

**Mental Health at a Glance:
Not Guilty by Reason of Insanity¹**
(last revised 11/4/2015)

	<u>Page</u>
Overview	3
Statutes	3
Pen. Code, § 25 - Test and Burden of Proving Insanity	4
Pen. Code, § 26 - Persons Capable of Committing Crimes	4
Pen. Code, § 29.8 - Excluded Bases for Finding Not Guilty by Reason of Insanity	4
Pen. Code, § 1026 - Pleading Not Guilty by Reason of Insanity	5
Pen. Code, § 1026.1 - Grounds for Post-Commitment Release	6
Pen. Code, § 1026.2 - Restoration of Sanity	6
Pen. Code, § 1026.3 - Outpatient Status	7
Pen. Code, § 1026.5 - Terms of Commitment	7
Maximum Term of Commitment	7
Credit for Time Served	7
Commitment Extensions	7
Nature of Commitment Proceedings	8
Pen. Code, § 1027 - Appointment/Testimony of Psychiatrist/Psychologist	8
Jury Instructions	8
CALCRIM 3450 (Insanity; Effect of Verdict)	8
CALCRIM 3452 (Determining Restoration to Sanity)	10
CALCRIM 3453 (Extension of Commitment)	11
Issue Spotting	11
Sentencing	11
Jury Instructions	12
Sufficiency of the Evidence	13
Opinion by Psychiatric Experts.....	13
Due Process	14

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.

Pending/Recent Supreme Court Cases 15
 California Supreme Court 15
 United States Supreme Court 16

Overview

When a person is charged with committing a crime, he or she is presumed to have been sane at the time the crime was committed. (Pen. Code § 1026, subd. (a); *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519.) If the person wishes to raise the defense of insanity, he or she pleads not guilty to the substantive charges and any special allegations, and additionally enters a plea of not guilty by reason of insanity.² (Pen. Code, § 1026, subd. (a); *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1430–1431.) Following such a plea, the court conducts two trials—one on the issue of guilt, the other on the issue of sanity. (Pen. Code, § 1026, subd. (a); *People v. Hernandez* (2000) 22 Cal.4th 512, 520.) The issue of guilt is tried first with no reference to the plea of insanity. (Pen. Code, § 1026, subd. (a); *People v. Dobson, supra*, 161 Cal.App.4th 1422, 1431.) If the trier of fact finds the defendant guilty of the substantive charges, then the trial to determine sanity at the time of the offense is held. (Pen. Code, § 1026, subd. (a); *People v. Dobson, supra*, 161 Cal.App.4th 1422, 1431.)

If a defendant is found not guilty by reason of insanity, he or she is committed to a state hospital, unless it is determined that since the time of the offense, the defendant has recovered his or her sanity. (Pen. Code, § 1026, subs. (a) & (b).) (*People v. Tilbury* (1991) 54 Cal.3d 56, 63.) If this is not the case, the defendant is committed for “[t]he maximum term of commitment[, which] is equal to the longest term of imprisonment which could have been imposed for the offenses of which the defendant was convicted.” (Pen. Code, § 1026.5, subd. (a)(1); *People v. Tilbury, supra*, 54 Cal.3d 56, 63.) At the end of the defendant’s maximum term of commitment the district attorney may petition to extend the defendant’s commitment another two years. (Pen. Code, § 1026.5, subd. (b)(1) & (8); *People v. Tilbury, supra*, 54 Cal.3d 56, 63.) Doing so requires a new jury trial, unless waived, at which the prosecution must prove that the defendant “by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.” (Pen. Code, § 1026.5, subd. (b)(1) & (3).) (*People v. Tilbury, supra*, 54 Cal.3d 56, 63.) If, at any time prior to the defendant’s completion of the term of commitment, he or she regains sanity, release is possible upon a showing of fitness for release. (Pen. Code, § 1026.2, subd. (e); *People v. Tilbury, supra*, 54 Cal.3d 56, 63.)

Statutes

There are a number of statutes in the Penal Code that together give definition to a plea of not guilty by reason of insanity. The two code sections one will primarily encounter on appeal are (1) Penal Code section 1026, which sets forth the procedural requirements of pleading not guilty by reason of insanity; and (2) Penal Code section 1026.5, which discusses the calculation of the maximum term of commitment and the procedure for commitment extensions. Other key “insanity” statutes include: Penal Code section 25 (test and burden for proving insanity), Penal Code section 26 (persons capable of committing crimes), Penal Code section 29.8 (excluded bases for finding not guilty by reason of insanity), Penal Code section 1026.1 (grounds for post-commitment release), Penal Code section 1026.2 (restoration of sanity), Penal Code section 1026.3 (outpatient status), and Penal Code section 1027 (appointment/testimony of psychiatrists/psychologists). All of these codes sections are discussed in detail below.

² Depending on strategic considerations, another option is to plead guilty and not guilty by reason of insanity. (Pen. Code, § 1026, subd. (a).)

Pen. Code, § 25 - Test and Burden for Proving Insanity

“In June 1982 the California electorate adopted an initiative measure, popularly known as Proposition 8, which (among other things) for the first time in this state established a statutory definition of insanity.” (*People v. Skinner* (1985) 39 Cal.3d 765, 768.) This definition was based on the test set forth in *M’Naghten’s Case* (1843) 10 Clark & Fin. 200. (*Id.* at p. 769.) As set out in Penal Code section 25, subdivision (b), the defense of not guilty by reason of insanity “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.”

Although Penal Code section 25 uses the conjunctive— incapable of knowing or understanding *and* of distinguishing right from wrong—the California Supreme Court has concluded that the test is properly read in the disjunctive, despite the literal wording of the statute. (*People v. Skinner, supra*, 39 Cal.3d 765, 769.) In other words, these are alternatives, not dual requirements. As the *Skinner* Court explained, the problem with the wording in the statute is that if “[r]ead literally [Penal Code] section 25(b) would do more than reinstate the *M’Naghten* test. It would strip the insanity defense from an accused who, by reason of mental disease, is incapable of knowing that the act he was doing was wrong.” (*Ibid.*) The Court was “[m]indful of the serious constitutional questions that might arise were [it] to accept a literal construction of the statutory language, and of [its] obligation wherever possible both to carry out the intent of the electorate and to construe statutes so as to preserve their constitutionality [citations].” (*Ibid.*) Thus, the Court “conclude[d] that [Penal Code] section 25(b) was intended to, and does, restore the *M’Naghten* test as it existed in this state before *Drew*. We shall also conclude that under that test there exist two distinct and independent bases upon which a verdict of not guilty by reason of insanity might be returned.” (*Ibid.*)

Pen. Code, § 26 - Persons Capable of Committing Crimes

Under California law, “[a]ll persons are capable of committing crimes except . . . [p]ersons who are mentally incapacitated.” (Pen. Code § 26.) Thus, those found to be insane are exempt from criminal responsibility for their actions. (*People v. Phillips* (2000) 83 Cal.App.4th 170, 173.) “[I]nsanity is a complete defense to a criminal charge; that an act committed by an insane person, though otherwise unlawful, is not criminal; and that the law regards such a person as innocent even though he may otherwise have transgressed in a most serious manner.” (*People v. Marshall* (1929) 99 Cal.App. 224, 228.)

Pen. Code, § 29.8 - Excluded Bases for Finding Not Guilty by Reason of Insanity

Penal Code section 29.8 provides that “[i]n any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances.” (Pen. Code, § 29.8.) This code section “was enacted in the wake of the three strikes law. The expressed purpose of the statute [was] to narrow the

availability of the insanity defense.”³ (*People v. Robinson* (1999) 72 Cal.App.4th 421, 427.) It provides that “if an accused’s insanity is caused solely by abuse of or addiction to intoxicating substances, then the insanity defense is not available to him or her. This statute makes no exception for brain damage or mental disorders caused solely by one’s voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated.” (*Ibid.*) “By enacting this statute, the Legislature expressed its intent that individuals rendered insane solely because of their substance abuse should be treated differently than those afflicted by mental illness through no conscious volitional choice on their part.” (*Id.* at p. 428.)

Pen. Code, § 1026 - Pleading Not Guilty by Reason of Insanity

“Insanity is a plea raising an affirmative defense to a criminal charge.” (*People v. Hernandez* (2000) 22 Cal.4th 512, 522.) In California “insanity may not be used as a basis for extending leniency. It is either a complete defense, or none at all.” (*People v. Cordova* (1939) 14 Cal.2d 308, 311.) Thus, “the issue at the insanity trial is not whether in fact the defendant has committed the act but whether or not he should be punished.” (*People v. Flores* (1976) 55 Cal.App.3d 118, 121.) “A successful insanity plea relieves the defendant of all criminal responsibility.” (*People v. Dobson* (2008) 161 Cal.App.4th 1422, 1432.)

At arraignment, a defendant may enter both a plea of not guilty and not guilty by reason of insanity. (Pen. Code, §§ 1016, 1026, subd. (a).) “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.” (*People v. Hernandez, supra*, 22 Cal.4th 512, 520.) The guilt phase trial and the sanity phase trial may be heard “either before the same jury or before a new jury in the discretion of the court.” (Pen. Code, § 1026, subd. (a).)

“In the first phase of trial, the defendant is tried on his or her factual guilt without reference to the insanity plea.” (*People v. Dobson, supra*, 161 Cal.App.4th 1422, 1431.) During the trial on the question of guilt, “the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.” (Pen. Code, § 1026.) Because “[t]he matter of the defendant’s sanity is not before the jury, [] evidence of insanity is inadmissible.” (*People v. Mills* (2012) 55 Cal.4th 663, 681.)

“If the defendant is found guilty, he or she receives a second jury trial in which his or her legal sanity is determined.” (*People v. Dobson, supra*, 161 Cal.App.4th 1422, 1431; see Pen. Code, § 1026.) To be found legally insane, the burden is upon the defendant to prove by a preponderance of the evidence that he or she was insane at the time of the offense. (Pen. Code, § 25.) “As in the determination of guilt, the verdict of the jury [in the sanity trial] must be unanimous.” (*People v. Hernandez, supra*, 22 Cal.4th 512, 521.)

“If the verdict or finding is that the defendant was sane at the time the offense was

³ *People v. Robinson* (1999) 72 Cal.App.4th 421 discusses Penal Code section 25.5, which was the original number of what is now Penal Code section 29.8. Penal Code section 25.5 was added by Stats.1993-94, 1st Ex.Sess., c. 10 (S.B.40), § 1, but was later renumbered § 29.8 and amended by Stats.2012, c. 162 (S.B.1171), § 120. (Pen. Code, § 29.8.)

committed, the court shall sentence the defendant as provided by law. If the verdict or finding be that the defendant was insane at the time the offense was committed, the court, unless it shall appear to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be committed” to a public or private facility that provides for the care and treatment of the mentally ill. (Pen. Code, § 1026, subd. (a).) “If the defendant is confined in a state hospital or other treatment facility as an inpatient, the medical director of the facility shall, at six-month intervals, submit a report in writing to the court and the community program director of the county of commitment, or a designee, setting forth the status and progress of the defendant. The court shall transmit copies of these reports to the prosecutor and defense counsel.” (Pen. Code, § 1026, subd. (f).)

Pen. Code, § 1026.1 - Grounds for Post-Commitment Release

After a defendant has been found not guilty by reason of insanity and committed to a state hospital or other treatment facility, he or she may be released upon (1) restoration of sanity (Pen. Code, § 1026.2), (2) expiration of the maximum term of commitment (Pen. Code, § 1026.5), or (3) approval of outpatient status (Pen. Code, §§ 1600 et seq.). (Pen. Code, § 1026.1; see *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1432.)

Pen. Code, § 1026.2 - Restoration of Sanity

In *People v. Soiu* (2003) 106 Cal.App.4th 1191, the Second District Court of Appeal summarized the restoration of sanity process:

“[Penal Code s]ection 1026.2 involves what has been described as a two-step process. [Citations.] The first step in the release process requires the defendant, who has filed a release application, to demonstrate at a *hearing* that he or she will not ‘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,] § 1026.2, subd[.] (e).) If the court finds such at the hearing, the defendant is then placed in ‘an appropriate forensic conditional release program for one year.’ ([Pen. Code,] § 1026.2, subd[.] (e).) This is commonly called the outpatient placement hearing. Thus concludes the first step of the release process.

“The second step in the release process, often referred to as the restoration of sanity trial, normally occurs one year after the defendant has been placed in an outpatient program. Typically after one year, the court holds a *trial* to determine whether the defendant’s sanity has been restored. [Penal Code] section 1026.2, subdivision (e), defines restoration of sanity as follows, ‘[T]he applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder.’ Unlike during the first step in the proceedings, the restoration of sanity trial requires the defendant to demonstrate that he or she is no longer a danger to the health and safety of others under all circumstances. During the first step of the release process, all the defendant must demonstrate is that she or he will not be a danger while ‘under supervision and treatment in the community.’ ([Pen. Code,] §

1026.2, subd. (e); [citations].) The statutory one-year wait for the restoration of sanity trial can be shortened if the community program director makes a recommendation to that effect and proposes release under specified circumstances.”

(*People v. Soiu, supra*, 106 Cal.App.4th 1191, 1196.)

For any Penal Code section 1026.2 hearing or trial, “the applicant shall have the burden of proof by a preponderance of the evidence.” (Pen. Code, § 1026.2, subd. (k).)

Pen. Code, § 1026.3 - Outpatient Status

“A person committed to a state hospital or other treatment facility under Section 1026 . . . may be placed on outpatient status from the commitment.” (Pen. Code, § 1026.3.) “ ‘Outpatient status is not a privilege given the [offender] to finish out his sentence in a less restricted 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.]” (*People v. Sword* (1994) 29 Cal.App.4th 614, 620.)

Pen. Code, § 1026.5 - Terms of Commitment

Penal Code section 1026.5 covers both the setting of the initial term of commitment for a person found not guilty by reason of insanity, as well as any subsequent commitment extensions.

Maximum Term of Commitment

The initial term of commitment for a person found not guilty by reason of insanity is referred to as the maximum term of commitment. The maximum term of commitment is equal to the longest term of imprisonment which could have been imposed for the offense(s) of which the defendant was convicted. (Penal Code, § 1026.5, subd. (a)(1).)

Credit for Time Served

In calculating the maximum term of commitment for a person who has been committed to a state hospital following a finding of not guilty by reason of insanity, any precommitment *actual* credit for time served is “deducted from the maximum term of commitment.” (Pen. Code, § 1026, subd. (e)(3).) However, such a person is not entitled to precommitment *conduct* credit. (*People v. Mord* (1988) 197 Cal.App.3d 1090, 1104.)

Commitment Extensions

When a person committed to a state hospital following a finding of not guilty by reason of insanity completes his or her maximum term of commitment, the state may initiate proceedings to extend that person’s commitment. (Penal Code, § 1026.5, subd. (b).) To succeed, the state must prove in a jury trial that the defendant “by reason of a mental disease, defect, or

disorder represents a substantial danger of physical harm to others.” (Penal Code, § 1026.5, subd. (b)(1).) This Penal Code section 1026.5, subdivision (b)(1), language has been interpreted as requiring the state to prove that the person has a serious difficulty controlling dangerous behavior. (See *People v. Galindo* (2006) 142 Cal.App.4th 531, 536; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878; *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159.) The standard of proof for extending a person’s commitment under Penal Code section 1026.5 is beyond a reasonable doubt. (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 217.) At the end of a two-year commitment extension, the state may repeat the process for additional two-year commitment extensions. (Pen. Code, § 1026.5, subd. (b)(8).)

Nature of Commitment Proceedings

“Penal Code section 1026.5 establishes a proceeding which is essentially civil in nature, but which expressly provides for many procedures related to criminal prosecutions. The petition for extension is presented and prosecuted by the district attorney. The individual has the right to be represented by an attorney. Indigent individuals are entitled to have the public defender represent them and to have psychologists or psychiatrists appointed at government expense. The individual is entitled to a jury trial. The rules of criminal discovery apply. (Pen.Code, § 1026.5.) In addition to the express statutory provisions, certain other constitutional procedural guarantees are mandated by judicial decision. Thus, the state has the burden of proof, the individual is entitled to have his dangerousness determined beyond a reasonable doubt, and the individual is entitled to a unanimous jury. [Citations.] In addition, the individual has the right to confront and cross-examine witnesses. [Citation.]” (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 488.)

Pen. Code, § 1027 - Appointment/Testimony of Psychiatrists/Psychologists

“When a defendant pleads not guilty by reason of insanity the court shall select and appoint two, and may select and appoint three, psychiatrists, or licensed psychologists who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, to examine the defendant and investigate his or her mental status. It is the duty of the psychiatrists or psychologists selected and appointed to make the examination and investigation, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question.” (Pen. Code, § 1027, 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 3450

Insanity: Determination, Effect of Verdict
(Pen. Code, §§ 25, 29.8)

You have found the defendant guilty of <insert crime[s]>. Now you must decide whether (he/she) was legally insane when (he/she) committed the crime[s].

The defendant must prove that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s].

The defendant was legally insane if:

1. When (he/she) committed the crime[s], (he/she) had a mental disease or defect;

AND

2. Because of that disease or defect, (he/she) was incapable of knowing or understanding the nature and quality of (his/her) act or was incapable of knowing or understanding that (his/her) act was morally or legally wrong.

None of the following qualify as a mental disease or defect for purposes of an insanity defense: personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.]

[If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. A *settled mental disease or defect* is one that remains after the effect of the drugs or intoxicants has worn off.]

You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime[s]. If you are satisfied that (he/she) had a mental disease or defect before (he/she) committed the crime[s], you may conclude that (he/she) suffered from that same condition when (he/she) committed the crime[s]. You must still decide whether that mental disease or defect constitutes legal insanity.

[If you find the defendant was legally insane at the time of (his/her) crime[s], (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/She) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the

defendant may be confined, or for how long, affect your decision in any way.]

[You may find that at times the defendant was legally sane and at other times was legally insane. You must determine whether (he/she) was legally insane when (he/she) committed the crime.]

[If you conclude that the defendant was legally sane at the time (he/she) committed the crime[s], then it is no defense that (he/she) committed the crime[s] as a result of an uncontrollable or irresistible impulse.]

If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s], you must return a verdict of not guilty by reason of insanity.

CALCRIM 3452

Determining Restoration to Sanity
(Pen. Code, § 1026.2)

The defendant was previously found not guilty of a crime and committed to a mental health facility. You must decide whether the defendant currently poses a danger to the health and safety of others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide the defendant's mental condition at any other time or whether (he/she) is guilty of any crime.

<Alternative A—defendant's ability to continue unsupervised self-medication not an issue>

[The law presumes that the defendant currently poses a danger to the health and safety of others as a result of a mental disease, defect, or disorder. In order to overcome this presumption, the defendant has the burden of proving that it is more likely than not that (he/she) no longer poses such a danger.]

<Alternative B—defendant's ability to continue unsupervised self-medication an issue>

[The law presumes that the defendant currently poses a danger to the health and safety of others as a result of a mental disease, defect, or disorder. In order to overcome this presumption, the defendant has the burden of proving that it is more likely than not that:

1. (He/She) is no longer a danger to the health and safety of others because (he/she) is now taking prescribed medicine that controls (his/her) mental condition;

AND

2. (He/She) will continue to take that medicine in an unsupervised environment.]

CALCRIM 3453

Extension of Commitment (Pen. Code, § 1026.5(b)(1))

<insert name of respondent> has been committed to a mental health facility. You must decide whether (he/she) currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide <insert name of respondent>'s mental condition at any other time or whether (he/she) is guilty of any crime.

To prove that <insert name of respondent> currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder, the People must prove beyond a reasonable doubt that:

1. (He/She) suffers from a mental disease, defect, or disorder;

AND

2. As a result of (his/her) mental disease, defect, or disorder, (he/she) now:

a. Poses a substantial danger of physical harm to others;

AND

b. Has serious difficulty in controlling (his/her) dangerous behavior.

[Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense, <insert name of respondent> must prove by a preponderance of the evidence that:

1. (He/She) no longer poses a substantial danger of physical harm to others because (he/she) is now taking medicine that controls (his/her) mental condition;

AND

2. (He/She) will continue to take that medicine in an unsupervised environment.

Proof by a *preponderance of the evidence* is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.]

Issue Spotting on Appeal

Sentencing

Failure to Apply Pen. Code, § 654

“Where a defendant is found not guilty by reason of insanity, ‘the trial court computes the maximum sentence, then imposes that time period as the maximum period of confinement pursuant to [Penal Code] section 1026.5, subdivision (a). [Citation.] [Penal Code s]ection 654, which bars multiple punishment for an indivisible course of conduct, applies in calculating the maximum confinement period.’” (*People v. Nunez* (2012) 210 Cal.App.4th 625, 629; see also *People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1238 [finding “section 654, subdivision (a) is applicable to the calculation of the maximum term of commitment imposed].”)

Standard of Review

A trial “court acts in ‘excess of its jurisdiction’ and imposes an ‘unauthorized’ sentence when it erroneously stays or fails to stay execution of a sentence under [Penal Code] section 654. [Citations.]” (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) An unauthorized sentence presents a question of law. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) An appellate court reviews questions of law de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

Standard of Prejudice

Not applicable (no need to show prejudice for an unauthorized sentence.)

Jury Instructions

Failure to Instruct Sua Sponte

The court has a sua sponte duty to instruct on the standard for extending a person’s mental health commitment, pursuant to Penal Code section 1026.5, including the constitutional requirement that the person be found beyond a reasonable doubt to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (CALCRIM 3453; see *People v. Sudar* (2007) 158 Cal.App.4th 655, 663.)

Standard of Review

An appellate court reviews de novo a claim that the trial court had a sua sponte duty to give a particular jury instruction. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

Standard of Prejudice

Where you can, strive to federalize your instructional error issue and thus elevate the standard of prejudice:

An error that violates the right to due process under the Fourteenth Amendment is reviewed under the harmless-beyond-a-reasonable-doubt test set forth in *Chapman v. California*. (*People v. Williams* (2009) 170 Cal.App.4th 587, 612; see also *Chapman v. California* (1967) 386 U.S. 18, 23–24.) “[B]efore a federal constitutional error can be held harmless, the court must be able

to declare a belief that it was harmless beyond a reasonable doubt.” (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under this standard, the focus is on whether the guilty verdict was reached without the influence of the erroneous jury instruction, not whether, absent the error, a guilty verdict would have been reached. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Sufficiency of the Evidence

Extending a Civil Commitment (Pen. Code, § 1026.5)

“A person may be committed beyond the term prescribed by subdivision (a) only under the procedure set forth in this subdivision and only if the person has been committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.” (Pen. Code, § 1026.5, subd. (b)(1).) “[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” (*Addington v. Texas* (1979) 441 U.S. 418, 425.) In order to preserve the constitutionality of such civil commitments, Penal Code section 1026.5, subdivision (b)(1), must be interpreted to require not only that the person presents a danger of physical harm to others, but also that that person has serious difficulty controlling such behavior. (See *In re Howard N.* (2005) 35 Cal.4th 117, 135; *People v. Galindo* (2006) 142 Cal.App.4th 531, 537; *People v. Bowers* (2006) 145 Cal.App.4th 870, 877; *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1162; see CALCRIM 3453.) Thus, to find true a Penal Code section 1026.5 petition seeking to extend a person’s commitment beyond the maximum term of commitment, the trier of fact must find beyond a reasonable doubt that that person “(1) ha[s] a mental disorder, and (2) that condition cause[s] her to have serious difficulty controlling her behavior such that (3) she present[s] a substantial danger of physical harm to others.” (*People v. Bowers, supra*, 145 Cal.App.4th 870, 879; see Pen. Code, § 1026.5, subd. (b)(1).) To uphold a finding, it must be supported by substantial evidence. (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410.)

Standard of Review

The standard of review for an assertion on appeal that insufficient evidence supported an order extending an involuntary commitment is substantial evidence. (*People v. McCune* (1995) 37 Cal.App.4th 686, 694.)

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 standard of review for an assertion on appeal that insufficient evidence supported an order extending an involuntary commitment is substantial evidence. (*People v. McCune* (1995) 37 Cal.App.4th 686, 694.)

Standard of Prejudice

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

Due Process

Use of Shackling

Where “the jury [is] asked to determine whether [a] defendant represents a substantial danger of physical harm to others ([Pen. Code,] §§ 1026.5, subd. (b)(1), 2972, subd. (c)), that is, whether he is disposed to commit a violent crime . . . If the jury sees that the defendant is physically restrained, it may reasonably infer that the defendant is dangerous. Because the potential for this type of jury prejudice is the same whether a defendant is shackled in a criminal case or in a [Penal Code section] 1026.5 proceeding, we conclude once the defendant objected to the shackles, the People were required to establish manifest need for shackling on the record in accordance with [*People v. Duran* (1976) 16 Cal.3d 282, 291–292.] We also conclude the trial court was required to make its own independent determination of the need for physical restraints. [(*People v. Mar* (2002) 28 Cal.4th 1201, 1218.)]” (*People v. Vance* (2006) 141 Cal.App.4th 1104, 1114.)

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.’ [Citations.]” (*People v. Fisher* (2006) 136 Cal.App.4th 76, 80.) While the trial court has discretion to order restraints when needed to protect against courtroom violence or other disruptions, imposing visible physical restraints, absent a showing of a need for such, will be deemed an abuse of discretion. (*People v. Stevens* (2009) 47 Cal.4th 625, 633.)

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 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.] In any event, the error in this case is prejudicial under either the *Chapman* or *Watson* standard.” (*People v. Vance* (2006) 141 Cal.App.4th 1104, 1114–1115.)

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. Tran (2013) 160 Cal.Rptr.3d 409 (S211329)

People v. Fuquay (2013) 160 Cal.Rptr.3d 408 (S211076)

Right to Jury Trial; Personal Waiver.

In August 2013, the California Supreme Court granted review in *People v. Tran* and *People v. Fuquay*, which both raised the issue of whether the trial court prejudicially erred by failing to advise defendant of his right to jury trial and obtain a personal waiver of that right as part of the district attorney filing a petition to extend the defendant’s Penal Code section 1026 commitment.

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

Recently Decided

Hudec v. Superior Court (2015) 60 Cal.4th 815

Right to Refuse to Testify at Extension Hearing.

Issue: Does Penal Code section 1026.5, subdivision (b)(7), give a person who was committed after being found not guilty of criminal charges by reason of insanity the right to refuse to testify in a proceeding to extend that civil commitment?

Held: A person found not guilty by reason of insanity (NGI) who is facing a commitment extension hearing has a statutory right to refuse to testify in the People's case-in-chief.

Details: http://capcentral.org/high_court/casedetails.aspx?id=517.

United States Supreme Court

No pending or recent not guilty by reason of insanity cases. (As of April 21, 2015.)