

**Mental Health at a Glance:
Mentally Disordered Offender¹**
(last revised 11/4/2015)

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¹ This article was drafted by CCAP staff and panel attorney Conness Thompson. CCAP wishes to thank Ms. Thompson for her extensive research on this foundation overview article. As always, counsel is encouraged to conduct their own independent research for current and applicable cases and/or statutory updates in an ever-changing body of law.

Overview

The Mentally Disordered Offenders (MDO) Act, Penal Code sections 2960 et seq., was enacted in 1985. (*In re Qawi* (2004) 32 Cal.4th 1, 9.) The MDO Act “requires that an offender who has been convicted of a specified felony related to a severe mental disorder and who continues to pose a danger to society receive appropriate treatment until the disorder can be kept in remission.” (*People v. Harrison* (2013) 57 Cal.4th 1211, 1218; see Pen. Code, § 2960.) “The act addresses treatment in three contexts—first, as a condition of parole ([Pen. Code,]§ 2962); then, as continued treatment for one year upon termination of parole ([Pen. Code,]§ 2970); and finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment ([Pen. Code,]§ 2972).” (*People v. Jauregui Garcia* (2005) 127 Cal.App.4th 558, 563.)

Statutes

The Mentally Disordered Offenders (MDO) Act is found at Penal Code section 2960, et seq. (*In re Qawi, supra*, 32 Cal.4th 1, 9.) Penal Code section 2960 presents the legislative findings and declarations for the MDO Act. The key MDO statutes include: (1) Penal Code section 2962: providing that a parolee may be committed as an MDO as a condition of parole; (2) Penal Code section 2965: providing that qualifying MDO parolees may receive treatment on an outpatient basis; (3) Penal Code section 2966: setting forth the procedure for challenging an MDO designation; (4) Penal Code section 2968: establishing that if a parolee’s severe mental disorder goes into and stays in remission during the parole period, treatment must be stopped; (5) Penal Code section 2970: providing for the extension of a commitment following the termination of parole or subsequent extension; (6) Penal Code section 2972: setting forth the procedures for extending a commitment; (7) Penal Code section 2972.1: setting forth the procedures related to an MDO receiving outpatient treatment. All of these codes sections are discussed in detail below.

Pen. Code, § 2960: Legislative Findings and Declarations

“The MDO Act requires CDCR to ‘evaluate each prisoner for severe mental disorders during the first year of the prisoner’s sentence’ and ‘provide [MDO prisoners] with an appropriate level of mental health treatment while in prison and when returned to the community.’ (Pen. Code, § 2960.)” (*Blakely v. Superior Court* (2010) 182 Cal.App.4th 1445, 1450.)

The legislative findings for the MDO Act are:

The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to

provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

(Pen. Code, § 2960.)

Pen. Code, § 2962: Treatment as Condition of Parole

“As a condition of parole, a prisoner who meets the [criteria set forth in Penal Code section 2962] shall be required to be treated by the State Department of State Hospitals, and the State Department of State Hospitals shall provide the necessary treatment.” (Pen. Code, § 2962.) The criteria are: “(1) the prisoner has a severe mental disorder; (2) the prisoner used force or violence in committing the underlying offense; (3) the prisoner had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission in the absence of treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder the prisoner poses a serious threat of physical harm to other people. ([Pen. Code] § 2962; [Citation].)” *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610.) The underlying criminal offense (criteria #2 above; see Pen. Code, § 2962, subd. (b)) must be one of the offenses listed in Penal Code section 2962, subdivision (e)(2)(A)–(Q).

“An MDO proceeding is commenced at the time of a prisoner's parole, and the proceeding is governed by criteria and conduct that assess the prisoner's mental condition at the time of parole.” (*People v. Renfro* (2004) 125 Cal.App.4th 223, 231.) The purpose of the proceeding is twofold—to provide mental health treatment for those suffering from severe mental illness and to protect the public from an individual who cannot be safely released. (*People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 837.) “Although related to the crime for which a person was imprisoned, an MDO proceeding focuses on criteria determined by mental health professionals [and thus,] an MDO proceeding is civil in nature, not criminal.” (*People v. Renfro, supra*, 125 Cal.App.4th 223, 231.)

Pen. Code, § 2964: Inpatient / Outpatient Treatment

Under the MDO law, the required treatment to be provided as a condition of parole “must be inpatient unless the Department of Mental Health certifies to the Board of Prison Terms that it is safe to treat the parolee on an outpatient basis. Outpatient treatment can be revoked and the parolee can be placed in a secure mental health facility if the outpatient mental health director thinks the parolee cannot be safely and effectively treated in the community. ([Pen. Code,] § 2964, subd. (a).)” (*People v. Superior Court (Myers), supra*, 50 Cal.App.4th 826, 831.)

Pen. Code, § 2966: Challenges to Treatment as Condition of Parole

To challenge a determination that treatment must be a condition of parole, a prisoner may request a hearing before the Board of Prison Terms. (Pen. Code, § 2966, subd. (a).) If the Board of Prison Terms finds that the MDO criteria are met, the prisoner may then file a petition “in the superior court of the county in which he or she is incarcerated or is being treated” for a hearing to determine whether he or she meets the MDO criteria. (Pen. Code, § 2966, subd. (b).) “The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.” (Pen. Code, § 2966, subd. (b).)

Pen. Code, § 2968: Remission of Prisoner’s Severe Mental Disorder

“If the prisoner’s severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of State Hospitals shall notify the Board of Parole Hearings and the State Department of State Hospitals shall discontinue treating the parolee.” (Pen. Code, § 2968.)

Pen. Code, § 2970: Evaluation at End of Parole

At the end of the parole term, the director of the program overseeing the MDO’s inpatient or outpatient treatment program (or the Secretary of CDCR if the MDO refused treatment as a condition of parole) shall submit to the district attorney an evaluation for any MDO whose severe mental disorder is not in remission or cannot be kept in remission without treatment. (Pen. Code, § 2970, subd. (a).) If continued treatment is sought, “[t]he district attorney may then file a petition with the superior court for continued involuntary treatment for one year” alleging that the individual suffers from a severe mental disorder that is not in remission, and that he or she poses a substantial risk of harm to others. (Pen. Code, § 2970, subd. (b).)

Pen. Code, § 2972: Hearing on Petition for Continued Treatment

Penal Code section 2972 sets forth the procedural requirements for a Penal Code section 2970 hearing: “The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.” (Pen. Code, § 2972, subd. (a).) “The standard of proof . . . shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.” (Pen. Code, § 2972, subd. (a).) “If the court or jury finds that the patient has a severe mental disorder, that the patient’s severe mental disorder 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, the court shall order the patient recommitted.” (Pen. Code, § 2972, subd. (c).) “The

commitment shall be for a period of one year from the date of termination of parole or a previous commitment.” (Pen. Code, § 2972, subd. (c).)

Note that while the right to a jury trial in a criminal proceeding “is a federal and state constitutional right that must be waived by the defendant personally . . . where a jury trial right is merely statutory, the federal Constitution is generally not implicated, and the right may be waived by counsel. [Citations.]” (*People v. Montoya* (2001) 86 Cal.App.4th 825, 829.) Thus, because an MDO hearing is civil in nature, “defense counsel may waive a jury on behalf of defendant.” (*People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1274.) However, this issue is presently before the California Supreme Court. (See California Supreme Court - Pending section below for discussion of *People v. Blackburn*, which considers the issue of whether the trial court prejudicially erred by failing to advise the MDO defendant of his right to jury trial and obtain a personal waiver of that right.)

Pen. Code, § 2972.1: Outpatient Status Pursuant to Section 2972

“Outpatient status for persons committed pursuant to [Penal Code s]ection 2972 shall be for a period not to exceed one year.” (Pen. Code, § 2972.1, subd. (a).) At the end of the one-year period, the court must hold a hearing to determine whether to discharge the MDO from commitment, order the MDO confined to a treatment facility, or renew its approval of the MDO’s outpatient status. (Pen. Code, § 2972.1, subd. (a).)

Jury Instructions

The annotations to the CALCRIM instructions, as found in either Westlaw or Lexis Nexis, are a good starting point for case law, secondary sources, and other authority that may prove helpful in crafting an argument on appeal.

CALCRIM 3456

Initial Commitment of Mentally Disordered Offender As Condition of Parole
(Pen. Code, § 2962)

The petition alleges that *<insert name of respondent>* is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. (He/She) was convicted of *<specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)>* and received a prison sentence for a fixed period of time;
2. (He/She) had a severe mental disorder;
3. The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;

4. (He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;

5. The severe mental disorder either was not in remission, or could not be kept in remission without treatment;

AND

6. Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.

A. severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her 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 (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on <insert date of hearing, if desired>], the person:

<Give one or more alternatives, as applicable>

[1 Was physically violent except in self-defense; [or]]

[2 Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3 Intentionally caused property damage; [or]]

[4 Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that <insert name of respondent> is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

CALCRIM 3457

Extension of Commitment as Mentally Disordered Offender
(Pen. Code, § 2972.)

The petition alleges that *<insert name of respondent>* is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Prison Terms]:

1. (He/She) (has/had) a severe mental disorder;
2. The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;

AND

3. Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.

A severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her 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 (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to *<insert the date the trial commenced>* the person:

<Give one or more alternatives, as applicable>

[1 Was physically violent except in self-defense; [or]]

[2 Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3 Intentionally caused property damage; [or]]

[4 Did not voluntarily follow the treatment plan.]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that *<insert name of respondent>* is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

Issue Spotting

Sufficiency of the Evidence

Crime Committed Not a Qualifying Offense

In an MDO proceeding, one of the elements that must be found beyond a reasonable doubt is that the person's mental disorder was the cause of or an aggravating factor in the commission of a criminal offense. (Pen. Code, § 2962, subd. (b).) This element must be read in conjunction with Penal Code section 2962, subdivision (e). (*People v. Green* (2006) 142 Cal.App.4th 907, 911.) Penal Code section 2962, subdivision (e), states that the criminal offense referred to in subdivision (b) must meet two criteria: (1) that the defendant received a determinate sentence for the offense (Pen. Code, § 2962, subd. (e)(1)); (2) the offense is one of the offenses listed in subdivision (e)(2) (Pen. Code 2962, § subd. (e)(2)). If the underlying offense is not a qualifying offense listed in Penal Code section 2962, subd. (e)(2), then treatment as an MDO is not triggered. (*People v. Green, supra*, 142 Cal.App.4th 907, 913.)

People v. Green, supra, 142 Cal.App.4th 907, illustrates this issue. In *Green*, the defendant appealed the order committing him as an MDO, contending that the trial court erred in ruling that his commitment offense of felony vandalism (Pen. Code, § 594, subd. (a)), involved the use of force or violence as contemplated by Penal Code section 2962. (*Id.* at p. 908.) The vandalism with which the defendant was charged was the breaking of a police car window. This occurred after someone called the police to complain that transients, including the defendant, were begging for money and shoplifting. (*Id.* at p. 911.) The responding officers detained the defendant and placed him in the police car, at which point he kicked out one of the windows. (*Ibid.*) The Court of Appeal held that the application of force to an inanimate object does not fall within the offenses listed in Penal Code section 2962, subdivision (e)(2), and thus was not a qualifying offense under the MDO statute. (*Id.* at p. 913.)

Standard of Review

“The substantial evidence rule applies to appellate review of the sufficiency of the evidence in MDO proceedings.” (*People v. Labelle* (2010) 190 Cal.App.4th 149, 151.) The record is reviewed “in the light most favorable to the judgment to determine whether it discloses substantial evidence—‘evidence that is reasonable, credible, and of solid value’—such that a

reasonable trier of fact could find beyond a reasonable doubt that the commitment offense was a qualifying offense under the MDO statute. [Citation.]” (*Ibid.*)

Standard of Prejudice

Not applicable; no need to show prejudice if there is insufficient evidence to support an order.

Extension Disorder Different than Original Disorder

In seeking to extend an MDO’s commitment upon the expiration of his or her parole, the basis for extending that commitment must be the same mental disorder for which the defendant was originally treated as a condition of parole. (*People v. Jauregui Garcia* (2005) 127 Cal.App.4th 558, 567.) *People v. Jauregui Garcia, supra*, 127 Cal.App.4th 558 illustrates this issue. In that case, at the extension hearing, the prosecutor “presented evidence to show that [the] defendant’s severe mental disorder was pedophilia . . . [however,] the Department had not diagnosed [the] defendant with that mental disorder. Therefore, [the] defendant had not been treated for pedophilia [while committed].” (*Id.* at p. 567.) Because this was a different disorder, the reviewing court reversed the defendant’s commitment extension, stating that “[t]he mental disorder for which extended involuntary treatment is sought must be the same mental disorder for which defendant was treated as a condition of his parole.” (*Ibid.*)

Standard of Review

“The substantial evidence rule applies to appellate review of the sufficiency of the evidence in MDO proceedings.” (*People v. Labelle* (2010) 190 Cal.App.4th 149, 151.) The record is reviewed “in the light most favorable to the judgment to determine whether it discloses substantial evidence—‘evidence that is reasonable, credible, and of solid value’—such that a reasonable trier of fact could find beyond a reasonable doubt that the commitment offense was a qualifying offense under the MDO statute. [Citation.]” (*Ibid.*)

Standard of Prejudice

Not applicable; no need to show prejudice if there is insufficient evidence to support an order.

Opinion by Psychiatric Experts

A single opinion by a psychiatric expert that a person is currently dangerous due to a severe mental disorder may constitute substantial evidence to support the extension of a commitment. (Cf. *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165.) However, “‘expert medical opinion evidence that is based upon a ‘guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence.’ [Citations.]” (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1504.)

Standard of Review

“The substantial evidence rule applies to appellate review of the sufficiency of the evidence in MDO proceedings.” (*People v. Labelle* (2010) 190 Cal.App.4th 149, 151.) The record is reviewed “in the light most favorable to the judgment to determine whether it discloses substantial evidence—‘evidence that is reasonable, credible, and of solid value’—such that a reasonable trier of fact could find beyond a reasonable doubt that the commitment offense was a qualifying offense under the MDO statute. [Citation.]” (*Ibid.*)

Standard of Prejudice

Not applicable; no need to show prejudice if there is insufficient evidence to support an order.

Instructional Error

Affirmative Defense

It is error for a trial court to give an affirmative defense instruction at a Penal Code section 2972 MDO commitment extension hearing based on a defendant’s theory that her mental disorder is controlled by medication and that she would not present a danger to others if released because she would continue to take the required medication. (*People v. Noble* (2002) 100 Cal.App.4th 184.) It is error in part because this is not a true affirmative defense—it challenges the elements of the extension petition rather than introduces new, exculpatory evidence. (*Id.* at p. 189.) Further, it is error because it shifts the burden to the defendant to prove by a preponderance of the evidence that she is in remission and thus not dangerous to others while medicated. (*Id.* at p. 190.) “Under the MDO statute, [a] defendant’s commitment may not be extended unless the prosecution proves, beyond a reasonable doubt, that [the defendant] has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and that, as a result of the disorder, [the] defendant represents a substantial danger of physical harm to others.” (*Ibid.*)

Standard of Review

Errors in jury instructions are questions of law and thus are reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

Standard of Prejudice

In determining prejudice where the trial court erroneously shifted the burden of proof to the defendant in an MDO commitment extension hearing by giving an affirmative defense instruction, the question “is not whether a reasonable jury might have found that [the] defendant met the statutory criteria. The trial court provided the jury with conflicting instructions on the burden of proof. To affirm, [the reviewing court] must ‘be able to declare a belief that [the instructional error] was harmless beyond a reasonable doubt.’ (*Chapman v. California* (1967) 386 U.S. 18, 24.) This requires [the court] to find that ‘ “ ‘the error complained of did not contribute to the verdict obtained [,]’ ” ’ because it was ‘unimportant in relation to everything else the jury considered on the issue in question.’ [Citations.] As the Supreme Court held in

Sullivan v. Louisiana (1993) 508 U.S. 275, 113, ‘Harmless-error review looks . . . to the basis on which “the jury actually rested its verdict.” [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.’ (*Id.* at p. 279.)” (*People v. Noble, supra*, 100 Cal.App.4th 184, 191, emphasis in original.)

Due Process

Shackling

“[T]he rules attendant to shackling in a criminal proceeding apply to MDO proceedings.” (*People v. Fisher* (2006) 136 Cal.App.4th 76, 80.) “The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.” (*People v. Duran* (1976) 16 Cal.3d 282, 291.) “In those instances when visible restraints must be imposed the court shall instruct the jury sua sponte that such restraints should have no bearing on the determination of the defendant’s guilt.” (*Id.* at pp. 291–292.) “However, when the restraints are concealed from the jury’s view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided.” (*Id.* at p. 292.)

An assertion that the trial court erred when it required a defendant to wear shackling is waived if the defendant did not object to the shackling. (*People v. Fisher, supra*, 136 Cal.App.4th 76, 79.)

Standard of Review

“A court’s decision to place a defendant in physical restraints will not be overturned on appeal unless there is a ‘showing of a manifest abuse of discretion.’ ” (*People v. Fisher, supra*, 136 Cal.App.4th 76, 80.)

Standard of Prejudice

“The California Supreme Court has not ruled which harmless error standard applies when a court abuses its discretion and permits a defendant to be shackled in violation of [*People v. Duran* (1976) 16 Cal.3d 282]. Thus far, the question appears to turn on whether the jury is aware of the physical restraints. ‘[W]hen a trial court abuses its discretion in shackling a defendant, evidence establishing that the jury saw the restraints means that the error rises to the level of constitutional error to be tested under the *Chapman* test. Thus, while a brief glimpse of [a] defendant in shackles would not constitute prejudicial error [citations], the use of physical restraints in the courtroom without a prior showing of the manifest need for such restraints violates *Duran*. [Citation.] When such restraints are visible to the jury for a substantial length of time without meeting the *Duran* requirements, this trial court error may deprive defendant of his due process right to a fair and impartial jury, and may affect the presumption of innocence. [Citation.] Accordingly, when such error occurs, it rises to the level of constitutional error.’ [Citations.]” (*People v. Vance* (2006) 141 Cal.App.4th 1104, 1114–1115.)

Statutory Authority

Prosecutor's

There is a split of authority as to whether the prosecutor has the statutory authority to file a petition seeking recommitment of an MDO pursuant to Penal Code section 2970 where the designated authority did not recommend recommitment. However, the split is distinguishable.

There are three cases that stand for the proposition that where the designated authority (as detailed in Pen. Code, § 2970) did not find the MDO to be dangerous and did not recommend recommitment, the district attorney does not have statutory authority to file the petition: *People v. Garcia* (2005) 127 Cal.App.4th 558 (4DCA) *People v. Marchman* (2006) 145 Cal.App.4th 79 (3DCA), and *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347 (2DCA).

There is one case that stands for the proposition that a recommendation for recommitment by the designated authority is not a prerequisite to the district attorney's authority to file a Penal Code section 2970 petition seeking recommitment: *People v. Hernandez* (2011) 201 Cal.App.4th 483 (5DCA).

As the court in *People v. Hernandez, supra*, 201 Cal.App.4th 483, 488–489 explained, in *Garcia, Marchman*, and *Cuccia*, the designated authorities each determined that the defendants' mental disorders were in remission and could be kept there (*People v. Garcia, supra*, 127 Cal.App.4th 558, 562–563 [“defendant's ‘severe mental disorder was in remission and could be kept in remission without treatment with the result that defendant did not pose a substantial danger of physical harm to others.’ ”]; *People v. Marchman, supra*, 145 Cal.App.4th 79, 83 [“defendant's mental disorder was in remission and could be kept in remission without treatment.”]; *Cuccia v. Superior Court, supra*, 153 Cal.App.4th 347, 351 [“patient's severe mental disorder was in remission, the patient did not represent a substantial danger of physical harm to others by reason of his mental illness, and the patient could be safely and effectively treated on an outpatient basis.”].) Under these facts, the *Garcia, Marchman*, and *Cuccia* courts found that the district attorney did not have the authority to file a Penal Code section 2970 petition for recommitment. (*People v. Garcia, supra*, 127 Cal.App.4th 558, 567; *People v. Marchman, supra*, 145 Cal.App.4th 79, 89; *Cuccia v. Superior Court, supra*, 153 Cal.App.4th 347, 353.)

The *Hernandez* court then distinguished the facts before it: “[U]nlike the situations in *Garcia, Marchman*, and *Cuccia*, the evaluation submitted by the medical director [in Hernandez's case] stated [that Hernandez] could not be kept in remission without treatment. Additionally, the evaluation listed incidents in which [Hernandez] had engaged in physical violence within the prior five months.” (*People v. Hernandez, supra*, 201 Cal.App.4th 483, 489.) Despite this, the medical director did not recommend extending Hernandez's commitment for further treatment. (*Id.* at p. 486.) However, the district attorney filed a Penal Code section 2970 petition to continue Hernandez's involuntary commitment for one year. (*Ibid.*) Hernandez challenged this, citing *Garcia, Marchman*, and *Cuccia*. (*Id.* at p. 488.) After discussing how the facts in Hernandez's case were distinguished from those in *Garcia, Marchman*, and *Cuccia*, (i.e. it was determined that Hernandez could not be kept in remission absent treatment, whereas the defendants in the other three cases could be) and parsing the language of Penal Code section 2970, the *Hernandez*

court concluded that “[a] recommendation for recommitment is not a prerequisite to the district attorney’s authority to file a petition under section 2970.” (*Id.* at pp. 488, 489.)

Standard of Review

The scope of a district attorney’s authority presents a question of law which is reviewed de novo. (*Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 612.)

Standard of Prejudice

This type of error does not involve or require a prejudice argument.

Note on Mootness

There is a high chance of issues becoming moot in MDO cases while awaiting disposition during the lengthy appellate process. Thus, in certain cases (e.g. appeals from a one year extension of commitment), counsel should consider filing a motion for calendar preference to expedite the appeal. A sample motion can be found on CCAP’s website in the motion samples book at <http://www.capcentral.org/resources/motion.asp>.

Pending/Recent California/United States Supreme Court Issues

When reviewing an appellate record for issues, always check the recent and pending issues in both the California and United States Supreme Courts. CCAP maintains a directory of such cases at: http://www.capcentral.org/high_court/index.asp.

In addition to CCAP’s inventory, an attorney should perform his or her own research to determine whether there are issues pending related to potential issues on appeal for his or her case. The California Supreme Court maintains a list of pending issues, which can be found at: <http://www.courts.ca.gov/13648.htm>. For information on cases pending in the United States Supreme Court, that website directs viewers to the American Bar Association’s webpage for its publication “Preview,” which is subtitled “Comprehensive Coverage of the U.S. Supreme Court.” The link is: http://www.americanbar.org/publications/preview_home/alphabetical.html. Unfortunately, this site is organized by case, not issue, but there is a wealth of information if one drills down, including questions presented, merit briefs, and amicus briefs. Each case also includes a “source” link, which directs the viewer to the U.S. Supreme Court’s docket for that case.

California Supreme Court

Pending

People v. Blackburn (2013) 215 Cal.App.4th 809.

MDO–Advisement and Waiver of Jury Trial Right

Did the trial court prejudicially err by failing to advise defendant of his right to jury trial and obtain a personal waiver of that right? (Review granted 8/14/2013 (S211078/H037207).)

Details: http://capcentral.org/high_court/casedetails.aspx?id=508

People v. Stevens (2013) 213 Cal.App.4th 1401.

MDO–Expert Testimony Based on Hearsay

May an expert’s testimony in support of a defendant’s commitment under the Mentally Disordered Offender Act (Pen. Code § 2960 et seq.) that the defendant used force or violence in committing the commitment offense (Pen. Code § 2962, subd. (e)(P)) and that he received treatment for at least 90 days in the year before being paroled (Pen. Code § 2962, subd. (c)) be based entirely on hearsay? (Review granted 6/12/2013 (S209643).)

Details: http://capcentral.org/high_court/casedetails.aspx?id=498

Recently Decided

No recently decided MDO cases. (As of August 13, 2015.)

United States Supreme Court

No pending or recently decided MDO cases. (As of August 13, 2015.)