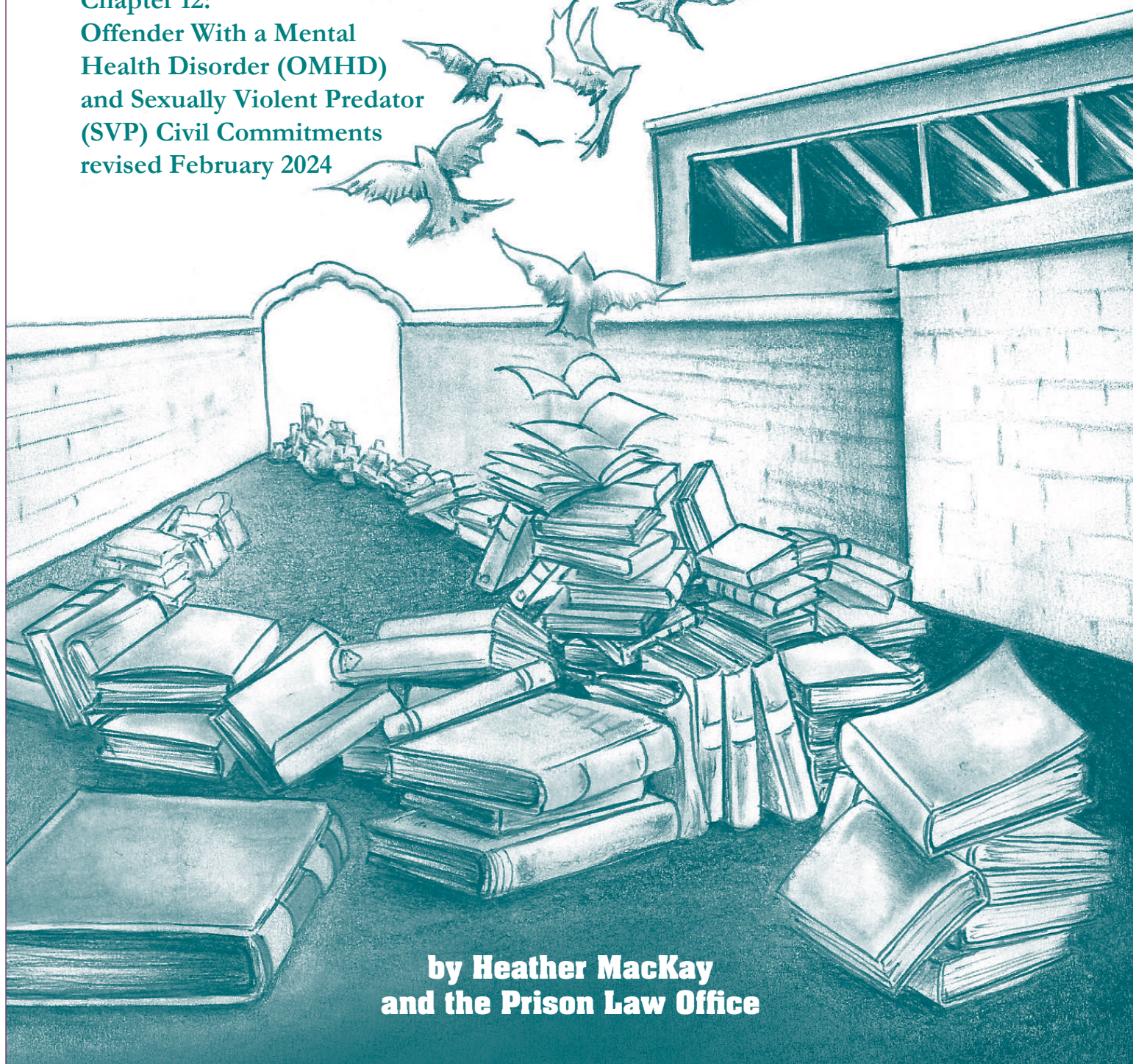


# The California Prison and Parole Law Handbook

Chapter 12:  
Offender With a Mental  
Health Disorder (OMHD)  
and Sexually Violent Predator  
(SVP) Civil Commitments  
revised February 2024



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## **THE CALIFORNIA PRISON & PAROLE LAW HANDBOOK**

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### **HOW TO USE THIS HANDBOOK**

*The California Prison and Parole Law Handbook* provides people in the custody of the California Department of Corrections and Rehabilitation (CDCR), and their attorneys and advocates, with a summary of the laws and policies governing prisons and parole, as well as practical guidance on procedures for enforcing legal rights. The *Handbook* chapters cover a broad variety of topics, and the Appendices contain sample CDCR forms, legal forms, and pleadings and resource lists. Anyone with limited legal knowledge may want to start by reading Chapter 19, which gives an overview of the structure of the legal system and discusses basic legal research and writing skills.

As of 2024, we are working on updating the *Handbook* chapter by chapter. Each updated chapter will identify the date on which it was revised. If you are in CDCR, you can find the most recent version of the *Handbook* chapters on CDCR's electronic tablets and kiosks under Law Library/California/Secondary Sources/The California Prison and Parole Law Handbook. If you have internet access, you can view, download, and print the *Handbook* under the Resources tab at [www.prisonlaw.com](http://www.prisonlaw.com). We currently do not know if or when we might publish paper copies of the updated *Handbook*.

***Users of the Handbook should take heed that the laws change frequently and are subject to differing interpretations. If you use the information in the Handbook, it is your responsibility to make sure that the law has not changed and that the provisions cited are applicable to your situation.***

In addition to the *Handbook*, Prison Law Office distributes free information packets on many topics. Sometimes these packets are updated more quickly than the *Handbook* chapters or cover topics not discussed in the *Handbook*. You can ask for one or more of these packets by sending a letter to Prison Law Office with a description of your issue or the information you are seeking. If you have internet access, most of the packets are also on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

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Anyone in CDCR custody who wants to understand and protect their rights should become familiar with CDCR's regulations and operational procedures. CDCR's regulations for adult facilities and parole are published in Title 15 of the California Code of Regulations starting at § 3000. Board of Parole Hearings regulations are in Title 15 of the Code of Regulations starting at § 2000. CDCR also has a Department Operations Manual (the "DOM") with specific procedures for carrying out the policies in the regulations; however, some sections of the DOM are outdated and no longer accurately describe state law or CDCR policy. Title 15, the DOM, and other CDCR policy memos and informational bulletins are available on CDCR tablets and kiosks and in prison law libraries. People with internet access can find Title 15, the DOM, and other information on CDCR's website at [www.cdcr.ca.gov](http://www.cdcr.ca.gov).

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**How to Use This Handbook**

# CHAPTER 12

## OFFENDER WITH A MENTAL HEALTH DISORDER (OMHD) AND SEXUALLY VIOLENT PREDATOR (SVP) CIVIL COMMITMENTS

(revised February 2024)

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### 12.1 Introduction

California's Offender with a Mental Health Disorder (OMHD)<sup>1</sup> and Sexually Violent Predator (SVP) laws create two types of civil commitments that can be used to send a person to a psychiatric

<sup>1</sup> This type of commitment previously was called a Mentally Disordered Offender (MDO) commitment. See *Public Guardian of Contra Costa County v. Eric B.* (2022) 12 Cal.5th 1085, 1095, fn. 3 [293 Cal.Rptr.3d 93].

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hospital at the end of their prison term. The OMHD laws and the SVP laws have different eligibility criteria, processes for commitment, and procedures for release.<sup>2</sup>

Note that there are other laws that provide for civil commitments of people who are incompetent to stand trial for a pending criminal charge, have been found not guilty of criminal charges by reason of insanity, are a danger to themselves or others, or have grave disabilities such that they are unable to take care of themselves.<sup>3</sup> These laws could potentially be used to involuntarily hospitalize a person at the end of their prison term, during their parole term, or after they are discharged entirely from their CDCR.<sup>4</sup> However, discussion of these laws is beyond the scope of this chapter. Information about civil commitments is available from Disability Rights California (DRC), 1831 K Street, Sacramento, California 95811, telephone (916) 504-5810 or (800) 776-5746, including information packets on DRC's website at <https://www.disabilityrightsca.org>.

# OFFENDER WITH A MENTAL HEALTH DISORDER (OMHD) COMMITMENT

## 12.2 Overview of the OMHD Law

The intent of the Offender with a Mental Health Disorder (OMHD) law is to provide treatment to “dangerous” people with mental illnesses after they finish serving their prison terms, in the interests of public safety.<sup>5</sup> A person who meets the OMHD criteria can be sent to the custody of the Department of State Hospitals (DSH) as a condition of parole. Once the person has served all of their parole term, the DSH can continue the involuntary commitment, potentially for the rest of the person's life. The criteria and process for committing a person as an OMHD are described in Penal Code § 2960 through § 2981, California Code of Regulations, title 15, § 2570 through § 2580, and DOM § 84090.1 through § 84090.12. The OMHD law has changed often since it was first enacted in 1986, so anyone researching OMHD issues should review the current statutes and most recent court cases.

The courts have held that OMHD commitments are not “punishment,” and thus do not violate the U.S. Constitution's Fifth Amendment bar against double jeopardy. For the same reason, the OMHD law can be applied to people who were convicted before the law went into effect without violating the U.S. Constitution's Article 1, § 10 prohibition on ex post facto laws.<sup>6</sup>

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<sup>2</sup> Many thanks to Jean Matulis and Paul Kraus for their expertise in reviewing and commenting on a draft of this chapter.

<sup>3</sup> Penal Code § 1367-§ 1376 (incompetence to stand trial); Penal Code § 1026-§ 1026.7 (not guilty by reason of insanity); Welfare & Institutions Code § 5150-§ 5349.1 (people who are danger to self or others or gravely disabled for various reasons); Welfare & Institutions Code § 6500-§ 6513 (developmentally disabled people).

<sup>4</sup> See Penal Code § 2974 (CDCR can refer people for consideration of civil commitment under other laws).

<sup>5</sup> *People v. Robinson* (1998) 63 Cal.App.4th 348 [74 Cal.Rptr.2d 315].

<sup>6</sup> *People v. Robinson* (1998) 63 Cal.App.4th 348, 350-352 [74 Cal.Rptr.2d 315]; *People v. Butler* (1999) 74 Cal.App.4th 557, 561 [88 Cal.Rptr.2d 210].

California Department of Corrections and Rehabilitation (CDCR) staff screen incarcerated people for OMHD eligibility. The BPH (Board of Prison Hearings) then reviews each person who is referred by CDCR staff and decides whether they should be committed to DSH for mental health treatment as a condition of parole. The person has a right to a court or jury trial to challenge the commitment. If a person is committed as an OMHD, they must be held in custody in a DSH hospital unless DSH staff reasonably believe that the person can be safely and effectively treated as an outpatient in the community. The OMHD commitment may be renewed annually for the entire parole term. Furthermore, DSH can keep custody of the person after their parole term ends if the local district attorney files a court petition asking that the person be recommitted for continued treatment. An OMHD commitment then can be renewed annually for as long as the court continues to find that the person has a severe mental health disorder and that treatment is necessary for public safety.<sup>7</sup>

### 12.3 Criteria for OMHD Commitment

There are six criteria that must be met for a person to be eligible for commitment as an OMHD:

- ◆ The person must have a “severe mental health disorder.” 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 that grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely.” It does not include personality or adjustment disorders, epilepsy, intellectual disability or other developmental disabilities or drug addiction or abuse.<sup>8</sup>
- ◆ The severe mental health disorder is not in remission or cannot be kept in remission without treatment. A disorder is not in remission unless the “overt signs and symptoms” of the disorder “are controlled either by psychotropic medication or psychosocial support.” A disorder “cannot be kept in remission without treatment” if during the prior year the person has been in remission and 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 their treatment plan.<sup>9</sup>
- ◆ Because of the severe mental health disorder, the person represents a substantial danger of physical harm to others.<sup>10</sup>

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<sup>7</sup> Penal Code § 2960-§ 2981.

<sup>8</sup> Penal Code § 2962(a)(1)-(2).

<sup>9</sup> Penal Code § 2962(a)(1), (a)(3); *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407-1408 [32 Cal.Rptr.3d 729].

<sup>10</sup> Penal Code § 2962(d)(1). This does not require proof of a recent dangerous act. Penal Code § 2962(g).

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- ◆ The severe mental health disorder was a cause or an aggravating factor of a crime for which the person was sentenced to prison.<sup>11</sup>
- ◆ The person has been treated for the severe mental health disorder for 90 days or more during the year prior to the end of the prison term.<sup>12</sup> The treatment must be for the disorder that is the basis for the OMHD petition and not for some other disorder.<sup>13</sup>
- ◆ The person received a determinate sentence for the crime that was caused by or aggravated by the severe mental health disorder and the crime was one of the following offenses:<sup>14</sup>
  - any of the 15 specific crimes listed in the OMHD law;
  - any crime in which the person used force or violence or caused serious bodily injury;<sup>15</sup>
  - any crime in which the person expressly or impliedly threatened someone with use of force or violence likely to cause substantial physical harm.<sup>16</sup>

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<sup>11</sup> Penal Code § 2962(b); *People v. Pace* (1994) 27 Cal.App.4th 795, 799 [33 Cal.Rptr.2d 352] (concurrently-sentenced offenses can qualify a person as an OMHD); *People v. Kortsmaki* (2007) 156 Cal.App.4th 922, 926-927 [67 Cal.Rptr.3d 706] (possible uncharged crimes that occurred during the same course of events as the commitment offenses cannot support OMHD commitment).

<sup>12</sup> Penal Code § 2962(c); see also *People v. Del Valle* (2002) 100 Cal.App.4th 88, 93 [121 Cal.Rptr.2d 889] (private outpatient treatment prior to incarceration does not count toward the 90-day treatment requirement); *People v. Achrem* (2013) 213 Cal.App.4th 153, 157, 159 [151 Cal.Rptr.3d 915] (treatment at a county jail prior to conviction does not count toward the 90-day period, but post-conviction treatment at a parole outpatient clinic is included the 90-day period); *People v. Parker* (2020) 44 Cal.App.5th 286, 295 [257 Cal.Rptr.3d 493] (treatment during 45-day extension of a incarceration to complete a psychiatric evaluation counts toward the 90 day period);.

<sup>13</sup> *People v. Sheek* (2004) 122 Cal.App.4th 1606 [19 Cal.Rptr.3d 737] (person could not be committed as OMHD for pedophilia when he had received treatment only for depression, which could be kept in remission); *People v. Bendavid* (2018) 30 Cal.App.5th 585, 590-595 [241 Cal.Rptr.3d 640] (prior treatment for a different disorder than the disorder that was the basis for the OMHD petition did not count toward the 90-day requirement).

<sup>14</sup> Penal Code § 2962(e).

<sup>15</sup> See *People v. Collins* (1992) 10 Cal.App.4th 690 [12 Cal.Rptr.2d 768] (stealing doll from small child not a crime of force under OMHD law); *People v. Valdez* (2001) 89 Cal.App.4th 1013, 1017 (sexual battery of a child involving more than slight touching was OMHD-qualifying offense); *People v. Dyer* (2002) 95 Cal.App.4th 448, 457 [115 Cal.Rptr.2d 527] (slashing dog's throat qualified as a crime of force under OMHD law); *People v. Hayes* (2003) 105 Cal.App.4th 1287 [129 Cal.Rptr.2d 885] (reckless arson does not qualify as crime of violence or force under OMHD law, but willful and malicious arson does qualify); *People v. Green* (2006) 142 Cal.App.4th 907 [48 Cal.Rptr.3d 464] (felony vandalism not OMHD-qualifying offense where person kicked out window of police car); *People v. Labelle* (2010) 190 Cal.App.4th 149, 152 [117 Cal.Rptr.3d 882] (felony vandalism was OMHD-qualifying crime where person shattered car window in manner that caused glass shards to fly at officer).

<sup>16</sup> See *People v. Butler* (1999) 74 Cal.App.4th 557 [88 Cal.Rptr.2d 210] (stalking was crime involving threat of force under OMHD law); *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 OMHD-qualifying threat, where person told customers about to enter a store that they were going to set fire to a nearby dumpster); *People v. Itehua* (2014) 227 Cal.App.4th 356 [173 Cal.Rptr.3d 614] (stalking was an implied threat satisfying OMHD commitment criteria); *People v. Warren* (2019) 33 Cal.App.5th 749, 751, 757 [245 Cal.Rptr.3d 345] (felony indecent exposure is not a crime in which the person expressly or impliedly threatened use of force).

## 12.4 OMHD Screening, Evaluation, and Certification

At the start of a person's prison term, CDCR staff members are required to evaluate the person for mental health disorders and provide them with appropriate mental health treatment.<sup>17</sup> Prior to release on parole, CDCR will screen a person to determine whether they have a diagnosis of a severe mental health disorder that is 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 OMHD-qualifying criminal offenses. If a person may qualify as an OMHD, they will be evaluated by their CDCR mental health clinician and by a DSH psychiatrist or psychologist.<sup>18</sup>

If the CDCR and DSH evaluators agree that the person qualifies as an OMHD, the prison's chief psychiatrist will notify BPH that the person has been "certified" as an OMHD.<sup>19</sup>

Even if the CDCR and DSH evaluators disagree about whether a person qualifies as an OMHD, the prison's chief psychiatrist may still certify a person as an OMHD. In such a case, BPH must then have two independent mental health professionals evaluate the person. If one or both of the independent mental health professionals agrees with the OMHD certification, then OMHD proceedings will continue.<sup>20</sup>

After the psychological evaluations, BPH staff will review the paperwork to verify the OMHD certification.<sup>21</sup> CDCR staff will then notify the person that they have been certified as an OMHD, that DSH inpatient treatment will be a required condition of parole, and that the person may request further psychological evaluations and a hearing to challenge the OMHD certification.<sup>22</sup>

The OMHD evaluations and certification usually will be completed prior to release on parole. However, if there is good cause to do so, BPH may issue an extension order that the person be kept in custody for up to 45 days beyond their scheduled release date to allow time to complete the OMHD certification. Situations that may be good cause for an extension include a recalculation or restoration of credits, re-sentencing, or some other unusual circumstance that results in there being less than 45 days to do the evaluations prior to the scheduled release date.<sup>23</sup> The BPH may file the extension order after the release date has passed, so long as the OMHD certification is completed within 45 days after the scheduled release date.<sup>24</sup>

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<sup>17</sup> Penal Code § 2960(b). See Chapter 7 for more information about CDCR mental health care.

<sup>18</sup> Penal Code § 2962(d)(1).

<sup>19</sup> Penal Code § 2962(d)(1).

<sup>20</sup> Penal Code § 2962(d)(2)-(3).

<sup>21</sup> Cal. Code Regs., tit. 15, § 2573.

<sup>22</sup> Cal. Code Regs., tit. 15, § 2574. A person cannot avoid OMHD commitment by refusing to sign the conditions of parole because the person's parole will be revoked, they will serve their entire parole term in custody, and they still can be certified as an OMHD after their parole term ends. Penal Code § 2970(a); Cal. Code Regs., tit. 15, § 2574.

<sup>23</sup> Penal Code § 2963.

<sup>24</sup> *People v. Gerard* (2015) 243 Cal.App.4th 242, 247 [196 Cal.Rptr.3d 278].

## 12.5 BPH OMHD Certification Hearing

A person can challenge their OMHD certification by requesting a BPH hearing; they also can request that two more independent mental health evaluations be done before the hearing.<sup>25</sup>

BPH will appoint a lawyer to prepare the person's case and represent the person at the hearing; the person will not be allowed to represent themselves.<sup>26</sup> The person has the right to review all non-confidential documents that will be used to support the OMHD certification, to attend the hearing, to speak at the hearing on their own behalf, and to present documents supporting their case.<sup>27</sup> They also have the right to have BPH provide assistance or accommodations necessary for them to attend, prepare for, and effectively communicate at the hearing.<sup>28</sup>

A BPH deputy commissioner will preside over the hearing.<sup>29</sup> The hearing will be by videoconference unless BPH determines that an in-person hearing is necessary for effective communication.<sup>30</sup>

At the hearing, the burden is on CDCR to prove by a preponderance of the evidence that the person meets the OMHD criteria.<sup>31</sup> If the BPH deputy commissioner decides that the person qualifies as an OMHD, the deputy commissioner must notify them of their right to file a petition requesting a court trial and, if the person wants a trial, BPH must provide the petition form and instructions.<sup>32</sup> Alternatively, if the BPH deputy commissioner decides that the person does not meet the OMHD criteria, CDCR staff must follow the normal procedures for release on parole.<sup>33</sup>

## 12.6 Court or Jury Trial Challenging OMHD Certification

After the BPH hearing, a person who has been certified as an OMHD can assert their right to a trial by filing a petition in the superior court for the county where they are currently incarcerated.<sup>34</sup>

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<sup>25</sup> Penal Code § 2966; Penal Code § 2978; Cal. Code Regs., tit. 15, § 2575(c)- § 2576.

<sup>26</sup> Cal. Code Regs., tit. 15, § 2576(b)(4).

<sup>27</sup> Cal. Code Regs., tit. 15, § 2244-§ 2249; Cal. Code Regs., tit. 15, § 2576(b)(3).

<sup>28</sup> Cal. Code Regs., tit. 15, § 2251-§ 2251.5.

<sup>29</sup> Cal. Code Regs., tit. 15, § 2576(b)(9).

<sup>30</sup> Cal. Code Regs., tit. 15, § 2050-§ 2054.

<sup>31</sup> Penal Code § 2966(a); Cal. Code Regs., tit. 15, § 2576.

<sup>32</sup> Penal Code § 2966(a); Cal. Code Regs., tit. 15, § 2576(b)(10-11); *People v. Tate* (1994) 29 Cal.App.4th 1678 [35 Cal.Rptr.2d 250].

<sup>33</sup> Cal. Code Regs., tit. 15, § 2573(d)(2).

<sup>34</sup> Penal Code § 2966(b).



The petition may be filed any time before the initial OMHD certification expires.<sup>35</sup> The person will be held in custody (most likely at the county jail) while the trial is pending.<sup>36</sup>

The person has a right to be represented by an appointed lawyer.<sup>37</sup> The person may ask to represent themselves, but there is no right to self-representation and the court has discretion whether to grant or deny the request.<sup>38</sup>

The person has a right to a trial by jury.<sup>39</sup> A court trial (with a judge but no jury) can be conducted if the person personally waives (gives up) their right to a jury and their waiver is voluntary and intelligent.<sup>40</sup> The person's lawyer may waive the right to a jury trial over the person's objection only if there is substantial evidence that the person is incompetent to make their own decision.<sup>41</sup>

The trial is supposed to be held 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 a delay.<sup>42</sup> However, an unjustified delay does not make the trial invalid unless the delay amounts to a due process violation.<sup>43</sup>

The issue for trial is whether the person met all of the OMHD criteria as of the date of the BPH hearing.<sup>44</sup> The district attorney has the burden of proving "beyond a reasonable doubt" that the person met the OMHD criteria, and a jury verdict must be unanimous in order to uphold the OMHD certification.<sup>45</sup>

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<sup>35</sup> *People v. J.S.* (2014) 229 Cal.App.4th 163, 170 [176 Cal.Rptr.3d 816, 820] ("a petition filed before the initial commitment term expires—regardless of when it is heard—is timely and not subject to dismissal on grounds of mootness").

<sup>36</sup> Penal Code § 2966(b).

<sup>37</sup> Penal Code § 2966(b).

<sup>38</sup> *State Dept. of State Hospitals v. S.M.* (2019) 40 Cal.App.5th 432, 438-39 [253 Cal.Rptr.3d 360].

<sup>39</sup> Penal Code § 2966(b).

<sup>40</sup> *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]; but see *People v. M.H.* (2022) 81 Cal.App.5th 299 [296 Cal.Rptr.3d 847] (court not required to advise of right to call and confront witnesses).

<sup>41</sup> *People v. Blackburn* (2015) 61 Cal.4th 1113, 1131 [191 Cal.Rptr.3d 458, 271].

<sup>42</sup> Penal Code § 2966(b).

<sup>43</sup> *People v. Bona* (2017) 15 Cal.App.5th 511, 518-519 [223 Cal.Rptr.3d 649].

<sup>44</sup> 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 behavior that happened after the BPH hearing); see also *People v. Harrison* (2013) 57 Cal.4th 1211 [164 Cal.Rptr.3d 167] (state does not have to prove that CDCR and BPH followed correct procedures in making the OMHD determination).

<sup>45</sup> Penal Code § 2966(b).

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The person has a right to avoid self-incrimination, and cannot be required to testify unless the district attorney shows that making the person testify is necessary to further a compelling state interest.<sup>46</sup>

The district attorney may use documentary evidence to prove the existence or nature of a qualifying offense, even if the document is hearsay (such as a probation officer's report).<sup>47</sup> The person's medical records can be admitted as evidence that the person received 90-days of treatment.<sup>48</sup>

A mental health expert witness may not opine on whether the person committed an OMHD-qualifying offense.<sup>49</sup> An expert witness may rely on notes made by hospital staff and testimony about the notes (under the business records exception to the hearsay rule) to give opinions about whether the person's severe mental health disorder was a cause or an aggravating factor in the commission of the crime.<sup>50</sup> An expert may rely on hearsay in forming an opinion about whether a person qualifies as an OMHD, so long as the hearsay is not be speculative or unreliable.<sup>51</sup> However, an expert cannot testify about case-specific facts obtained through what would otherwise be inadmissible hearsay.<sup>52</sup>

The court should not instruct the jury to consider the consequences of the verdict. Examples of improper instructions are those that ask the jury to determine whether the person will be dangerous "if released into the community unsupervised" or explain that the verdict will determine whether the person should be further hospitalized or released on parole.<sup>53</sup>

If the court or jury finds that the person does not qualify as an OMHD, normal parole procedures should be followed with release from custody within five business days.<sup>54</sup> If the court or jury decides that the person does not qualify as an OMHD because their severe mental health disorder was not an aggravating factor in their crime offense, or the crime was not a qualifying offense, those issues can never be raised again and the person cannot ever be committed as an OMHD based on

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<sup>46</sup> *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1453 [203 Cal.Rptr.3d 335]; *People v. Alfasar* (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 person required to testify about their offense); but see *People v. Clark* (2000) 82 Cal.App.4th 1072 [98 Cal.Rptr.2d 767].

<sup>47</sup> Penal Code § 2962(f); *People v. Baker* (2012) 204 Cal.App.4th 1234 [139 Cal.Rptr.3d 594] (court could rely on probation report as evidence that crime met OMHD criteria); see also *People v. Woods* (2016) 3 Cal.App.5th 457, 460-462 [207 Cal.Rptr.3d 622] (guilty plea to resisting an officer "by the use of force and violence" established that offense involved force or violence).

<sup>48</sup> Penal Code § 2981.

<sup>49</sup> *People v. Stevens* (2015) 62 Cal.4th 325, 329 [195 Cal.Rptr.3d 762].

<sup>50</sup> *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].

<sup>51</sup> *People v. Dodd* (2005) 133 Cal.App.4th 1564 [35 Cal.Rptr.3d 692] (reversing OMHD commitment where experts relied on unreliable hearsay in making diagnosis).

<sup>52</sup> *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]; *People v. Bona* (2017) 15 Cal.App.5th 511 [223 Cal.Rptr.3d 649].

<sup>53</sup> *People v. Collins* (1992) 10 Cal.App.4th 690 [12 Cal.Rptr.2d 768]; *People v. Mendez* (2018) 21 Cal.App.5th 654, 659-662 [230 Cal.Rptr.3d 543].

<sup>54</sup> Penal Code § 2966(c).

that offense.<sup>55</sup> In contrast, if the court or jury decides that the person is not an OMHD because they do not have a “severe mental health disorder,” or because their disorder can be kept in remission without treatment, those issues can be re-litigated at a future OMHD proceeding.<sup>56</sup> Thus, if the person’s mental health deteriorates while they are on parole, CDCR can undertake new evaluations and proceedings to determine whether the person qualifies as an OMHD.<sup>57</sup>

## 12.7 Commitment to DSH for OMHD Treatment

A person who is found to be an OMHD must be committed to a hospital for inpatient treatment unless DSH certifies that there is reasonable cause to believe the person can safely and effectively be treated as an outpatient.<sup>58</sup> If necessary, DSH may place the person in a CDCR prison due to assaultive or sexually inappropriate behavior.<sup>59</sup>

DSH must provide the person with mental health treatment.<sup>60</sup> The person may be forced to involuntarily take medications in an emergency situation, but for longer involuntary medication, DSH must show at a court hearing that either the person is incompetent to make decisions about their medical treatment or presents a danger to themselves or others because they have attempted, inflicted, or made a serious threat of substantial physical harm.<sup>61</sup>

The person will be represented by a lawyer and have the right to be present at the hearing unless they have a “demonstrated inability to attend” or they personally waive the right to attend.<sup>62</sup>

Any time after the first 60 days in DSH custody, a person committed as an OMHD may demand a “placement hearing” to determine whether they must remain in a hospital or can be treated as an outpatient. A lawyer will be appointed to represent the person, and the person can request evaluations by two independent mental health professionals. The issue will be heard and decided by a BPH deputy commissioner. The burden is on DSH to establish by a preponderance of the evidence that the person requires continued inpatient treatment.<sup>63</sup>

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<sup>55</sup> *People v. Francis* (2002) 98 Cal.App.4th 873 [120 Cal.Rptr.2d 90]; *People v. Crivello* (2011) 200 Cal.App.4th 612 [132 Cal.Rptr.3d 655].

<sup>56</sup> *People v. Hannibal* (2006) 143 Cal.App.4th 1087 [49 Cal.Rptr.3d 645].

<sup>57</sup> *People v. Coronado* (1994) 28 Cal.App.4th 1402 [33 Cal.Rptr.2d 835].

<sup>58</sup> Penal Code § 2964; Cal. Code Regs., tit. 15, § 2577.

<sup>59</sup> Welfare & Institutions Code § 7301; *People v. Gram* (2012) 202 Cal.App.4th 1125, 1138-1139 [135 Cal.Rptr.3d 914].

<sup>60</sup> Penal Code § 2972(f).

<sup>61</sup> Penal Code § 2972(g); *In re Qawi* (2004) 32 Cal.4th 1, 27 [7 Cal.Rptr.3d 780]; Penal Code § 2602; *People v. Fisher* (2009) 172 Cal.App.4th 1006, 1015-1016 [91 Cal.Rptr.3d 609] (person has no right to have a jury decide whether they can be forcibly medicated); *State Dep’t of State Hosps. v. A.H.* (2018) 27 Cal.App.5th 441, 446-447 [238 Cal.Rptr.3d 180] (even if there were a religious rights exception, there was no credible evidence refusal to take medication was based on sincerely held religious belief).

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

<sup>63</sup> Penal Code § 2964; Cal. Code Regs., tit. 15, § 2578.

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At any time during the parole period, if the person's severe mental disorder is in remission and can be kept in remission without treatment, the DSH Director must notify BPH and BPH should remove the OMHD treatment parole condition.<sup>64</sup>

Because a person who has been committed as an OMHD is still considered to be serving their parole term, parole can be revoked and the parole term extended if they commit a new crime or fail to comply with parole conditions.<sup>65</sup>

### 12.8 Review of OMHD Commitment During the Parole Term

BPH must conduct regular parole discharge reviews for people committed as OMHDs, usually starting one year after their CDCR release. If BPH recommends that the person be retained on parole, BPH will also decide whether to keep the parole condition requiring the person to undergo OMHD treatment.<sup>66</sup>

The process is somewhat similar to the original commitment process. The person will be represented by a lawyer, and cannot represent themselves. They have the right to request evaluations by two independent mental health professionals. There will be a hearing at which a BPH deputy commissioner will determine whether the person still qualifies as an OMHD and whether they should be in inpatient or outpatient treatment. The burden of proof is on DSH to show by a preponderance of the evidence that the person's serious mental health disorder is not in remission or cannot be kept in remission without treatment and requires further treatment.<sup>67</sup> Continued commitment must be based on the same mental disorder for which the person was originally committed.<sup>68</sup>

If the BPH commissioner decides that the person still meets the OMHD criteria, the person can request a new jury trial in superior court to challenge the continued commitment.<sup>69</sup> The procedures will be the same as those for a trial challenging an original OMHD certification.

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<sup>64</sup> Penal Code § 2968.

<sup>65</sup> Cal. Code Regs., tit. 15, § 2579.

<sup>66</sup> Penal Code § 3000.01(b)(1); Cal. Code Regs., tit. 15, § 2535; Cal. Code Regs., tit. 15, § 2580. More information about parole discharge reviews is in Chapter 11.

<sup>67</sup> Penal Code § 2966; Cal. Code Regs., tit. 15, § 2580(b)-(c). Note that a person cannot re-litigate the “static” OMHD criteria as to whether they have an OMHD-qualifying crime, whether their severe mental health disorder was a cause or an aggravating factor of the crime, and whether they were treated for 90-days during their prison term. Penal Code § 2966(c); see also *Lopez v. Superior Court* (2013) 50 Cal.4th 1055, 1061-1062 [116 Cal.Rptr.3d 530]; *People v. Torfason* (2019) 38 Cal.App.5th 1062, 1066-1067 [252 Cal.Rptr.3d 11]. Also, after an initial OMHD commitment, re-designation of the qualifying offense as a misdemeanor under Proposition 47 does not prohibit OMHD re-commitment. *People v. Goodrich* (2017) 7 Cal.App.5th 699 [212 Cal.Rptr.3d 788] *People v. Foster* (2019) 7 Cal. 5th 1202, 1211 [251 Cal.Rptr.3d 312].

<sup>68</sup> *People v. Torfason*, (2019) 38 Cal.App.5th 1062, 1067 [252 Cal.Rptr.3d 11].

<sup>69</sup> Cal. Code Regs., tit. 15, § 2580(c)(10).



## 12.9 Petition and Trial for Continued OMHD Commitment at End of Parole Term

When the person's parole term ends, DSH will send an "evaluation on remission" to the district attorney in either the county where they were sentenced or the county where they are receiving outpatient treatment.<sup>70</sup> This should happen no later than 180 days prior to the end of the parole term.<sup>71</sup> However, this deadline is not mandatory and failure to meet it does not invalidate an OMHD commitment.<sup>72</sup>

After receiving the DSH evaluation, the district attorney may file a petition in the superior court, asking the court to order another year of OMHD commitment.<sup>73</sup> The petition must be filed prior to the end of the parole term; a late petition must be dismissed and the OMHD commitment must end.<sup>74</sup> The petition must be accompanied by declarations stating that the person has received continuous treatment over the past year and still meets the OMHD criteria.<sup>75</sup> The district attorney has no authority to seek continued commitment if the DSH evaluation states that the person's serious mental health disorder is in remission and could be kept in remission without treatment.<sup>76</sup> However, a district attorney may file a petition if the DSH evaluation states that the person's disorder cannot be kept in remission without treatment, even if DSH concludes that the person is not a danger and does not recommend recommitment.<sup>77</sup> Also, if the district attorney has filed a petition based on a DSH recommendation, the petition does not need to be rescinded if DSH later changes its evaluation.<sup>78</sup>

When the district attorney files a petition for continued commitment, the person has a right to a trial to determine whether they still meet the OMHD criteria.<sup>79</sup> The trial should start no later than 30 days prior to the parole discharge date, unless the person gives up that right or there is good cause

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<sup>70</sup> Penal Code § 2970(a).

<sup>71</sup> Penal Code § 2970. The referral may be made by CDCR if the person refused to sign their conditions of parole and thus served their entire parole term in jail.

<sup>72</sup> *People v. Kirkland* (1994) 24 Cal.App.4th 891 [29 Cal.Rptr.2d 863]; *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].

<sup>73</sup> Penal Code § 2970(b).

<sup>74</sup> *People v. Allen* (2007) 42 Cal.4th 91, 104 [64 Cal.Rptr.3d 124]. Note that if the OMHD commitment cannot be continued, the person might be subjected to other types of civil commitment proceedings, depending on the circumstances. *People v. Allen* (2007) 42 Cal.4th 91, 108 [64 Cal.Rptr.3d 124].

<sup>75</sup> Penal Code § 2970(b); but see *People v. Kirkland* (1994) 24 Cal.App.4th 891 [29 Cal.Rptr.2d 863] (recommitment for continued treatment may occur even if DSH has been unable to provide treatment to person on outpatient status because they committed repeated parole violations).

<sup>76</sup> *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].

<sup>77</sup> *People v. Hernandez* (2011) 201 Cal.App.4th 483, 489-490 [133 Cal.Rptr.3d 817].

<sup>78</sup> *People v. Superior Court (Salter)* (2011) 192 Cal.App.4th 1352, 1359 [121 Cal.Rptr.3d 873].

<sup>79</sup> *People v. Blackburn* (2013) 215 Cal.App.4th 809 [156 Cal.Rptr.3d 106] (person's lawyer may waive the right to a jury trial over the person's objection only when there is reason to doubt that the person is capable of determining whether a court or jury trial is in their best interests).

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for a delay.<sup>80</sup> If the trial is not completed by the time of the parole discharge date and termination of the prior commitment order, and the person does not waive their right to a timely trial, the person should be released pending trial.<sup>81</sup>

At trial, the person has a right to be represented by a lawyer. A jury shall hear and decide the case, unless both the person and the district attorney agree to have a court trial at which a judge will made the decision. The question at trial is whether the district attorney has proven beyond a reasonable doubt that the person's severe mental health disorder is not in remission or cannot be kept in remission without treatment, and that the person represents a substantial danger of physical harm to others because of the disorder.<sup>82</sup> If the person asserts a "medication defense" by arguing that they are not a danger to others while medicated, the district attorney has the burden of proving beyond a reasonable doubt that the person will not take their medication if released and that in an unmedicated state they will represent a substantial danger of physical harm to others.<sup>83</sup> If the trial is by a jury, the person can be re-committed as an OMHD only if there is a unanimous verdict in favor of commitment.<sup>84</sup>

If the court or jury finds that the person meets the OMHD criteria, the person will be recommitted to DSH for a one-year term.<sup>85</sup> The person shall be released for outpatient treatment if the court finds that there is reasonable cause to believe that the person can be safely and effectively treated as an outpatient.<sup>86</sup> However, time spent on outpatient status will not count toward the one-year commitment period.<sup>87</sup>

### 12.10 Subsequent Continued OMHD Commitments

An OMHD commitment may be continued each year, potentially for the rest of the person's life.<sup>88</sup> The recommitment process for someone getting inpatient treatment at a hospital is the same as the initial continuation of the commitment when the parole term ended: DSH sends an evaluation to

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<sup>80</sup> Penal Code § 2972(a).

<sup>81</sup> *People v. Cobb* (2010) 48 Cal.4th 243, 252 [106 Cal.Rptr.3d 230]; *Myers v. Superior Court* (2022) 78 Cal.App.5th 1127, 1133-1134 [294 Cal.Rptr.3d 338] (where person was released from custody due to delayed trial, the subsequent commitment extension period started on the day the previous commitment had ended).

<sup>82</sup> Penal Code § 2972(a)-(b), but see *People v. Beeson* (2002) 99 Cal.App.4th 1393 [122 Cal.Rptr.2d 384] (court does not need to instruct jury to presume that the person does not qualify as an OMHD).

<sup>83</sup> *People v. Noble* (2002) 100 Cal.App.4th 184, 190 [121 Cal.Rptr.2d 918].

<sup>84</sup> Penal Code § 2972(a).

<sup>85</sup> Penal Code § 2972(c).

<sup>86</sup> Penal Code § 2972(d); *People v. May* (2007) 155 Cal.App.4th 350 [65 Cal.Rptr.3d 873]; *People v. Gregerson* (2011) 202 Cal.App.4th 306 [135 Cal.Rptr.3d 188].

<sup>87</sup> Penal Code § 2972(c).

<sup>88</sup> Although an OMHD commitment may be continued for the length of a person's life, DSH can recommend a person for court-ordered compassionate release if they are terminally ill or medically incapacitated and release would not pose a threat to public safety. Penal Code § 2977; Welfare & Institutions Code § 4146.

the district attorney, the district attorney may file a petition for re-commitment, and a trial will be held to determine whether the OMHD commitment is to be continued.<sup>89</sup>

There is a special recommitment procedure for people who are receiving court-approved outpatient treatment. At the end of the approved period of outpatient treatment, the court shall give notice to all the parties, and the outpatient treatment officials shall prepare a recommendation. If the treatment officials recommend confinement or continued outpatient treatment, the court will appoint a lawyer to help the person decide if they should accept the recommendation or ask for a jury trial or court trial. The court will then hold either a trial or a hearing to determine whether the person continues to qualify as an OMHD. If the OMHD commitment is continued, the court will decide whether to order the person confined to a treatment facility or renew the approval of outpatient status.<sup>90</sup>

## 12.11 Legal Actions for Challenging an OMHD Commitment or Hospital Conditions

After a court or jury commits a person as an OMHD, the person can file a direct appeal. The process for filing a notice of appeal and pursuing an appeal 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 or denial of outpatient treatment, that the proper commitment procedures were not followed, or that the commitment statutes are not lawful. To get a reversal of an OMHD commitment due to insufficient evidence, the person must show that no rational fact-finder could have found beyond a reasonable doubt that they qualified an OMHD based on the evidence presented at the trial.<sup>91</sup>

A person with an OMHD commitment can file a state court habeas corpus petition if their issue is based on information that was not presented to the court during their trial (see Chapter 15).<sup>92</sup>

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

People with OMHD commitments may challenge poor conditions of confinement by filing state petitions of habeas corpus (Chapter 15) or federal civil rights lawsuits (Chapter 17). They may also seek money damages or other remedies for harms caused by hospital or outpatient staff by filing federal civil rights lawsuits (Chapter 17) or state tort lawsuits (Chapter 18).

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<sup>89</sup> Penal Code § 2972(e).

<sup>90</sup> Penal Code § 2972.1; *People v. Morris* (2005) 126 Cal.App.4th 527, 547 [23 Cal.Rptr.3d 881] (no need for district attorney to file recommitment petition where person was on court-approved outpatient status).

<sup>91</sup> *People v. Clark* (2000) 82 Cal.App.4th 1072, 1082 [98 Cal.Rptr.2d 767]; *People v. Valdez* (2001) 89 Cal.App.4th 1013 [107 Cal.Rptr.2d 783]; *People v. Johnson* (2020) 55 Cal.App.5th 96 [269 Cal.Rptr.3d 253]; *People v. Jenkins* (2023) 95 Cal.App.5th 124 [313 Cal.Rptr.3d 220].

<sup>92</sup> Welfare & Institutions Code § 7250.

## SEXUALLY VIOLENT PREDATOR (SVP) COMMITMENT

### 12.12 Overview of the SVP Law

The Sexually Violent Predator (SVP) law allows the state to commit some people with sex offenses to the custody of DSH psychiatric hospitals at the end of their prison terms. The SVP law is in Welfare and Institutions Code § 6600-§ 6609.3. These statutes were extensively revised in November 2006<sup>93</sup> so people should be careful to rely on the current laws.

CDCR and BPH screen incarcerated people for SVP eligibility prior to their release dates. If a person is identified as potentially eligible for an SVP commitment, BPH will refer them for a DSH evaluation. DSH then can send the case to the district attorney, who may file a petition for SVP commitment in the superior court. The court will hold a probable cause hearing, followed by a trial. If a person is committed as SVP, they will be confined in a DSH hospital until either DSH staff decide the person no longer meets the SVP criteria or the person can prove in court that further hospitalization is not necessary to protect public safety. Thus, an SVP commitment might continue for the rest of a person's life.<sup>94</sup>

Courts have generally found the SVP laws to be valid. For example, courts have held that SVP commitments do not violate the U.S. Constitution's Fifth Amendment prohibition on double jeopardy, Article 1, Section 10 ban on ex post facto laws, or Eighth Amendment bar on cruel or unusual punishment because the laws are for the purpose of providing treatment and protecting public safety, rather than punishment.<sup>95</sup> Courts have concluded that the SVP law does not violate the U.S. Constitution's Fourteenth Amendment rights to due process.<sup>96</sup> Further, courts have held that there are rational reasons for providing people who are subject to SVP commitments with fewer procedural protections than people subject to other types of civil commitments, so that the SVP laws do not violate the U.S. Constitution's Fourteenth Amendment guarantee of equal protection.<sup>97</sup>

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<sup>93</sup> See *People v. Kisling* (2011) 199 Cal.App.4th 687 [131 Cal.Rptr.3d 869] (Prop. 83 "Jessica's Law" was validly enacted); *People v. McDonald* (2012) 214 Cal.App.4th 1367, 1383 [154 Cal.Rptr.3d 823] (same).

<sup>94</sup> Welfare & Institutions Code § 6600-§ 6609.3.

<sup>95</sup> *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072; 138 L.Ed.2d 501]; *Seling v. Young* (2001) 531 U.S. 250 [121 S.Ct. 727; 148 L.Ed.2d 734]; *People v. McDonald* (2012) 214 Cal.App.4th 1367, 1383 [154 Cal.Rptr.3d 823, 835].

<sup>96</sup> *Hubbart v. Knapp* (9th Cir. 2004) 379 F.3d 773; *Taylor v. San Diego County* (9th Cir. 2015) 800 F.3d 1164; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42]; *People v. McKee* (2010) 47 Cal.4th 1172 [104 Cal.Rptr.3d 427]; *People v. Buffington* (1999) 74 Cal.App.4th 1149 [88 Cal.Rptr.2d 696]; *People v. Hubbart* (2001) 88 Cal.App.4th 1202 [106 Cal.Rptr.2d 490].

<sup>97</sup> *Hubbart v. Knapp* (9th Cir. 2004) 379 F.3d 773; *Seeboth v. Allenby* (9th Cir. 2015) 789 F.3d 1099; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42]; *People v. Buffington* (1999) 74 Cal.App.4th 1149 [88 Cal.Rptr.2d 696]; *People v. McKee* (2012) 207 Cal.App.4th 1325, 1347 [144 Cal.Rptr.3d 308]; *People v. McKnight* (2012) 212 Cal.App.4th 860 [151 Cal.Rptr.3d 132]; *People v. Landau* (2013) 214 Cal.App.4th 1 [154 Cal.Rptr.3d 1]; *People v. McCloud* (2013) 213 Cal.App.4th 1076 [153 Cal.Rptr.3d 10]; *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1376 [154 Cal.Rptr.3d 823]; *People v. Nguyen* (2013) 218 Cal.App.4th 1363, 1378 [160 Cal.Rptr.3d 868, 879]; *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].



## 12.13 Criteria for SVP Commitment

There are two criteria that must be met for a person to be committed as an SVP:

- ◆ The person has a prior or current conviction, prior juvenile adjudication, or prior finding of not guilty by reason of insanity for a “sexually violent” crime against one or more victims that is listed in the SVP law.<sup>98</sup> Even though the statute defines “predatory,” the qualifying crime does not have to be an act against a stranger, casual acquaintance, or selected target for victimization.<sup>99</sup> The conviction can be by either trial or plea, but the California Supreme Court is considering whether a defense lawyer’s failure to advise a person about possible SVP consequences of a guilty or no contest plea is ineffective assistance of counsel that could result in the conviction being vacated.<sup>100</sup>
- ◆ The person must have a diagnosed mental disorder that makes them “a danger to the health and safety of others in that it is likely that [they] will engage in sexually violent criminal behavior.”<sup>101</sup> The disorder may be “a congenital or acquired condition affecting the emotional or volitional capacity,” which can include personality disorder, developmental disability, or substance addiction or abuse.<sup>102</sup> The disorder does not have to be a cause or aggravating factor for the sexually violent offense, the person does not have to have been provided with mental health treatment in prison, and the person does not have to have committed any recent dangerous act.<sup>103</sup> For determining whether someone is likely to be dangerous, “sexually violent behavior” is defined more broadly than “sexually violent offense,” and can include lesser crimes such as sexual battery involving unlawful restraint.<sup>104</sup>

## 12.14 SVP Screening

CDCR and BPH screen people to see if they may qualify for an SVP commitment based on their social and criminal history and their behavior in prison. If a person is likely to qualify as an SVP, CDCR will refer the person to DSH for a full evaluation. A person will also automatically be referred if they are in CDCR for a new offense they committed while they were in a state hospital under an SVP commitment. The referral should occur no later than six months prior to the person’s release

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<sup>98</sup> Welfare & Institutions Code § 6600(a)-(b), (g).

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

<sup>100</sup> *People v. Tellez*, No. S277072; see also *People v. Codinha* (2021) 71 Cal.App.5th 1047 [286 Cal.Rptr.3d 822] (failure to advise about SVP law was not IAC).

<sup>101</sup> Welfare & Institutions Code § 6600(a)(1), (c).

<sup>102</sup> See Welfare & Institutions Code § 6600(c).

<sup>103</sup> Welfare & Institutions Code § 6600(d); *People v. Felix* (2008) 169 Cal.App.4th 607, 620-621 [87 Cal.Rptr.3d 482].

<sup>104</sup> *People v. White* (2016) 3 Cal.App.4th 433, 446-453 [208 Cal.Rptr.3d 1].

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date, but can occur later if the person arrived in CDCR with less than nine months to serve or if their release date was modified.<sup>105</sup>

SVP commitment proceedings can be started only when someone in CDCR custody is nearing the end of their criminal sentence or parole revocation term.<sup>106</sup> If a person's current convictions are fully reversed or reduced to non-prison offenses, the state cannot go ahead with SVP proceedings.<sup>107</sup>

### 12.15 DSH SVP Evaluation and Referral

When CDCR refers a person for an SVP evaluation, DSH must appoint two mental health professionals (either two psychiatrists or a psychologist and a psychiatrist) to do the evaluation.<sup>108</sup>

If a person is scheduled to be released from their prison term before the DSH evaluation can be completed, a BPH commissioner or deputy commissioner may issue a hold to keep the person in custody for up to 45 days past their release date. The commissioner must find there is "good cause" for the hold due to "exigent circumstances" that result in there being less than 45 days to complete the evaluation; examples of such circumstances include last-minute recalculation or restoration of credits, resentencing, or arrival of the person in CDCR with a short amount of time to serve.<sup>109</sup>

The DSH evaluators will assess the person's mental health, as well as factors associated with risk of re-offense. The evaluators will decide whether the person has a diagnosed mental disorder so that they are "likely to engage in acts of sexual violence without appropriate treatment and custody."

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<sup>105</sup> Welfare & Institutions Code § 6601(a)-(b).

<sup>106</sup> Welfare & Institutions Code § 6601(a); *People v. Putney* (2016) 1 Cal.App.5th 1058 [205 Cal.Rptr.3d 600] (no authority to hold SVP commitment proceedings if a person has years left to serve). However, there is no requirement that the SVP proceedings be fully completed before the CDCR release date. *People v. Talhelm* (2000) 85 Cal.App.4th 400, 406 [102 Cal.Rptr.2d 150].

<sup>107</sup> *In re Franklin* (2008) 169 Cal.App.4th 386, 392 [86 Cal.Rptr.3d 702]; see also *In re Smith* (2008) 42 Cal.4th 1251, 1269-1271 [73 Cal.Rptr.3d 469] (if current conviction is reversed after SVP petition is pending, the petition must be stayed; if there is not a timely retrial and new conviction, SVP proceedings must be dismissed).

<sup>108</sup> Welfare & Institutions Code § 6601(c)-(d).

<sup>109</sup> Welfare & Institutions Code § 6601.3; Cal. Code Regs., tit. 15, § 2600.1(e); *In re Hovanski* (2009) 174 Cal.App.4th 1517 [95 Cal.Rptr.3d 370] (person can be subject to 45-day SVP hold even though they had been scheduled for discharge from sentence); *In re Lucas* (2012) 53 Cal.4th 839 [137 Cal.Rptr.3d 595]; *Brown v. Superior Court* (2013) 213 Cal.App.4th 61 [151 Cal.Rptr.3d 818]; *Orey v. Superior Court* (2013) 213 Cal.App.4th 1241 [152 Cal.Rptr.3d 878]; *People v. Hydrick* (2016) 1 Cal.App.5th 837, 841 [205 Cal.Rptr.3d 154] (45-day evaluation hold includes time for district attorney to file SVP petition).

If both DSH evaluators agree that the person meets this standard, DSH will refer the case to the district attorney.<sup>110</sup>

If the DSH evaluators disagree with each other about whether the person qualifies as an SVP, DSH will arrange for evaluations by two independent mental health professionals. If the two independent evaluations determine that the person meets the SVP mental health and dangerous criteria, DSH will refer the case to the district attorney. However, if one or both of the independent evaluators concludes that the person does not meet the SVP criteria, then the SVP proceedings will be finished and the person will be released from custody.<sup>111</sup>

When the required number of evaluators agree that a person has a qualifying mental disorder, DSH will ask the district attorney in the county where the person was most recently convicted to file an SVP commitment petition. The request should be sent to the district attorney no later than 20 days before either the person's release date or the end of the 45-day hold; however, there is no remedy if this deadline is not met.<sup>112</sup>

## 12.16 Filing of an SVP Commitment Petition

When DSH refers a case for SVP proceedings, the district attorney has discretion whether to file an SVP petition in the superior court. The petition must be filed either before the person's prison release date or before the 45-day hold expires. However, an SVP petition will not be dismissed if it is

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<sup>110</sup> Welfare & Institutions Code § 6601(c)(d); *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888 [119 Cal.Rptr.2d 1]; *Reilly v. Superior Court* (2013) 57 Cal.4th 641 [160 Cal.Rptr.410] (if evaluator uses invalid assessment protocol, person entitled to dismissal of SVP proceedings only if the error likely affected the result); *Rabuck v. Superior Court* (2013) 221 Cal.App.4th 1334 [165 Cal. Rptr.3d 354, 360] (SVP commitment upheld against claim that assessment protocol was invalid); *People v. Superior Court (Troyer)* (2015) 240 Cal.App.4th 654 [192 Cal.Rptr.3d 820] (no error where evaluator copied substantial portions of prior evaluations); *People v. Morrison* (2019) 34 Cal.App.5th 980, 983-985 [246 Cal.Rptr.3d 734] (where one of the DSH evaluators found person did not qualify as an SVP, but later changed their mind, DSH properly referred the person to the DA even though two independent evaluators disagreed with each other about the case); see also *Seaton v. Mayberg* (9th Cir. 2010) 610 F.3d 530 (person has no right to prevent disclosure of their medical records to DSH for the SVP evaluation because the person's privacy interest is outweighed by the government's interest in public safety); *Hubbs v. Alamao* (C.D. Cal. 2005) 360 F.Supp.2d 1073 (same).

<sup>111</sup> Welfare & Institutions Code § 6601(e)-(f); *In re Snyder* (2017) 12 Cal.App.5th 744 [219 Cal.Rptr.3d 171] (DSH cannot avoid the requirement for two independent evaluations by "undesignating" the DSH evaluator who found the person did not meet the SVP criteria and appointing a substitute DSH evaluator); but see *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912 [119 Cal.Rptr.2d 1] (allowing exception so that DSH may refer a case to the district attorney if the DSH Director believes one of the evaluators misunderstood the SVP legal criteria).

<sup>112</sup> Welfare & Institutions Code § 6601(a)-(2), (d), (f), (h)-(i); see also *Cheek v. Superior Court* (2002) 103 Cal.App.4th 520 [126 Cal.Rptr.2d 820]; *People v. Krah* (2003) 114 Cal.App.4th 534 [7 Cal.Rptr.3d 853] (if a person is incarcerated on convictions from more than one county, the SVP petition may be filed and heard in any of those counties); Welfare & Institutions Code § 6601(i) (commission of new in-prison crime that is not a sexually violence offense does not change jurisdiction over the SVP petition, but commission of a new sexually violent offense allows filing of a subsequent petition in the county where the person committed the in-prison crime).

later discovered that the person’s release date should have been earlier, so long as the period of unlawful custody was due to a good faith mistake of fact or law.<sup>113</sup>

## 12.17 Court Screening and Hearing on Probable Cause for the SVP Petition

The court must screen the SVP commitment petition to see if there appears to be “probable cause” to believe that the person is likely to engage in sexually violent criminal behavior if released. If the court believes there is probable cause for the petition, the person must be kept in a “secure facility” during further SVP proceedings.<sup>114</sup> The person must be “confined separately and distinctly” from people who are awaiting criminal trials or sentenced for crimes, and the conditions must be non-punitive. If the person is placed in administrative segregation, there must not be any deprivation of privileges beyond that necessary to protect staff and other incarcerated people.<sup>115</sup>

The judge must hold a probable cause hearing within 10 calendar days after the screening.<sup>116</sup> At the hearing, the district attorney has the burden of convincing the judge that a reasonable person could have a strong suspicion that the person meets the SVP criteria, including a “serious and well-founded risk” that the person is likely to commit sexually violent predatory criminal acts.<sup>117</sup> At the hearing, the person has the right to be represented by a lawyer, to present evidence, and to cross-examine the district attorney’s witnesses.<sup>118</sup> The district attorney’s witnesses may rely on hearsay statements in probation report descriptions about the facts of the person’s sexually violent offenses, but may not relay hearsay about facts of any other alleged crimes.<sup>119</sup>

If the judge does not find probable cause to continue the proceedings, the SVP petition will be dismissed and the person will be paroled.<sup>120</sup> When a court finds probable cause in an SVP hearing, the court also has authority to consider a motion to involuntarily medicate the person if they are incompetent to refuse medical treatment.<sup>121</sup>

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<sup>113</sup> Welfare & Institutions Code § 6601(a)(3); *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301 [71 Cal.Rptr.3d 462]; *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 where late petition was not due to good faith mistake).

<sup>114</sup> Welfare & Institutions Code § 6601.5.

<sup>115</sup> Welfare & Institutions Code § 6601.5-§ 6602(a); Penal Code § 4001-§ 4002.

<sup>116</sup> Welfare & Institutions Code § 6601.5; *People v. Hayes* (2006) 137 Cal.App.4th 34 [39 Cal.Rptr.3d 747]; *Jones v. Blanas* (9th Cir. 2004) 393 F.3d 918 (failure to meet the deadline does not bar the court from holding the probable cause hearing and subsequent SVP trial).

<sup>117</sup> *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].

<sup>118</sup> *In re Parker* (1998) 60 Cal.App.4th 1453 [71 Cal.Rptr.2d 167].

<sup>119</sup> *Walker v. Superior Court* (2021) 12 Cal.5th 177, 185 [283 Cal.Rptr.3d 296]; *People v. Howard* (1999) 70 Cal.App.4th 136, 152-155 [82 Cal.Rptr.2d 481].

<sup>120</sup> Welfare & Institutions Code § 6602.

<sup>121</sup> *State Department of State Hospitals. v. J.W.* (2018) 31 Cal.App.5th 334, 344, 347-348 [242 Cal.Rptr.3d 596].



A judge who finds probable cause for the SVP petition will order that the person be held in a secure facility pending trial; at this point the person can be moved to one of the state psychiatric hospitals.<sup>122</sup>

## 12.18 Court or Jury Trial for SVP Commitment

If the judge finds probable cause for the SVP petition, the court must then hold a full trial. At the trial, the district attorney has the burden of proving beyond a reasonable doubt that the person meets the SVP criteria.<sup>123</sup>

There is no set deadline for starting or completing the trial, but delays in the trial must be justified by a showing of good cause.<sup>124</sup> A person who is mentally incompetent does not have the right to have the SVP proceedings stayed or suspended.<sup>125</sup> Unjustified extensive delays may violate the Fourteenth Amendment due process right to a speedy trial and require dismissal of the petition, but even a delay of over a decade does not necessarily violate due process if the person's attorney asked for or agreed to most or all of the postponements.<sup>126</sup>

The person has the right to trial by a jury.<sup>127</sup> If the person does not request a jury, the trial will be by a judge.<sup>128</sup> The SVP law does not require the court to advise a person of their right to a jury or to get the person's personal waiver of the right, but California Supreme Court is considering what level of scrutiny should be used in deciding whether the lack of such requirements violates the U.S. Constitution's Fourteenth Amendment guarantee of equal protection.<sup>129</sup> If the case is heard by a jury,

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<sup>122</sup> Welfare & Institutions Code § 6602-§ 6602.5.

<sup>123</sup> Welfare & Institutions Code § 6604. *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42] (although it seems contradictory to conclude "beyond a reasonable doubt" that the person is "likely" to re-offend, this standard is constitutional); see also *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]; see also *Kansas v. Crane* (2002) 534 U.S. 407 [122 S.Ct. 867; 151 L.Ed.2d 856] (to conclude that a person is likely to re-offend, it is necessary to determine that the person has serious difficulty controlling their behavior); *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].

<sup>124</sup> Welfare & Institutions Code § 6603(c).

<sup>125</sup> *Moore v. Superior Court* (2010) 50 Cal.4th 802 [114 Cal.Rptr.3d 199].

<sup>126</sup> *Camacho v. Superior Court* (2023) 15 Cal.5th 354, 368 [312 Cal.Rptr.3d 490] see also *People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405 [102 Cal.Rptr.2d 150]; *People v. Evans* (2005) 132 Cal.App.4th 950 [34 Cal.Rptr.3d 35]; *People v. Litmon* (2008) 162 Cal.App.4th 383 [76 Cal.Rptr.3d 122]; *People v. Sanders* (2012) 203 Cal.App.4th 839 [137 Cal.Rptr.3d 830]; *People v. Landau* (2013) 214 Cal.App.4th 1 [154 Cal.Rptr.3d 1]; *People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36, 60-82 [238 Cal.Rptr.3d 14]; *People v. DeCasas* (2020) 54 Cal.App.5th 785 [268 Cal.Rptr.3d 663]; *In re Butler* (2020) 55 Cal.App.5th 614 [269 Cal.Rptr.3d 649]; *People v. Tran* (2021) 62 Cal.App.5th 330, 349-351, 355 [276 Cal.Rptr.3d 603].

<sup>127</sup> Welfare & Institutions Code § 6603(a).

<sup>128</sup> Welfare & Institutions Code § 6603(f).

<sup>129</sup> *People v. Cannon*, No. S277995; see also *People v. Washington* (2021) 72 Cal.App.5th 453 [287 Cal.Rptr.3d 352]; *People v. Magana* (2022) 76 Cal.App.5th 310 [291 Cal.Rptr.3d 394].

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the person cannot be committed as an SVP unless properly-instructed jurors unanimously agree that the person meets all of the SVP criteria.<sup>130</sup>

The person has the right to be represented by a lawyer and to receive effective assistance of counsel; the court will appoint a lawyer if the person does not have money to hire one.<sup>131</sup> The person also has the right to hire experts to do further psychological evaluations, and if the person has no money, the court must appoint a mental health professional for them.<sup>132</sup> The court need appoint only one expert for the person so long as the person is “fully able to present his side of the story” to the court or jury, even though the state can have two expert witnesses.<sup>133</sup> The California Supreme Court is currently considering whether the district attorney can hire their own private psychological expert to testify at trial or whether the district attorney can use only the appointed DSH evaluators.<sup>134</sup>

The person has a due process right to be present at the trial; the lawyer may not waive this right over the person’s objection.<sup>135</sup> The person also has a due process right to testify at trial, even over the objection of their lawyer.<sup>136</sup> The district attorney cannot force the person to testify unless the district attorney can show there is a compelling state interest in requiring such testimony when other people facing civil commitments cannot be compelled to testify.<sup>137</sup>

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<sup>130</sup> Welfare & Institutions Code § 6603(g); Welfare & Institutions Code § 6604; see also *People v. Roberge* (2003) 29 Cal.4th 979 [120 Cal.Rptr.2d 861] (jurors should be instructed not to find person to be an SVP based solely on the convictions); *People v. Hurtado* (2002) 28 Cal.4th 1179 [124 Cal.Rptr.2d 186]. *Brock v. Selig* (9th Cir. 2004) 390 F.3d 1088 (court is not required to instruct jury that person must have a serious lack of ability to control behavior; it is sufficient for jury to find that person has a mental disorder which makes them likely to commit future sexually violent acts); *People v. Calderon* (2004) 124 Cal.App.4th 80 [4 Cal.Rptr.3d 92] (when there is evidence that person is amenable to post-release treatment, court must instruct jury to determine whether it is necessary that person be confined in a secure facility); *People v. Grassini* (2003) 113 Cal.App.4th 765 [6 Cal.Rptr.3d 662].

<sup>131</sup> Welfare & Institutions Code § 6603(a); *People v. Carter*, No. S278262 (Cal. Supreme Court currently considering whether trial court had duty to appoint substitute counsel to evaluate person’s claim that original counsel provided ineffective assistance that resulted in 12-year delay in trial); *People v. Hill* (2013) 219 Cal.App.4th 646 [162 Cal.Rptr.3d 3] (person may ask for new lawyer due to ineffective assistance or conflict); see also *People v. Fraser* (2006) 138 Cal.App.4th 1430 [42 Cal.Rptr.3d 424] (unlike criminal trials, there is no right to self-representation in SVP proceedings).

<sup>132</sup> Welfare & Institutions Code § 6603(a).

<sup>133</sup> *People v. Dean* (2009) 174 Cal.App.4th 186, 205 [94 Cal.Rptr.3d 478].

<sup>134</sup> *Needham v. Superior Court*, No. S276395.

<sup>135</sup> *People v. Nguyen* (2013) 218 Cal.App.4th 1363, 1378 [160 Cal.Rptr.3d 868].

<sup>136</sup> *People v. Allen* (2008) 44 Cal.4th 843 [80 Cal.Rptr.3d 183].

<sup>137</sup> *People v. Curlee* (2015) 237 Cal.App.4th 709, 721-722 [188 Cal.Rptr.3d 421]; *People v. Field* (2016) 1 Cal.App.5th 174, 195-197 [204 Cal.Rptr.3d 548]; *People v. Flint* (2018) 22 Cal.App.5th 983, 990-994 [231 Cal.Rptr.3d 910].

The person facing an SVP commitment has the right to have access to all relevant psychological records and reports.<sup>138</sup> Both sides may depose potential witnesses and subpoena records.<sup>139</sup>

During the SVP proceedings, the district attorney can request that DSH provide recent records and updated evaluations about the person's mental disorder and treatment or to replace an evaluation done by a clinician who is no longer authorized to perform evaluations or is unavailable to testify.<sup>140</sup> If the person who is facing trial wants an updated evaluation, they can ask the court exercise its discretion to order DSH to provide an updated evaluation.<sup>141</sup>

The facts about the person's SVP-qualifying crimes may be proven through documents, including hearsay statements in probation and sentencing reports.<sup>142</sup> However, a psychological expert cannot testify that the person's crime was an SVP-qualifying sexually violent offense.<sup>143</sup> Hospital records can be admitted into evidence as business records if they are authenticated.<sup>144</sup> An expert may rely on hearsay evidence in forming an opinion about whether the person has a mental disorder and is likely to commit sexually violent behavior, but the expert may not relay the details of case-specific facts contained in hearsay statements.<sup>145</sup>

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<sup>138</sup> Welfare & Institutions Code § 6603(a).

<sup>139</sup> *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 discovery to whether person has committed sexually violent crimes and has 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 may only access records related to the mental evaluation); *Murillo v. Superior Court* (2006) 143 Cal.App.3d 730 [49 Cal.Rptr.3d 511] (district attorney cannot request that person make admissions); *People v. Dixon* (2007) 148 Cal.App.4th 414, 442-444 [56 Cal.Rptr.3d 33] (person can request and receive contact information for district attorney's witnesses, even if they were victims of person's crimes).

<sup>140</sup> Welfare & Institutions Code § 6603(c), (j); *Albertson v. Superior Court* (2001) 25 Cal.4th 796 [107 Cal.Rptr.2d 381]; *People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, 461-462 [241 Cal.Rptr.3d 1]; *Reilly v. Superior Court* (1013) 57 Cal.4th 641 [160 Cal.Rptr.410] (if an updated or replaced evaluation finds the person does not qualify as an SVP, DSH must obtain two more independent evaluations).

<sup>141</sup> *Conway v. Superior Court of Los Angeles County* (2023) 97 Cal.App.5th 750 [315 Cal.Rptr.3d 793].

<sup>142</sup> Welfare & Institutions Code § 6600(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; *People v. Bocklett* (2018) 22 Cal.App.5th 879, 890 [232 Cal.Rptr.3d 140]; *People v. Flint* (2018) 22 Cal.App.5th 983, 1000 [231 Cal.Rptr.3d 910]; *People v. Yates* (2018) 25 Cal.App.5th 474, 483, 485-486 [235 Cal.Rptr.3d 756].

<sup>143</sup> *People v. Burroughs* (2016) 6 Cal.App.5th 378, 403 [211 Cal.Rptr.3d 378].

<sup>144</sup> *People v. Yates* (2018) 25 Cal.App.5th 474, 486 [235 Cal.Rptr.3d 756].

<sup>145</sup> *People v. Landau* (2016) 246 Cal.App.4th 850 [201 Cal.Rptr.3d 684]; *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]; *People v. Flint* (2018) 22 Cal.App.5th 983, 998-999 [231 Cal.Rptr.3d 910]; *People v. Yates* (2018) 25 Cal.App.5th 474, 483, 485-486 [235 Cal.Rptr.3d 756]; *People v. Presley* (2021) 65 Cal.App.5th 1131 [280 Cal.Rptr.3d 632].

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There have been many other cases discussing what evidence may be admitted at the SVP trial and what types of questions the district attorney can ask the witnesses.<sup>146</sup>

### 12.19 Commitment to the DSH for SVP Treatment

If the judge or jury decides that the person meets the SVP criteria, they will be committed to a DSH hospital for an indeterminate amount of time (with no set end date).<sup>147</sup> If a person is receiving DSH treatment while housed at a CDCR prison, they must be separated from people who are serving criminal sentences.<sup>148</sup> DSH must provide treatment that is consistent with the “current institutional standard for the treatment of sex offenders.”<sup>149</sup> However, there is no requirement that the treatment be effective.<sup>150</sup>

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<sup>146</sup> *People v. Shazier* (2014) 60 Cal.4th 109 [175 Cal.Rptr.3d 774] (allowing evidence that person planned to live near parks or schools); *People v. Gonzales* (2013) 56 Cal.4th 353 [154 Cal.Rptr.3d 38] (person’s confidential communications to a therapist during parole-mandated therapy generally cannot be admitted in SVP proceedings); *People v. Poulson* (2013) 213 Cal.App.4th 501 [152 Cal.Rptr.3d 563] (evidence of recent parole violations allowed to show person lacked ability to control behavior); *People v. Lowe* (2012) 211 Cal.App.4th 678 [149 Cal.Rptr.3d 860] (expert may give opinion about whether person is likely to engage in predatory sexually violent offenses, as long as expert explains why); *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); *People v. Krah* (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 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 in evaluations 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 people were not SVPs); *People v. Shazier* (2014) 60 Cal.4th 109 [175 Cal.Rptr.3d 774] (district attorney did not commit misconduct during cross-examination by reciting facts of prior SVP cases in which the defense psychologist had testified); *People v. Golden* (2017) 19 Cal.App.5th 905, 910-912 [228 Cal.Rptr.3d 489] (person has no right of privacy to avoid search of state hospital dormitory, and evidence found in such a search is admissible); *People v. Jackson* (2022) 75 Cal.App.5th 1 [290 Cal.Rptr.3d 301] [court violated due process by excluding sole defense expert witness from testifying following discovery dispute].

<sup>147</sup> Welfare & Institutions Code § 6604. California law previously required review of an SVP commitment every two years, but courts have held that that people committed under the previous law can lawfully be confined indefinitely. *People v. McKee* (2010) 47 Cal.4th 1172, 1194 [104 Cal.Rptr.3d 427] (the U.S. Constitution, Article I, § 10 bar on ex post facto laws is not violated by applying indefinite terms to people who were originally committed under former law); 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 Los Angeles district attorney agreed to two-year SVP commitments while it was uncertain whether change in law could be applied retroactively).

<sup>148</sup> *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [81 Cal.Rptr.2d 42].

<sup>149</sup> Welfare & Institutions Code § 6606(a), (c).

<sup>150</sup> Welfare & Institutions Code § 6606(b); *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1164-1165 [81 Cal.Rptr.2d 42].

During the commitment, DSH must provide the court with an annual report on the person's mental condition.<sup>151</sup> The person also can request an evaluation by an independent mental health professional once a year; the person can either hire an expert or have the court appoint one.<sup>152</sup> The expert shall have access to all records concerning the person.<sup>153</sup>

## 12.20 Petition for Conditional Release from SVP Commitment

A person who has been committed under the SVP law can be considered for conditional release from the DSH hospital for outpatient treatment. Conditional release requires an order by the court that issued the original SVP commitment.<sup>154</sup> The person has a right to be represented by a lawyer at all hearings concerning conditional release.<sup>155</sup> The proceedings can be started any of three ways:

- ◆ If the DSH Director determines that the person's condition has changed so that they are not likely to commit predatory sexually violent acts while in community treatment, the DSH shall send a recommendation for conditional release to the district attorney, the lawyer for the person, and the court.<sup>156</sup>
- ◆ If a DSH annual evaluation concludes that conditional release is in the best interest of the person and that conditions can be imposed to adequately protect the community, DSH must authorize the person to file a petition for conditional release.<sup>157</sup>
- ◆ Any time after the first year of the SVP commitment, the person can file a petition asking the court for conditional release, even if DSH has not recommended conditional release or found that the person could be safely placed in the community.<sup>158</sup>

If DSH recommends conditional release, the court must schedule the case for a hearing.<sup>159</sup> Otherwise, the person must file a petition with the court that issued the SVP commitment and serve a copy of the petition on the district attorney.<sup>160</sup> When the person initiates the petition, the court can deny the petition without a hearing if it is frivolous because it is totally and completely without merit

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<sup>151</sup> Welfare & Institutions Code § 6604.9(a).

<sup>152</sup> Welfare & Institutions Code § 6605(a).

<sup>153</sup> Welfare & Institutions Code § 6604.9(a).

<sup>154</sup> Welfare & Institutions Code § 6608.

<sup>155</sup> Welfare & Institutions Code § 6608(a).

<sup>156</sup> Welfare & Institutions Code § 6607(a).

<sup>157</sup> Welfare & Institutions Code § 6604.9(d); *People v. Landau* (2011) 199 Cal.App.4th 31 [130 Cal.Rptr.3d 683] (DSH must authorize person to file petition even if DSH Director disagrees with evaluator's conclusion that person no longer poses a danger).

<sup>158</sup> Welfare & Institutions Code § 6608(a), (f).

<sup>159</sup> Welfare & Institutions Code § 6607(b).

<sup>160</sup> Welfare & Institutions Code § 6604.9(d).

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or for the purpose of harassment.<sup>161</sup> The court also can deny the petition if the person's previous petition was denied on the merits or as frivolous and the new petition does not contain facts upon which the court could find that the person's condition has changed significantly.<sup>162</sup>

If the court allows the case to proceed, the court will resolve any dispute about whether the county where the person's SVP commitment happened is the same as the county of "domicile" where the person used to live and intends to live upon release. If the court decides that the county of domicile is different from the county of commitment, there is a process to determine which county's district attorney will participate in the hearing on the conditional release petition.<sup>163</sup>

If DSH has not recommended conditional release, the court must obtain DSH's evaluation of the person and a community program director's report as whether the person can be appropriately placed in a conditional release program.<sup>164</sup> The person may also be required to undergo evaluations by the district attorney's experts and may request that the court appoint independent experts to conduct an evaluation.<sup>165</sup>

The court will then hold a hearing on whether the person would pose a danger if conditionally released into a community treatment program for one year.<sup>166</sup> The person has a due process right to testify at their conditional release hearing.<sup>167</sup>

The burden of proof at the hearing depends on whether DSH recommended or supported 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, the burden of proof is on the district attorney to prove by a preponderance of evidence that conditional release is not appropriate. If DSH does not support conditional release, the burden is on the person to show that

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<sup>161</sup> 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] (court failed to apply correct "totally and completely without merit" standard); *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 dismissing petition as frivolous where it was disputed whether person had a mental disorder, court did not consider evidence of reduced likelihood of recidivism, and court deemed failure to participate in treatment to be dispositive); *People v. Smith* (2022) 75 Cal.App.5th 332 [290 Cal.Rptr.3d 420] (petition improperly denied as frivolous because person had an arguable claim that he did not have a legitimately diagnosed mental disorder).

<sup>162</sup> Welfare & Institutions Code § 6608(a); *People v. McCloud* (2021) 63 Cal.App.5th 1 [277 Cal.Rptr.3d 311]; *People v. Smith* (2022) 75 Cal.App.5th 332 [290 Cal.Rptr.3d 420] (petition did not need to show material change since prior petition that had not been denied on merits or found to be frivolous).

<sup>163</sup> Welfare & Institutions Code § 6608(b)-(d); Welfare & Institutions Code § 6608.5(b)(1).

<sup>164</sup> Welfare & Institutions Code § 6608(e)-(f).

<sup>165</sup> Welfare & Institutions Code § 6608(g); see *People v. McKee* (2010) 47 Cal.4th 1172, 1192-1193 [104 Cal.Rptr.3d 427].

<sup>166</sup> Welfare & Institutions Code § 6608(g).

<sup>167</sup> *People v. Force* (2019) 39 Cal.App.5th 506, 521 [251 Cal.Rptr.3d 834] (reversing denial of conditional release because district attorney both prevented person from testifying and kept person's written statements out of evidence).

conditional release is in their best interest and that they can be released under conditions that will adequately protect the community.<sup>168</sup>

If the court denies the petition, the person must wait one year after a denial before filing a new petition for conditional release.<sup>169</sup>

If the court grants conditional release, the DSH community program director will submit a report to identify the program that is most appropriate for supervising and treating the person. The court can accept or reject this recommendation.<sup>170</sup> The person must be released to the county of domicile unless a court finds that extraordinary circumstances justify placement elsewhere.<sup>171</sup> The county law enforcement agencies where the person will be placed must be notified and can comment on a proposed placement.<sup>172</sup> Conditions will include wearing a GPS device and, for people whose criminal behavior involved children, not residing within a quarter mile of a public or private school for grades between K and 12.<sup>173</sup> The person should be notified of the conditions of their release; the conditions should not be changed without prior approval of the court, except in emergencies.<sup>174</sup>

The district attorney can file a petition requesting revocation of conditional release if the person has become a danger to health and safety of others.<sup>175</sup> The court will hold a hearing to decide whether the district attorney has shown by a preponderance that the person is a danger.<sup>176</sup>

## 12.21 Petition for Unconditional Discharge from SVP Commitment

The SVP law allows for a person to be unconditionally discharged from the SVP commitment in some circumstances. Unconditional discharge can be initiated in one of three ways:

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<sup>168</sup> Welfare & Institutions Code § 6608(k); *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. Rasmuson* (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 would be homeless).

<sup>169</sup> Welfare & Institutions Code § 6608(j).

<sup>170</sup> Welfare & Institutions Code § 6608(h).

<sup>171</sup> Welfare & Institutions Code § 6608.5(a)-(c); Welfare & Institutions Code § 6608.6.

<sup>172</sup> Welfare & Institutions Code § 6609.1.

<sup>173</sup> Welfare & Institutions Code § 6608.1; Welfare & Institutions Code § 6608.5(f); *People v. Cheek* (2023) 87 Cal.App.5th 373 [303 Cal.Rptr.3d 534] (applying residence restriction even though small home school was created after community received notice of person's release).

<sup>174</sup> Welfare & Institutions Code § 6608.8.

<sup>175</sup> Penal Code § 1609.

<sup>176</sup> See *People v. DeGuzman* (1995) 33 Cal.App.4th 414, 419 [39 Cal.Rptr.2d 137].



## § 12.21

- ◆ If at any time the DSH annual report finds that the person's condition has changed so that they no longer meet the criteria for an SVP commitment, DSH shall authorize the person to file a petition for unconditional discharge.<sup>177</sup>
- ◆ After a minimum of one year of successful conditional release, the person may petition the court for unconditional discharge, with or without a DSH recommendation.<sup>178</sup> The person must remain on conditional release throughout the unconditional discharge proceedings.<sup>179</sup>
- ◆ If DSH has reason to believe the person no longer qualifies for an SVP commitment, it must seek court review of the commitment by filing a petition for writ of habeas corpus.<sup>180</sup>

To seek unconditional discharge, the person must file a petition with the court that issued the SVP commitment and serve a copy of the petition on the district attorney.<sup>181</sup> The court must then hold a probable cause hearing. If the court finds probable cause to believe that the person no longer poses a substantial danger to others and is not likely to engage in sexually violent behavior if discharged, then the court must set the case for a full hearing.<sup>182</sup> At the hearing, the person has the same rights as at the original SVP commitment trial.<sup>183</sup> The court should grant unconditional discharge unless the district attorney proves beyond a reasonable doubt that the person still has a mental disorder such that they are a danger to the health and safety of others and likely to engage in sexually violent criminal behavior if discharged.<sup>184</sup>

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<sup>177</sup> Welfare & Institutions Code § 6604.9(d); *People v. Landau* (2011) 199 Cal.App.4th 31 [130 Cal.Rptr.3d 683] (DSH must authorize person to file petition even if DSH Director disagrees with annual report conclusion that the person no longer is dangerous); *People v. Smith* (2022) 75 Cal.App.5th 332 [290 Cal.Rptr.3d 420] (SVP law does not allow person to directly petition for unconditional discharge without either a favorable DSH evaluation or having served at least a year on conditional release, and this does not violate the right to due process); *People v. Peyton* (2022) 81 Cal.App.5th 784 [297 Cal.Rptr.3d 469] (same).

<sup>178</sup> Welfare & Institutions Code § 6608(m).

<sup>179</sup> *People v. Smith* (2020) 49 Cal.App.5th 445, 455-56 [263 Cal.Rptr.3d 90] (person was no longer eligible for unconditional discharge when they were recommitted to inpatient treatment facility while unconditional discharge petition was pending).

<sup>180</sup> Welfare & Institutions Code § 6605(c).

<sup>181</sup> Welfare & Institutions Code § 6604.9(d).

<sup>182</sup> Welfare & Institutions Code § 6605(a); *People v. Consiglio* (2022) 85 Cal.App.5th 615, 630-631, 633-635 [303 Cal.Rptr.3d 9] (a finding of probable cause is required if a reasonable person could at least have a strong suspicion that a person no longer qualifies for SVP commitment, reversing denial of unconditional release where court failed to apply reasonable person standard and court's rejection of DSH psychologist's opinion was not supported by substantial evidence).

<sup>183</sup> Welfare & Institutions Code § 6605(a).

<sup>184</sup> Welfare & Institutions Code § 6605(a); *People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1077-1078 [189 Cal.Rptr.3d 886] (failure to participate in treatment may be considered, but by itself does not necessarily prove that the person is still dangerous).

If the court denies the petition, the person must wait one year before filing another petition for unconditional discharge.<sup>185</sup>

If the court grants unconditional discharge, the SVP commitment will be over.<sup>186</sup> However, the person's CDCR parole term will have been tolled (not running) during their SVP proceedings and commitment, so they will still have to serve their parole period.<sup>187</sup> Also, even after unconditional discharge from the SVP commitment and parole, people are subject to strict laws that require them to register as people with sex offenses and may restrict their employment.<sup>188</sup> Their identifying information will also be listed on the "Megan's Law" website.<sup>189</sup>

## 12.22 Legal Actions for Challenging an SVP Commitment or Hospital Conditions

If a court or jury commits someone as an SVP, the person can file a direct appeal. A denial of conditional release or unconditional discharge may also be appealed.<sup>190</sup> The process for filing a notice of appeal and for the rest of the appeal process is similar to appeals for criminal cases (see Chapter 14).<sup>191</sup> Many different types of issues might be raised, including claims that there was insufficient evidence to support the court's decision, arguments that the procedural rules were not followed, or attacks on the lawfulness of the commitment statutes or how they were applied. However, appellate courts will not overturn an SVP commitment decision for insufficient evidence if there is substantial evidence from which a reasonable trier of fact could have made the necessary finding under the governing standard of proof.<sup>192</sup>

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<sup>185</sup> Welfare & Institutions Code § 6605(b).

<sup>186</sup> Welfare & Institutions Code § 6605(b).

<sup>187</sup> Penal Code § 3000(a)(4); *People v. Bocklett* (2018) 22 Cal.App.5th 879, 893-894 [232 Cal.Rptr.3d 140] (parole tolling does not violate the U.S. Constitution's guarantee of equal protection or prohibition on ex post facto laws).

<sup>188</sup> Penal Code § 290 et seq. (sex offender registration); Penal Code § 290.95 (job restrictions).

<sup>189</sup> Penal Code § 290.46.

<sup>190</sup> *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408 [105 Cal.Rptr.3d 560] (allowing appeal even where court denied person's petition as being frivolous).

<sup>191</sup> 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. Kisling* (2015) 239 Cal.App.4th 288, 291 [190 Cal.Rptr.3d 800].

<sup>192</sup> *People v. Sumahit* (2005) 128 Cal.App.4th 347 [27 Cal.Rptr.3d 233] (person who refused to be interviewed by state's experts cannot show there is insufficient evidence to support their finding of lack of ability to control behavior); *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. Wright* (2016) 4 Cal.App.5th 537 [208 Cal.Rptr.3d 686] (reversing SVP commitment due to lack of evidence supporting mental health diagnosis).

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As with criminal cases, a person can file a state court habeas corpus petition challenging an SVP commitment based on information that was not presented to the trial court (see Chapter 15).<sup>193</sup>

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).

People with SVP commitments who want to challenge the conditions under which they are being held may file state petitions of habeas corpus (see Chapter 15), federal civil rights lawsuits (Chapter 17), or state tort lawsuits (Chapter 18). For example, a group 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.<sup>194</sup>

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<sup>193</sup> Welfare & Institutions Code § 7250; *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 shows that testimony of state experts was false); 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 SVP probable cause hearing).

<sup>194</sup> *Hydrick v. Hunter* (9th Cir. 2007) 500 F.3d 978.