REPRESENTING CLIENTS WITH MENTAL HEALTH ISSUES

By: Lori Quick

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INTRODUCTION

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

I. INCOMPETENCY TO STAND TRIAL (Penal Code section 1367)

A. General Principles

A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence. (Pen. Code, sec. 1369, subd. (f).) Requiring an accused "to stand trial while not in the full enjoyment of consciousness and mental power" is a fundamental error of constitutional proportions. (*People v. Berling* (1953) 115 Cal.App.2d 255, 270.) Trial of an incompetent person violates the Sixth and Fourteenth Amendments to the United States Constitution. (*Pate v. Robinson* (1966) 383 U.S. 375, 378 [15 L.Ed.2d 815, 818].)

> "A person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

(Pen. Code, sec. 1367, subd. (a).) It is a violation of due process to try a person who is incompetent, because he or she is not able to properly prepare a defense. (*Drope v. Missouri* (1975) 420 U.S. 162, 171-172; accord, *In re R.V.* (2015) 61 Cal.4th 181, 188; *In re M.P.* (2013) 217 Cal.App.4th 441, 459.)

The finding that a defendant is *competent* is not an appealable order. Rather, it may be reviewed on appeal from the subsequent judgment of conviction. (*People v. Fields* (1965)

62 Cal.2d 538, 541.) A finding that he is *incompetent* within the meaning of Penal Code section 1368 is appealable as a final judgment in a special proceeding. (*Id.*, at p. 542; accord, *People v. Christiana* (2010) 190 Cal.App.4th 1040, 1045.)

B. Is the Defendant Mentally Incompetent?

The term "mentally incompetent" has a specific meaning in this context. "Competence is not a clinical, medical, or psychiatric concept. It does not derive from our understanding of health, sickness, treatment, or persons as patients. Rather, it relates to the world of law, to society's interest in deciding whether an individual should have certain rights (and obligations) relating to person, property and relationships. [Citation.]" (*Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1321, cited with approval in *In re Qawi* (2004) 32 Cal.4th 1, 17, internal quotation marks omitted.) A defendant is incompetent to stand trial if he or she lacks a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and ... a rational as well as a factual understanding of the proceedings against him.' " (*Dusky v. United States* (1964) 362 U.S. 402, 402 [4 L. Ed. 2d 824, 80 S. Ct. 788]; see also *Godinez v. Moran* (1993) 509 U.S. 389, 399–400 [125 L. Ed. 2d 321, 113 S. Ct. 2680]; § 1367; *People v. Stewart* (2004) 33 Cal.4th 425, 513;*People v. Rogers* (2006) 39 Cal.4th 826, 846-847.) It means that "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, sec. 1367, subd. (a); *Drope v. Missouri, supra,* 420 U.S. at p. 171; see *People v. Lightsey* (2012) 54 Cal.4th 668, 703.)

C. Procedure

Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. (Pen. Code, sec. 1368; *Drope v. Missouri, supra*, 420 U.S. at p. 181; *Pate v. Robinson, supra*, 383 U.S. at pp. 384–386; *People v. Blair* (2005) 36 Cal.4th 686, 711; *People v. Pennington* (1967) 66 Cal.2d 508, 516–517.) The court's duty to conduct a competency hearing may arise at any time prior to judgment. (*People v. Danielson* (1992) 3 Cal.4th 691, 726, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; accord, *People v. Rogers* (2006) 39 Cal.4th 826, 847.)

1. What must be shown?

"If a defendant presents *substantial evidence* of his lack of competence and is unable to assist counsel in the conduct of a defense in a rational matter during the legal

proceedings, the court must stop the proceedings and order a hearing on the competence issue." (*Pate v. Robinson, supra,* 383 U.S. at pp. 384-386, emphasis added; *Pennington, supra,* 66 Cal.2d at pp. 516-517.) In this context, substantial evidence means evidence that raises a reasonable doubt about the defendant's ability to stand trial. (*People v. Frye* (1998) 18 Cal.4th 894, 951-952.) Specifically, it must be shown that defendant lacked " ' rational as well as factual understanding of the proceedings against him' " or " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' " (*Dusky v. United States, supra,* 362 U.S. at p. 402 [80 S. Ct. at p. 788])

2. When Must Substantial Evidence be Shown?

The substantiality of the evidence is determined when the competence issue arises, which can occur at any point in the proceedings. (*People v. Welch* (1999) 20 Cal.4th 701, 739.) Expert testimony is not necessary to raise a doubt. (*Pate v. Robinson, supra,* 383 U.S. at p. 385, fn. 7.) An attorney representing a criminal defendant has a duty to investigate the competency issue when he or she is in the possession of evidence of the defendant's mental instability. A number of factors may prompt an attorney to question the client's mental competency, for example, the nature of the crimes, the defendant's mental history, medications being taken by the defendant, or current psychiatric evaluations. (See *People v. Corona* (1978) 80 Cal.App.3d 684, 709; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 464.) Defense counsel's opinion is a factor for the court to consider in determining whether substantial evidence of a lack of competence exists. (*People v. Panah* (2005) 35 Cal.4th 395, 433.)

3. What Happens After Defense Counsel Declares a Doubt Regarding the Defendant's Competency to Stand Trial?

a. Suspension of Proceedings

When an order for a hearing into the present mental competency of the defendant has been issued, all proceedings in the criminal prosecution must be suspended until the competency issue is resolved. (Pen. Code, sec. 1368, subd. (c).) "Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.]" (*Rogers, supra,* 39 Cal.4th at p. 847.)

When the court becomes aware of substantial evidence that objectively generates a doubt about whether the defendant is competent to stand trial, the trial court must on its own motion declare a doubt and suspend proceedings even if the trial judge's personal observations lead the judge to a belief the defendant is competent. (*Pennington, supra,* 66

Cal.2d at p. 518; *People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153.) The trial court has no discretion on whether to order a competency hearing once there exists substantial evidence giving rise to a doubt regarding competency. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 69.) If a trial court proceeds without holding a competency hearing, the defendant has been deprived of his or her due process right to a fair trial, the trial court has acted in excess of its jurisdiction, and the judgment is a nullity. (*Id.*, at pp. 70-71; *People v. Hale* (1988) 44 Cal.3d 531, 541.)

There are a few exceptions to the court's lack of jurisdiction during the suspension of proceedings. (Pen. Code, sec. 1368.1.) The court may still rule on demurrers (Pen. Code, sec. 1004); motions for the return of property or suppression of evidence obtained as a result of an improper search or seizure (Pen. Code, sec. 1538.5); motions to set aside a felony indictment or information (Pen. Code, sec. 995); and motions for substitution of attorney (*People v. Stankewitz* (1990) 51 Cal.3d 72, 87-89.) The prosecution is entitled to force the defendant to undergo a psychological examination under the Civil Discovery Act if the defendant claims incompetence. (see *People v. Pokovich* (2006) 39 Cal.4th 1240, 1252; *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 40-46; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 489-493.)

b. <u>The Hearing</u>

1. The hearing must be held in superior court. (Pen. Code, sec. 1368, subd. (b).) Any pending demurrers or motions to set aside or dismiss or to suppress evidence must be ruled on before any certification may be entered. (Pen. Code, sec. 1368.1, subd. (e).) The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard. (Pen. Code, sec. 1368; *Welch, supra,* 20 Cal.4th at p. 742; *People v. Ramos* (2004) 34 Cal.4th 494, 507.)

2. If the defendant or his or her attorney seeks a finding of mental incompetence, the court must appoint at least one expert to examine the defendant. (Pen. Code, sec. 1369, subd. (a).) If the defendant or the defendant's attorney informs the court that the defendant is *not* seeking a finding of mental incompetence, the court must appoint *two* psychiatrists or licensed psychologists. (*Ibid.*) The court's failure to obtain a second evaluation when the defendant is not committed is reversible error, but only if either the defendant or counsel expressly informed the court during the competency hearing that the defendant was not seeking a finding of incompetence. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 281; *People v. Lawley* (2002) 27 Cal.4th 102, 132-133; *People v. Robinson* (2007) 151 Cal.App.4th 606, 618; *People v. Harris* (1993) 14 Cal.App.4th 984, 995-996.) The court need not have a third evaluation if the first two split. (*People v. Blacksher* (2011) 52 Cal.4th 769, 798.)

3. "The examining psychiatrists or licensed psychologists shall evaluate the nature of the defendant's mental disorder, if any, the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder and, if within the scope of their licenses and appropriate to their opinions, whether or not treatment with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence." (Pen. Code, sec. 1369, subd. (a).) Penal Code section 1369, subdivision (a) specifies all of the following in considering whether the defendant is mentally competent to proceed.

A. Does the defendant have the capacity to make decisions regarding antipsychotic medication?
B. Is he/she a danger to himself/herself or others?
C. If evaluator is a psychiatrist, and the psychiatrist forms an opinion as to whether antipsychotic medication is medically appropriate, the psychiatrist shall inform the court of his or her opinions as to the likely or potential side effects of the medication, its expected efficacy, possible alternative treatment, and whether it is medically appropriate to administer the medication in the county jail.
D. If the evaluator is a psychologist and he she believes antipsychotic medication may be medically appropriate, the psychologist shall inform the court of this opinion and recommendation as to whether a psychiatrist should examine the defendant.
E. If the defendant is developmentally disabled, the court must appoint the director of the regional center for the developmentally disabled pursuant to Welfare & Institutions Code section 4500, et. seq.

4. A competency hearing is to be held at any time during the proceedings before sentencing if the judge has reason to doubt the defendant's competency. (*Jones, supra,* 53 Cal.3d at pp. 1152-1153; *People v. Melissakis* (1976) 56 Cal.App.3d 52, 62.)

4. <u>What Rights Does a Defendant Have at a Competency Hearing?</u>

It is important to keep in mind that competency hearings are civil in nature. (*Centeno v. Superior Court, supra,* 117 Cal.App.4th at p. 43; *In re R.V., supra,* 61 Cal.4th at p. 202.) This limits somewhat the panoply of rights available.

a. Does the Defendant Have the Right to a Jury Trial?

A competency hearing pursuant to Penal Code section 1368 is a "special proceeding" in which the right to trial by jury is wholly statutory. (*People v. Masterson* (1994) 8 Cal.4th 965, 969; accord, *People v. Barrett* (2012) 54 Cal.4th 1081, 1101; see Pen. Code, sec. 1369, subd. (f).) There is no right to a jury trial to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. (Pen. Code, sec. 1369, subd. (g).) The trial court has no duty to advise the defendant about the right to a jury trial in a mental competency proceeding, at least where he or she is represented by counsel. (*Masterson, supra,* at p. 971; *Barrett, supra,* at p. 1102.) This is true because when the preliminary evidence is sufficient to trigger a mental competence hearing, " 'it should be assumed that [the defendant] is unable to act in his own best interests. In such circumstances counsel must be free to act even contrary to the express desires of his client.' " (*Masterson, ibid.*, quoting *People v. Hill* (1967) 67 Cal.2d 105, 115, fn. 4.) Thus, counsel may, without consulting the defendant, waive the defendant's statutory right to a jury trial. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1121; *Barrett, ibid.; Masterson, supra,* at p. 972, quoting *People v. Samuel* (1981) 29 Cal.3d 489, 496 [summarizing *Hill*].)) This may be done even over the defendant's objection. (*Masterson, supra,* at p. 974; see *D'Arcy, supra,* 48 Cal.4th 257.)

b. What if the Defendant Objects to His or Her Attorney's Claim that the Defendant is Incompetent?

When the defendant does not wish to be found incompetent and objects to the attorney's claim that he or she is, the trial court may appoint additional counsel for the purpose of arguing that the defendant is competent. (*People v. Stanley* (1995) 10 Cal.4th 764, 805, citing *Stankewitz, supra,* 32 Cal.3d at p. 94.) However, such an appointment is discretionary. (*People v. Jernigan* (2003) 110 Cal.App.4th 131, 136-137.)

c. Does the Defendant Have the Right to Self-Representation?

Although the California Supreme Court has left open the question of whether a defendant may participate as co-counsel or represent himself in a section 1368 proceeding, it is likely to answer this question in the negative. Penal Code section 1368, subdivision (a) expressly requires the appointment of counsel. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (*Brady v. United States* (1970) 397 U.S. 742, 748 [25 L.Ed.2d 747, 90 S.Ct. 1463]; see *People v. Mroczko* (1983) 35 Cal.3d 86, 110; *D'Arcy, supra,* 48 Cal.4th at p. 284.) If the court has a reasonable doubt as to the defendant's competency to stand trial, that doubt should extend to the defendant's competency to waive counsel and represent himself. (See *Robinson, supra,* 151 Cal.App.4th

at p. 616; *D'Arcy, supra,* at p. 283, fn. 13 [leaving the question open].)

d. Does the Defendant Have the Right to be Present?

Yes. The United States Constitution requires a criminal defendant to be present at those stages of trial in which his absence might frustrate the fairness of the proceedings. (U.S. Const., 14th Amend.; *Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15 [45 L. Ed. 2d 562, 95 S. Ct. 2525].) Due process demands that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence. " (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 108 [78 L. Ed. 674, 54 S. Ct. 330].) This right has been applied to competency proceedings. (*Jernigan, supra,* 110 Cal.App.4th at p. 137.) It can be waived, expressly or impliedly. (*Ibid.*; see *Taylor v. United States* (1973) 414 U.S. 17, 20 [38 L.Ed.2d 174, 94 S.Ct. 194.) In order to establish a violation of due process, the defendant must show prejudice. (See e.g., *People v. Price* (1991) 1 Cal.4th 324, 407-408 [a defendant claiming a violation of the right to personal presence bears the burden of demonstrating that personal presence could have substantially benefitted the defense]; accord, *People v. Johnson* (2013) 221 Cal.App.4th 943, 949.)

e. What About Statements Made by the Defendant?

The Fifth Amendment's privilege against self-incrimination applies to competency examinations, and therefore a defendant's statements made during such an examination may not be used by the prosecution to prove its case-in-chief as to either guilt or penalty. (*Pokovich, supra,* 39 Cal.4th at p. 1246, citing *Estelle v. Smith* (1981) 451 U.S. 454, 468-469.) It also prohibits the prosecution from using at trial, for the purpose of impeachment, statements a defendant made during a court-ordered mental competency examination. (*Pokovich, supra,* at p. 1253.) The Court concluded "the impairment of the mental competency evaluation process if impeachment is permitted outweighs the speculative risk to the truth-seeking function of the criminal trial if impeachment is denied. [Footnote.] Accordingly, we conclude that the Fifth Amendment's privilege against self-incrimination prohibits the prosecution from using at trial, for the purpose of impeachment, statements a defendant has made during a court-ordered mental competency examination." (*Id.,* at p. 1253.)

Statements made while testifying at a competency hearing are a different matter. If the defendant chooses to testify, he or she should be advised that if he or she testifies *voluntarily*, anything said during that testimony can be used against him or her in future proceedings in the criminal case since such statements are not compelled. (*People v. Dunkle* (2005) 36 Cal.4th 861, 905-906; disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

5. What is the Burden of Proof and Who Bears It?

The presumption is that the defendant is competent. (Pen. Code, sec. 1369, subd. (f).) The burden of proof is borne by the party claiming incompetence, who must show incompetence by the preponderance of the evidence. (*Ibid.*; *Medina v California* (1992) 505 U.S. 437; *People v. Marshall* (1997) 15 Cal.4th 1, 31; *People v. Rells* (2000) 22 Cal.4th 860, 865 [presumed competent at restoration hearing under Pen. Code, § 1372].)

What happens if the experts say the defendant is incompetent, but the court rejects that evaluation and the defendant is nonetheless found to be competent? The court examined this situation in *In re R.V., supra,* 61 Cal.4th 181. The court held that in such a situation, there is not substantial evidence to support the verdict. When the court rejects the defense expert, the only evidence in the case, "the inquiry on appeal is whether the weight and character of the evidence of incompetency was such that the . . . court could not reasonably reject it." (*Id.* at p. 199; but see *In re Albert C.* (2015) 241 Cal.4th 1436, 1455-1456, review granted February 24, 2016, S231315 [court can find minor competent, despite the expert's contrary opinion, when the basis for incompetence was the minor's youth and the court could reasonably conclude the minor learned court procedures after eight months].)

6. What Evidence May be Presented?

As stated above, the party seeking to show that the defendant is incompetent must establish his or her inability to understand the nature of the proceedings or to assist in the presentation of the defense. It is permissible for the parties to stipulate that the matter can be determined based on the written reports of the experts and that they need not testify in person. (*People v. Weaver* (2001) 26 Cal.4th 876, 903-904; *People v. McPeters* (1992) 2 Cal.4th 1148, 1168-1169.) This does not violate the due process right to an adversarial hearing. (*McPeters, ibid.*)

Other evidence that might be considered probative are records of earlier hospitalizations; other treatments for the defendant's mental illness; reports of professional personnel with whom the defendant had contact; friends, relatives, co-workers, or others familiar with the defendant who can testify about his or her present mental state or history of mental illness. (See, e.g., *Pate v. Robinson, supra,* 383 U.S. 375, 378, fn. 2 [family members and friends testified]; *People v. Campbell* (1976) 63 Cal.App.3d 599, 605 [friend of defendant testified].)

The defendant's courtroom demeanor may be considered by the finder of fact. The prosecutor may urge the finder of fact to observe the defendant. (*People v. Prince* (1988) 203 Cal.App.3d 848, 856.) If the defendant is under the influence of antipsychotic medications during the hearing, it is possible in the appropriate case to argue that his or her

defense was impaired due to the administration of the drug. (See *Riggins v. Nevada* (1992) 504 U.S. 127 [112 S.Ct. 1810, 118 L.Ed.2d 479]; accord, *People v. Mar* (2002) 28 Cal.4th 1201, 1227-1228.)

7. Verdict

As in a criminal case, a jury verdict on the issue of a defendant's competency must be unanimous. (Pen. Code, sec. 1369, subd. (f).) However, in spite of a unanimous verdict finding the defendant competent, the judge may still order a judgment of mental incompetence. This is because the proceedings are civil in nature, and therefore the trial court has jurisdiction under Code of Civil Procedure section 629 to render a judgment notwithstanding the verdict. (*People v. Conrad* (1982) 132 Cal.app.3d 361, 368; accord, *People v. Mapp* (1983) 150 Cal.App.3d 346, 350.) If the defendant is found competent to stand trial, criminal proceedings are reinstated. (Pen. Code, sec. 1370, subd. (a)(1)(A).)

8. What Happens When the Defendant is Found Incompetent?

a. The court must order the county mental health director or his or her designee to evaluate the defendant and to submit to the court a written recommendation regarding whether the defendant should be committed to a treatment facility, or may undergo outpatient treatment. The recommendation must be submitted to the court within 15 work days of the order. (Pen. Code, sec. 1370.01, subd. (a)(2)(A).)

b. The court must order the mentally incompetent defendant to be transported by the sheriff to a state hospital for the care and treatment of the mentally disordered, or to any other available public or private treatment facility or a community based residential treatment system. (Pen. Code, sec. 1370, subd. (a)(1)(B)(i).)

c. If the defendant has been charged with a felony offense specified in Penal Code section 290, the DA must determine whether he/she has either (1) previously been found mentally incompetent to stand trial on a charge of a Section 290 offense, or (2) whether he/she is currently the subject of a pending Section 1368 proceeding arising out of a charge of a Section 290 offense. If either is true, the court must be notified in writing. After an opportunity for a hearing, the court shall order the defendant delivered to a state hospital or other secure treatment facility unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment and would not pose a danger to the health and safety of others. (Pen. Code, sec. 1370, subd. (a)(1)(B)(ii).)

d. If the defendant was charged with a violent felony within the meaning of Penal Code section 667.5, subdivision (c), he/she may not be delivered to a state hospital or treatment facility unless it has a secured perimeter or a locked and controlled

treatment facility. (Pen. Code, sec. 1370, subd. (a)(1)(D), (E).) Outpatient status is permissible only if the court finds it will not pose a danger to the health or safety of others. (Pen. Code, sec. 1370, subd. (a)(1)(F).)

e. A sex offender must be placed in custody for six months, even if he will never regain competency. (*In re Williams* (2014) 228 Cal.App.4th 989, 1003-1004 [developmental delay]; *People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558, 1564.)

There has been an increasing problem of incompetent defendants not being transported to a state hospital in a timely manner. (*In re Loveton* (2016) 244 Cal.App.4th 1025, 1036 [trial court issued standing order that state hospital was to accept the defendant within 60 days of the commitment order].) An incompetent person cannot be "treated" at the jail. (*In re Williams, supra,* 228 Cal.App.4th at pp. 1005-1011; *In re Mille* (2010) 182 Cal.App.4th 635, 645-649; see also *People v. Brewer* (2015) 235 Cal.App.4th 122, 140-143.) The California Supreme Court recently granted review in *In re Albert C., supra,* 241 Cal.App.4th 1436, review granted February 24, 2016, S231315 in order to determine whether it was a violation of due process to detain a minor past the 120 day limit established in the Los Angeles County Superior Court Juvenile Division's "Amended Competency to Stand Trial Protocol" without evidence of progress toward attaining competency.

The court cannot place under Welfare and Institutions Code section 6500 et seq. a developmentally disabled person in a facility for treatment of the developmentally disabled when that facility has refused to accept him for safety reasons and has so notified the court in writing. (Welf. & Inst. Code, sec. 6510.5; *In re Williams, supra,* 228 Cal.App.4th at pp. 1015-1017.)

The defendant cannot be held as incompetent indefinitely. (*Jackson v. Indiana* (1972) 406 U.S. 715, 730, 738; see also *In re Davis* (1973) 8 Cal.3d 798, 801; *People v. Quiroz* (2016) 244 Cal.App.4th 1371, 1378.) He "cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." (*Davis, ibid.*) One cannot be held more than three years or the maximum penalty for the crime, even if there are multiple pretrial commitments from multiple informations in the same case. (Pen. Code, sec. 1370, subd. (c)(1); *In re Polk* (1999) 71 Cal.App.4th 1230, 1238; accord, *People v. G.H.* (2014) 230 Cal.app.4th 1548, 1558.)

The court shall determine precommitment credits. (Pen. Code, sec. 1370(a)(3)(C); *In re Banks* (1979) 88 Cal.App.3d 864, 867.) If the defendant is committed for three years because the maximum penalty is greater, he or she does not receive any precommitment credits. (*People v. G.H., supra,* 230 Cal.App.4th at pp. 1557-1558; *People v. Reynolds*

(2011) 196 Cal.App.4th 801, 807-809.) If a defendant is later found to be competent, he or she cannot receive conduct credits toward the criminal sentence for the time in the state hospital. (*People v. Waterman* (1988) 42 Cal.3d 565, 568-569.)

When the certificate of restoration of competence is filed, the court shall order the defendant returned to court. (Pen. Code, sec. 1370, subd. (a)(1)(C).)

9. What About Antipsychotic Medications?

An order authorizing antipsychotic medications is appealable as an order after judgment, affecting the substantial rights of the party. (Pen. Code, sec. 1237, subd. (b); *Fields, supra,* 62 Cal.2d at p. 542; *Christiana, supra,* 190 Cal.App.4th at pp. 1046-1047.) An order authorizing involuntary treatment under Penal Code section 1370 is reviewed for substantial evidence. (*Christiana, supra,* at pp. 1049–1050; accord, *People v. Coleman* (2012) 208 Cal.App.4th 627, 633.) No objection is required to challenge the sufficiency of the evidence on appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126–1128; see *Christiana, supra,* at pp. 1046-1047.)

A defendant has a significant liberty interest in "avoiding the unwanted administration of antipsychotic drugs." (*Sell v. United States* (2003) 539 U.S. 166, 178; accord, *People v. Fisher* (2009) 172 Cal.App.4th 1006, 1012-1013.) This interest is protected by the due process clause of the Fifth Amendment as well as article I, section 1 of the California Constitution. (*Qawi, supra,* 32 Cal.4th at p. 17; *Riese v. St. Mary's Hospital & Medical Center, supra,* 209 Cal.app.3d at p. 1318.) Penal Code section 1370 provides that prior to committing an incompetent defendant to a facility for restoration of competence, "[t]he court shall hear and determine whether the defendant lacks capacity to make decisions regarding the administration of antipsychotic medication." (Pen. Code, sec. 1370, subd. (a)(2)(B).) If the court determines that the defendant is able to make decisions about medication, it must then ask defendant whether he consents to the administration of antipsychotic medication. (Pen. Code, sec. 1370, subd. (a)(2)(B)(iv) & (v).) If the defendant consents, then "the court order of commitment shall include confirmation that antipsychotic medication may be given to the defendant as prescribed by a treating psychiatrist pursuant to the defendant's consent." (Pen. Code, sec. 1370, subd. (a)(2)(B)(iv).) If the defendant does not consent, the commitment order must direct the treating psychiatrist to determine whether antipsychotic medication is medically necessary and appropriate and "make efforts to obtain informed consent from the defendant for antipsychotic medication." (Pen. Code, sec. 1370, subds. (a)(2)(B)(v) & (a)(2)(C).) If after this process the defendant still does not consent, "the defendant shall be returned to court for a hearing . . . regarding whether antipsychotic medication shall be administered involuntarily." (Pen. Code, sec. 1370, subd. (a)(2)(B)(v).)

To override the liberty interest in avoiding the unwanted administration of antipsychotic drugs, due process requires the trial court to determine four factors before such drugs may be involuntarily administered for the purpose of rendering the defendant competent to stand trial:

1. The court must find that an important governmental interest is at stake;
2. The court must conclude that involuntary medication will significantly further those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial, *and* that administration of the drugs is substantially unlikely to have side effect that will interfere significantly with the defendant' ability to assist counsel in conducting a trial defense.
3. The court must conclude that involuntary medication is necessary to further those interests and that any alternative, less intrusive treatments are unlikely to achieve substantially the same results;
4. The court must conclude that administration of the drugs is medically appropriate, i.e. in the patient's best medical interest in light of the medical condition.

(*Sell, supra,* 539 U.S. at pp. 178, 180-181; see also *People v. O'Dell* (2005) 126 Cal.App.4th 562, 569; *Christiana, supra,* 190 Cal.App.4th at p. 1049.) These factors are inapplicable when the administration of antipsychotic medication is proposed for a different purpose such as to minimize the defendant's dangerousness or when he or she has refused to take the medication, thereby putting his or her health gravely at risk. (*Sell, supra,* 539 U.S. at pp. 181-182; *O'Dell, supra,* 126 Cal.app.4th at p. 569.)

California's statute authorizing involuntary treatment essentially tracks the *Sell* factors. (*O'Dell, supra,* 126 Cal.App.4th at p. 569.) "The court shall hear and determine whether the defendant lacks capacity to make decisions regarding administration of antipsychotic medication. The court shall consider opinions in the reports prepared pursuant to subdivision (a) of Section 1369, as applicable to the issue of whether the defendant lacks capacity to make decisions regarding the administration of antipsychotic medication . . ." (Pen. Code, sec. 1370, subd. (a)(2)(B).) Pursuant to Penal Code, section 1370, subdivision (a)(2)(B)(i), the court must determine whether *any* of the following is true:

(I) The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and, if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder and his or her condition is substantially deteriorating. The fact that a

defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant.

(II) The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another that resulted in his or her being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others. Demonstrated danger may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within six years prior to the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence.

(III) The people have charged the defendant with a serious crime against the person or property, involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial, the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner, less intrusive treatments are unlikely to have substantially the same results, and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition.

If *any* of the foregoing conditions exist, the court must issue an order authorizing the treatment facility to involuntarily administer antipsychotic medication as prescribed by the treating psychiatrist. (Pen. Code, sec. 1370.01, subd. (a)(2)(B)(ii).)

D. Commitment Extensions

If the defendant has not regained competency by the end of the commitment, he or she can be committed under the Lanterman-Petris-Short (LPS) Act under a *Murphy* conservatorship. (*People v. Sheirik* (1991) 229 Cal.App.3d 444, 456-457.) The court must find that "by reason of a mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177; *People v. Karriker* (2007) 149 Cal.App.4th 763, 775-777.) Criminal proceedings remain suspended. (See *Karriker,* at pp. 780-781.)

E. Miscellaneous Matters

Penal Code section 1367 et seq. was amended, effective January 1, 2015, to apply to those on probation, parole, postrelease community supervision, and mandatory supervision. Penal Code section 1370.02 was added to apply to those on parole or postrelease community

supervision. It provides that "the defendant is found mentally incompetent, the court shall dismiss the pending revocation matter and return the defendant to supervision." (Pen. Code, sec. 1370.02, subd. (b).) If the revocation matter is dismissed pursuant to this subdivision, the court may modify the conditions or refer the matter for a commitment under the LPS Act. (*Ibid.*)

Penal Code section 1367 et seq. does not apply to juveniles. (*In re Patrick H.* (1997) 54 Cal.App.4th 1346, 1359.) The minor does have a due process right to a competency hearing. (*In re Ricky S.* (2008) 166 Cal.App.4th 232, 234; *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857.) The statutory procedure for determining if a minor is incompetent is similar. (Welf. & Inst. Code, sec 709; Cal. Rules of Court, rule 5.645(d); *In re R.V., supra,* 61 Cal.4th 181, 193-194; *Timothy J., supra,* at pp. 857-858; *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 172-178.) A minor can be found to be incompetent if he does not understand the proceedings or is unable to assist counsel. But the test for competence does not include the minor's education or knowledge of the juvenile court system. (*In re Alejandro G.* (2012) 205 Cal.4th 472, 478-480.) Nonetheless, a minor under the age of 14 years cannot be found to be a ward if he did not understand the wrongfulness of his actions. (Pen. Code, sec. 26.) A minor can be found incompetent if he cannot understand the wrongfulness of his actions because of immaturity or developmental delay. (*In re Matthew N.* (2013) 216 Cal.App.4th 1412, 1420-1421; *Timothy J., supra,* at pp. 856-862.) Adequate services must be provided to an incompetent minor. (see *In re Jesus G.* (2013) 218 Cal.App.4th 157, 174.)

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

A. Generally

Contrary to popular belief, it is not easy to prove that your client was insane at the time he or she committed a crime. In California, " [i]n any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, sec. 25, subd. (b); *People v. Elmore* (2014) 59 Cal.4th 121, 140; see also *People v. Wilder* (1995) 33 Cal.App.4th 90, 98.)

B. Elements

The test of legal insanity in California is the rule in *M'Naghten's Case* (1843) 10 Clark & Fin. 200, 210 [8 Eng.Rep. 718, 722], as adopted by the electorate in June 1982 with the

passage of Proposition 8. Despite the use of the conjunctive "and" instead of M'Naghten's disjunctive "or," the California Supreme Court has interpreted the statute as recognizing two distinct and independent bases on which a verdict of not guilty by reason of insanity might be returned. (*People v. Skinner* (1985) 39 Cal. 3d 765, 769; accord, *People v. Kelly* (1992) 1 Cal.4th 495, 533; *Lawley, supra,* 27 Cal.4th at pp. 169-170.) "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.' [Citations.]" (*Kelly, supra,* at p. 532; accord, *Skinner, supra,* at p. 768 [depends on objective, not subjective right and wrong].) "The relevant inquiry regarding sanity is whether the defendant was incapable of distinguishing right from wrong, that is, of realizing that his crimes were morally wrong." (*Kelly, supra,* at p. 535.)

C. Procedure

Under California law, if a defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and sanity are tried separately. Penal Code section 1026, subdivision (a), provides that in such circumstances, "the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed." (*People v. Hernandez* (2000) 22 Cal.4th 512, 520 see also *Elmore, supra,* 59 Cal.4th at p. 141.)

A plea of insanity concedes the act but seeks to avoid the penalty. (*Hernandez, supra,* 22 Cal.4th at p. 520.) "The 'sanity trial is but part of the same criminal proceeding as the guilt phase' [citation] but differs procedurally from the guilt phase or trial 'in that the issue is confined to sanity and the burden is upon the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense' [citation]. As in the determination of guilt, the verdict of the jury must be unanimous." (*Id.* at pp. 520-521.)

Insanity negates intent under Penal Code section 25, subdivision (b). (*Skinner, supra,* 39 Cal.3d at p. 773; *People v. Miller* (1972) 7 Cal.3d 562, 568.) Insanity cannot be based solely on drug or alcohol use (Pen. Code, sec. 29.8; *People v. Cabonce* (2009) 169 Cal.App.4th 1421, 1434-1439), but it can be a partial cause. (*People v. Robinson* (1999) 72 Cal.App.4th 421.) Insanity does not include an irresistible impulse. (*People v. Clark* (2011)

52 Cal.4th 856, 975-976; *People v. Coddington* (2000) 23 Cal.4th 529, 602; *People v. Steverance* (2006) 138 Cal.App.4th 305, 324 [head trauma leading defendant to believe receiving commands from Satan to rob was an irresistible impulse now banned].) There is no longer a defense of diminished capacity, though the defendant can still argue a lack of specific intent. (*People v. Saille* (1991) 54 Cal.3d 1103, 1116-1117.)

Penal Code "Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state." (*Coddington, supra,* 23 Cal.4th at p. 582; accord, *People v. Pollock* (2004) 32 Cal.4th 1153, 1172; *People v. Cortes* (2011) 192 Cal.App.4th 873, 908-911.)

> Penal Code sections 25 and 28 prohibit the admission of evidence of the defendant's "intoxication, trauma, mental illness, disease, or defect" if its purpose is "to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged" (Pen. Code, sec. 25, subd. (a)) or "with which the accused committed the [crime]" (Pen. Code, sec. 28, subd. (a)), or "required ... for the crimes charged" (Pen. Code, sec. 29). In other words, the defendant cannot put on an expert to testify that, because of his mental disorder or condition (for example, dissociation, or PTSD), he or she did not have the ability, or capacity, to form or harbor whatever mental state is a required element of the charged offense, such as intent to kill, or malice aforethought, or premeditation, or deliberation. (*Cortes, supra,* 192 Cal.App.4th at p. 908.)

Unless requested by the defense, it is error for the court to instruct the jury the defendant would be released if not committed. (*People v. Collins* (1992) 10 Cal.App.4th 690, 696; *People v. Kipp* (1986) 187 Cal.App.3d 748, 750-751.)

D. Commitment Extensions

Once found not guilty by reason of insanity, there are three ways to be released:

1. The patient shows sanity has been restored under Penal Code section 1026.2;
2. The court approves outpatient treatment upon recommendation of the medical director under Penal Code section 1600 et seq., and
3. Upon the expiration of the maximum time of commitment unless an extension petition is filed pursuant to Penal Code section 1026.5, subdivision (b). (*People v. Soiu* (2003) 106 Cal.App.4th 1191, 1194-1195; *People v. Sword* (1994) 29 Cal.App.4th

614, 620.)

It is a violation of due process for a defendant who is no longer insane to remain in custody. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 86; *Jones v. United States* (1983) 463 U.S. 354, 370; *O'Connor v. Donaldson* (1975) 422 U.S. 563, 575; *Jackson v. Indiana, supra,* 406 U.S. 715.)

E. Application for Release Pursuant to Penal Code section 1026.2

Release under Penal Code section 1026.2 is a two-step process. First, the defendant petitions for a hearing in order to show he would not be a danger because of mental illness if he is released under the supervision and treatment in the community. (Pen. Code, sec. 1026.2, subd. (a).) A hearing may not be held until the defendant has been confined or placed on outpatient status for at least 180 days from the date of the order of commitment. (Pen. Code, sec. 1026, subd. (d).)

At the hearing, the court must determine whether the defendant "would be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community." (Pen. Code, sec. 1026.2, subd. (e).)

1. If the court determines the defendant would not be, it shall order the defendant "placed with an appropriate forensic conditional release program for one year. All or a substantial portion of the program shall include outpatient supervision and treatment." (*Ibid.*)

2. At the end of that year, a trial is held to determine whether sanity has been restored, meaning the defendant is no longer a danger to the health and safety of others due to mental defect, disease, or disorder." (*Ibid.*) It is possible to have this determination sooner than one year, but only if the community program director makes a recommendation for restoration of sanity and unconditional release. (*Ibid.; Soiu, supra,* 106 Cal.App.4th at p. 1196.) The defendant has the burden of proof. (See *People v. Bartsch* (2008) 167 Cal.App.4th 896, 903.)

a. Restoration of Sanity

If the court determines that sanity has been restored, it must also decide whether unconditional release should be granted. (Pen. Code, sec. 1026.2, subd. (h).)

b. What Happens After the Trial?

If the court determines that sanity has *not* been restored, it may place the defendant on outpatient status if he or she meets all of the requirements of Penal Code section 1603.

That section provides:

> (a) Before any person subject to subdivision (a) of Section 1601 may be placed on outpatient status the court shall consider all of the following criteria:
> (1) Whether the director of the state hospital or other treatment facility to which the person has been committed advises the committing court and the prosecutor that the defendant would no longer be a danger to the health and safety of others, including himself or herself, while under supervision and treatment in the community, and will benefit from that status.
> (2) Whether the community program director advises the court that the defendant will benefit from that status, and identifies an appropriate program of supervision and treatment.
> (b)(1) Prior to release of a person under subdivision (a), the prosecutor shall provide notice of the hearing date and pending release to the victim or next of kin of the victim of the offense for which the person was committed where a request for the notice has been filed with the court, and after a hearing in court, the court shall specifically approve the recommendation and plan for outpatient status pursuant to Section 1604. The burden shall be on the victim or next of kin to the victim to keep the court apprised of the party's current mailing address.
> (2) In any case in which the victim or next of kin to the victim has filed a request for notice with the director of the state hospital or other treatment facility, he or she shall be notified by the director at the inception of any program in which the committed person would be allowed any type of day release unattended by the staff of the facility.
> (c) The community program director shall prepare and submit the evaluation and the treatment plan specified in paragraph (2) of subdivision (a) to the court within 30 calendar days after notification by the court to do so.
> (d) Any evaluations and recommendations pursuant to paragraphs (1) and (2) of subdivision (a) shall include review and consideration of complete, available information regarding the circumstances of the criminal offense and the person's prior criminal history.

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

of the evidence, that he is either no longer mentally ill or not dangerous." (*Id.* at p. 624.) Outpatient treatment is required; it cannot be bypassed. (*People v. McDonough* (2011) 196 Cal.App.4th 1472, 1493.)

F. Can Outpatient Status be Revoked?

Yes, of course. There are two procedures for revoking outpatient status. The director of the program can petition the court for revocation because the patient requires extended inpatient treatment or because he refuses to accept further outpatient treatment and supervision. (Pen. Code, secs. 1608, 1610; *People v. DeGuzman* (1995) 33 Cal.App.4th 414, 420-421; *In re McPherson* (1985) 176 Cal.App.3d 332, 339-340.) Alternatively, the prosecution can petition the court on the ground the patient poses a danger to others. (Pen. Code, secs. 1609, 1610.) Due process requires that the person have as many rights as in a probation or parole hearing, and hearsay evidence is no more admissible than at a violation of probation hearing. (*McPherson, supra*, at pp. 340-341; but see *Sword, supra,* 29 Cal.App.4th at pp. 634-636 [hospital records admissible].) The government has the burden of proof by a preponderance of the evidence. (*DeGuzman, supra,* at pp. 419-420.) Outpatient status can be revoked before being placed in an outpatient program. (*People v. Parker* (2014) 231 Cal.App.4th 1423, 1432-1434.)

G. Maximum Confinement Time

The maximum confinement time is the longest sentence the defendant could serve for the crimes. Penal Code section 654 applies in calculating the maximum confinement time. (*People v. Nunez* (2012) 210 Cal.App.4th 625, 628-629; *People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1238.) Time in an outpatient program does not count toward the maximum confinement time. (Pen. Code, secs. 1026, subd. (b)(8), 1606; *People v. Superior Court (Henderson)* (1993) 12 Cal.App.4th 1308, 1312; but see *People v. Gunderson* (1991) 228 Cal.App.3d 1292, 1297.)

When the defendant is convicted of some crimes but found not guilty by reason of insanity on others, the defendant shall be committed until his sanity is restored, and the prison sentence shall be stayed until then. (Pen. Code, sec. 1026.2, subd. (m); *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1434; *People v. Chavez* (2008) 160 Cal.App.4th 882, 896-897.)

H. Commitment Extension Trials

It does not violate due process to commit the defendant beyond the length of time for which he could have been punished if he is still insane and a danger to himself or society. (*Jones v. United States, supra,* 463 U.S. at pp. 368-369.) A defendant is really only entitled

to release "when he has recovered his sanity or is no longer dangerous." (See *O'Connor v. Donaldson* (1975) 422 U.S. 563, 575-576.) Penal Code section 1026.5, subdivision (b)(1) permits two-years extensions beyond the maximum confinement time if the prosecution can show beyond a reasonable doubt that

(1) the defendant's mental illness

(2) causes a substantial risk of physical danger to others.

(Pen. Code, sec. 1026.5, subd. (b)(8); *People v. Tilbury* (1991) 54 Cal.3d 56, 63.) There does not need to be a recommendation from the medical director or the hospital. (*People v. Kendrid* (2012) 205 Cal.App.4th 1360, 1367-1369.) Penal Code section 1368 does not apply to NGI extension proceedings. (*People v. Angeletakis* (1992) 5 Cal.App.4th 963, 970-971.)

There are a series of deadlines for an NGI extension proceeding. However, they are not mandatory, as long as the petition is filed before the commitment expires. (*People v. Lara* (2010) 48 Cal.4th 215, 225-226.) The medical director of the treating state hospital shall deliver to the prosecution a recommendation for recommitment at least 180 days before the commitment expires, but the deadline is not jurisdictional. (Pen. Code, sec. 1026.5, subd. (b)(2); *People v. Mirahen* (1986) 179 Cal.App.3d 180.)

The prosecution shall file a petition at least 90 days before the commitment expires unless there is good cause. Even without good cause, the defendant must show prejudice. (Pen. Code, sec. 1026.5, subd. (b)(2); *Jackson v. Superior Court* (1983) 140 Cal.App.3d 526, 533; *People v. Echols* (1982) 138 Cal.App.3d 838, 842-843.) When there is a delay in filing a petition so that the trial cannot be held before the commitment ends, the remedy is not dismissal but release of the committed individual if the justification for the delay is not outweighed by the prejudice to the person, including the prejudice of remaining in custody. (*Lara, supra*, 48 Cal.4th at pp. 229, 236.) But the defendant can still be held in custody under the LPS Act. (See *Lara, supra,* 48 Cal.4th at p. 236.) There is no remedy after trial without showing the delay prejudiced the trial. (*Ibid.*)

The trial shall begin at least 30 days before the commitment expires, unless the defendant waives time or there is good cause. (Pen. Code, sec. 1062.5, subd. (b)(4).) There is not a due process violation for holding the trial after the expiration of the commitment in order to permit counsel to prepare when it is not caused by government delay. (*Lara, supra*, 48 Cal.4th at p. 232.)

The attorney does not have the right to waive the right to a jury unless there is substantial evidence the defendant lacks the competence to make this decision. (*People v. Tran* (2015) 61 Cal.4th 1160, 1166-1168.)

The defendant in an NGI extension trial cannot be compelled to testify because the NGI statute gives the defendant "the constitutional rights" that apply in criminal cases. (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 826; *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1228.)

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

A. Generally

The MDO Act was designed to confine mentally ill prisoners who were about to be released when it is deemed they have mental illness which contributed to them committing a violent crime. It applies to convicted felons who committed any of certain designated crimes for which a determinate sentence was received, and who has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The disorder must be one of the causes of or an aggravating factor in the commission of the crime, for which the felon has been in treatment for 90 days or more within the year before parole or release, but who, by reason of a severe mental disorder, represents a substantial danger of physical harm to others. By statute, the defendant is entitled to a jury trial. The jury must unanimously agree that the allegations of the petition were proved beyond a reasonable doubt. (*People v. Fisher* (2006) 136 Cal.App.4th 76, 81.)

There are currently 17 crimes for which a defendant has been convicted that can qualify him or her for MDO status. They are:

(1) Voluntary manslaughter.

(2) Mayhem.

(3) Kidnapping in violation of Section 207.

(4) Any robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

(5) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of the carjacking.

(6) Rape, as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(7) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(8) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(9) Lewd acts on a child under the age of 14 years in violation of Section 288.

(10) Continuous sexual abuse in violation of Section 288.5.

(11) The offense described in subdivision (a) of Section 289 where the act was accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(12) Arson in violation of subdivision (a) of Section 451, or arson in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others.

(13) Any felony in which the defendant used a firearm which use was charged and proved as provided in Section 12022.5, 12022.53, or 12022.55.

(14) A violation of Section 18745.

(15) Attempted murder.

(16) A crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243.

(17) A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury.

The offense can be any crime of force, violence, or great bodily injury. (*People v. Anzalone* (1999) 19 Cal.4th 1074, 1082.) The trier of fact can rely on police reports and probation reports. (*People v. Valdez* (2001) 89 Cal.App.4th 1013, 1017.) The offense cannot be one the defendant might have committed for which he was not convicted. (*People v. Kortesmaki* (2007) 156 Cal.App.4th 922, 927; *People v. Green* (2006) 142 Cal.App.4th 907, 913.)

B. Elements

Penal Code section 2962 lists six criteria that must be met for the initial MDO certification. The trial court must consider whether

1. the prisoner has a severe mental disorder;
2. the prisoner used force or violence in committing the underlying offense;
3. the severe mental disorder was one of the causes or an aggravating factor in the commission of the offense;
4. the disorder is not in remission or capable of being kept in remission without treatment;
5. the prisoner was treated for the disorder for at least 90 days in the year before his release; and
6. by reason of his severe mental disorder, the prisoner poses a serious threat of physical harm to others.

(Pen. Code, sec. 2962, subds. (a)-(d)(1); see *People v. Cobb* (2010) 48 Cal.4th 243, 251-252;

see also *People v. Anzalone, supra,* 19 Cal.4th at p. 1077.)

A "severe mental disorder" means an illness or disease or condition that either (1) substantially impairs the person's thought, perception of reality, emotional process, or judgment; (2) grossly impairs behavior; or (3) demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. (Pen. Code, sec. 2962, subd. (a)(2).) It specifically does *not* include personality or adjustment disorders, epilepsy, mental retardation or other developmental disabilities, or addiction or abuse of intoxicating substances. (*Ibid.*)

C. Procedure

1. Initial Determination

Prior to release on parole, the person in charge of treating the defendant and a psychiatrist or psychologist from the Department of Mental Health (D.H.) will evaluate the defendant. If he appears to be a MDO, the chief psychiatrist will certify to the Board of Parole Hearings (BPH) that the defendant meets the criteria. If the evaluators do not agree that he or she meets the criteria, the BPH must order an examination by two independent psychologists or psychiatrists. If at least one of the independent evaluators concurs with the chief psychiatrist's certification, then the MDO statutory scheme will apply to him or her. (Pen. Code, sec. 2962, subds. (d)(2), (3).)

The defendant cannot qualify as an MDO until he has received 90 days of inpatient treatment before the parole release date. (*People v. Del Valle* (2002) 100 Cal.App.4th 88, 93.) The treatment must be for the committing disorder. (*People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611.) It can include treatment received at the jail. (*People v. Martin* (2005) 127 Cal.App.4th 970, 974.) It can include outpatient treatment as required by parole. (*People v. Achrem* (2013) 213 Cal.App.4th 153, 157-159; but see *People v. Del Valle, supra,* 100 Cal.App.4th at p. 93 ["there is no suggestion [in the statutes] that a parolee may participate in treatment that is outside the auspices of the D.H."].)

2. What are the Defendant's Rights?

"Section 2966, subdivision (c) governs the second commitment phase. It provides that if an individual's parole is continued beyond one year pursuant to section 3001, and that individual"s treatment is also continued pursuant to section 2962, the individual may utilize the procedures outlined in section 2966 (a hearing before the BPH, or a court proceeding) *only* to challenge the dynamic commitment criteria — namely, that the individual suffers from a severe mental disorder that is not in remission, and that he or she poses a substantial risk of danger. (§ 2966, subd. (c).) If the offender's 'mental disorder is put into remission

during the parole period,' treatment must cease. (§ 2968.)" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1062-1063, overruled on another ground in *People v. Harrison* (2013) 57 Cal.4th 1211, 1218.) The defendant may file a petition for a hearing on whether he or she does in fact meet the criteria of a mentally disordered offender. The petition is filed in the superior court of the county in which he or she is incarcerated or is being treated. (Pen. Code, sec. 2966, subd. (b).) The hearing must be held within 60 days of the filing of the petition unless time is waived or good cause shown (*ibid.*) and the defendant has a statutory right to an attorney and a jury trial. (*People v. Sheek, supra,* 122 Cal.App.4th 1606.)

A finding that a defendant is not an MDO has collateral estoppel and res judicata effect on subsequent attempts to certify the defendant as an MDO. "[W]here a trial court has found that a severe mental disorder was not an aggravating factor in the commission of the crime, the People are precluded from seeking [subsequent] MDO determination[s] based on the same underlying offense." (*People v. Francis* (2002) 98 Cal.App.4th 873, 879; *People v. Crivello* (2011) 200 Cal.App.4th 612, 616.) In *Crivello,* the defendant was found incompetent to stand trial pursuant to Penal Code section 1368, then pled guilty after proceedings were reinstated. The BPH then determined he met the criteria under Penal Code section 2962 and sustained the condition that he undergo mental health treatment as a condition of parole. Crivello challenged the determination, and the trial court found that there was a reasonable doubt whether he had a substantial mental disorder that was a causative or aggravating factor in the robbery. The Court of Appeal found that the People could not later challenge a determination that defendant's mental illness did not contribute to the underlying offense by repeatedly initiating MDO proceedings.

D. Petitions for Continued Involuntary Treatment

" 'An MDO is committed for one-year period[s] and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year.' [Citation.]" (*Lopez v. Superior Court, supra,* 50 Cal.4th at p. 1063, disapproved on other grounds in *People v. Harrison, supra,* 57 Cal.4th at pp. 1222-1230, fn. 2.) The procedure is found in Penal Code section 2970, et. seq.

Penal Code section 2970, subdivision (a) provides that not later than 180 days prior to the termination of parole or release from prison if the defendant would not agree to treatment as a condition of parole, if the defendant's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital that is treating the parolee, or the community program director in charge of the parolee's outpatient program, or the Secretary of the Department of Corrections and Rehabilitation, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital, the district attorney for the county of commitment to prison, his or her written evaluation on remission.

The district attorney may then file a petition for continued involuntary treatment for one year. (Pen. Code, sec. 2970, subd. (b).) The petition must be filed with the court before the current commitment terminates, or the court will lose jurisdiction over the extension petition. (*People v. Allen* (2007) 42 Cal.4th 91, 104.) The prosecution has no power to file a petition without the medical director finding the defendant could not keep his mental disorder in remission. (*People v. Marchman* (2006) 145 Cal.App.4th 79, 84-89; *People v. Garcia* (2005) 127 Cal.App.4th 558, 565.) The statute does not require that the medical director of the hospital recommend that a petition be filed. (*People v. Hernandez* (2011) 201 Cal.App.4th 483, 488-489.) It does not require that the medical director find the defendant poses a danger. (*Id.* at pp. 489-490.)

The trial court must personally advise the defendant of his or her right to a jury trial and then hold the jury trial unless waived by both the defendant and the district attorney. (Pen. Code, sec. 2972, subd. (a); *People v. Blackburn, supra,* 61 Cal.4th 1113, 1116.) "The decision to waive a jury trial belongs to the NGI defendant in the first instance, and the trial court must elicit the waiver decision from the defendant on the record in a court proceeding. But if the trial court finds substantial evidence that the defendant lacks the capacity to make a knowing and voluntary waiver, then control of the waiver decision belongs to counsel, and the defendant may not override counsel's decision. In this context, evidence is substantial when it raises a reasonable doubt about the defendant's capacity to make a knowing and voluntary waiver, and the trial court's finding of a reasonable doubt must appear on the record." (*Blackburn, ibid.*)

Because MDO proceedings are civil in nature, the defendant has no constitutional right to self-representation; it is statutory only and within the trial court's discretion. (See *People v. Williams* (2003) 110 Cal.App.4th 1577, 1592; see also *People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1092-1093.) The denial of a request for self-representation is reviewable on appeal for abuse of discretion. In order to obtain a reversal, the appellant must show that it is more probable than not that he or she would have received a better result had self-representation been allowed. (*Hannibal, supra*, at p. 1093.)

The court cannot instruct the jury that the defendant would be released if the petition is found not to be true. (*People v. Collins* (1992) 40 Cal.App.4th 690, 693-695.) The court cannot direct a verdict for the prosecution. (*People v. Cosgrove* (2002) 100 Cal.App.4th 1266 1275.) It can grant summary judgment in favor of the prisoner. (*People v. Sheek, supra,* 122 Cal.App.4th at p. 1612; but see *People v. Superior Court (Salter)* (2011) 192 Cal.App.4th 1352, 1356-1359 [no summary judgment just because the prosecution expert now favors the defense].

E. Recommitment

If the court finds that the patient has a severe mental disorder which is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, it will order the patient recommitted to the facility, outpatient program, or state hospital for one year. (Pen. Code, sec. 2972, subd. (c).) "The term 'remission' means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person 'cannot be kept in remission without treatment' if during the year prior to the question being [presented] . . . he or she has not voluntarily followed the treatment plan." (Pen. Code, sec. 2962, subd. (a)(3).)

The prosecution can show the mental illness is not in remission if the defendant exhibits unexcused violence, threats, or damage to property. (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1399.) It can also be shown that a defendant's mental disorder cannot be kept in remission without treatment "by establishing that the defendant has failed to voluntarily follow his treatment plan." (*Ibid.*) "[N]ot voluntarily following the treatment plan is essentially an exception to the finding that the illness is in remission." (*Id.*, at p. 1400.) The defendant's claim that medication put the mental disorder in remission shifts the burden of proof to the prosecution. (*People v. Noble* (2002) 100 Cal.App.4th 184, 189-190.) Thus, "[t]he People have the burden to prove, beyond a reasonable doubt, that if released, the defendant will not take his or her prescribed medication and in an unmedicated state, the defendant represents a substantial danger of physical harm to others." (*Id.*, at p. 190.)

It is possible for a person whose commitment is extended to be released on outpatient status. "A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis." (Pen. Code, sec. 2972, subd. (d).)

There is no limit to the number of recommitment petitions that can be filed. (Pen. Code, sec. 2972, subd. (e); see *People v. Fernandez* (1999) 70 Cal.App.4th 117, 126.)

F. Outpatient Treatment

The court has the power at a recommitment hearing to place the defendant in CONREP on its own initiative. (*People v. May* (2007) 155 Cal.App.4th 350.) But the court does not have a *sua sponte* responsibility to consider it. (*People v. Rush* (2008) 163 Cal.App.4th 1370, 1384.) The defendant has the burden of proof to demonstrate reasonable cause to believe that he or she can be safely and effectively treated on an outpatient basis. (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 314-316.)

Penal Code section 1600 et seq. applies to outpatient MDO and NGI treatment. (Pen. Code, sec. 1600.5; *People v. Morris* (2005) 126 Cal.App.4th 527, 540.) When the MDO patient is receiving outpatient treatment, the court must hold a hearing within 30 days of the expiration of the one year period. (Pen. Code, secs. 1606, 2972.1, subd. (a); *Morris, supra,* at pp. 540-541.) The medical director shall send notice to the court, prosecutor, and defense attorney that the person requires more outpatient treatment or should be discharged. (Pen. Code, sec. 2972.1, subds. (b) & (c); *Morris, supra,* at p. 539.) If the medical director recommends more outpatient treatment, the prosecutor need not file a petition. (*People v. Garcia* (2005) 127 Cal.App.4th 558, 566-567; *Morris,* at p. 541.) If more treatment is required, and the person waives a jury trial, the court holds a hearing. (Pen. Code, sec. 2972.1, subd. (e); *Morris, supra,* at p. 540.) If more treatment is required, and the person does not waive a jury trial, the jury trial shall be heard within 60 days. (Pen. Code, sec. 2972.1, subd. (d); *Morris, supra,* at p. 540.)

Again, there are a series of deadlines, but they are not mandatory. (*People v. Cobb, supra,* 48 Cal.4th at pp. 249-250.) "Without a time waiver or good cause, section 2972 does not permit continued confinement when an extension trial does *not* begin before the scheduled release date." (*Id.* at p. 252.) The remedy is not dismissal, and release would be permitted only if the prejudice from being in custody after the commitment ended outweighs the government's justification for the delay. (*People v. Lara, supra,* 48 Cal.4th at pp. 229, 236.) The court can still detain the person under the LPS Act. (*Id.* at p. 236; *Cobb, supra,* at p. 259, fn. 3.) There is no remedy after trial without showing prejudice to the trial itself. (*Lara, supra,* at p. 236; *Cobb, supra,* at p. 253; see *People v. Allen, supra,* 42 Cal.4th at p. 105 [prejudice will almost always be impossible to show, even when the petition is filed after the expiration of the last term].) Nonetheless, the court loses jurisdiction when the government fails to file an MDO extension petition before the last commitment expires, if there is objection below. (*Allen, supra,* at p. 104.)

CONCLUSION

As these materials demonstrate, there are numerous issues to keep in mind when representing the mentally ill client. While they do not enjoy the full panoply of rights afforded criminal defendants, it is the duty of defense counsel to ensure that the rights they do have are scrupulously observed.