

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 2

Not Guilty by Reason of Insanity (NGRI) Commitment and Restoration of Sanity



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A. Introduction

A distinguished jurist once wrote that “our collective conscience does not allow punishment where it cannot impose blame.”¹ As old and revered a part of criminal philosophy as the insanity defense may be, no one should be lulled by antiquity or reverence. The belief in a moral high ground in light of evidence to the contrary is not realistic. As N. Morris stated, the insanity defense can also be seen as a “tribute to our capacity to pretend to a moral position while pursuing profoundly different practices.”² And it is that practice – how insanity acquittees fare after having been found not guilty – that must be the primary concern of defense attorneys and mental health advocates, especially when “by reason of insanity” results in greater disadvantage than “guilty.”

Too often, defense lawyers raise the insanity defense because they believe that commitment to the state mental health system will ultimately benefit their clients. However, a finding of not guilty by reason of insanity (NGRI) might not be best for their clients in the long run, in comparison to staying in the criminal justice system. Commitment to a state hospital or a Conditional Release Program, when it occurs, may result in a far greater curtailment of the client’s liberty than had the client remained in the criminal justice system.

Although the law holds insanity acquittees unaccountable for their actions and imposes mandatory treatment in lieu of punishment, they are frequently confined for longer periods than their criminal defendant counterparts. A 1995 study found that in California, the median length of confinement for insanity acquittees was 1,359 days, yet for those unsuccessful in their NGRI pleas (and thus found guilty) was 610 days.³

¹ Judge David Bazelon, American Bar Association Criminal Justice Mental Health Standards, 324 (1986).

² Morris, N., *Madness and the Criminal Law*, Chicago, Ill: University of Chicago Press (1982).

³ Silver, E., *Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants*, 19 Law

B. Insanity Defense: Definition and Exclusions

1. *Introduction*

The plea of not guilty by reason of insanity is an affirmative defense to a criminal charge, although one that does not negate an element of the offense. Penal Code §§ 25, 28. It is one of six pleas that can be made to an indictment or information. Penal Code § 1016. The term “insanity” connotes a legal definition, not a clinical diagnosis. Even individuals with the most severe mental disability may not be insane unless they meet the strict legal test for cognitive incapacity. The legal test for determining insanity has continually changed through case law and legislation, driven in part by politics and public sentiment.

2. *What is the definition of “insanity?”*

Proposition 8, the "Victims' Bill of Rights," which went into effect by initiative measure in 1982, abolished the diminished capacity defense and codified the “*M’Naghten* test” for insanity. Penal Code § 25(b). The *M’Naghten* test is named after the first modern British insanity defense case, which established a legal standard that is substantially identical to the standard used in California today. *M’Naghten’s Case* (H.L. 1843) 8 Enq. Rep. 718.

In 1978, the California Supreme Court had abandoned the *M’Naghten* test for the broader American Law Institute (ALI) test for insanity. *People v. Drew* (1978) 22 Cal.3d 333. The ALI test provides that a person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect she⁴ lacks substantial capacity either to appreciate the criminality of her conduct or to conform her or her conduct to the requirements of law. *In re Ramon M.* (1978) 22 Cal.3d at 422. Because the *M’Naghten* test was in effect before the ALI test was adopted, case law that applied the *M’Naghten* test prior to *Drew* should have precedential effect for later cases decided under Penal Code section 25.

and Human Behavior 381 (1995).

⁴ For the sake of readability, this publication uses the masculine and feminine personal pronouns in alternate chapters.

Under the current test, a defendant will be found NGRI if it can be proven by a preponderance of the evidence that the individual was either (1) incapable of knowing or understanding the nature and quality of the act, or (2) incapable of distinguishing right from wrong at the time she committed the offense. Penal Code § 25(b)⁵.

Jury instructions under the *M'Naghten* test need not specify that the jurors may consider the combined effects of both a mental disease and a mental defect. *People v. Kelly* (1992) 1 Cal.4th 495.

Under the second prong of the *M'Naghten* test, the issue is whether the defendant was able to distinguish the moral wrongfulness of his act, regardless of whether he knew the act was illegal. *People v. Stress* (1988) 205 Cal.App.3d 1259.

Unlike in some other states, the fact that the defendant was acting under an "irresistible impulse" is not a defense in California. *People v. Hubert* (1897) 119 Cal. 216; *People v. Severance* (2006) 138 Cal.App.4th 305.

3. Does the insanity defense apply to people with personality, adjustment, seizure, or substance abuse disorders?

A finding of insanity cannot be found "solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances." Penal Code § 25.5. See also *People v. Fields* (1983) 35 Cal.3d 329 (to classify people with antisocial personality as insane would place people in mental institutions for whom there is currently no suitable treatment and who would be a constant danger to staff and other inmates); *People v. McCaslin* (1986) 178 Cal.App.3d 1 (applying *Fields* to the *M'Naghten* test). However, as discussed below, a diagnosis of antisocial personality disorder may constitute substantial evidence of a

⁵ Although Penal Code section 25 states the two-prong test in the conjunctive ("and"), the California Supreme Court has held that the disjunctive ("or") is correct and that both prongs remain alternatives. *People v. Skinner* (1985) 39 Cal.3d 765; *People v. Stress* (1988) 205 Cal.App.3d 1259. See also *People v. Kelly* (1992) 1 Cal.4th 495 (*M'Naghten* test is constitutional).

mental disorder to support an extension of an NGRI commitment if the diagnosis is based on other criteria, in addition to repeated criminal or antisocial behavior. *People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202.

Penal Code section 25.2 erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless of whether the substances caused organic damage or a settled mental defect or disorder that persisted after the immediate effects of the intoxicant subsided. In other words, "if an alcoholic or drug addict attempts to use her problem as an escape hatch, she will find that section 25.5 has shut and bolted the opening." *People v. Robinson* (1999) 72 Cal.App.4th 421.

It is important to note that Penal Code section 25.5 was enacted in the wake of the three strikes law, with the expressed purpose of narrowing the availability of the insanity defense. According to the sponsor, the statute's exclusionary provisions "will prevent potential abuse of the plea and therefore, appropriately direct these individuals to the correctional system rather than state hospitals. This will allow state resources to be utilized for the purpose of serving those individuals who would benefit most." Sen. Com. on Judiciary, analysis of Sen. Bill No. 40X (1993- 1994 Reg. Sess.) as amended Apr. 18, 1994. The reason to exclude substance abuse was explained as follows: "The individual with a major mental disorder does not choose the illness. However, difficult as it may be, a drug or alcohol abuser does have a choice. Typically, these individuals have the capacity to distinguish between right and wrong and should be held responsible for their crimes." Assem. Public Safety Com., Republican analysis of Sen. Bill No. 40X (1994) p. 17; See also Sen. Com. on Judiciary, analysis of Sen. Bill No. 40X, *supra*, at 21.

4. Does the insanity defense apply to people with developmental disabilities, head trauma, or other degenerative brain disorders?

Although the diminished capacity defense has been abolished under Penal Code section 25(a), "idiots" are still considered incapable of committing crimes under Penal Code section 26. Although the statute does not include a definition of "idiot," this may be a viable defense for defendants with mental retardation, head trauma, fetal alcohol syndrome, or other

degenerative brain disorders. The test for “idiocy” has been held to be the same as for insanity under the ALI Test. See *In re Ramon M.* (1978) 22 Cal.3d 419.

C. Pleading NGRI

1. *What happens when a defendant pleads NGRI?*

The insanity defense is used primarily when the criminal charge is a serious felony. If a defendant pleads NGRI, the court will determine guilt and sanity in separate phases of the trial.

A defendant may join a plea of NGRI with one or more other pleas. Penal Code § 1016. If a felony defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and sanity are tried separately. In such circumstances:

the defendant shall first be tried as if only [the not guilty plea] had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. Penal Code § 1026(a).

In the sanity phase of a trial, the burden is on the defendant to prove by a preponderance of the evidence that she was insane at the time of the offense. *People v. Flores* (1976) 55 Cal.App.3d 118.

As in the determination of guilt, the verdict of the jury that the defendant was insane at the time of the offense must be unanimous. *People v. Troche* (1928) 206 Cal. 35.

Although guilt and sanity are separate issues, the evidence as to each may be overlapping. Accordingly, a finding at the guilt phase concerning whether the defendant had the mental state required to commit the charged

crime may be relevant to, but will not be determinative of, the issue of insanity. *People v. Hernandez* (2000) 22 Cal.4th 512; *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112; Penal Code §§ 21, 28, 29.

A defendant waives the privilege against self-incrimination and the right to counsel regarding expert testimony to the extent necessary to permit useful sanity examinations by mental health experts. However, statements made by the defendant during those examinations are admissible only to show the basis for the expert's opinion and not for proof of the facts described. *In re Spencer* (1965) 63 Cal.2d 400; *People v. Jantz* (2006) 137 Cal.App.4th 1283.

When a jury deadlocks during the sanity phase of a trial, the trial court may not dismiss the insanity proceedings under Penal Code section 1385(a) on the ground that a retrial would "unduly burden judicial resources." *People v. Hernandez* (2000) 22 Cal.4th 512.

2. Can minors plead NGRI?

Minors may use the insanity defense in juvenile court proceedings, and can be committed to a state hospital or outpatient treatment program up to the age of 25. Like adults, they have a right to petition for restoration of sanity pursuant to Penal Code section 1026.2 to obtain early release. However, they can also have their commitment extended beyond the jurisdictional age of 25 under the provisions of Penal Code section 1026.5. See Welf. and Inst. Code §§ 702.3, 607(d).

D. Disposition and Place of Commitment

1. Where will an insanity acquittee be committed?

If a court or jury finds that a defendant was insane at the time of the offense, the court must determine whether to confine her in a state hospital or treatment facility, or place her on outpatient status. If the underlying charge is a violent felony, the acquittee must remain in a state hospital for at least six months before the court can consider discharge to outpatient status. Penal Code § 1601(a).

Although few NGRI acquittees are immediately released to outpatient commitment, a defendant who pleads NGRI to a federal crime is not statutorily entitled to a jury instruction stating that a finding of insanity will

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result in involuntary commitment to a mental institution. *Shannon v. U.S.* (1994) 129 L.Ed.2d 459.

When an insanity acquittee has not recovered her sanity at the time of sentencing, the court will commit her to a state hospital, treatment facility or outpatient program for care and treatment. Before making any placement decision however, the court must first refer her to the local community program director for evaluation. This referral is usually to the local CONREP director. The director or designee issues a report and the court will usually follow the placement recommendation. If the underlying charge is a violent felony, the acquittee must remain in a state hospital for at least six months before the court can consider discharge to outpatient status. Penal Code § 1601(a).

If it appears that the defendant has fully recovered her sanity at the time of sentencing, the court should remand the defendant to the sheriff's custody pending a sanity determination "in a manner prescribed by law." Penal Code § 1026(b). Some courts have interpreted this phrase to mean involuntary commitment proceedings under the LPS Act. *In re Slayback* (1930) 209 Cal.480, 484; *People v. Kelly* (1973) 10 Cal.3d 565, 577-68, fn.18.

The standard for determining whether an NGI acquittee will be evaluated for placement as required by section 1026(b) is "full recovery." This means that an evaluation will be ordered "if there is any evidence that the defendant is still suffering from a mental illness." *People v. De Anda* (1980) 114 Cal.App.3d 480. Moreover, the taking of psychiatric medication counts as evidence of mental illness. *People v. De Anda* (1980) 114 Cal.App.3d 480, 489-90 (holding that, because the purpose of section 1026 is to protect the public and the defendant, "psychopharmaceutical restoration of sanity should not be considered a 'full' recovery).

If an insanity acquittee is committed to a state hospital, the hospital or treatment facility must submit status reports to the court every six months. Penal Code § 1026(f). If she is committed to the outpatient conditional release (CONREP) program, the community program director of the program to which she is assigned must submit status reports to the court every three months. Penal Code § 1605(d).

2. *How can an insanity acquittee be transferred to a different placement?*

The county superior court that committed an insanity acquittee retains jurisdiction and must approve transfer to another hospital, off-grounds leave, and outpatient placement. The court also has the authority to transfer an individual to a local treatment facility or back to a state hospital. Either the acquittee or the prosecutor may contest such a transfer. If contested, the court will hold a hearing using the same procedures and standards of proof as those used in probation revocation hearings. Penal Code § 1026(c).

NGRI acquittees who are not residents of California have the right to “to be promptly and humanely returned under proper supervision to the states in which they have legal residence.” Penal Code § 1026(b); Welf. and Inst. Code § 4119.

E. Length of Commitment under Penal Code section 1026

1. *What is the duration of an NGRI commitment?*

Under Penal Code section 1026.1, the court may release an insanity acquittee who has been committed to a state hospital conditionally to another placement that is considered a lower level, or unconditionally for an outright release, only under one or more of the following circumstances:

- a. As an unconditional release upon expiration of the maximum term of commitment (Penal Code § 1026.5);
- b. As an unconditional release upon successful completion of CONREP and a court finding of restoration of sanity (Penal Code § 1026.2); or
- c. As a conditional release to outpatient (CONREP) status (Penal Code §§ 1603, 1604).

The maximum term of commitment for an insanity acquittee is the longest sentence that she could have received for the underlying crime(s) as charged. The U.S. Supreme Court has held that a defendant acquitted as NGRI does not have the right to release merely because she has been in a hospital longer than she would have been incarcerated if convicted. *Jones*

v. United States (1983) 463 U.S. 354. However, the California Supreme Court has held that principles of equal protection preclude retention of NGRI acquittees committed to state hospitals beyond the maximum term of punishment for the underlying offense. *In re Moye* (1978) 22 Cal.3d 457; Penal Code § 1026.5.

Under California's determinate sentencing scheme, the court must impose the longest term for the base offense, adding any additional enhancements or consecutive sentences. California allows for extensions of time, adding two additional years to the base term as long as the criteria for extended commitment are met. Penal Code § 1026.5.

An insanity acquittee does not receive conduct or work credits, and does not receive any credit toward the maximum term of commitment for time spent on outpatient status through CONREP. Penal Code §§ 1026.5(a)(1), 1600.5. *People v. Bodis* (1985) 174 Cal.App.3d 435. In many cases, the maximum term for an insanity acquittee is essentially a life sentence because of the strict application of this statutory scheme.

A defendant cannot receive pre-commitment conduct credit for the time incarcerated in jail prior to the NGRI finding and subsequent placement. Whether a defendant receives credit toward the maximum term for time served in transitional housing depends on whether the placement was so restrictive that the defendant was "in custody" while placed there. *People v. Mord* (1988) 197 Cal.App.3d 1090.

F. Restoration of Sanity and Release

1. *What is the substantive standard for a determination of restoration of sanity?*

The relevant standard for restoration of sanity proceedings is not whether the individual committed is legally insane, but whether she has improved to the extent that she is no longer a danger to the health and safety of herself or others. Penal Code § 1026.2(e); *People v. Blackwell* (1981) 117 Cal.App.3d 372; *In re Franklin* (1972) 7 Cal.3d 126.

It is error for a trial court in a restoration of sanity hearing to disregard the effect of psychotropic medications on the individual's behavior. If evidence shows that an acquittee is no longer a danger to herself and/or others while in a medicated condition, and she will continue to take medication, then the

requirements for restoration of sanity are met. *People v. Williams* (1988) 198 Cal.App.3d 1476.

2. ***What are the procedures for a determination of restoration of sanity?***

a. ***Overview: Two-Step Process***

Restoration of sanity is a two-step process. In both steps, the acquittee has the burden of proving by a preponderance of the evidence that she is not dangerous due to mental defect, disease, or disorder. First, in an “outpatient placement” hearing, the court must find that the insanity acquittee would no longer be a danger to the health and safety of others if released under supervision and treatment in the community. After such a finding, the court will place the acquittee on outpatient status in CONREP for at least one year. Second, usually after one year of outpatient commitment, a court or jury must determine through a restoration hearing whether the acquittee has been fully restored to sanity. A finding of restoration will result in the individual’s unconditional release. An insanity acquittee may bypass the mandatory one-year of outpatient commitment and have an earlier trial only when the community program director recommends an early release. Penal Code § 1026.2(h).

There is also a mandatory one-year review of an acquittee's outpatient or CONREP status under Penal Code section 1606. At that review, the judge may renew the acquittee's outpatient status for one year, revoke outpatient status and order confinement to a treatment facility, or discharge the individual from commitment. The right to a full restoration trial is separate from the Penal Code section 1606 yearly review, and counsel should consider having both hearings.

b. ***Initiating a Restoration of Sanity Petition***

A petition for restoration of sanity may be filed only after the insanity acquittee spends at least six months committed to a hospital or outpatient program. Penal Code § 1026.2(d).

An NGRI acquittee may seek total release from the state mental health system after completing one year on outpatient status with CONREP, unless the community program director recommends earlier unconditional release. Penal Code § 1026.2(e), (h).

An insanity acquittee, medical director, or community program director may petition the superior court for restoration of sanity once per year. Penal Code § 1026.2(j). When the acquittee files the petition, the court can take no action without first obtaining a written recommendation from the medical director of the state hospital or from the CONREP director if the acquittee is already on outpatient status. Penal Code § 1026.2(1). The district attorney, mental health facility, and CONREP program director must receive notice of the hearing at least 15 judicial days in advance. Penal Code § 1026.2(a).

c. The First Step: The Outpatient (Placement) Hearing

At the initial outpatient placement hearing, the insanity acquittee must prove by a preponderance of the evidence that she would no longer be a danger to the health and safety of others due to mental defect, disease, or disorder if under supervision and treatment in the community. Penal Code § 1026.2(e); *People v. Sword* (1994) 29 Cal.App.4th 614.

Insanity acquittees do not have the right to a jury trial at an outpatient placement hearing. *People v. Tilbury* (1991) 54 Cal.3d 56; *Barnes v. Superior Court* (1986) 186 Cal.App.3d 969.

If the court finds in the acquittee's favor at an outpatient placement hearing, the community program director must recommend to the court the most appropriate outpatient program. The court may accept or reject the director's recommendation, and may exercise its discretion to place the individual in a facility or program that is not administered by CONREP. Penal Code § 1026.2(g). The court must not merely rubber stamp the recommendations of medical experts, but should come to its own conclusions. *People v. Superior Court (Almond)* (1990) 219 Cal.App.3d 607; *People v. Sword* (1994) 29 Cal.App.4th 614. However, the factors supporting the trial court's decision must be both adequate and supported by the record. *People v. Cross* (2005) 127 Cal.App.4th 63.

If the court orders release to CONREP, this placement in the community must occur within 21 days. Penal Code § 1026.2(h). The CONREP commitment will last for one year, unless the community program director recommends early release, in which case the court will proceed to the second step of the restoration process and will hold a restoration trial sooner than one year from the commencement of CONREP status. Penal

Code §§ 1026.2(e), (h). At the end of the one-year period, the court will hold a restoration hearing as described below.

Challenges to the validity of California's mandatory one-year conditional release program for insanity acquittees are unlikely to succeed. Courts have held that the statutory scheme is reasonably related to the purpose of public protection and, therefore, does not violate due process. *People v. Beck* (1996) 47 Cal.App.4th 1676. It does not violate equal protection because, unlike civilly committed persons, insanity acquittees have demonstrated dangerousness by committing a criminal offense. *Id.* Also, even though pre-1986 versions of section 1026 required only 90 days rather than one year in confinement before the filing of a restoration petition, any increase in the confinement of acquittees sentenced before that time is permissible because NGI commitments are rehabilitative rather than punitive. *People v. Superior Court (Woods)* (1990) 268 Cal.App.3d 614.

d. The Second Step: Full Restoration and Unconditional Release

Despite a defendant's request for a bench trial, the prosecution has a right to a jury trial under Penal Code section 1026.2 because a restoration hearing has "features and indicia peculiar to a criminal action" and thus, requires adherence to criminal procedure. *People v. Coleman* (1978) 86 Cal.App.3d 746; *People v. Superior Court (Almond)* (1990) 219 Cal.App.3d 607.

Courts have uniformly held that restoration of sanity proceedings are primarily civil in nature, noting that the purpose of confinement is for treatment rather than punishment. *In re Franklin* (1972) 7 Cal.3d 126; *People v. Superior Court (Woods)* (1990) 219 Cal.App.3d 616; *People v. Juarez* (1986) 184 Cal.App.3d 570; *People v. Mapp* (1983) 150 Cal.App.3d 346.

At a restoration hearing, the insanity acquittee has the burden of proving by a preponderance of the evidence that she is no longer dangerous. Penal Code § 1026.2(k); *Hartman v. Summers* (9th Cir. 1995) 878 F. Supp. 1335; *People v. Sword* (1994) 29 Cal.App.4th 614. The relevant standard is not whether the individual committed is legally insane, but whether she has improved to the extent that she is no longer a danger to the health and

safety of herself or others. *People v. Blackwell* (1981) 117 Cal.App.3d 372; *In re Franklin* (1972) 7 Cal.3d 126. In making this determination, the court may not disregard the effect of psychotropic medications on the acquittee's behavior. If evidence shows that an acquittee is no longer a danger to herself and/or others while in a medicated condition, and that she will continue to take medication, then the requirements for restoration of sanity are met. *People v. Williams* (1988) 198 Cal.App.3d 1476.

Court rules may allow only six peremptory juror challenges in restoration trials. *People v. Jones* (1987) 192 Cal.App.3d 400.

A decision in a restoration trial requires a three-quarters jury verdict, as in a civil trial. *In re Franklin* (1972) 7 Cal.3d at 149.

The court may direct a verdict if the petitioner does not produce substantial evidence. *People v. Mapp* (1983) 150 Cal.App.3d 346.

A trial court should not inform jurors in a restoration of sanity hearing that a finding of restoration will mean that the patient will no longer receive mandatory treatment. *People v. Kipp* (1986) 187 Cal.App.3d 748.

An order in a restoration trial denying a patient's release can be appealed. *People v. Coleman* (1978) 86 Cal.App.3d 746.

3. *Where will an insanity acquittee be placed pending a restoration hearing?*

Pending a restoration of sanity hearing, an acquittee shall be confined in a facility near the court. That facility must continue to provide treatment, adequate security, and to the greatest extent possible, minimize interference with the defendant's treatment program. The facility may be the county jail only if the jail will continue to provide treatment and adequate security, minimize interference with the patient's treatment program, and be able to provide accommodations which ensure both the patient's safety and the safety of the general population of the jail. If the county jail does not meet these conditions, the court must order the transfer to an appropriate facility or make other appropriate orders. Penal Code § 1026.2.

G. Extension of Commitment: Penal Code section 1026.5

1. *What is the substantive standard for extending an NGRI commitment?*

The court may extend an insanity commitment beyond the maximum term of commitment every two years if the underlying crime was a felony and if, by reason of a mental disease, defect, or disorder, the acquittee represents a substantial danger of physical harm to others. Penal Code § 1026.5(b).

- One single recent act of violence unrelated to the original crime may constitute substantial evidence of dangerousness to support an extension. *People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202.
- Evidence that in the month prior to the filing of a petition for extension an NGRI acquittee shot another patient constituted sufficient evidence of dangerousness. *People v. Echols* (1983) 138 Cal.App.3d 837.
- Evidence that NGRI acquittee walked around the state hospital with clenched fists, made numerous threats to staff, did not cooperate with therapists, and physically harmed staff and patients without provocation was sufficient to affirm an extension order. *People v. Beard* (1985) 173 Cal.App.3d 1115.

An insanity acquittee may rely on evidence of good behavior while she was in the hospital to show that her commitment should not be extended (or that she should be conditionally or unconditionally released).

Administrative Directives (AD) are operating policies of the specific state hospital and often will list eligibility factors for either additional services or reduction of services. For example, increased grounds access in the form of level or type of grounds passes will be granted based in part on good behavior.

Vocational training would be offered to an individual who displays good behavior. Since most state hospitals will have either a closed or open unit, placement on an open unit which affords an individual more physical freedom is subject to eligibility requirements as listed in an AD.

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Absence of documents recording incidents of harmful behavior will imply good behavior.

Locating the AD document that relates to the good behavior, reviewing and admitting the document in court could be useful evidence.

Examples of this type of evidence may include:

- Privileges that the hospital granted to the individual on the basis of her good behavior;
- 90-Day treatment team reports discussing the individual's good behavior;
- Grounds passes that the individual has earned;
- Vocational training programs in which the individual was eligible to participate because of her good behavior;
- The absence of Special Incident Reports in which the individual is the subject of a complaint of harmful behavior;
- The absence of seclusion or restraint measures taken in response to dangerous behaviors; and
- The individual's eligibility to be on an open unit.

To satisfy due process, the standard for extending an NGRI commitment must be interpreted as requiring proof that the individual's mental disease, defect or disorder causes her to have serious difficulty controlling her dangerous behavior. *People v. Bowers* (2006) 145 Cal.App.4th 870.

Due process does not require that the standard for legal insanity and the standard for extension of commitment for insanity acquittees be the same. *People v. Wilder* (1995) 33 Cal.App.4th 90.

A diagnosis of antisocial personality disorder may be substantial evidence of a mental disorder under Penal Code section 1026.5 if the diagnosis is based on other criteria, in addition to repeated criminal or antisocial behavior. *People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202.

Amenability to treatment is not necessary to support that an extension of commitment under Penal Code section 1026.2. *People v. Bennett* (1982) 131 Cal.App.3d 488. However, an acquittee may establish an affirmative defense if she can prove by a preponderance of the evidence that she is amenable to treatment and that she will be compliant with treatment if released. *People v. Bolden* (1990) 217 Cal.App.3d 1591.

An extension of commitment may be maintained on the basis of a mental disorder that is different than the one for which the defendant was originally committed as an insanity acquittee, as long as the subsequent disorder causes the defendant to represent a substantial danger of physical harm to others. *People v. McClure* (1995) 37 Cal.App.4th 686.

Note that prior to 1985, NGRI extensions were only allowed for persons who had been held for violent felonies. Insanity acquittees committed for nonviolent felonies prior to 1985 might be able to successfully challenge the extension or withdraw their insanity plea because the law changed after their original commitment.

2. *What are the procedures for extending an NGRI commitment?*

Unlike restoration proceedings, extension proceedings are essentially criminal in nature. The patient has all the rights guaranteed to criminal defendants under the federal and state constitutions for criminal proceedings. Penal Code § 1026.5(b)(7). But, see *People v. Wilder* (1995) 33 Cal.App.4th 90 (extension proceedings are essentially civil in nature, notwithstanding the fact that they include many constitutional protections relating to criminal proceedings).

To extend an insanity commitment past the maximum term, the state hospital or the local program director must first submit a report and recommendation to the district attorney six months before the patient's maximum expiration date. The district attorney must then file an extension petition no later than three months before the maximum expiration date, unless good cause is shown. Penal Code § 1026.5(b)(2). A trial is then held within 30 days of the patient's maximum release date, unless the parties waive time or show good cause for delay.

In an extension hearing, the prosecution has the burden to prove beyond a reasonable doubt that the patient represents a substantial danger of

physical harm to others by reason of a mental disease, defect, or disorder. *People v. Angeletakis* (1992) 5 Cal.App.4th 963. The burden then shifts to the acquittee to prove by a preponderance of the evidence that medication controls her dangerousness and that she will take it without fail in an unsupervised environment. *People v. Bolden* (1990) 217 Cal.App.3d 1591.

The time requirements under Penal Code section 1026.5 for filing a petition for extension are mandatory, although the prosecutor may show good cause for missing filing and service deadlines. *People v. Pacini* (1981) 120 Cal.App.3d 877; *People v. Johns* (1981) 119 Cal.App.3d 577; *People v. Mord* (1988) 197 Cal.App.3d 1090; *People v. Minahen* (1986) 179 Cal.App.3d 180. On the other hand, a finding that an extension petition was not timely filed does not necessarily void the individual's commitment under a subsequent extension in which the petition was timely. See *People v. Price* (2007) 55 Cal.3d 81, 86 no. 5, review granted 61 Cal.3d 1.

An NGRI extension trial shall be by jury unless waived by both parties. Penal Code § 1026.5(b)(4) . Defense counsel can waive the right to jury even over the acquittee's objection. *People v. Givan* (2007) 156 Cal.App.4th 405; *People v. Powell* (2004) 114 Cal.App.4th 1153.

The jury verdict in an NGRI extension trial must be unanimous. *People v. Angeletakis* (1992) 5 Cal.App.4th 363.

It is improper for a trial court to instruct jurors in an extension trial that if they find that the defendant is not dangerous she will no longer receive mandatory treatment or court supervision. *People v. Kipp* (1986) 187 Cal.App.3d 748.

Due process does not require that an insanity acquittee be competent to stand trial during an extension hearing. *Juarez v. Superior Court* (1987) 196 Cal.App.3d 928; *People v. Angeletakis* (4th Dist.1992) 5 Cal.App.4th 963.

3. What are the effects of an NGI commitment extension?

There is no statutory limit to the number of two-year extensions that can be imposed under Penal Code section 1026.5(b). Therefore, a defendant can remain committed as NGRI indefinitely, as long as the criteria for extended commitment are met.

An extension of commitment places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the patient's mental disorder. Penal Code § 1025.5(b)(11).

An individual whose commitment has been extended is eligible for outpatient CONREP status if she petitions for restoration of sanity or if the state hospital applies for outpatient commitment. Penal Code §§ 1600 *et seq.*; 1026.5(b)(7). (See Restoration of Sanity and Release, above, on the maximum time of commitment before a petition may be filed.)

H. Right to Advisement of Effect of Insanity Plea

1. What is the “Lomboy rule”?

A defendant pleading NGRI must be advised about the possibility that her commitment could be extended indefinitely. *People v. Lomboy* (1981) 116 Cal.App.3d 67. However, courts have been split as to the evidence that is required to establish the adequacy of the advisements, the effect of a defendant's failure to promptly challenge the adequacy of the advisements, the appropriate remedy for inadequate advisements, and whether the *Lomboy* rule can be applied retroactively.

2. What type of Advisements are required under Lomboy?

The Second District of the Court of Appeal dismissed a *Lomboy* challenge because the person who had been committed only relied on the record of her court proceedings, but did not show that her attorney did not tell her about the possibility of indefinite commitment, or that she would not have entered into an NGRI plea if she had known about the possibility of indefinite commitment. *People v. Superior Court (Wagner)* (1989) 258 Cal.Rptr. 740.

The Second District also found that a defendant had sufficiently shown a failure to advise when, even after the defendant reached the hospital and heard about extension petitions in other people's cases, she did not know that she herself could be extended because the terms of her plea agreement, which were in writing and signed by the defendant, said that the maximum term of punishment was seven years. *People v. McIntyre* (1989) 209 Cal.App.3d 548.

The Fourth District Court of Appeal accepted a defendant's statements

that, even though she knew that she should have been advised about the consequences of her plea, she did not know that she could challenge the validity of her plea based on *Lomboy*. This explanation, combined with the failure to make a *Lomboy* challenge at her first extension hearing, was enough to show that the defendant really didn't know about her *Lomboy* rights. *In re Robinson* (1990) 216 Cal.App.3d 1510.

3. *Can Lomboy rights be waived?*

The *Wagner* court held that waiting until an extension petition had been filed before making a *Lomboy* challenge was impermissible when there was no proof that the defendant did not know she could make a *Lomboy* challenge sooner and when it appeared that the defendant waited to bring the challenge so that she could reap the benefits of being in a hospital rather than prison, and so she could avoid parole. The problem was that the delay in bringing the *Lomboy* challenge was for "tactical" reasons rather than because the defendant did not know about her *Lomboy* rights. *People v. Superior Court (Wagner)* (1989) 258 Cal.Rptr. 740.

The *Robinson* court excused the defendant's delay in bringing a *Lomboy* challenge because there was proof that, even though she knew that she should have been advised about the consequences of her plea, she did not know that the failure to advise gave her grounds to challenge her plea, and because she had already been extended once, so her failure to raise *Lomboy* issues at her first extension hearing did not give her any advantage. Instead, her failure to make a *Lomboy* challenge earlier meant that she spent more, rather than less, time in the hospital. *In re Robinson* (1990) 216 Cal.App.3d 1510.

The First District Court of Appeal held that a defendant's failure to challenge the absence of *Lomboy* advisements at a previous extension hearing did not constitute a waiver of her *Lomboy* rights, because the original failure to raise the issue provided not advantage to the defendant and served to increase the length of her commitment. *People v. Minor* (1991) 227 Cal.App.3d 37.

4. *What is the effect of a violation of Lomboy rights?*

The *McIntyre* and *Minor* courts both held that an insanity commitment resulting from inadequate *Lomboy* advisements was void. Therefore, the state must release the individual or seek civil commitment. *People v. Minor*

(1991) 227 Cal.App.3d 37; *People v. McIntyre* (1989) 209 Cal.App.3d 548.

The *Robinson* court held that the effect of inadequate *Lomboy* advisements was to allow the defendant the chance to withdraw her NGI plea. *In re Robinson* (1990) 216 Cal.App.3d 1510.

5. *Is the Lomboy rule retroactive?*

The First and Second District Courts of Appeal have held that *Lomboy*, which was decided on February 20, 1981, applies retroactively to NGRI pleas that were entered into before that date, at least as far back as September 28, 1979, and possibly as far back as September 18, 1974. *People v. Minor* (1991) 227 Cal.App.3d 37; *People v. McIntyre* (1989) 209 Cal. App.3d 548. However, a different division of the Second District held that *Lomboy* only applies to pleas entered into after 1981. *People v. Superior Court (Bannister)* (1988) 203 Cal.App.3d 1525.