An Appellate Defender's Guide to the Insanity Defense and Not Guilty by Reason of Insanity Commitments

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I. Introduction

In criminal proceedings, there are three primary ways in which the law contemplates a defendant's mental illness factoring into the outcome: "by providing for the [not guilty by reason of insanity (NGI)] plea, by allowing evidence of mental illness to prove the absence of specific intent, and by permitting consideration of mental illness as a mitigating factor for sentencing purposes." (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084.)[1] All three areas are ones in which it is important for appellate defenders to become well-versed. These materials, however, focus on NGI proceedings, addressing appellate issues that may arise at the pleading and sanity phases of a criminal trial as well as during civil commitment proceedings after a defendant has been found NGI.

While appeals from criminal cases in which defendants entered NGI pleas are relatively rare, the stakes are exceptionally high, as an NGI finding functions as an acquittal, which can have a profound effect on a client's near- and long-term interests. First and foremost, an NGI finding removes the immediate prospect of incarceration, at least in a prison or jail cell. But there are other benefits of great significance, too. For example, a person convicted of a strike offense at trial who is subsequently found NGI cannot later in a new case have that initial guilt finding used to increase his or her sentence under the Three Strikes Law. Nor is a person found NGI obligated to make victim restitution payments. It may even surprise some to learn that a person found NGI of murder cannot be denied an otherwise lawful inheritance from the individual he or she killed.

In order for an appellate defender to understand whether an insanity defense was improperly rejected or incompetently not pursued, at a minimum, one must have a sufficient understanding of the legal definition of insanity in California, the types of mental disorders statutorily exempted from the insanity defense, the requirements of a valid NGI plea, the applicable standard and burden of proof on the sanity question, the scope of mental state evidence admissible at both the guilt and sanity phases of a criminal trial, the Fifth Amendment implications of undergoing insanity evaluations,

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[1] Mental illness, of course, also stands front and center in criminal cases in other ways, including most notably when it comes to issues of competency to stand trial (Pen. Code, § 1367, et seq.) and mental health diversion (Pen. Code, § 1001.36).

and the consequences of an insanity verdict. Additionally, an attorney handling an appeal from an NGI finding must consider the potential pitfalls of challenging the guilt-phase verdict in a reviewing court. These materials aim to provide an overview of these foundational considerations and more.

Appeals from criminal proceedings after the successful or unsuccessful assertion of an insanity defense are not the only NGI cases appellate defenders encounter. Once a person has been found NGI and placed under an inpatient or outpatient civil commitment, appeals may arise out of ensuing extended commitment, conditional release, unconditional release, outpatient revocation, and involuntary medication proceedings. Such proceedings often involve complex statutory schemes and constitutional principles. And, despite the grave liberty interests at stake – it is not uncommon for an insanity acquittee to end up spending more time in a psychiatric institution than they would have spent in state prison had they not been found NGI – many of the bedrock constitutional protections afforded criminal defendants have no direct application in civil commitment proceedings.

Appellate representation in NGI civil commitment proceedings, therefore, demands a unique skill set and knowledge base apart from that which is necessary to litigate criminal appeals – and constant vigilance against the erosion of an already reduced constellation of rights afforded a class of defendants who are often marginalized and overlooked. These materials serve as an overview of the tools necessary for an appellate defender to navigate the insanity civil commitment framework and, for those new to civil commitment appeals, as an invitation to get involved.

II. The Insanity Defense

A. What Is the Insanity Defense?

"A plea of not guilty by reason of insanity is a statutory defense that does not implicate guilt or innocence but, instead, determines whether the accused shall be *punished* for the *guilt* which has already been established." (*People v. Blakely* (2014) 230 Cal.App.4th 771, 775, emphasis in original, quoting *People v. Hernandez* (2000) 22 Cal.4th 512, 528 (conc. opn. of Brown, J.), internal quotation marks omitted.)

"'[I]nsanity . . . is either a complete defense or it is no defense at all.'" (*People v. Elmore* (2014) 59 Cal.4th 121, 145, quoting *People v. Wells* (1949) 33 Cal.2d

330, 349.) In other words, a successful insanity defense results in "*complete exoneration* from criminal liability," but evidence of insanity "may not be employed to reduce a defendant's degree of guilt." (*Elmore*, *supra*, 59 Cal.4th at p. 145, emphasis in original.)

"The plea of insanity is thus necessarily one of confession and avoidance. [Citation omitted].) Commission of the overt act is conceded but punishment is avoided *upon the sole ground* that at the time the overt act was committed the defendant was [insane]." (*Hernandez*, *supra*, 22 Cal.4th at p. 521, emphasis in original, internal quotation marks omitted.) A finding that the defendant had the mental state required to commit the charged crime does not foreclose a finding of insanity. (*Id*. at p. 520.)

Most importantly, a person cannot be punished for an act committed while legally insane. (*In re Slayback* (1930) 209 Cal. 480, 490.)

B. The Insanity Defense Has Never Been Held To Be Rooted in the Federal or State Constitution

Whether the United States Constitution requires states to make an insanity defense available to a criminal defendant remains an open question. (*Clark v. Arizona* (2006) 548 U.S. 735, 752 ["We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter."].) The United States Supreme Court has made it clear, however, that if a state (or, presumably the federal government) does provide for an insanity defense, federal constitutional principles of due process do not require the use of any particular formulation of the insanity defense. (*Kahler v. Kansas* (2020) 589 U.S. ___; 140 S.Ct. 1021, 1027.)

Accordingly, the United States Supreme Court has upheld various states' legal definitions of insanity. (*Id*. at pp. 1027-1029, discussing *Leland v. Oregon* (1952) 343 U.S. 790, 798 [rejecting a due process challenge to Oregon's use of the "moral-incapacity test of insanity"], and *Clark*, *supra*, 548 U.S. 735 [rejecting a due process challenge to Arizona's decision to eliminate the "cognitive-incapacity" definition of insanity].) "Nothing could be less fruitful," the United State Supreme Court has observed, "than for this Court to be impelled into defining some sort of insanity test in constitutional terms." (*Powell v. Texas* (1968) 392 U.S. 514, 536.)

In California, the insanity defense has always been a creature of the common law and statute that has no apparent state constitutional origins (see *People v. Nash* (1959) 52 Cal.2d 36, 43-48), though the California Supreme Court has recognized that "[i]t is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane." (*People v. Kelly* (1973) 10 Cal.3d 565, 574.) Moreover, the California Supreme Court has suggested – but ultimately declined to hold – that the abolition of the insanity defense could amount to a constitutional violation. (*People v. Skinner* (1985) 39 Cal.3d 765, 775 [offering reasons for concluding to do so would run afoul of both due process and cruel and unusual punishment protections].)

C. Most States and the Federal Courts Follow the *M'Naghten* Rule

Although the Due Process Clause of the United States Constitution does not require states to provide any particular type of insanity defense, a majority of states uses some version of the test set forth in *M'Naghten's Case* (1843) 10 Clark & Fin. 200, 210. In *M'Naghten*, Daniel M'Naghten was found not guilty by reason of insanity after killing the Prime Minister of England's secretary (though he intended to kill the Prime Minister). In response to questions put forth by the House of Lords, the judges of the common law courts concluded: "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of 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." The two alternative prongs of the *M'Naghten* standard have been referred to as the "cognitive incapacity" and "moral incapacity" strains of the insanity defense. (See *Clark*, *supra*, 548 U.S. at p. 749.)

While the *M'Naghten* rule (or a modified version of it) is the most common expression of the insanity defense in the United States, there are others, most notably the American Law Institute's Model Penal Code version, which provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease of defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." The second part of the ALI test – that the defendant lacks the capacity to conform their conduct to the requirements of the law – has been characterized as the "volitional incapacity" insanity defense standard. (See *Clark*, *supra*, 548 U.S. at p. 749.)

The ALI conception of the insanity defense went through a period of fairly widespread acceptance, only to find many jurisdictions retreating from it after John Hinckley, Jr., was found not guilty by reason of insanity in 1982 of attempting to assassinate President Reagan on a volitional control theory of insanity. In fact, a few states responded to the Hinckley verdict by abolishing the insanity defense altogether.

For a detailed history of the insanity defense dating back to centuries before *M'Naghten*, see *People v. Horn* (1984) 158 Cal.App.3d 1014, 1020-1026. For a more thorough discussion of the most common variants of the insanity defense and their prevalence (at least as of 2006), see *Clark*, *supra*, 548 U.S. at pp. 749-752.)

D. California Re-Adopted the *M'Naghten* Insanity Test in 1982 with the Enactment of Penal Code Section 25

California first adopted the *M'Naghten* insanity test in 1872 and continued to apply it for more than a century until the state Supreme Court in *People v. Drew* (1978) 22 Cal.3d 333 discarded it in favor of the volitional insanity test proposed by the ALI. This change was short-lived, as a 1982 voter initiative – Proposition 8 – brought California back into the *M'Naghten* fold. (*Skinner*, *supra*, 39 Cal.3d 765, 768-769.)[2]

Prior to Proposition 8, there was no statute codifying the *M'Naghten* rule. However, by virtue of the 1982 voter initiative, California's *M'Naghten* insanity defense standard is now found in Penal Code section 25, subdivision (b),[3] which provides: "In 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

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[2] Proposition 8 also abolished the defense of "diminished capacity" as follows: "In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible 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, § 25, subd. (a).)

[3] All future statutory references are to the Penal Code, unless otherwise indicated.

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." (§ 25, subd. (b), emphasis added.)

While the statute's use of the word "and" (see italicization in the preceding quotation) suggests the defendant must make two showings to prevail on an insanity defense – both cognitive and moral incapacity – in fact, the California Supreme Court has construed the statute's use of "and" instead of "or" as a drafting error. (*Skinner*, *supra*, 39 Cal.3d 765, 777.) Thus, "there exist two distinct and independent bases upon which a verdict of not guilty by reason of insanity might be returned." (*Id*. at p. 754.) A defendant is entitled to a finding of not guilty by reason of insanity if they establish that they were (1) incapable of knowing or understanding the nature and quality of their act (cognitive incapacity) *or* (2) incapable of distinguishing right from wrong (moral incapacity).

1. Cognitive Incapacity

Insanity defenses are more commonly predicated on moral incapacity than cognitive incapacity. As a result, there is little case law discussing the what it means for a defendant to lack the capacity to know or understand the nature and quality of their act. But the California Supreme Court has identified some factors that may shed light on whether a defendant is sane under the cognitive incapacity prong of the *M'Naghten* standard, including:

- Whether the defendant demonstrated an ability to devise and execute a deliberate plan
- The manner in which the crime was conceived, planned and executed
- Whether witnesses observed any change in the defendant's manner
- Whether the defendant walked steadily and calmly, spoke clearly and coherently and appeared to be fully conscious of what they were doing
- Whether the defendant was cooperative shortly after committing the offense
- Whether the defendant appeared rational, spoke coherently, and was oriented as to time, place and those persons who were present

(*People v. Wolff* (1964) 61 Cal.2d 795, 805-806, superseded by statute on other grounds, as recognized by *People v. Bloom* (1989) 48 Cal.3d 1194, 1211; see also *People v. Sloper* (1926) 198 Cal. 238, 247-248 ["The purpose, plan, acts, conduct, and statement of the defendant, considered in orderly sequence, constitute irrefutable proof that the defendant knew and appreciated the

nature and the quality of the act he was committing, and he knew that it was wrong to commit it and that it was punishable under the law"].)

2. Moral Incapacity

"Being able to distinguish legal right from legal wrong is not the test for insanity[.]" (*People v. Torres* (2005) 127 Cal.App.4th 1391, 1401.) Instead, "the proper question is whether a defendant can distinguish, not the legal rightness or wrongness of his act, but its moral rightness or wrongness." (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1272.)

The California Supreme Court has expounded on the meaning of moral rightness or wrongness in this context as follows:

> The morality contemplated by section 25, subdivision (b) is, as the prosecutor argued here, not simply the individual's belief in what conduct is or is not good. While it need not reflect the principles of a recognized religion and does not demand belief in a God or other supreme being, it does require a sincerely held belief grounded in generally accepted ethical or moral principles derived from an external source. "[M]oral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused." (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1274 [252 Cal.Rptr. 913].)
>
> Religious beliefs are often the source of generally accepted moral standards, but a defendant need not show that he or she believed that Judeo-Christian standards of morality justified the criminal conduct. An insane delusion that the conduct was morally correct under some other set of moral precepts would satisfy this prong of the *M'Naghten* test of legal insanity. However, "[t]he fact that a defendant claims and believes that his acts are justifiable according to his own distorted standards does not compel a finding of legal insanity." (*People v. Rittger* (1960) 54 Cal.2d 720, 734 [7 Cal.Rptr. 901, 355 P.2d 645].) As we explained in *Rittger*, this aspect of the *M'Naghten* test, adapted from the rule of *M'Naghten's Case* (1843) 8 Eng.Rep. 718, 722, is necessary "if organized society is to formulate standards of conduct and responsibility deemed essential to its preservation or welfare, and

> to require compliance, within tolerances, with those standards." (*People v. Rittger*, *supra*, 54 Cal.2d at p. 734.)

(*People v. Coddington* (2000) 23 Cal.4th 529, 608-609, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

It has also been held, for example, that "[a] claim of unreasonable self-defense based *solely* on delusion is quintessentially a claim of insanity under the *M'Naghten* standard of inability to distinguish right from wrong." (*Elmore*, *supra*, 59 Cal.4th at p. 140, emphasis added; see also *Skinner*, *supra*, 39 Cal.3d at p. 781, fn. 13.)

E. Incapacity under the *M'Naghten* Standard Must Be Based on Mental Illness

"The incapacity must be based on a mental disease or defect even though that requirement is not specifically mentioned in [section] 25, subd[ivision] (b)." (*Stress*, *supra*, 205 Cal.App.3d at p. 1271.) "In other words, there is a causation element connecting appellant's criminal acts and a *mental condition*. Establishing such a causal connection requires evidence that appellant is suffering from a specific mental condition." (*People v. Ceja* (2003) 106 Cal.App.4th 1071, 1089, emphasis in original.)

Mental illness alone, however, does not establish insanity. The California Supreme Court has repeatedly observed that "a defendant may suffer from a diagnosable mental illness without being legally insane under the *M'Naghten* standard." (*People v. Mills* (2012) 55 Cal.4th 663, 672; see also *Elmore*, *supra*, 59 Cal.4th at p. 146.)

F. Insanity Distinguished from Incompetency

Insanity is a separate concept from the question of the defendant's competency to stand trial.

"A plea of not guilty by reason of insanity refers to the defendant's mental state at the time of the commission of the crime, a mental state which is distinguishable from that which is required of a defendant before he may be allowed to stand trial. [(Citation.)] For example, even if the defendant is suffering from the same mental disturbance with which he was afflicted at the time of the commission of the crime, he may still be competent to stand trial as long as he is able to understand the nature of the proceedings taken

against him and is able to assist counsel in presenting a defense. (Pen. Code, § 1367.)" (*People v. Hofferber* (1977) 70 Cal.App.3d 265, 269; accord *People v. Field* (1951) 108 Cal.App.2d 496, 500.)

G. Certain Mental Disorders Are Excluded from the Insanity Defense

Pursuant to section 29.8, a defendant may not be found NGI "solely on the basis of" any of the following conditions:

- a personality or adjustment disorder
- a seizure disorder
- an addiction to, or abuse of, intoxicating substances

1. Addiction to, or Abuse of, Intoxicating Substances

"In *People v. Kelly* (1973) 10 Cal.3d 565, 574-575 [111 Cal.Rptr. 171, 516 P.2d 875], the Supreme Court, acknowledging that a person cannot be convicted for acts performed while insane, held that a person may be found legally insane because of long-term voluntary intoxication when the intoxication causes a mental disorder which remains after the effects of the intoxicant have worn off. While this mental disorder need not be permanent, it must be of a settled nature and must qualify under the *M'Naughton* test. One 'does not lose the defense of insanity because [he or she] may also have been intoxicated at the time of the offense.'" (*People v. Randolph* (1993) 20 Cal.App.4th 1836, 1841, fn. omitted.)

The above rule pre-dated the passage of former section 25.5, the statutory forerunner to section 29.8 and its prohibition against an insanity defense based solely on the basis of "an addiction to, or abuse of, intoxicating substances." Now, section 29.8 "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. Rather, it erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the *sole* basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off. In other words, if an alcoholic or drug addict attempts to use his problem as an escape hatch, he will find that [former] section 25.5 has shut and bolted the opening." (*People v. Robinson* (1999) 72 Cal.App.4th 421, 426-427, emphasis added.)

Picking up on the italicized "sole" in the quotation from *Robinson* above, CALCRIM No. 3450 explains that while "[a]ddiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity," "[i]f 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." (Emphasis added.)

2. Antisocial Personality Disorder

Section 29.8's language precluding an NGI finding based solely on "a personality or adjustment disorder" does not absolutely prohibit consideration of an antisocial personality disorder as part of an insanity defense. As the California Supreme Court has explained, the statute "prevent[s] consideration of a mental illness if that illness is manifested *only* by a series of criminal or antisocial acts." (*People v. Fields* (1983) 35 Cal.3d 329, 369, emphasis added.) Therefore, "if the defense expert can point to no symptom, no manifestation, of defendant's condition except repeated criminal or antisocial acts, that condition cannot be considered grounds for finding defendant insane." (*Id.* at p. 370.) Ultimately, "[w]hether this requirement denies the insanity defense to a person with an 'antisocial personality' will depend upon the individual case, and on the ability of the psychiatrist to base a diagnosis upon facts additional to a list of defendant's criminal or antisocial acts." (*Ibid.*)[4]

H. Temporary Insanity

"[I]nsanity need not be permanent in order to establish a defense." (*Kelly*, *supra*, 10 Cal.3d at p. 577.) "Thus, if defendant at the time of the offense was insane under the [*M'Naghten*] test, it makes no difference whether the period of insanity lasted several months, as in this case, or merely a period of hours." (*Id.* at pp. 576-577.)

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[4] While *Fields* announced this rule in reviewing a case where an insanity defense was raised during the brief period in which California followed the ALI insanity standard, the Supreme Court left no doubt that "[t]he consideration of policy barring extension of the insanity defense to psychopaths discussed in this opinion apply with equal force to cases arising under the new statutory definition" found in section 25, subdivision (b). (*Fields*, *supra*, 35 Cal.3d at p. 369, fn. 19.)

I. Entering a Plea of Not Guilty by Reason of Insanity

Section 1016 specifies six different types of pleas a criminal defendant may enter:

- Guilty
- Not guilty
- Nolo contendere
- A former judgment of conviction or acquittal of the offense charged
- Once in jeopardy
- Not guilty by reason of insanity

The same statute also provides: "A defendant who does not plead guilty may enter one or more of the other pleas. *A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged*; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. *A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged*." (§ 1016, emphasis added.)

Thus, a defendant who wishes to rely on an insanity defense may plead not guilty *and* not guilty by reason of insanity or simply not guilty by reason of insanity. A defendant may not, however, plead guilty (or no contest) and not guilty by reason of insanity. (*People v. John* (2019) 36 Cal.App.5th 168, 175 ["a plea of guilty cannot be combined with a plea of NGI to the same charges"].)

An NGI plea must be made in open court, orally or in writing. (§ 1017).

The defendant must personally enter an NGI plea; it cannot be entered by counsel alone. (§ 1018; *People v. Gauze* (1975) 15 Cal.3d 709; see also *Hofferber*, *supra*, 70 Cal.App.3d at p. 268.)

The decision of whether to enter an NGI plea "is a matter within the defendant's, rather than counsel's, ultimate control." (*People v. Clark* (2011) 52 Cal.4th 856, 893.) "[A] defendant has the right to personally enter the plea of his choice regardless of what his counsel thinks of the merits of an NGI plea." (*People v. Henning* (2009) 178 Cal.App.4th 388, 394.) When a trial court learns defense counsel has wrongly refused to allow the defendant

to enter an NGI plea, the court should grant a *Marsden*[5] motion to substitute counsel. (*Henning*, *supra*, 178 Cal.App.4th at p. 404.)

Before accepting an NGI plea, the trial court must obtain a knowing and voluntary waiver of the defendant's *Boykin/Tahl* rights.[6] (*People v. Rizer* (1971) 5 Cal.3d 35, 42-43; *People v. Wagoner* (1979) 89 Cal.App.3d 605, 610-611.)

A defendant may enter a "slow plea" by submitting guilt on the transcript of the preliminary hearing and sanity on the reports of doctors so long as the defendant is properly advised of the consequences of an NGI finding. (See, e.g., *People v. Vanley* (1974) 41 Cal.App.3d 846, 855-858.)

"[A] plea of insanity may be withdrawn by the defendant and the defendant alone." (*Hernandez*, *supra*, 22 Cal.4th at p. 522.)

As will be discussed in greater detail below, a defendant found NGI may be committed to a psychiatric facility for the same length of time they could have been imprisoned had they been found guilty. A person found NGI and committed for a determinate term, could end up serving a longer – potentially lifetime – commitment by virtue of the extended insanity commitment framework found in section 1026.5, subdivision (b). Therefore, prior to accepting an NGI plea to any offense – irrespective of the punishment it ordinarily carries – the trial court must inform the defendant of the possibility of a lifetime commitment should they be found insane. (*People v. McIntyre* (1989) 209 Cal.App.3d 548, 553, 558; accord *People v. Lomboy* (1981) 116 Cal.App.3d 67, 69 ["advisement of the disparity in the lengths of possible custodial consequences is essential to insure a defendant knows the true potential of such a plea even though she may be generally aware 'some' institutionalization is possible"].)

In a criminal trial, one must be competent to stand trial in order to enter a valid plea of any kind, including a plea of not guilty by reason of insanity.

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[5] *People v. Marsden* (1970) 2 Cal.3d 118.

[6] Under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, when a defendant pleads guilty or no contest the record must affirmatively establish a knowing and intelligent waiver of certain constitutional rights: the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination.

(*Hofferber*, *supra*, 70 Cal.App.3d at p. 269 ["[E]ven if the defendant is suffering from the same mental disturbance with which he was afflicted at the time of the commission of the crime, he may still be competent to stand trial as long as he is able to understand the nature of the proceedings taken against him and is able to assist counsel in presenting a defense. (Pen. Code, § 1367.) If by reason of mental disturbance he is also incompetent to stand trial, the defendant is incapable of entering a knowledgeable plea."].)

1. When an NGI Plea Is Combined with a Not Guilty Plea, Bifurcated Guilt and Sanity Hearings Must Be Held

"A defendant may plead not guilty to the substantive charges and deny any special allegations, and join that plea with a plea of '[n]ot guilty by reason of insanity.' (§ 1016, subds. (2), (6); see § 1026, subd. (a).)

When such dual pleas are entered, the court conducts a bifurcated trial and the issues of guilt and sanity are separately tried." (*People v. Dobson* (2008) 161 Cal.App.4th 1422, 1430-1431; see also § 1026, subd. (a) ["If a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only the 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"][7]; *ibid*. ["If the jury finds the defendant guilty, . . . 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"].)

Although guilt and sanity are determined at separate hearings, "the sanity proceedings are 'but a part of the same criminal proceeding' as the guilt trial"

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[7] Notwithstanding the conclusive presumption of sanity that attaches to the guilt-phase trial following the entry of an NGI plea, it is error for a trial court to instruct the jury on that presumption during the guilt-phase, as "[t]he defendant is presumed sane for *procedural* purposes, not for any evidentiary purpose," and "[t]he presumption of sanity is not pertinent to any issue at a trial on the question of guilt." (*Mills*, *supra*, 55 Cal.4th at pp. 681, emphasis in original.)

and are not considered “a separate action.” (*Hernandez*, *supra*, 22 Cal.4th at p. 523.)

2. When an NGI Plea Alone Is Entered, Only a Sanity Hearing Is Held

Because “[a] defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged” (§ 1016), when a defendant enters only an NGI plea, there are no bifurcated hearings. Instead, the court must hold a single sanity hearing.

J. Right to Jury Trial on Question of Sanity

Section 1026, subdivision (a), provides for a right to a jury trial on the question of the defendant’s sanity. Any “waiver of jury on the issue of insanity must be expressed in open court by the defendant and his counsel.” (*People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1355, citing *People v. Walker* (1948) 33 Cal.2d 250, 267.) While in some circumstances a defendant’s waiver of the right to a jury trial on the issue of guilt will be construed as a waiver of the right to a jury trial on the issue of sanity, “a defendant who waives jury trial on the issue of guilt is [not] foreclosed from requesting a jury trial on the issue of sanity. If, at the time of the jury waiver on the issue of guilt, the defendant specifically demands a jury on his defense of insanity, the statutory language of Penal Code section 1026 does not prohibit this procedure.” (*Jarmon supra*, 2 Cal.App.4th at p. 1355.)

K. Insanity Is a Question of Fact for the Trier of Fact

Both the cognitive and moral incapacity prongs of the *M’Naghten* insanity test present factual questions to be decided by the trier of fact. (*Kelly*, *supra*, 10 Cal.3d at p. 574.)

L. Burden and Standard of Proof

Section 25, subdivision (b), places on the defendant the burden of proving the insanity defense by a preponderance of the evidence.

In *Leland*, *supra*, 343 U.S. at pp. 798-799, the United States Supreme Court affirmed the constitutionality of “an Oregon law placing the burden of proving insanity beyond a reasonable doubt on the defendant[.]” (*Skinner*, *supra*, 39 Cal.3d at p. 774.)

M. An NGI Plea Is an Assertion of an Affirmative Defense

"Insanity is a plea raising an affirmative defense to a criminal charge, although one that does not negative an element of the offense." (*Hernandez*, *supra*, 22 Cal.4th at p. 522.)

N. A Trial Court May Direct a Verdict of Sanity

"Because a plea of insanity is an affirmative defense in which the defendant has the burden of proof, the court may, through the grant of a directed verdict, 'remove the issue of sanity from the jury when the defendant has failed to present evidence sufficient to support the special plea.'" (*Blakely*, *supra*, 230 Cal.App.4th at p. 775, quoting *Ceja*, *supra*, 106 Cal.App.4th 1071, 1089.)

Directing a verdict in this circumstance violates neither the defendant's constitutional right to due process nor to a jury trial. (*People v. Severance* (2006) 138 Cal.App.4th 305, 318.)

O. Pattern Jury Instructions for Sanity Trial

See CALCRIM No. 3450.

P. Instructions on Consequences of an Insanity Verdict

In civil commitment proceedings, "as in criminal matters generally, it is 'improper for the jury to consider what disposition of the defendant may be made or what treatment he may receive.'" (*People v. Mendez* (2018) 21 Cal.App.5th 654, 660, quoting *People v. Allen* (1973) 29 Cal.App.3d 932, 936.) However, because an instruction that an NGI verdict does not mean the defendant will be released from custody is intended to aid the defense, such an instruction should be given upon request by the defendant or by the jury (but not by the prosecutor or sua sponte). (*People v. Moore* (1985) 166 Cal.App.3d 540, 556; *People v. Kelly* (1992) 1 Cal.4th 495, 537-538.)

Q. Self-Defense Instructions at the Sanity Phase

When the focus of a sanity trial is on the defendant's claimed self-defense, it is error for a trial court to instruct the jury that the defendant's conduct must have been objectively reasonable. (*People v. Leeds* (2015) 240 Cal.App.4th 822, 832-833 ["The sanity verdicts turned on whether Leeds actually believed

he was defending himself from imminent peril, and thus could not appreciate the wrongfulness of his actions, rather than on whether his belief was reasonable in light of the objective circumstances. The trial court's instruction on self-defense, with its emphasis on reasonableness, was error."].)

R. Right to Self-Representation at the Sanity Phase

"The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process." (*Iowa v. Tovar* (2004) 541 U.S. 77, 87.) Where the Sixth Amendment right to counsel applies, in most circumstances, a criminal defendant has a federal constitutional right to proceed without counsel. (*Faretta v. California* (1975) 422 U.S. 806 [announcing the right to self-representation]; *Godinez v. Moran* (1993) 509 U.S. 389 [holding that a state may permit self-representation so long as the defendant is competent]; but see *Indiana v. Edwards* (2008) 554 U.S. 164 [holding that a state may deny self-representation to a defendant deemed competent to stand trial on the ground that the defendant lacks the mental capacity to conduct his or her trial without the assistance of counsel].)

"[T]he trial of the issue of insanity is . . . an integral part of a criminal prosecution[.]" (*Vanley*, *supra*, 41 Cal.App.3d at p. 857.) Moreover, because "the sanity proceedings are 'but a part of the same criminal proceeding' as the guilt trial" and are not considered "a separate action" (*Hernandez*, *supra*, 22 Cal.4th at p. 523), there is little doubt a defendant has the right to self-representation at the sanity phase as well.

"[T]he timeliness of one's assertion of *Faretta* rights is critical." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433.) "[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128; see also *People v. Valdez* (2004) 32 Cal.4th 73, 97-98.)

Due to the fact that the sanity phase of a criminal trial is not a separate proceeding, if a defendant makes a *Faretta* request for self-representation in between the guilt and sanity phases, that request will likely be deemed untimely. (See *People v. Hardy* (1992) 2 Cal.4th 86, 194 [holding that a *Faretta* request brought after the guilt phase but before the penalty phase of a capital trial is untimely, as both phases are part of a unitary action].)

When a *Faretta* motion is untimely, the decision whether to grant the motion rests within the discretion of the trial court. (*Hardy*, *supra*, 2 Cal.4th at p. 195; *Windham*, *supra*, 19 Cal.3d at p. 128.) In assessing an untimely *Faretta* request, the trial court may consider a number of factors, such as "the potential for delay and disruption . . . the quality of counsel's representation to that point, the reasons the defendant gives for the request, and the defendant's proclivity for substituting counsel." (*People v. Buenrostro* (2018) 6 Cal.5th 367, 426.)

When a mentally competent criminal defendant who has pled NGI makes a request for self-representation, the trial court should address the request in a matter consistent with the standard announced in *Edwards*, where the United States Supreme Court concluded:

> [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky*[[8]] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

(*Edwards*, *supra*, 554 U.S. at pp. 177-178.)

Our Supreme Court has since accepted the invitation in *Edwards* to apply a higher standard of mental competence for self-representation. (See *People v. Johnson* (2012) 53 Cal.4th 519.) In doing so, *Johnson* declined to adopt a more specific standard for California and instead held: "the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Id*. at p. 530.)

S. Insanity Contrasted with Diminished Actuality

"[E]vidence of a defendant's mental state at the guilt and sanity phases may be overlapping. [Citation omitted.] But the extent of the overlap is limited by the rule that the defendant's sanity is *irrelevant* at the guilt phase and

[8] *Dusky v. United States* (1960) 362 U.S. 402.

evidence tending to prove insanity, as opposed to the absence of a particular mental element of the offense, is *inadmissible*. [Citation omitted.] The defendant may employ mental state evidence in different ways at the guilt and sanity phases, but may not make the same showing twice." (*Elmore*, *supra*, 59 Cal.4th at p. 145, emphasis in original.)

One form of guilt phase mental state evidence is known as "diminished actuality" evidence. "To support a defense of 'diminished actuality,' a defendant presents evidence of voluntary intoxication or mental condition to show he 'actually' lacked the mental states required for the crime." (*Clark*, *supra*, 52 Cal.4th at p. 880, fn. 3, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

In 1981, the Legislature abolished the doctrine of "diminished capacity," pursuant to which "evidence which tended to show a defendant *could not* form the requisite mental state is admissible in the guilt phase" of a criminal trial. (*People v. Saille* (1991) 54 Cal.3d 1103, 1111, emphasis in original.) At the same time the Legislature discarded diminished capacity as a defense in California, the Legislature enacted sections 28 and 29. (*Ibid*.) These statutes left intact the defense of diminished actuality. (*Id*. at p. 1117.)

Consistent with the legislative abolition of the diminished capacity doctrine, section 28, subdivision (a), provides: "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act." (§ 28, subd. (a).) However, "[e]vidence of mental disease, mental defect, or mental disorder *is* admissible . . . on the issue of whether or not the accused *actually formed* a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (*Ibid*., emphasis added.) Any expert called to testify at the guilt phase of a criminal trial "about a defendant's mental illness, mental disorder, or mental defect *shall not* testify as to whether the defendant had or did not have the required mental states[.]" (§ 29, emphasis added.)

Although section 29 "prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted," sections 28 and 29 "allow the presentation of detailed expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted." (*People v. Nunn* (1996)

50 Cal.App.4th 1357, 1364-1365.) Thus, for example, in *Nunn*, the Court of Appeal held that "it was permissible for [an expert] to opine that appellant, because of his history of psychological trauma, tended to overreact to stress and apprehension." (*Id*. at p. 1365.) *Nunn* also approved of an expert testifying that the defendant's mental condition "could result in appellant acting impulsively under certain particular circumstances." (*Ibid*.) Lastly, the expert "could have evaluated the psychological setting of appellant's claimed encounter . . . and could have offered an opinion concerning whether that encounter was the type that could result in an impulsive reaction from one with appellant's mental condition." (*Ibid*.) However, "[w]hat the doctor could not do" under section 29 "was to conclude that appellant had acted impulsively, that is, without the intent to kill, that is, without express malice aforethought." (*Ibid*.) Section 29 leaves that ultimate determination to the trier of fact. (§ 29.) *People v. Cortes* (2011) 192 Cal.App.4th 873, 908-910, also provides an instructive overview of the type of evidence that may be presented in compliance with sections 28 and 29. (See also *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324-1330.)

In *Elmore*, our Supreme Court addressed whether a defendant is entitled to imperfect self-defense instructions "based solely on a defendant's delusional mental state." (*Elmore*, supra, 59 Cal.4th at p. 132.) *Elmore* held the answer is "no" based both on case law concerning voluntary manslaughter and California's statutory scheme governing the insanity defense. (*Id*. at pp. 135-146.) *Elmore* observed that "[a] defendant who makes a factual mistake misperceives the *objective* circumstances. A delusional defendant holds a belief that is divorced from the circumstances." (*Id*. at p. 137, emphasis added.) As *Elmore* explained, evidence of "a belief in the need for self-defense that is *purely* delusional is a paradigmatic example of legal insanity," a question reserved by statute for a trial's sanity phase, and therefore not a basis for voluntary manslaughter instructions in the guilt phase. (*Id*. at pp. 135, 139-146, emphasis added.)[9]

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[9] If there is evidence the defendant's belief in the need to use self-defense was not *purely* delusional, imperfect self-defense instructions should be given at the guilt-phase. (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409-1410 ["whether defendant's statements were sufficiently credible or his beliefs purely delusional were questions of fact for the jury to decide"]; see also *People v. Schuller* (2021) 72 Cal.App.5th 221, review granted January 19, 2022, S272237 [delusions are not a bar to imperfect self-defense if objective circumstances support the claim, even where defendant's own testimony is the only evidence of objective circumstances].)

However, when delusions are relevant to determining whether a defendant has acted with the elements of a *subjective* mental state, such evidence may be considered by the trier of fact at the guilt phase. (See, e.g., *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 ["nothing in the law necessarily precludes Padilla's hallucination from negating deliberation and premeditation so as to reduce first degree murder to second degree murder, as that test is subjective"]; see also *People v. McCarrick* (2016) 6 Cal.App.5th 227, 246 [holding that jurors may also consider evidence of delusions in deciding whether the defendant premeditated and deliberated].)[10]

"Accordingly, the provisions of section 28(a) allowing evidence of diminished actuality are 'qualified' by the caveat that at a trial on the question of guilt, 'evidence tending to show lack of mental capacity to commit the crime because of legal insanity is barred[.]'" (*Elmore supra*, 59 Cal.4th at p. 144, quoting *Wells*, *supra*, 33 Cal.2d at p. 350.) At the same time, though, *Elmore* reiterated that "'a defendant may suffer from a diagnosable mental illness without being legally insane under the *M'Naghten* standard," which means that "[a]ll relevant evidence of mental states short of insanity is admissible at the guilt phase under section 28(a), including evidence bearing on unreasonable self-defense[.]" (*Elmore*, *supra*, 59 Cal.4th at pp. 145-146.)

T. Appointment of Experts and Contents of Reports

"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." (§ 1027, subd. (a).)

"Any report on the examination and investigation made pursuant to subdivision (a) shall include, but not be limited to, the psychological history

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[10] In *People v. McGehee* (2016) 246 Cal.App.4th 1190, the Third District Court of Appeal, applying *Elmore*, rejected an argument that the jury in a murder prosecution should have been instructed on involuntary manslaughter under a diminished actuality theory in a case where the defendant's claim that he did not actually form the required mental state was entirely attributable to delusions.

of the defendant, the facts surrounding the commission of the acts forming the basis for the present charge used by the psychiatrist or psychologist in making his or her examination of the defendant, the present psychological or psychiatric symptoms of the defendant, if any, the substance abuse history of the defendant, the substance use history of the defendant on the day of the offense, a review of the police report for the offense, and any other credible and relevant material reasonably necessary to describe the facts of the offense." (§ 1027, subd. (b).)

When a defendant asserts an insanity defense, and thereby "places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert." (§ 1054.3, subd. (b)(1); see also *Estelle v. Smith* (1981) 451 U.S. 454, 465 ["When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist."].)

"By presenting, at trial, a mental-state defense to criminal charges or penalties, a defendant waives his or her Fifth Amendment privilege to the limited extent necessary to allow the prosecution a fair opportunity to rebut the defense evidence. Under such circumstances, the Constitution allows the prosecution to receive unredacted reports of the defendant's examinations by defense mental experts, including any statements by the defendant to the examiners and any conclusions they have drawn therefrom. The prosecution is also constitutionally permitted to obtain its own examination of the accused, and to use the results, including the accused's statements to the prosecution examiners, as is required to negate the asserted defense. If the defendant refuses to cooperate with the prosecution examiners, the court may impose sanctions, such as advising the jury that it may consider such noncooperation when weighing the opinions of the defense experts. *On the other hand, except for appropriate rebuttal, the defendant's statements to the prosecution experts may not be used, either directly or as a lead to other evidence, to bolster the prosecution's case against the defendant*." (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1125, emphasis added.) "[T]he Fifth Amendment does not directly prohibit the government from *eliciting* self-incriminating disclosures despite the declarant's invocation of the Fifth

Amendment privilege. Absent a valid waiver of Fifth Amendment rights, this constitutional provision simply bars the direct or derivative *use* of such officially compelled disclosures to convict or criminally punish the person from whom they were obtained." (*Id*. at p. 1127, emphasis in original.)

"[A] psychiatrist appointed to examine a defendant for competency could not testify later on the question of the defendant's sanity. . . because a defendant may not invoke his right against compelled self-incrimination in an examination for competency." (*People v. Weaver* (2001) 26 Cal.4th 876, 959; see also *People v. Arcega* (1982) 32 Cal.3d 504, 522.)

U. Direct Consequences of an Insanity Verdict

"If the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law." (§ 1026, subd. (a).)

On the other hand, "[a] successful insanity plea relieves the defendant of all criminal responsibility." (*Dobson*, *supra*, 161 Cal.App.4th at p. 1432.) "If the verdict or finding is that the defendant was insane at the time the offense was committed, the court, unless it appears to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be committed to the State Department of State Hospitals for the care and treatment of persons with mental health disorders or any other appropriate public or private treatment facility approved by the community program director, or the court may order the defendant placed on outpatient status pursuant to Title 15 (commencing with Section 1600) of Part 2." (§ 1026, subd. (a).)

The court must obtain a written recommendation from "the community program director or a designee" before selecting the appropriate placement for a defendant whose sanity has not been fully recovered. (*Ibid*.) "The purpose of committing an insanity acquittee is two-fold: to treat his mental illness and to protect him and society from his potential dangerousness." (*Dobson*, *supra*, 161 Cal.App.4th at p. 1432, internal quotation marks omitted.)

When a person has been found not guilty by reason of insanity of a criminal offense, "the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society."

(*Jones v. United States* (1983) 463 U.S. 354, 370.) An NGI "may be held as long as he is both mentally ill and dangerous, but no longer." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77.) Thus, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, an NGI may not be kept "against his will in a mental institution . . . absent a determination in civil commitment proceedings of current mental illness and dangerousness." (*Id*. at p. 78.)

An individual found not guilty by reason of insanity of a felony in California may be committed to a state hospital for a period of time equal to "the longest term of imprisonment which could have been imposed for the offense or offenses for which the person was convicted." (§ 1026.5, subd. (a)(1).)[11]

In calculating an insanity acquittee's commitment length, the trial court must apply the prohibition against multiple punishment found in section 654. (*People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1238.)

An insanity acquittee whose maximum term of commitment was calculated by reference to the Three Strikes Law may petition to have the length of the commitment reduced in light of the Three Strike Reform Act enacted by Proposition 36. (§ 1170.127.)

An insanity acquittee whose maximum term of commitment includes a firearm enhancement may not benefit from the changes effected by Senate Bill No. 620 that vested trial courts with newfound discretion to dismiss such enhancements. (*People v. K.P.* (2018) 30 Cal.App.5th 331.)

"[T]he calculation of the maximum term of commitment for persons committed to a state hospital pursuant to section 1026 includes credits for days served in actual custody and conduct credits pursuant to section 4019." (*People v. Superior Court (Frazier)* (2020) 54 Cal.App.5th 652, 656.) *Frazier* holds that conduct credits apply against the maximum term of commitment for "time spent in jail awaiting trial and before the order of commitment." (*Id*. at p. 659.) However, "[o]nce committed, the person found not guilty by reason of insanity is barred from receiving *post*commitment conduct credits in the same manner as a prison inmate, who would generally be eligible to

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[11] If the underlying offense was a misdemeanor, the maximum term of commitment is the longest county jail sentence which could have been imposed, and the term may not be extended. (§ 1026.5, subd. (a)(3).)

receive conduct credits pursuant to section 2930 et seq." (*Id*. at p. 661, emphasis in original.)

"[T]here is no legal basis to order a state hospital commitment and a state prison sentence to run concurrently with or consecutively to one another." (*People v. Chavez* (2008) 160 Cal.App.4th 882, 896.) When a person is convicted of one offense and found NGI of another, "if the trial court orders defendant to be confined in a state mental hospital, it is to stay execution of defendant's state prison term until such time as defendant regains his sanity. He shall then be transferred to the trial court for imposition of the stayed prison term." (*Id*. at p. 897.)

After an individual has been found not guilty by reason of insanity and committed to a state hospital or other treatment facility, release is possible in three situations: (1) expiration of the maximum term of commitment if no extended commitment petition (§ 1026.5, subd. (b)) is filed by the District Attorney or if a petition is filed and denied; (2) a finding of restoration of sanity or successful petition for conditional release (§ 1026.2); or (3) approval of outpatient status (§§ 1600 et seq.).[12] All three avenues for release – as well as the outpatient revocation scheme – are discussed in greater detail below.

V. Collateral Consequences of an Insanity Verdict

Estates of Ladd (1979) 91 Cal.App.3d 219 interpreted former Probate Code section 258 and held that a finding of not guilty by reason of insanity of the killing of another person does not preclude inheritance from that person. To the contrary, an insanity verdict "should constitute an acquittal and a conclusive determination that the defendant did not 'unlawfully and intentionally' cause the death of the decedent." (See also *Estate of Armstrong v. Armstrong* (Miss. 2015) 170 So.3d 510, 515 [where the Supreme Court of Mississippi, citing *Ladd*, held in a case involving a son found NGI of killing his mother: "this Court concludes that Mississippi should follow the majority of states and holds that the Slayer Statute requires a finding of *willful* conduct to preclude a person from inheriting from his or her victim. Because an insane person lacks the requisite ability willfully to kill another person,

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[12] As discussed in greater detail below, these same procedures apply to minors found NGI in delinquency proceedings, except that minors facing commitment extensions do not have a right to a jury trial. (Welf. & Inst. Code, § 702.3, subds. (d), (f).)

the Slayer Statute is not applicable in cases where the killer is determined to be insane at the time of the killing."].)

Because a "not guilty by reason of insanity . . . finding is not a conviction," an insanity acquittee cannot file a motion to vacate an insanity verdict pursuant to section 1203.4. (*People v. Morrison* (1984) 162 Cal.App.3d 995, 998.)

Although no published case addresses whether a person found NGI can be ordered to pay victim restitution or a restitution fine, at least one unpublished decision, citing *Morrison*, has held that neither can be imposed because the applicable Penal Code sections only apply where there has been a "conviction." (*People v. McEntire* (Mar. 26, 2009, A121192) [nonpub. opn.] [2009 WL 792467, at *5].)

In the California Three Strikes Sentencing treatise written by Judge Couzens and Justice Bigelow, the authors ask the following question: "May the prosecution use a prior serious or violent felony charge as a strike when the defendant was found NGI?" (Couzens & Bigelow, Cal. Three Strikes Sentencing (2021) § 13:10.) They proceed to answer their own question in the negative, explaining: "the finding of insanity is a complete defense to the charge, notwithstanding the initial conviction that occurs prior to the determination of sanity. (*In re Merwin*, 108 Cal. App. 31, 290 P. 1076 (3d Dist. 1930).) Since there is no 'conviction' of the prior serious or violent felony, there is no prior strike that may be used in the current proceeding." (Couzens & Bigelow, Cal. Three Strikes Sentencing (2021) § 13:10.)

Whether, for federal immigration purposes, a California NGI finding qualifies as a conviction and whether an NGI commitment qualifies as a sentence remain open questions. There are no published authorities directly on point. However, "[t]here is a grave risk that a not guilty by reason of insanity (NGI) disposition constitutes a conviction [for federal immigration purposes], at least under California procedure, since the defendant is required first to enter a guilty plea, and in effect be convicted, before entering a[n] NGI plea, and receiving treatment rather than a sentence." [13] (Norton Tooby, Criminal Defense of Immigrants, § 8.60.) "It is possible to argue to the contrary, based on 'basic principles' such as the 'not guilty' part of the 'not

[13] As discussed above, this description of entering an NGI plea is not entirely correct – one cannot plead guilty and NGI – but the point remains well-taken: an NGI finding is not made until after the defendant has admitted or been found to have committed the elements of the crime.

guilty by reason of insanity' plea. Whether the NGI plea results in a conviction and whether the resulting incarceration constitutes a sentence [for federal immigration purposes] are two different questions." (*Ibid.*) A potential problem for our clients is that "the current definition of sentence" – which can have significant adverse immigration consequences – "literally requires only a 'period of . . . confinement ordered by a court of law.'" (*Ibid.*) Moreover, even if an NGI finding and resulting commitment meet neither the definition of a "conviction" nor the definition of a "sentence" for federal immigration purposes, the NGI finding could adversely affect an undocumented person's efforts to apply for discretionary relief from deportation or a lawful permanent resident's efforts to become a citizen.

W. Adverse Consequence to Appealing from an NGI Verdict

A defendant has the right to appeal the underlying guilty finding following an insanity verdict. (§ 1237, subd. (a) ["An appeal may be taken by the defendant from . . . the commitment of a defendant for insanity"]; see also *Vanley*, *supra*, 41 Cal.App.3d at p. 848, fn. 1.)

However, taking such an appeal is not without risk. If the appellate court reverses the guilt verdict and remands the case for a new trial, "reversal of the judgment necessarily requires the retrial of appellant's insanity defense should that plea be reentered upon remand, and if appellant ultimately is found guilty following the retrial of the guilt phase." (*People v. James* (2015) 238 Cal.App.4th 794, 813, fn. 6.)

Accordingly, an appellate reversal of the guilt-phase verdict could lead to another guilty verdict followed by a rejection of the insanity defense, which means a defendant originally committed to the state hospital could end up in prison by virtue of "winning" their appeal. Appellate counsel should advise an NGI client of this potential adverse consequence and obtain the client's informed consent to proceed with the appeal if any of the issues raised on appeal could lead to a retrial on the question of guilt, thereby potentially disturbing the insanity finding.

Should the client choose to proceed with an appellate challenge to the underlying guilt-phase verdict, counsel should consider briefing that *James* was wrongly decided on this point and that state constitutional principles of double jeopardy bar a retrial on the sanity finding in the event of a reversal of the guilt finding. (See, e.g., *People v. Hanson* (2000) 23 Cal.4th 355, 365-366 [noting that, unlike the Fifth Amendment double jeopardy protection, the

state Constitution's equivalent clause prohibits trial courts from imposing a more severe punishment on remand from a successful appeal].) Were one to rely on the Fifth Amendment, one might turn to *Bullington v. Missouri* (1981) 451 U.S. 430, in which the United States Supreme Court, applying the federal constitutional double jeopardy provision, prohibited retrial on the previously rejected death penalty verdict following reversal of the guilt-phase verdict.

X. A Finding of Sanity Is Reviewed for Substantial Evidence

When challenging the sufficiency of the evidence in support of a sanity finding – a claim that the defendant carried their burden of establishing the affirmative defense of insanity – the substantial evidence test applies. (*Rittger*, *supra*, 54 Cal.2d 720, 733-734; *Wolff*, *supra*, 61 Cal.2d at p. 804; *Chavez*, *supra*, 160 Cal.App.4th at p. 891.) The substantial evidence test, though, has a different gloss in this context because the issue of insanity arises as an affirmative defense. (*McCarrick*, *supra*, 6 Cal.App.5th at pp. 247-248, quoting *Drew*, *supra*, 22 Cal.3d at p. 351 ["'the question on appeal is not so much the substantiality of the evidence favoring the jury's [sanity] finding as whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it.'"]; accord *Chavez*, *supra*, 160 Cal.App.4th at p. 891.)[14]

"It is only in the rare case when 'the evidence is uncontradicted and entirely to the effect that the accused is insane' (*In re Dennis* (1959) 51 Cal.2d 666,

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[14] It should always be remembered that, while the substantial evidence test is rooted in deference, "[s]ubstantial evidence is . . . not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process . . . . The Court of Appeal was not created . . . merely to echo the determinations of the trial court." (*In re Carlos J.* (2018) 22 Cal.App.5th 1, 7, quoting *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652, internal quotation marks omitted.) As our Supreme Court has noted in multiple settings, "deference is not abdication." (*People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. Ledesma* (1987) 43 Cal.3d 171, 217; see also *People v. Gonzales* (2008) 165 Cal.App.4th 620, 628 [declaring "deference is not abdication" in applying the substantial evidence test]; accord *People v. Batts* (2003) 30 Cal.4th 660, 703 (conc. opn. of Moreno, J.) [same].)

674(12), 335 P.2d 657) that a unanimity of expert testimony could authorize upsetting a jury finding to the contrary." (*Wolff*, *supra*, 61 Cal.2d at p. 804.)

For cases affirming the sufficiency of the evidence in support of a sanity verdict, see *Blakely*, *supra*, 230 Cal.App.4th 771, *Severance*, *supra*, 138 Cal.App.4th 305, *Ceja*, *supra*, 106 Cal.App.4th 1071, and *People v. Skinner* (1986) 185 Cal.App.3d 1050. There do not appear to be any published cases reversing a sanity finding for insufficient evidence.

Y. Reversal of Sanity Verdict Does Not Require Reversal of Guilt Verdict

Although "the determination of the issues presented by the pleas of not guilty and not guilty by reason of insanity constitute but one trial[,] . . . error in the trial of the issue of sanity does not entitle the defendant to a retrial upon the issue presented by the plea of not guilty." (*People v. Eggers* (1947) 30 Cal.2d 676, 691.)

Z. Involuntary Medication Orders

"[P]ersons who are found not guilty by reason of insanity (NGI's) have the same constitutional right as [mentally disorder offenders (MDO's)] and [sexually violent predators (SVP's)] to refuse antipsychotic medication." (*In re Greenshields* (2014) 227 Cal.App.4th 1284, 1287.) As such, the Department of State Hospitals must "refrain from administering antipsychotic medication to [an NGI] against his will in a nonemergency situation unless a trial court determines he is (1) incompetent to refuse the treatment, or (2) a danger to others within the meaning of Welfare and Institutions Code section 5300, i.e., whether he committed the types of violent or threatening acts specified in section 5300 within the year prior to the recommitment." (*Id*. at p. 1294.)

AA. No Insanity Defense in Probation, Parole, Mandatory Supervision, and Postrelease Community Supervision Revocation Proceedings

"There is no insanity defense in revocation hearings[.]" (*People v. Harrison* (1988) 199 Cal.App.3d 803, 809-810; accord *People v. Breaux* (1980) 101 Cal.App.3d 468, 474 ["the fact that an act constituting a probation violation was committed while the defendant was insane is not a defense to a probation violation charge"].)

Nevertheless, "the mental state of the defendant, though not a defense, is relevant to the decision to revoke." (*Breaux*, *supra*, 101 Cal.App.3d at p. 474.) "'Fundamental fairness – the touchstone of due process – requires that the trial court consider whether the appellant knew the difference between right or wrong at the time the alleged violations of probation occurred, not as a defense to the alleged violations, but to make it possible for the trial court to have all the information necessary to make the judgment justice demands.'" (*Ibid*., quoting *State v. Johnson* (1973) 514 P.2d 1073, 1076.) Therefore, "[a] person's sanity or the fact that he suffers from a mental disease or defect is relevant for the court to consider in determining whether a probationer's probation should be revoked or modified." (*Breaux*, *supra*, 101 Cal.App.3d at p. 474.)

For the purpose of determining the process due at revocation proceedings, probationers are constitutionally indistinguishable as a group from parolees. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782; accord *People v. Vickers* (1972) 8 Cal.3d 451, 458; see also (Stats. 2012, ch. 43, § 2, subd. (b) [where the Legislature unequivocally declared its intent to import the procedural due process protections articulated in *Morrissey v. Brewer* (1972) 408 U.S. 471 into the mandatory supervision and postrelease community supervision revocation frameworks].) Given that *Breaux* in part rooted its holding in the procedural due process rights identified in *Morrissey*, there is every reason to believe its holding applies to parole, mandatory supervision, and postrelease community supervision revocation proceedings as well.

BB. The Insanity Defense in Delinquency Proceedings

The insanity defense applies to juvenile delinquency proceedings conducted pursuant to Welfare and Institutions Code section 602. (*In re Ramon M.* (1978) 22 Cal.3d 419, 423, fn. 3; *In re M.G.S.* (1968) 267 Cal.App.2d 329, 336; *In re Vicki H.* (1979) 99 Cal.App.3d 484, 491.) In fact, is has been suggested that the availability of the insanity defense in delinquency proceedings is constitutionally compelled. (*M.G.S.*, *supra*, 267 Cal.App.2d at p. 336 ["We see no reason why the defense of legal insanity should not be interposed in a juvenile court proceeding as it goes to the very essence of the jurisdiction of the juvenile court to declare a minor a ward of the court. A deprivation of the right to present such a defense violates the constitutional guarantee of due process of law[.]"].) *M.G.S.* made this pronouncement, however, before there was a statute expressly providing for an insanity defense.

Since 1978, Welfare and Institutions Code section 702.3 has codified the juvenile delinquency proceeding insanity defense.[15] As with its adult criminal trial counterpart (§ 1026, subd. (a)), Welfare and Institutions Code section 702.3, subdivision (a), provides for a two-phase hearing – with a sanity hearing held after a hearing resulting in a true finding on any of the offense allegations – when the minor enters both a general denial to the charges and a plea of not guilty by reason of insanity.

Upon a finding of insanity, as with defendants charged in criminal court, if the minor's sanity has not been fully restored, the juvenile court shall place the minor in a state hospital, in another psychiatric facility, or on outpatient status under community supervision. (Welf. & Inst. Code, § 702.3, subd. (b).)

A juvenile insanity commitment may not be "for a period longer than the jurisdictional limits of the juvenile court, pursuant to [Welfare and Institutions Code] [s]ection 607," though a commitment may be extended pursuant to section 1026.5, subdivision (b). In light of the potential for such extensions, prior to accepting an NGI plea to any offense – irrespective of the jurisdictional limits imposed by Welfare and Institutions Codes section 607 – the juvenile court must inform the minor of the possibility of a lifetime commitment should they be found insane. (See *McIntyre*, *supra*, 209 Cal.App.3d at pp. 553, 558; *Lomboy*, *supra*, 116 Cal.App.3d at p. 69.)

The same procedures that govern the extended commitment, conditional release, and unconditional release of criminal court insanity acquittees apply to minors found NGI. (Welf. & Inst. Code, § 702.3, subd. (d).) Minors facing extended insanity commitment proceedings, however, do not have a jury trial right. (Welf. & Inst. Code, § 702.3, subd. (f).)

III. Extended Commitment Proceedings (§ 1026.5)

An NGI may not be committed longer than the maximum term of imprisonment for the underlying offense(s), unless the prosecution successfully petitions to extend the commitment as set forth in section 1026.5. (§ 1026.5, subd. (a)(1); *Dobson*, *supra*, 161 Cal.App.4th at p. 1434.) Under section 1026.5, the commitment may be extended for an additional two

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[15] Even before the enactment of Welfare and Institutions Code section 702.3, section 26, subdivision (1), provided: "Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness" are "[in]capable of committing crimes[.]"

years calculated from the date of termination of the previous commitment. (§ 1026.5, subd. (b)(8).) Section 1026.5 does not limit the number of times an individual's commitment may be extended. Thus, an individual is not guaranteed an end date for their NGI commitment and may in fact be committed for a period of time that exceeds the maximum term of imprisonment that could have been imposed for the charged offense.

A. History of Section 1026.5

Until 1979, there was no extended commitment scheme for NGI's, as all insanity commitments were indeterminate in length.

> Penal Code section 1026.5 was enacted in 1979, as emergency legislation in response to the California Supreme Court's decision of [*In re Moye* (1978) 22 Cal.3d 457]. Prior to *In re Moye*, individuals committed to state hospitals after having been acquitted by reason of insanity were committed for an indefinite period of time. *In re Moye* concluded that equal protection principles mandated that such individuals be released after they had been committed for a period of time equal to the maximum state prison sentence which they could have received for the underlying offense. Faced with the imminent release of many potentially dangerous individuals, the legislature adopted Penal Code section 1026.5 to provide for a maximum term of commitment, together with the possibility of successive two-year recommitments for dangerous individuals. At the same time, the statutes relating to mentally disordered sex offenders (MDSO) were amended to provide for virtually identical procedures.

(*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 487-488, footnote omitted.)

B. Extension Petition and Deadlines

Section 1026.5, subdivision (b)(2), provides that, no "later than 180 days prior to the termination of the maximum term of commitment," the medical director of the hospital or other facility must submit to the prosecuting attorney their opinion on whether the individual continues to represent a substantial danger of physical harm to others by reason of mental disease, defect, or disorder. The prosecutor must then file an extension petition no later than 90 days prior to the expiration of the commitment, unless good

cause is shown.[16] The petition "shall state the reasons for the extended commitment, with accompanying affidavits." Subdivision (b)(4) provides that the trial on the extension petition "shall commence" no later than 30 days prior to the expiration of the commitment.

In *People v. Lara* (2010) 48 Cal.4th 216, the California Supreme Court addressed the consequences when these deadlines are not met. In *Lara*, the district attorney filed the extension petition less than a month before the individual's commitment expired and conceded there was no good cause for the late filing. The defense made a record in the trial court that it was unable to adequately prepare for a trial prior to the commitment expiration date. The jury trial was then not held until seven months after the original commitment had expired. The defendant appealed the extension finding based on the trial court's denial of his motions to dismiss on the grounds that the prosecution's late filing of the extension petition resulted in a due process violation. The Court held that the statutory deadlines were directory, not mandatory, and failure to comply with the deadlines did not deprive the trial court of jurisdiction or require dismissal of the extension petition so long as the petition was filed prior to the expiration of the commitment. (*Id.* at pp. 226-228.) However, the requirement that the state file an extension petition before expiration of the commitment is mandatory, which means failure to comply with this deadline is grounds for dismissal. (*Id.* at pp. 235-236.)

Failure to meet the timelines may result in a due process violation if the late filing renders the trial unfair by depriving the defendant of adequate time to prepare. (*Id.* at p. 229.) However, the Court in *Lara* explicitly disapproved of prior cases holding dismissal of the extension order was required in order to remedy a due process violation. (*Id.* at pp. 229, 226, fn. 26.) Instead, the appropriate remedial action in the trial court is release of the defendant pending trial on the extension petition if "good cause [for the late filing] is not shown, or the good cause shown does not outweigh the prejudice suffered." (*Id.* at p. 235.)

After *Lara,* it is doubtful an appellate court will order relief based on the prosecution's failure to adhere to extension commitment deadlines if the resulting trial was fair, even if substantially delayed. (*Id.* at p. 236.) The exception may be a situation where the trial court denied defense requests for

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[16] The prosecutor may file an extended commitment petition even upon receipt of a recommendation against extending the person's commitment. (*People v. Kendrid* (2012) 205 Cal.App.4th 1360, 1363.)

continuances to prepare for trial and the defense was so unprepared that the trial was unfair.

C. Constitutional and Statutory Rights

"The proceedings to extend commitments under section 1026.5 are essentially civil in nature, . . . though they include many constitutional protections relating to criminal proceedings." (*Dobson, supra*, 161 Cal.App.4th at p. 1435.) Principles of due process apply because the hearing may result in loss of liberty and continued involuntary commitment. (*Jones*, *supra*, 463 U.S. at pp. 362-363; *Addington v. Texas* (1979) 441 U.S. 418, 425-427.)

Subdivision (b)(7) provides that all federal and state constitutional rights "for criminal proceedings" apply to individuals subject to an extension petition, and that all extension "proceedings shall be in accordance with applicable constitutional guarantees." Certain rights are also specifically mentioned in section 1026.5, including the right to a jury trial (§ 1026.5, subds. (b)(3) & (4)), appointed counsel (§ 1026.5, subd. (b)(3) & (7)), appointment of psychologists and/or psychiatrists (§ 1026.5, subd. (b)(7)), and discovery commensurate with that afforded criminal defendants (§ 1026.5, subd. (b)(3)).

The question of which other constitutional rights are statutorily afforded NGIs by subdivision (b)(7) has proven difficult to answer. "[T]he statute in effect commands a translation or transposition of procedural rights from the criminal context to the noncriminal, contexts sufficiently different to raise a question of its interpretation. That the appellate courts have struggled to delineate the set of criminal trial rights the statute incorporates into a commitment extension hearing is not surprising." (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 826.)

Our Supreme Court most recently addressed which rights are guaranteed by subdivision (b)(7) in *Hudec*, when it resolved a split of authority as to whether an individual may be compelled to testify at an extension hearing. *Hudec* held that individuals facing an extension "enjoy the *trial rights* constitutionally guaranteed to criminal defendants" (*Id*. at p. 832, emphasis added), including the right to refuse to testify. The Court looked to the legislative history of section 1026.5, which indicated the legislature's intent to provide individuals with "all rights that apply in criminal trials." (*Id*. at pp. 822, 827.) The legislature's choice of "the" in subdivision (b)(7) was "equivalent to 'all.'" (*Id*. at p. 826.)

Hudec specifically disapproved of several prior Court of Appeal opinions that had taken more limited views of the rights guaranteed by subdivision (b)(7). (*Id*. at p. 828, fn. 3.) In particular, *Hudec* rejected the reasoning employed in *Williams*, *supra*, 233 Cal.App.3d 477, which held that subdivision (b)(7) codified the application of only those constitutional rights that had been mandated by prior judicial decision. In disavowing this limited view, *Hudec* explained that the "Legislature chose not merely to codify the particular rights mandated" in prior cases "but rather to state a broader rule that . . . commitments call for procedural protections otherwise applicable in criminal cases." (*Id*. at p. 828.)

Hudec did acknowledge that absurd consequences could result from transporting certain rights of criminal defendants to the context of extension hearings (e.g., the right not to be tried while incompetent) and did not explain in which situations a trial right guaranteed a criminal defendant may not apply to an individual facing an NGI commitment extension. (*Id*. at pp. 829-830; see *People v. Angeletakis* (1992) 5 Cal.App.4th 963 [discussing inapplicability of right not to stand trial while incompetent].) However, the *Hudec* Court clearly took an expansive view of the rights included in subdivision (b)(7), and any trial right guaranteed a criminal defendant by the state or federal constitutions should be applicable to extension proceedings, unless it results in absurdity or prevents the hearing from going forward.

A possible exception are constitutional rights that "bear no relevant relationship" to extension proceedings. (*Williams, supra,* 233 Cal.App.3d at p. 488.) In *Williams*, the court found that the right not to be subjected to double jeopardy did not apply to extension proceedings because it had no "meaningful application" to the proceedings.[17] Though *Hudec* disapproved of *Williams's* otherwise restricted view of subdivision (b)(7) and noted that the right not to testify did have meaningful application to extension proceedings (*Hudec*, *supra*, 60 Cal.5th at p. 830), it did not expressly reject the "meaningful application" analysis employed in *Williams*.

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[17] With the recent decision in *People v. Cheatham* (C094175, Aug. 29, 2022), ___ Cal.App.5th ___[2022 WL 3714656], there is now a split of authority in the Courts of Appeal as to whether due process principles apply to preclude retrial where the appellate court reverses an extension on insufficient evidence grounds. (See Section III.C.5.)

Apart from *Hudec's* affirmation that individuals facing a commitment extension enjoy trial rights equivalent to that of a criminal defendant, certain rights have been specifically affirmed by the appellate courts, including that:

- The state bears the burden of proof (*Williams, supra*, 233 Cal.App.3d at p. 488);
- The standard of proof is proof beyond a reasonable doubt (*People v. Redus* (2020) 54 Cal.App.5th 998; *People v. Burnick* (1975) 14 Cal.3d 306);
- The jury decision must be unanimous (*Hudec, supra,* 60 Cal.4th 815; *People v. Martinez* (2016) 246 Cal.App.4th 1226);
- The individual must be personally advised of their jury trial right and must personally waive that right (*People v. Tran* (2015) 61 Cal.4th 1160; *People v. Ford* (2020) 56 Cal.App.5th 385);
- The individual has the right to be personally present for the extension hearing and other critical stages of the proceedings (*Ford, supra,* 56 Cal.App.5th 385);
- The individual has a right to self-representation (*People v. Wolozon* (1982) 138 Cal.App.3d 456);
- The individual has the right to confront and cross-examine witnesses, including at pretrial hearings (*Wolozon, supra,* 138 Cal.App.3d 456 [pretrial hearing concerning waiver of right to counsel]; *Williams, supra,* 233 Cal.App.3d 477);
- The individual may not be compelled to testify (*Hudec, supra,* 60 Cal.4th 815).

Although *Hudec* interpreted subdivision (b)(7) broadly, this provision may not include rights not directly related to trial court proceedings. For example, in an appeal of an extension order, the reviewing court is not required to conduct an independent review of the record on appeal if the appellate attorney files a no-issues brief. As Division Eight of the Second District recently explained in *People v. Luper* (2022) 73 Cal.App.5th 1077, 1082, subdivision (b)(7) addresses only extension proceedings in the superior court, and the *Hudec* opinion repeatedly employed the phrase "trial rights," rather than "rights." (See also *Martinez, supra,* 246 Cal.App.4th 1226 [due process does not require independent review of the record in appeal of extension order].)

The following sections examine a few rights in greater detail:

1. Jury Trial Advisement and Waiver

In *Tran*, *supra*, 61 Cal.4th at p. 1166, our Supreme Court held that subdivision (b)(3)'s requirement that the trial court "advise the person" of their right to a jury trial and subdivision (b)(4)'s requirement that the extension trial be by jury unless waived "by the person" requires personal advisement and waiver of that right. (See also *People v. Blackburn* (2015) 61 Cal.4th 1113 [companion case addressing identical question in context of OMHD (formerly "MDO") commitment extension]). 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." (*Tran*, *supra*, 61 Cal.4th at p. 1167.)

Despite the statute's apparent unambiguous language requiring personal advisement and waiver, several pre-*Tran* Court of Appeal decisions had previously held that counsel could waive jury trial, even over the NGI's objection. (See, e.g., *People v. Powell* (2004) 114 Cal.App.4th 1153, *People v. Givan* (2007) 156 Cal.App.4th 405.) *Powell* and similar decisions relied on *Williams's* limited view of the rights guaranteed by subdivision (b)(7), but also essentially took the position that an NGI should be presumed not competent to choose between a bench or jury trial. As the court in *Powell* explained,

> An insane person who is "a substantial danger of physical harm to others" (§ 1026.5, subd. (b)(1)) should not be able to veto the informed tactical decision of counsel. We do not deny the right to jury trial for such a person. We only limit the manner in which it may be invoked or waived.
>
> Appellant has twice been adjudged to be insane and state hospital doctors have never indicated that he has regained his sanity. He seeks release so that he can kill people. Can such a person intelligently invoke or waive the right to jury trial? Is such a person competent to meaningfully understand who should make the determination of whether his commitment should be extended?
>
> Common sense dictates that appellant should not be able to veto his attorney's decision to waive jury.

(*Powell, supra,* 114 Cal.App.4th at p. 1158.) Until *Hudec* and *Tran,* this very limited view both of the rights afforded individuals facing extension, but also of those individuals' capabilities to make choices about their own legal cases, predominated.

Tran explicitly rejected the presumption that NGI defendants lack the capacity to make a knowing and voluntary choice between a jury and bench trial. (*Tran*, *supra*, 61 Cal.4th at p. 1167.) Instead, capacity is presumed unless the trial court makes a finding on the record that there is a reasonable doubt as to the individual's capacity. (*Ibid*.) "[I]f 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." (*Ibid*.)

Citing *Blackburn,* the Court in *Tran* further held that a trial court's acceptance of an invalid jury trial waiver automatically requires reversal unless the record affirmatively shows substantial evidence that the individual lacked the capacity to make a waiver. (*Id*. at p. 1170.) Likewise, the trial court's failure to personally advise the individual as to their jury trial rights requires reversal unless the record shows, "based on the totality of the circumstances, that the defendant's waiver was knowing and voluntary." (*Ibid*.) If the record is silent, "no valid waiver may be presumed." (*Ibid*.)

Since *Tran* and *Blackburn,* appellate courts have provided further guidance as to what constitutes an adequate advisement of the right to a jury trial. In *People v. Sivongxxay* (2017) 3 Cal.5th 151, the Supreme Court "eschewed any rigid formula or particular form of words that a trial court must use," but "emphasize[d] the value of a robust oral colloquy" and specifically recommended trial courts inform the individual that

> (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence.

(*Sivongxxay, supra*, 3 Cal.5th at p. 169; see also *People v. Blancett* (2017) 15 Cal.App.5th 1200; *People v. Jones* (2018) 26 Cal.App.5th 420.)

2. Right to Personal Presence

An individual facing civil commitment has a due process right to be present for critical stages of the proceedings. (*Ford, supra,* 56 Cal.App.5th at p. 392, fn. 3.) This includes the hearing on the extension petition as well as other "critical" pretrial hearings.

Ford addressed the intersection between the right to be present and the right to be personally advised and waive jury trial. In *Ford*, the individual was not transported to the pretrial hearing where his attorney waived his right to a jury trial and represented to the trial court that the individual lacked the capacity to decide whether to waive jury. On the basis of a psychiatrist's letter, and without hearing from the individual himself, the trial court found the individual incompetent, accepted counsel's waiver, and conducted a bench trial, for which the individual was present and testified. The Attorney General conceded that appellant's constitutional rights were violated by the trial court's incompetency finding in his absence, but argued that the error was harmless. (*Ford, supra*, 114 Cal.App.4th at p. 392.) The Court of Appeal rejected that argument, emphasizing that the trial court must "directly" advise the NGI defendant of his right to a jury trial and further explained that the "court's direct observation . . . may be the most relevant evidence of . . . competence." (*Id*. at pp. 392-393.)

3. Confrontation

There is no Sixth Amendment confrontation right in civil commitment proceedings, including commitment extension hearings, because these proceedings are not criminal trials. However, NGIs facing extensions are guaranteed the right to confront witnesses by both due process principles and subdivision (b)(7). (See *Wolozon, supra,* 138 Cal.App.3d at p. 462.)

The most common confrontation issue in extension proceedings involves the erroneous admission of hearsay testimony by experts. Although *People v. Sanchez* (2016) 63 Cal.4th 665 was a criminal case involving hearsay testimony by a gang expert, *Sanchez's* prohibition on admission of case-specific hearsay via expert testimony applies to civil commitment proceedings. (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507, 509, fn. 6.) Because extension proceedings invariably involve expert testimony about

medical records, which may contain multiple levels of hearsay, counsel should be alert to potential *Sanchez* violations.

Counsel should also consider whether the testifying experts improperly testified to the conclusions of other, nontestifying experts. (See *People v. Campos* (1995) 32 Cal.App.4th 304, 308 ["An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts," as "[t]he opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse"].)

4. Self-Representation

The right to waive counsel for proceedings on an extension petition is guaranteed by subdivision (b)(7). In *Wolozon, supra,* 138 Cal.App.3d at p. 461, the appellate court concluded without discussion that an individual facing an extension of his NGI commitment could waive counsel, subject to the same considerations as a criminal defendant. Moreover, the court clarified that the evaluation of the individual's competence to waive counsel was a question separate from whether the individual represents a danger due to mental disease or defect. (See also *Johnson*, *supra*, 53 Cal.4th at p. 530 [addressing consideration of mental health condition in context of self-representation at criminal trial].) Thus, the expert reports on which the trial court relied to refuse the defendant's request to represent himself were insufficient for determining whether he was competent to waive counsel; they addressed only whether the commitment should be extended due to dangerousness. (See also *People v. Powell* (1986) 180 Cal.App.3d 469, 477.)

5. Double Jeopardy

Until very recently, it appeared that double jeopardy principles did not apply to extension proceedings. (*Williams, supra* 233 Cal.App.3d at p. 488.) *Williams* reasoned both that subdivision (b)(7) codified constitutional protections that had been "mandated by judicial decision,"[18] and that double jeopardy provisions had no "meaningful application" to extension proceedings because commitment proceedings are civil in nature.

[18] This aspect of *Williams* was specifically rejected by *Hudec, supra,* at pp. 827-828.

However, in *Cheatham,* the Third District recently held that double jeopardy principles do apply to commitment extensions to bar retrial after appellate reversal for insufficient evidence. (*Cheatham, supra,* 2022 WL 3714656.) In *Cheatham*, the court found the evidence was insufficient to establish dangerousness and reversed the extension order. The court accepted the "meaningful application" distinction articulated in *Williams,* but disagreed with *Williams's* application of the rule to double jeopardy.

The court began its analysis by noting the parties agreed that neither the federal nor state constitutions bar successive trials in a civil commitment case following an appellate reversal for insufficient evidence because civil commitments are not "prosecution[s]." (*Id*. at p. 7.) However, the plain language of subdivision (b)(7) grants NGIs "the rights constitutionally guaranteed to criminal defendants." The court rejected the Attorney General's argument that subdivision (b)(7) includes only rights related to the evidentiary phase of the trial as inconsistent with the statute's clear language and *Hudec.* (Id. at p. 10.)

The court noted a limited interpretation of (b)(7) would also be inconsistent with its prior decision in *In re Anthony C.* (2006) 138 Cal.App.4th 1493, which held a similar statute in the juvenile context included the prohibition against double jeopardy. (*Cheatham*, *supra*, 2022 WL 3714656, *9.) The court also disagreed with *Williams's* conclusion that double jeopardy principles have no meaningful application to extension proceedings, explaining that the right not to be tried twice could apply in any adversarial proceeding even though it is only constitutionally guaranteed in criminal cases. (*Ibid*.)

D. Basis for Extension

An individual's commitment may be extended by two years only if he or she "represents a substantial danger of physical harm to others" "by reason of a mental disease, defect, or disorder." (§ 1026.5, subd. (b)(1); see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 357-358.) The prosecution bears the burden of proof beyond a reasonable doubt. (§ 1026.5, subd. (b)(4); *People v. Bowers* (2006) 145 Cal.App.4th 870, 878-879; *People v. Tilbury* (1991) 54 Cal.3d 56, 63.)

1. Sufficiency of the Evidence

On appeal, a claim of insufficient evidence is reviewed by applying "the test used to review a judgment of conviction." (*People v. Zapisek* (2007) 147

Cal.App.4th 1151, 1165.) The court reviews the "entire record in the light most favorable to the extension order to determine whether any rational trier of fact could have found the requirements of section 1026.5(b)(1) beyond a reasonable doubt. A single psychiatric opinion that an individual is dangerous because of a mental disorder constitutes substantial evidence to support an extension." (*Ibid.*, citing *Bowers, supra*, 145 Cal.App.4th at pp. 878-879; see also *People v. Beard* (1985) 173 Cal.App.3d 1113, 1118 ["single recent act of violence" sufficient evidence].) However, the experts' medical opinions and inferences made from the evidence must not be based on "speculation and conjecture." (*Anthony C., supra,* 138 Cal.App.4th at p. 1509.)

Whether an NGI represents a substantial danger to others is a question of fact to be resolved with the assistance of expert testimony. Thus, the trial court or jury is not required to follow the recommendation of the state hospital staff and may extend an individual's commitment even if the hospital director recommends otherwise.

2. Mental Disease, Defect, or Disorder

In many extension proceedings, the disputed issue is not whether the individual has been diagnosed with a mental health disorder, but whether that disorder renders the individual dangerous to others. However, the "mental disorder" element of section 1026.5 has been the subject of litigation, and it is important for appellate counsel understand a few aspects of this element.

a. Changed Diagnosis

An NGI's commitment may be extended due to a mental disorder different from the one that justified the original commitment. (*People v. McCune* (1995) 37 Cal.App.4th 686, 692.)

b. Range of Mental Disorders Supporting Extension Broader Than for Initial NGI Finding

A mental health disorder that could not legally support an initial NGI finding and commitment can support an extension of the commitment. This seems unfair and counterintuitive, so a brief explanation of the relevant cases may be helpful.

Whether the individual has a mental disease or disorder is a question of fact to be resolved by the fact finder. This inquiry includes both whether the individual has a mental disease or disorder and *whether the diagnosed condition qualifies as a mental disease or disorder*. (*People v. Blakely* (1997) 60 Cal.App.4th 202, 205; *Williams, supra,* 233 Cal.App.3d at p. 489.) Section 1026.5 does not specify which mental health diagnoses can support an extension, and appellate courts have declined to adopt limiting language or further define these terms.

This means that a mental health diagnosis that could not legally support an initial NGI finding and commitment can support an extension of the commitment. As described in Section II.G, only certain types of mental health diagnoses can support an initial NGI finding. However, the "test for extension of commitment is not the same as the test for insanity." (*Williams, supra,* 233 Cal.App.3d at p. 490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 98-99 [rejecting due process challenge to the different standards].) Thus, courts have held that a diagnosis of a personality disorder can be the basis for an extension commitment even though it could not have supported an NGI plea under section 29.8.

In *Williams, supra*, 233 Cal.App.3d 477, the prosecution petitioned to extend the individual's commitment based on the individual's ASPD diagnosis, but, relying on *Fields,* the trial court dismissed the petition prior to a hearing. The Court of Appeal reversed, holding that ASPD could qualify as mental disorder for purposes of section 1026.5. Because personality disorders are mental disorders, they can justify extension of an NGI commitment, and so the question should be resolved by the trier of fact. (*Id.* at p. 490.)

Soon after *Williams*, the United States Supreme Court decided *Foucha, supra,* 504 U.S. 71, in which it reversed an order extending an NGI commitment where the individual was diagnosed only with ASPD and where the parties agreed that ASPD was *not* a mental disease. Because the government did not claim that the individual was mentally ill, a continued civil commitment was unconstitutional. (*Foucha*, *supra*, 504 U.S. at p. 80.)

Relying on *Foucha,* the defendant in *Wilder,* who had been diagnosed with ASPD, substance abuse disorder, and bipolar disorder, argued that the different standard for extension commitments and the vagueness of the term "mental disease, defect, or disorder" violated due process. (*Wilder*, *supra*, 33 Cal.App.4th 90.) The court rejected the due process challenge, explaining that there was a reasonable relationship between section 1026.5's extension

procedures and the purpose of commitment (treatment) and that the statute was not overly inclusive because it did not "encompass the mental conditions of recidivists or sociopaths." (*Id.* at p. 101.) *Wilder* repeated *Foucha's* characterization of ASPD as "a condition that is not a mental disease and that is untreatable," but distinguished *Foucha* on the facts, as the individual in *Wilder* had other mental health disorders in addition to ASPD. (*Ibid.*)

Since *Wilder,* at least two decisions have held that commitment extensions can be based on personality disorders.[19] In *Blakely,* the Court of Appeal directed the superior court to vacate a pretrial order finding the individual's ASPD diagnosis did not qualify as a mental disorder under section 1026.5. In *People v. Williams* (2015) 242 Cal.App.4th 861, 872-873, the court affirmed an extension order based on the individual's diagnosis of personality disorder NOS (not otherwise specified).

The inconsistent tests for the initial NGI commitment and commitment extension create a situation that certainly seems unfair from the perspective of the committed individual. In addition, the fact that an individual's commitment may be extended on the basis of a diagnosis for which there is no effective treatment appears inconsistent with the stated purpose of NGI commitments – treatment for a mental disorder. However, courts have not been receptive to defense efforts to limit the types of conditions that can justify an extension.

3. Dangerousness

For a commitment to be extended, the prosecution must prove that the NGI, "by reason of a . . . mental disorder, "represents a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1).) Several aspects of this requirement are worth highlighting.

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[19] In the context of a conditional release petition (§ 1026.2), Division Four of the First District recently rejected an equal protection challenge to the use of ASPD as a basis for continued inpatient NGI commitments where an ASPD diagnosis is an impermissible basis for an individual's continued commitment as an offender with a mental health disorder (formerly MDO). (*People v. Diggs* (2022) 80 Cal.App.5th 702, 710-711.)

a. Nexus Between Mental Disorder and Dangerousness

Though it seems obvious, it bears repeating that the individual's dangerous behavior must be due to a mental disorder. If an individual both has a mental disorder and is dangerous, but there is no factual nexus between the disorder and dangerous behavior, the commitment should not be extended. (See *People v. Galindo* (2006) 142 Cal.App.4th 531, 539.)

b. Danger "To Others"

In addition, the danger posed must be "to others," so an extended commitment under 1026.5 is not the appropriate procedure for civilly committing an NGI because he or she is suicidal, engages in self-harming behaviors, or cannot take care of himself due to a mental disorder. (See *Cheatham, supra,* 2022 WL 3714656 *6 [appellant's difficulty managing potentially harmful physical side effects of medication could not justify NGI commitment].)

c. Physical Harm

The potential danger to others must be that of physical harm. An NGI commitment may not be extended where the individual's mental disorder results in verbally disruptive or aggressive behavior only.[20] (*Redus*, *supra*, 54 Cal.App.5th at pp. 1012-1013 [angry letters to psychiatrist insufficient evidence of dangerousness where letters were not threatening].)

Recently, in *Cheatham,* the Third District found insufficient evidence of dangerousness where the NGI had not committed a violent crime or showed any inclination to do so. The commitment offense involved an escape from criminal custody and resisting an officer after the NGI heard voices that caused him to believe he was in danger from the police. (*Cheatham*, *supra*, 2022 WL 3714656, *2.) Since the initial commitment, he had not committed any violent acts, though he had engaged in bizarre and disruptive behavior and had difficulty taking medications that would control his delusions. (*Id*. at pp. 4-5.) The appellate court found there was substantial evidence that

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[20] *People v. Kerbs* (2020) 258 Cal.Rptr.3d 67, *though depublished and not citable*, is a good example of a dangerousness analysis where the aggressive behavior was mainly verbal.

the individual would stop taking his medications if released and that his mental health symptoms would increase. (*Id.* at p. 4.) But, because his mental disorder, even if untreated, did not result in dangerous behavior, continued commitment could not be justified. (*Id.* at pp. 6-7.)[21]

However, counsel should be aware that courts have frequently connected non-violent, but disruptive or inappropriate, behavior to potential physical harm to others. For example, in *Zapisek, supra,* the court found substantial evidence of physical dangerousness where the NGI's delusions caused him to tape over hospital alarm sensors needed for medical emergencies, even though he had not done so out of a desire to harm anyone. (*Zapisek*, *supra*, 147 Cal.App.4th at p. 1168; see also *Bowers, supra,* 169 Cal.App.4th at pp. 1451-1452 [self-harming behavior relevant to dangerousness where it demonstrated NGI had difficulty controlling behavior related to her mental disorder].)

d. Substantial Danger

The risk of danger of physical harm to others must be "substantial." (*Cheatham, supra,* 2022 WL 3714656, *6.) This means that the experts' opinions (and factfinder's conclusion) must be based on "relevant facts . . . probative as to" the particular individual's risk and not speculation or conjecture. (*Id.* at p. 5.) It is not sufficient that an expert or jury believes the individual might engage in dangerous behavior or poses some risk if released.[22]

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[21] Although an OMHD and not an NGI case, *People v. Johnson* (2020) 55 Cal.App.5th 96 is also a useful case involving an appellate reversal for insufficient evidence of dangerousness.

[22] There are several cases in the parole suitability context that provide guidance on how to assess an individual's risk of dangerousness. (See *In re Morganti* (2012) 204 Cal.App.4th 904, 921 ["The risk an inmate may fall back into alcohol or drug abuse can justify denial of parole only where it is greater than that to which a former drug or alcohol abuser is normally exposed."]; *In re Stoneroad* (2013) 215 Cal.App.4th 596, 630 [immutable historical facts are insufficient to establish a person's current dangerousness]; *In re Lawrence* (2008) 44 Cal.4th 1181.) "[A]n outpatient's interest in his conditional liberty status is not unlike that possessed by a parolee." (*In re Bye* (1974) 12 Cal.3d 96, 100.)

For example, in *Anthony C.*, *supra*, 138 Cal.App.4th at p. 507, the court found insufficient evidence of substantial danger where the expert opined that the youth posed "some risk, moderate at least," but did not prepare a formal risk assessment evaluation, could not identify specific risk factors, and was "not sure exactly how high" the risk of harm was. Because courts frequently rely on expert opinions to evaluate the risk posed by release of an NGI, appellate counsel must carefully analyze the expert testimony presented at trial to determine whether the experts' conclusions were based on relevant facts and were not speculative.

The fact that the NGI individual has harmed or endangered others in the past due to a mental disorder is insufficient to support extension of the commitment in the absence of other evidence supporting a finding of dangerousness. In most extension proceedings, the facts of the commitment offense do not support the NGI's position that he is not dangerous if released. However, counsel should be watchful for overreliance on prior incidences of dangerous behavior without consideration of more recent patterns. (See *People v. McDonough* (2011) 196 Cal.App.4th 1472, 1490 [relevance of commitment offense to current dangerousness "may become weaker as substantial time elapses"].)

Likewise, the focus in an extension proceeding is the individual's present condition, "not his or her behavior under future changes." (*Zapisek, supra,* quoting *People v. Williams* (1988) 198 Cal.App.3d 1476, 1481.) Counsel should be alert to reliance on too many "ifs," or speculation about how an individual might react to future changes.

However, evidence that the individual continues to experience the same mental health symptoms that resulted in the commitment offense is relevant to an assessment of future dangerousness. (*Zapisek, supra,* 147 Cal.App.4th at p. 1168 [individual "continued to act inappropriately based on delusions of the type he experienced" during the commitment offense]; *Bowers, supra,* 145 Cal.App.4th at p. 879; *People v. Sudar* (2007) 158 Cal.App.4th 655, 663-664.) Evidence of the individual's prior experiences on conditional release is also relevant. (*Redus, supra,* 54 Cal.App.5th at p. 1012; *Johnson*, *supra*, 55 Cal.App.5th at p. 110 [MDO context].)

Consideration of the individual's insight into his mental health condition and willingness to take prescribed medications, participate in treatment, and/or develop a relapse prevention plan is also appropriate when assessing dangerousness. (*Redus, supra,* 54 Cal.App.5th at p. 1012.) This is because

an individual's lack of insight into the behaviors that lead to violence bears on the question of whether he is able to control them. (*Kendrid, supra,* 2015 Cal.App.4th at p. 1370; *Williams, supra,* 242 Cal.App.4th at p. 875 [lack of plan to prevent relapse into substance abuse relevant to assessment of dangerousness].)

However, evidence that the individual will likely stop taking medication and decompensate is insufficient to support an extension without evidence that decompensation will result in dangerous behavior. (See *Johnson, supra,* 55 Cal.App.5th at 110 [MDO context]; *Cheatham, supra*.) In addition, it is important to remember that the individual's participation in treatment need not be perfect. (*McDonough, supra,* 196 Cal.App.4th at pp. 1491-1492 ["Even assuming a court may insist upon a certain level of participation in [CONREP groups], repeating perpetual, unvarying courses on an already mastered subject serves no legitimate purpose."].) Moreover, lack of insight in the past may not be probative of the NGI's current condition (*Id*. at p. 1491.)

Where the NGI has a substance abuse disorder diagnosis or where prior acts of violence involved the use of alcohol or drugs, evaluation of dangerousness includes consideration of the risk of relapse into substance abuse and the risk of dangerous behavior while under the influence of alcohol or drugs. (See *People v. Bartsch* (2008) 167 Cal.App.4th 896, 900 [affirmed denial of conditional release petition under section 1026.2 where NGI "did not understand the triggers for his substance abuse and had not developed and internalized an effective plan to prevent his relapse"].)

e. Serious Difficulty Controlling Behavior

In order to satisfy constitutional requirements, the showing of substantial danger also requires proof that the individual has "serious difficulty controlling his potentially dangerous behavior." (*Galindo*, *supra*, 142 Cal.App.4th 531; *Bowers, supra,* 145 Cal.App.4th at p. 878; *Zapisek, supra*, 147 Cal.App.4th at pp. 1165, 1167-1168.) The appellate court in *Galindo* arrived at this requirement by applying the California Supreme Court's decision in *In re Howard N.* (2005) 35 Cal.4th 117, which addressed the same question in the juvenile context. "Serious is defined as considerable." (*Anthony C., supra*, 138 Cal.App.4th at p. 1507.) However, the prosecution is "not required to prove the defendant is completely unable to control his behavior," and the "impairment need only be serious, not absolute." (*Kendrid, supra,* 205 Cal.App.4th at p. 1370, internal citations omitted.)

Galindo further commented that "the fact [appellant] *did not* control his behavior does not prove that he *was unable to do so*." (*Galindo, supra*, 142 Cal.App.4th 531 at p. 539, emphasis in original.) It is difficult to know what to make of this language in *Galindo*. It is hard to imagine succeeding on appeal by arguing that one's NGI client should be released because he has the capacity to control his violent behavior but chooses not to do so. (See *Williams, supra,* 242 Cal.App.4th at p. 875 [rejecting appellant's argument that lack of violence while committed showed his ability to control behavior]; *Kendrid, supra,* 205 Cal.App.4th at p. 1367 [affirming extension where the NGI was diagnosed with a personality disorder and the hospital director recommended against commitment because the dangerous behavior was volitional].) However, it is worth keeping in mind that the prosecution must prove not only that the individual's mental disorder is connected to dangerous behavior, but that the NGI struggles to control that behavior.

A better approach on appeal is likely to be that the client is able to control dangerous behavior with medication and/or other coping strategies. For example, in *Redus, supra,* 54 Cal.App.5th at p. 1012, the court reversed an extension order for insufficient evidence where the NGI continued to have the type of delusions that had previously caused dangerous behavior, but had reported them to staff and had not acted on them.

f. Medication Defense

Ongoing symptoms of a mental disorder need not result in a commitment extension. Compliance with medication is an affirmative defense to the extension petition with the burden on the NGI to prove by a preponderance of the evidence two elements: (1) that the person does not pose a substantial danger of physical harm to others because he or she takes medication that controls the condition, and (2) that the person will continue to take that medication if released. (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600.)

E. Jury Instructions

The jury instruction related to commitment extensions is CALCRIM No. 3453. The court has a sua sponte duty to instruct on the standard for extension, including that the individual has serious difficulty controlling dangerous behavior. (See *Sudar*, *supra*, 158 Cal.App.4th at p. 662.) The bench notes to the instruction also provide that the jury should be instructed with CALCRIM No. 219 [Reasonable Doubt in Civil Commitment

Proceedings] and “other relevant post-trial instructions,” including instructions related to deliberations, witnesses, and evidence. CALCRIM No. 3453 includes instructions on the affirmative defense of medication.

F. Mootness

Because a commitment may be extended by only two years, it is possible that the commitment extension has expired by the time it is reviewed by an appellate court. Nonetheless, counsel may request appellate review if the issue is one that is likely to “recur, but evade review.” (See *Redus, supra,* 54 Cal.App.5th at 1001.) To ensure the client receives meaningful appellate review, counsel should be diligent in completing the record and should consider requesting calendar priority if appropriate.

If the appeal raises an insufficient evidence claim that, if successful, would bar retrial based on double jeopardy principles (per *Cheatham, supra*), then the case is not moot as to the substantial evidence claim. Not only should retrial on the extension petition be barred, but any pending extension petition should be dismissed if the order on which the current extension is based is reversed for insufficient evidence. (See, e.g., *People v. Fernandez* (1999) 70 Cal.App.4th 117, 134-135 [an appeal is not moot where a reviewing court’s decision may affect the trial court’s right to continue jurisdiction in subsequent commitment extensions]; accord *People v. J.S.* (2014) 229 Cal.App.4th 163, 170-171.)

IV. Conditional Release and Restoration of Sanity (§ 1026.2)

The second way an NGI may be released from commitment to the state hospital is through a restoration of sanity petition under section 1026.2, which involves a two-step process.

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, an NGI may not be kept “against his will in a mental institution . . . absent a determination in civil commitment proceedings of current mental illness and dangerousness.” (*Foucha, supra,* 504 U.S. at p. 78; see also *Addington*, *supra*, 441 U.S. at p. 425 [civil commitment requires due process protection].)

However, because the initial finding of not guilty by reason of insanity creates a reasonable inference that the NGI continues to suffer from a mental disorder, the state may properly place the burden of proof on the person

seeking release from an insanity commitment at restoration to sanity proceedings. (*Jones, supra*, 463 U.S. at p. 366; see also *In re Franklin* (1972) 7 Cal.3d 126, 141; *Tilbury*, *supra*, 54 Cal.3d at pp. 65-66.) Requiring an NGI to complete a year of outpatient treatment before unconditional release does not violate due process. (*People v. Beck* (1996) 47 Cal.App.4th 1676, 1684.)

A. Section 1026.2's Two-Step Process

Release pursuant to section 1026.2 is a multi-step process. (§ 1026.2, subds. (a), (d), and (e); *Dobson*, *supra*, 161 Cal.App.4th 1422.) Once the first 180 days of the commitment have elapsed, the NGI may petition for conditional release.[23] After the filing of the petition and the receipt of a recommendation from the medical director of the state hospital, the court must hear the petition and determine whether the NGI "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[.]" (§ 1026.2, subd. (e); *Dobson, supra,* 161 Cal.App.4th at p. 1432.)

No action may be taken on the petition until the court receives the written recommendation from the medical director. (§ 1026.2, subd. (l).) It is the trial court's – not the NGI's – responsibility to obtain the medical director's report. (*People v. Endsley* (2016) 248 Cal.App.4th 110, 120-122.) The trial court cannot summarily deny a conditional release petition without holding an evidentiary hearing. (*People v. Soiu* (2003) 106 Cal.App.4th 1191, 1197.)

If the petition for conditional release is granted, the NGI must spend one year in an "appropriate forensic conditional release program" (CONREP). (§ 1026.2, subd. (e); *Dobson, supra*, 161 Cal.App.4th at p. 1433.) The trial court retains jurisdiction over the individual during that year, and outpatient status may be revoked. (§§ 1026.2, subd. (e), 1608-1610.)

After one year in outpatient treatment, the court "shall have a trial to determine if sanity has been restored." (§ 1026.2, subd. (e); *Beck, supra,* 47 Cal.App.4th at 1681.) "The court may not set the trial before the person has completed a year of outpatient treatment unless the program director recommends an earlier release." (*Ibid*; § 1026.2, subd. (h).) Subdivision (e)'s requirement that the second-stage hearing take place after one year is

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[23] The petition may also be brought by the medical director of the facility or the community program director if the NGI is on outpatient status under Section 1600 et seq. (§ 1026.2, subd. (a).)

directory, not mandatory, and the court retains jurisdiction even if a restoration to sanity hearing is not timely held. (*People v. Smith* (1990) 224 Cal.App.3d 1389, 1396.)

Parole and/or outpatient status under section 1600 qualify as an appropriate conditional release program. (§ 1026.2, subd. (f).) If the second-stage petition is denied, the court may place the individual on outpatient status pursuant to sections 1600 et seq. (§ 1026.2, subd. (i).)

If an NGI is restored to sanity but has "prison time remaining to serve" for a conviction that did not result in an NGI finding, he is not eligible for outpatient status and instead will be transferred to CDCR to finish his sentence. (§ 1026.2, subd. (m).)

Following denial of either type of petition under 1026.2, an NGI may not bring another petition for one year from the date of denial. (§ 1026.2, subd. (j).)

B. Burden of Proof

The NGI bears the burden of proof by a preponderance of the evidence at the hearing on both the petition for conditional release and the hearing on restoration of sanity. (§ 1026.2, subd. (k); *Dobson*, *supra*, 161 Cal.App.4th at pp. 1433-1434.)

C. Standard of Review

Denial of a conditional release or restoration of sanity petition has historically been reviewed under the abuse of discretion standard. (*McDonough*, *supra*, 196 Cal.App.4th at p. 1489; *People v. Cross* (2005) 127 Cal.App.4th 63, 73; *Dobson, supra,* 161 Cal.App.4th at p. 1434.)

However, there is a strong argument that the appropriate standard of review is the substantial evidence standard.[24] Contrary to the language used in many appellate opinions, the decision to conditionally release an NGI to CONREP is not discretionary. Instead, release to CONREP is mandatory if the NGI establishes he will not be a danger to others if under supervision and

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[24] At least one appellate court has agreed with this position in an unpublished decision. (See *People v. Stockman* (Mar. 28, 2014, A137286) [nonpub. opn.] [2014 WL 1293449, at *4].)

treatment. (§ 1026.2, subds. (e), (h).) If the requisite factual findings are made, a trial court may not refuse to release the individual to CONREP.

Likewise, the question at the restoration of sanity stage is a factual one – whether the NGI is no longer a danger to the health and safety of others. (§ 1026.2, subd. (e).) If not, unconditional release is mandatory.

Appellate courts have applied the substantial evidence standard in comparable contexts. (See *People v. Gregerson* (2011) 202 Cal.App.4th 306, 320 [denial of conditional release from MDO commitment]; *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1504 [denial of conditional release from SVP commitment].)

D. Constitutional Rights Available to Petitioner

Unlike section 1026.5, section 1026.2 does not generally extend to NGIs the constitutional rights available to criminal defendants, nor does it guarantee NGIs any specific constitutional rights. Whether a certain constitutional right must be extended to an NGI during the restoration of sanity process is a question of due process or equal protection principles. (See *Tilbury*, *supra*, 54 Cal.3d 56.)

1. First-stage Proceedings (Conditional Release)

"An outpatient status hearing *is not a criminal proceeding*. An applicant has substantial procedural safeguards at the outpatient placement hearing, including the right to counsel and to confront and cross-examine witnesses, but not the right to a jury trial." (*Dobson, supra*, 161 Cal.App.4th at pp. 1432-1433, citing *People v. Sword* (1994) 29 Cal. App.4th 614, 635; *Soiu*, *supra*, 106 Cal.App.4th at pp. 1199-1200.) Additional rights include the right to appointment of an independent expert (*People v. Endsley* (2018) 28 Cal.App.5th 93, 104-107) and the right to be present (*Soiu, supra,* 106 Cal.App.4th at p. 1198).

In *Tilbury, supra,* 54 Cal.3d 56, the California Supreme Court held that the plain language of section 1026.2 does not provide for right to jury trial at a first-stage proceeding, and also that the lack of a jury trial right was not an equal protection violation.

2. Second-stage Proceedings (Restoration of Sanity)

The NGI is entitled to a jury trial at a second-stage restoration of sanity hearing. (*Tilbury, supra,* 54 Cal.3d at p. 68; *Franklin, supra,* 7 Cal.3d at p. 148.) However, the jury need not be unanimous and may reach a decision with a "three-fourths verdict." (*Franklin, supra*, 7 Cal.3d at p. 149.) The jury instruction related to restoration of sanity trials is CALCRIM No. 3452. The instruction's bench notes direct the trial court to give other instructions relevant to civil commitment proceedings.

In other respects, the rights guaranteed NGIs at second-stage proceedings are co-extensive with those guaranteed at the first stage. (*Dobson, supra,* 161 Cal.App.4th at p. 1433.)

E. Right to a Hearing

An NGI is entitled to a hearing on a section 1026.2 petition that accords with due process. (*Soiu,* 106 Cal.App.4th at p. 1199.) The NGI must be allowed to call witnesses on his behalf, cross-examine prosecution witnesses, and be present at the proceedings. (*Id.* at pp. 1198-1199; *Tilbury, supra,* 54 Cal.3d at p. 69.) A trial court may not deny a petition for conditional release solely on the basis of the petition and the medical director's report. (*Ibid.*)

F. Petitioner Must Show Lack of Dangerousness or Mental Disorder

The language of section 1026.2 is very similar to section 1026.5, and much of the analysis as to dangerousness in the context of extension proceedings is applicable to conditional release proceedings. However, counsel should keep in mind that there are some differences.

1. First-stage Proceedings (Conditional Release)

The factual question at hearing on a conditional release petition (first-stage) is whether the individual "would be a danger to the health and safety of others, due to mental disease, defect, or disorder, if under supervision and treatment in the community." (§1026.2, subd. (e).)

When evaluating the sufficiency of the evidence and framing persuasive arguments for the appellate court, counsel must keep in mind that the question at a first-stage proceeding is whether the individual would present a

danger to others if released *under the supervision of CONREP*. An NGI seeking conditional release need not prove that he would not present a danger to others in an unsupervised environment. (*Bartsch*, *supra*, 167 Cal.App.4th at p. 902, fn, 7; *Cross*, *supra*, 127 Cal.App.4th at pp. 74-75 [degree of supervision must be considered].) CONREP provides intensive supervision and treatment, including medication management, therapy, drug tests, and home visits.[25] Thus, it is important to keep the focus of the appeal on whether the individual established by a preponderance of the evidence that he was not a danger to others if provided the high level of support and structure afforded by CONREP.

Moreover, counsel should remind the Court of Appeal that the decision to place an NGI on outpatient status can be reversed. The trial court retains jurisdiction over an NGI on outpatient status and can revoke outpatient status pursuant to sections 1608 and 1609. The state can even return the person to custody before a petition has been filed. (§ 1610.) Thus, the outpatient revocation procedures found in sections 1608 to 1610 make it unnecessary to deny outpatient placement to appellant based on "probabilistic pessimism."[26]

2. Second-Stage Proceedings (Restoration of Sanity)

The finding required at a second-stage proceeding is more similar to the question at an extension hearing. At the second stage, the NGI must show

[25] See Conditional Release Program (CONREP), Department of State Hospitals, at https://www.dsh.ca.gov/Treatment/Conditional_Release.html; *No Driving, No Working, No Dating: Inside a Government Program That Controls The Lives of People Leaving Psych Hospitals,* The Marshall Project, Sept. 24, 2021, at https://www.themarshallproject.org/2021/09/24/no-driving-no-working-no-dating-inside-a-government-program-that-controls-the-lives-of-people-leaving-psych-hospitals.

[26] This quoted phrase has been borrowed from an appellate opinion addressing a similar consideration in the Lanterman-Petris-Short Act conservatorship context: "If LPS conservatorship may be reestablished because of a perceived likelihood of future relapse, many conservatees who would not relapse will be deprived of liberty based on probabilistic pessimism. This cost is unwarranted in view of the statutory procedures available to rapidly invoke LPS conservatorship if required." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1034, fn. 2.)

that he is "no longer a danger to the health and safety of others, due to mental" disorder. (§ 1026.2, subd. (e); *Dobson, supra,* 161 Cal.App.4th at p. 1433.)

Though the NGI must show that he does not need the level of supervision and support provided by CONREP, he is not required to prove that he no longer has a mental health condition. Thus, the NGI's dependence on medication and treatment to control mental symptoms does not defeat a finding that he has been restored to sanity. (See *Williams, supra,* 198 Cal.App.3d at pp. 1481-1482 ["threshold question" was whether NGI "would continue to take his prescribed medication in an unsupervised environment"].) An NGI satisfies the standard for release if she takes medication in an unsupervised environment and, while medicated, does not present a danger to others. (*Ibid.*)

3. Danger to Health and Safety of Others

Like section 1026.5, the danger posed by the NGI's conditional release must be to others, not solely to himself. However, it is unclear whether the danger presented under 1026.2 must be physical, as subdivision (e) refers to "danger to the health and safety of others." Two decisions have held that the test for section 1026.2 is not the same as for section 1026.5, and that danger to property is sufficient to deny conditional release. (See *People v. Allesch* (1984) 152 Cal.App.3d 365, 372-373; *People v. Woodson* (1983) 140 Cal.App.3d 1, 4.) It is not clear whether an appellate court now would hold the same, and counsel should advocate for the narrower definition of dangerousness.

G. Revocation of Outpatient Status

Once the NGI's conditional release petition is granted, the NGI is placed in an appropriate outpatient program. During the one-year period of conditional release, the trial court retains jurisdiction over the individual. (§ 1026.2, subd. (e).) Conditional release may be revoked pursuant to sections 1608-1610, and revocation of outpatient status is an appealable order.

1. Initiation of Revocation Proceedings

Revocation proceedings may be initiated at CONREP's written request if "the outpatient treatment supervisor is of the opinion that the person requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision[.]" (§ 1608.) Outpatient revocation proceedings

may also be initiated by the prosecutor if "the person is a danger to the health and safety of others while on [outpatient] status." (§ 1609.) Revocation proceedings may be initiated even if the NGI has not yet been placed in an outpatient program. (*People v. Parker* (2014) 231 Cal.App.4th 1423, 1434.)

2. Detention Pending Revocation Hearing

"[P]ending the court's decision on revocation, the person subject to revocation may be confined in a facility designated by the community program director when it is the opinion of that director that the person will now be a danger to self or to another while on outpatient status and that to delay confinement until the revocation hearing would pose an imminent risk of harm to the person or to another." (§ 1610, subd. (a).) If that facility is a county jail, certain procedures must be followed. (§ 1610, subds. (a), (b).)

3. Hearing on Revocation

Once revocation of outpatient status has been requested, the court must hold a hearing within 15 days. If the prosecutor files the revocation petition, section 1609 specifies that the hearing must be "conducted using the same standards used in conducting probation revocation hearings pursuant to Section 1203.2." (§ 1609.) Thus, revocation hearings initiated under section 1609 must comport with *Morrissey*, *supra*, 408 U.S. 471, which set forth minimum due process requirements in the parole revocation context. (See *Vickers*, *supra*, 8 Cal.3d at pp. 457-458 [applying *Morrisey* to probation revocation proceedings].)

Section 1608 does not reference the standards used for probation revocation hearings, but courts have held that hearings conducted pursuant to this section must similarly satisfy due process, including "the constitutional requirements of confrontation, cross-examination, and a fact-finding hearing by a neutral body applying a preponderance of the evidence standard of proof." (*People v. DeGuzman* (1995) 33 Cal.App.4th 414, 420, citing *In re McPherson* (1985) 176 Cal.App.3d 332, 340.)

4. Basis for Revocation

The factual question to be decided at a revocation hearing depends on whether revocation proceedings were initiated by the outpatient program (§ 1608) or the prosecution (§ 1609). If initiated by the prosecution, outpatient

status may be revoked if the individual “presents a danger to the health and safety of others.” (§ 1609.) However, the outpatient program may initiate proceedings based on a concern for the individual’s welfare, and a showing of dangerousness is not required. (*McPherson, supra,* 176 Cal.App.3d at pp. 339-340.) Under section 1608, the trial court must only find that the NGI requires extended inpatient treatment or refused outpatient treatment. (*Ibid.*)

H. Detention in Appropriate Local Facility Pending Conditional Release Hearing

Pending hearing on a petition for conditional release, the NGI must be detained in an appropriate local facility that must “must be able to continue the NGI’s treatment while at the same time ensuring they remain safely confined.” (*Endsley II, supra,* 28 Cal.App.5th at p. 103; § 1026.2, subd. (b).) A county jail may be an appropriate facility if it complies with subdivision (b) and ensures the NGI’s safety, but the trial court must “oversee” the designation of an appropriate local facility. (§ 1026.2, subd. (c); *Endsley II, supra*, 28 Cal.App.5th at p. 103.)

Though the failure to provide the NGI with appropriate local housing is not a standalone issue on appeal, it may be relevant if the lack of appropriate housing prevented exercise of a constitutional right. For example, the court in *Endsley II* reversed the denial of the NGI’s conditional release petition where the NGI wanted to testify at his hearing but objected to confinement in jail, subdivisions (b) and (c) were not followed, and the court refused to allow him to testify via phone. (*Id.* at p. 104.)

I. No-Issues Briefs

There is no right to independent appellate review of the record when appellate counsel finds no arguable issues on appeal of either a petition for conditional release or restoration of sanity. (*Dobson, supra,* 161 Cal.App.4th at pp. 1438-1439.) If appellate counsel files a no-issues brief, the procedures set forth in *Conservatorship of Ben. C.* (2007) 40 Cal.4th 529, apply: the appellant must be provided with a copy of the brief and an opportunity to file a supplemental brief. (*Id.* at p. 1439.)

J. Mootness

If the remedy on appeal is to remand the matter for a new conditional release hearing, it is highly likely that an appeal from the denial of conditional release will become moot, as an NGI may file a new petition one year after denial. However, if the appeal raises an important issue that will evade review if left unaddressed, counsel should request the court reach the merits of the claim. (See *People v. Jones* (1987) 192 Cal.App.3d 400, 401, fn. 1.) To avoid the appeal becoming moot due to record delays, counsel should also be diligent in ensuring the record is produced and is complete. Counsel should also consider requesting calendar preference and that the appeal be expedited.

V. Release Pursuant to Sections 1600 et seq.

The second way an NGI may be placed on outpatient status and eventually released is through the procedures outlined in sections 1600-1607. These procedures apply to individuals civilly committed under several statutory schemes, including section 1026. Outpatient status may be revoked pursuant to sections 1608-1610.

"Outpatient status is not a privilege given the [NGI] 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 [NGI] and cause no undue hazard to the community." (*Sword*, *supra*, 29 Cal.App.4th at p. 620.)

A. Eligibility

A person found NGI of any felony is eligible for outpatient placement pursuant to section 1600 et seq. after having spent 180 days under commitment at a state hospital. (§ 1601, subds. (a), (b).) A person found NGI of a felony not involving harm or a serious threat of harm to another may be placed on outpatient status without first being committed to the state hospital. (§ 1601, subd. (b).)

B. Recommendation and Hearing Procedures

The recommendation for outpatient status must be made by the director of the state hospital or other treating facility. (§ 1604.) An individual NGI may

not request outpatient status under section 1600; procedures for an NGI's request for outpatient status (conditional release) are governed by section 1026.2.

When the court receives a recommendation for outpatient status, the court "shall immediately forward such recommendation to the community program director [CONREP], prosecutor, and defense counsel." (§ 1604, subd. (a).) Within 30 days, CONREP must submit a report regarding the individual's eligibility and a "recommended plan for outpatient supervision and treatment." (§ 1604, subd. (b).) The court shall set the matter for hearing within 15 days of receipt of the CONREP report. (§ 1604, subd. (c).) Following a hearing, the court must approve or disapprove the recommendation for outpatient status. (§ 1604, subd. (d).)

C. Required Considerations

Sections 1602-1604 require the court to consider specific criteria when determining whether to grant outpatient status. In all hearings conducted under these sections, the court is required to consider "the circumstances and nature of the criminal offense leading to the commitment and . . . the person's prior criminal history." (§ 1604, subd. (c).)

Section 1602, which applies to NGIs committed for misdemeanors or non-violent felonies, requires the court to consider whether the hospital director believes the NGI will not be a danger to the health and safety of others and will benefit from outpatient status (§ 1602, subd. (a)(1)) and whether CONREP believes the NGI will not be a danger to others, will benefit from outpatient status, and has identified an appropriate program (§ 1602, subd. (a)(2)). Both the hospital director and CONREP must include in their reports "consideration of complete, available information regarding the circumstances of the criminal offense and the person's prior criminal history." (§ 1602, subd. (d).) The victim must also receive notice of the hearing. (§ 1602, subd. (b).)

Section 1603 applies to NGIs committed for felonies involving violence and requires consideration of substantially the same factors listed in section 1602. However, the hospital director's assessment of dangerousness may include the possibility of harm to oneself in addition to dangerousness to others. (§ 1603, subd. (a)(1).)

D. Burden of Proof

At the outpatient status hearing, the NGI bears the burden of proof. (*Sword, supra,* 29 Cal.App.4th at p. 624.) Federal constitutional principles of due process mandate that "[o]ne who had been found to be not guilty by reason of insanity 'may be held as long as he is both mentally ill and dangerous, but no longer.'" (*McDonough*, *supra*, 196 Cal.App.4th at p. 1493, quoting *Foucha*, *supra*, 504 U.S. at p. 77.) In order to gain conditional release for outpatient treatment under section 1600 et seq., the NGI bears "'the burden of proving, by a preponderance of the evidence, that he [was] either no longer mentally ill or not dangerous.'" (*Cross*, *supra*, 127 Cal.App.4th at p. 72, quoting *Sword*, *supra*, 29 Cal.App.4th at p. 624; accord *McDonough*, *supra*, 196 Cal.App.4th at p. 1491.) "[T]he persistence of [an NGI's] mental illness [is] not alone sufficient to deny him outpatient status if he [is] no longer dangerous." (*Cross*, *supra*, 127 Cal.App.4th at p. 74.)

The court may find the NGI unsuitable for outpatient status even if the medical experts unanimously recommend outpatient status. (*Sword*, *supra*, 29 Cal.App.4th at p. 628.) For example, in *Sword,* four experts testified in favor of outpatient status, and the prosecution presented no expert testimony that the individual was dangerous. However, the appellate court found the trial court did not abuse its discretion in denying the recommendation because the "reasons stated by the trial court were legitimate concerns resulting from a thorough review" of the evidence. (*Id.* at p. 630.) In *Sword,* the trial court noted multiple problems with the experts' reports, including that the experts had not adequately considered the individual's alcohol use or "unresolved" family issues or the role the individual's religious command hallucinations had played in the underlying commitment offense. (*Id.* at pp. 629-630.) The experts also "did not know, or did not consider, what would happen if defendant did not take his medication while on outpatient status." (*Id.* at p. 630.)

The court explained that

> the judge's role is not to rubber-stamp the recommendations of the Patton doctors and the community release program staff experts. Those recommendations are only prerequisites for obtaining a hearing. [Citation] The fact that the statute requires the trial court to approve or disapprove the expert's recommendations shows the discretion placed in the trial court.

(*Id.* at p. 628.)

However, if the trial court deviates from the experts' unanimous recommendations, the appellate court should closely scrutinize the court's reasoning and "'consider whether the record demonstrates reasons for the trial court's disregard of the opinion of the treating doctors and other specialists who [all] testified that defendant was no longer dangerous.'" (*McDonough*, *supra*, 196 Cal.App.4th at p. 1489, quoting *Sword*, *supra*, 29 Cal.App.4th at p. 626; *Cross*, *supra*, 127 Cal.App.4th at p. 73.) In *McDonough,* the appellate court found the trial court's disagreements with the experts were irrelevant to the question of dangerousness and did not support denial of outpatient status. (*McDonough, supra,* 196 Cal.App.4th at pp. 1491-1492.) In *Cross,* the appellate court similarly closely examined the reasons for the denial and found them unsupported by the evidence. The record "revealed no reasons to doubt the adequacy of the experts' knowledge regarding appellant's history or status," and the trial court did not identify "particular areas of deficiency." (*Cross, supra,* 127 Cal.App.4th at p. 74.)

McDonough also clarified that a denial of outpatient status may not be based on deficiencies in the recommended outpatient treatment program. "[T]he state may not continue to confine an individual who is no longer mentally ill or dangerous by its failure to provide the court with an adequate outpatient treatment program. To hold otherwise would place upon the patient an undue burden to prove that which is beyond the patient's ability or control." (*McDonough*, *supra*, 196 Cal.App.4th at p. 1492.) Instead, if the court has concerns about the proposed program of supervision and treatment, it should "enter orders to cure the deficiency" rather than deny the individual outpatient status. (*Id.* at p. 1494.)

E. Standard of Review

A denial of outpatient status pursuant to section 1600 et seq. is reviewed under the deferential abuse of discretion standard. (*Cross, supra,* 127 Cal.App.4th at p. 73.) Nevertheless, when the trial court deviates from the unanimous recommendations of the expert witnesses, its reasons must be based on relevant facts. (*Sword, supra,* 29 Cal.App.4th at p. 629.) Under the abuse of discretion standard, when the appellate record reveals facts that "merely afford an opportunity for a difference of opinion," there is no abuse of discretion. (*Id.* at p. 626.) However, "[a] trial court abuses its discretion

when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) [27]

F. Procedures Following Approval of Outpatient Status

If the court grants the request for outpatient status, CONREP must supervise the person in the community. (§ 1604, subd. (d); § 1605, subd. (c).) CONREP must provide the court with regular reports at 90-day intervals concerning the person's status and progress. (§ 1605, subd. (d).) Outpatient placement shall be for a year, after which time the court must "discharge the person from commitment under appropriate provisions of the law, order the person confined to a treatment facility, or renew its approval of outpatient status." (§ 1606.) Failure to hold an annual review hearing does not require the individual be discharged. (See *People v. Harner* (1989) 213 Cal.App.3d 1400 [release not required despite fact individual had been on outpatient status for six years without an annual hearing].)

Once a person is conditionally released into a court-approved outpatient program, revocation of that status is governed by sections 1608 through 1610 (see Section IV.G.)

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[27] Try framing the abuse of discretion standard in a more defense-friendly fashion, such as: "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior* Court (2008) 43 Cal.4th 706, 711-712, internal footnotes omitted.) "[P]ejorative boilerplate" that often asks only "whether the trial court's action was whimsical, arbitrary, or capricious" is not the "sole test." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) "Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion." (*Ibid.*) "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737, internal quotation marks and citations omitted.)