SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 1295	**Hearing Date:**	April 19, 2016
Author:	Nielsen		
Version:	March 28, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Mentally Ill Prisoners***

HISTORY

Source: California District Attorneys Association

Prior Legislation: SB 279 (Dunn) Ch. 16, Stats. 1999
SB 34 (Peace) Ch. 761, Stats. 1995
SB 1296 (McCorquodale) Ch.1419, Stats. 1985

Support: Unknown

Opposition: California Public Defenders Association

PURPOSE

The purpose of this bill is to allow documentary and other specified hearsay evidence to prove that an alleged mentally disordered offender's (MDO) crime of commitment to prison qualified as a violent crime under the MDO law.

Existing law states a legislative finding and declaration that the Department of Corrections and Rehabilitation (CDCR) should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community. (Pen. Code § 2960.)

Existing law requires, as a condition of parole, a prisoner who meets the following criteria be treated by the State Department of State Hospitals (DSH) and DHS to provide the necessary treatment:

- The prisoner has a severe mental disorder, as defined, that is not in remission, as defined, or cannot be kept in remission without treatment;
- The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime, as specified, for which the prisoner was sentenced to prison;
- The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release; and,
- Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the DSH or a chief psychiatrist of CDCR, as applicable,

have evaluated the prisoner at a CDCR facility or state hospital, as applicable, and a chief psychiatrist of CDCR has certified to BPH that the prisoner meets the above criteria and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. (Pen. Code § 2962.)

Existing law requires BPH to order a further examination by two independent professionals, as specified, if the professionals doing the evaluation above do not concur that the inmate meets the criteria for MDO commitment. The certification by a chief psychiatrist to BPH that the inmate is an MDO shall stand if at least one of the independent professionals who evaluate the prisoner concurs with the chief psychiatrist's certification. (Pen. Code § 2962, subds. (d)(2)- (3).)

Existing law allows BPH, upon a showing of good cause, to order an inmate to remain in custody for up to 45 days past the scheduled release date for a full MDO evaluation. (Pen. Code § 2963.)

Existing law allows the prisoner to challenge the MDO determination both administratively (at a hearing before the board) and judicially (via a superior court jury trial). (Pen. Code § 2966.)

Existing law provides that if the MDO determination made by BPH is reversed by a judge or jury, the court shall stay the execution of the decision for five working days to allow for an orderly release of the person. (Pen. Code § 2966.)

Existing law requires MDO treatment to be inpatient treatment unless there is reasonable cause to believe that the parolee can be safely and effectively treated on an outpatient basis. Existing law allows a parolee to request a hearing to determine whether outpatient treatment is appropriate if the hospital does not place the parolee on outpatient treatment within 60 days of receiving custody of the parolee. (Pen. Code § 2964, subds. (a)-(b).)

Existing law provides that a person involuntarily confined for treatment of mental illness as a MDO can be involuntarily treated with antipsychotic medication in a non-emergency situation where the MDO is determined by a court to be either 1) incompetent to refuse medication (unable to make rational medical decisions); or 2) a danger to others within the meaning of Welfare and Institutions Code section 5300 (the LPS section for 180 day commitments of dangerous persons). (In re Qawi, supra, (2004) 32 Cal.4th 1, 27-28.)

Existing law requires the director of the hospital to notify BPH and discontinue treatment if the parolee's severe mental disorder is put into remission during the parole period and can be kept that way. (Pen. Code § 2968.)

Existing law allows the district attorney to file a petition in the superior court seeking a one-year extension of the MDO commitment, subject to the same procedural and substantive rules of the original commitment trial. (Pen. Code § 2970.)

Existing law provides that proof of qualifying nature of an alleged sexually violent predator's qualifying prior convictions may be established by documentary evidence: "The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by [DSH]." (Welf. & Inst. Code § 6600, subd. (a)(3).)

This bill would allow evidence of the qualifying violent nature of an alleged MDO's crime of commitment to prison to include "documentary evidence or pursuant to the testimony of the [mental health expert] who evaluated the alleged MDO."

This bill provides that documentary evidence to establish the qualifying violent nature of the inmate's offense or offenses includes, but is not limited to, preliminary hearing and trial transcripts, probation and sentencing reports and DSH evaluations.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, Coleman v. Brown, Plata v. Brown (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;

- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> SB 1295 seeks to relieve crime victims from being required to give traumatic testimony during a parole hearing of their mentally disordered attacker. The bill would amend the Mentally Disordered Offender (MDO) Act to allow mental health experts to provide testimony based on probation reports, trial transcripts, and other documentary evidence. Under a 1994 court ruling, proof of an offender's force, violence, or threat could be admitted into a parole hearing through the testimony of an expert evaluator (generally psychologists or psychiatrists) relying on probation reports, DSH evaluations and trial transcripts. This means the evidence could be presented in an MDO parole hearing without prosecutors re-victimizing crime victims.
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> A 2015 California Supreme Court decision overturned the allowance of expert testimony. Since then, expert testimony based on documentary evidence could not be used to prove the force, violence, or threat of an MDO's prior crime during a parole hearing. This poses a problem because it forces the prosecution to choose between victim "re-victimization" and holding a hearing without full evidence. The absence of this testimony could lead to the release of a parolee who with full evidence would be shown to be an MDO. Consequently, prosecutors are put in a tough place during an MDO parole hearing: ask a victim to relive a traumatic experience, or risk releasing a dangerous person who requires in-patient treatment.
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> Fortunately, in its opinion, the California Supreme Court paved the way for a solution. The ruling acknowledged that the Legislature is free to create exceptions to the rules of evidence as it has done in the SVP (Sexually Violent Predator) context. SB 1295 is that solution. This bill will protect victims in two ways – by relieving them of the obligation to provide traumatic testimony in a parole hearing, and by helping to prevent the release of dangerous offenders. This bill will once again allow mental health evaluators to play a critical role in the parole hearings of mentally disordered offenders.

2. Background on the Mentally Disordered Offender Act (Pen. Code § 2960 et seq.)

A MDO commitment is a post-prison civil commitment. The MDO Act is designed to confine as mentally ill an inmate who is about to be released on parole when it is deemed that he or she has a mental illness which contributed to the commission of a violent crime. Rather than release the inmate to the community, CDCR paroles the inmate to the supervision of the state hospital, and the individual remains under hospital supervision throughout the parole period. The MDO law actually addresses treatment in three contexts - first, as a condition of parole (Pen. Code, §

2962); then, as continued treatment for one year upon termination of parole (Pen. Code § 2970); and, finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment (Pen. Code § 2972). *(People v. Cobb* (2010) 48 Cal.4th 243, 251.)

Penal Code section 2962 lists six criteria that must be proven for an initial MDO certification, namely, whether: (1) the inmate has a severe mental disorder; (2) the inmate used force or violence in committing the underlying offense; (3) the severe mental disorder was one of the causes or an aggravating factor in the commission of the offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) the inmate was treated for the disorder for at least 90 days in the year before the inmate's release; and (6) by reason of the severe mental disorder, the inmate poses a serious threat of physical harm to others. (Pen. Code § 2962, subds. (a)-(d); *People v. Cobb*, *supra*, 48 Cal.4th at p. 251-252.)

The initial determination that the inmate meets the MDO criteria is made administratively. The person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the DSH will evaluate the inmate. If it appears that the inmate qualifies, the chief psychiatrist then will certify to the Board of Parole Hearings (BPH) that the prisoner meets the criteria for an MDO commitment

The inmate may request a hearing before BPH to require proof that he or she is an MDO. If BPH determines that the defendant is an MDO, the inmate may file, in the superior court of the county in which he or she is incarcerated or is being treated, a petition for a jury trial on whether he or she meets MDO criteria. The jury must unanimously agree beyond a reasonable doubt that the inmate is an MDO. If the jury, or the court if a jury trial is waived, reverses the determination of BPH, the court is required to stay the execution of the decision for five working days to allow for an orderly release of the prisoner.

MDO treatment must be on an inpatient basis, unless there is reasonable cause to believe that the parolee can be safely and effectively treated on an outpatient basis. But if the parolee can no longer be safely and effectively treated in an outpatient program, he or she may be taken into custody and placed in a secure mental health facility. An MDO commitment is for one year; however, the commitment can be extended. (Pen. Code § 2972, subd. (c).) When the individual is due to be released from parole, the state can petition to extend the MDO commitment for another year. The state can file successive petitions for further extensions, raising the prospect that, despite the completion of a prison sentence, the MDO may never be released. The trial for each one-year commitment is done according to the same standards and rules that apply to the initial trial.

3. Evidence That the Parolee's Crime of Commitment Involved Violence

The determination whether the inmate committed a qualifying violent crime is essentially a formality if he or she was convicted of an offense specified in the governing statute. These include voluntary manslaughter, robbery in which the inmate personally used a weapon, forced or coerced sex crimes and others. (Pen. Code § 2962, subd. (e)(2)(A)-(O).) Proof of the violent nature of a crime is less clear if it is based on the defendant's conduct in any felony "in which the prisoner used force or violence, or caused serious bodily injury… or made a credible threat to cause "substantial physical harm…." (*Id*., at subparagraphs (P)-(Q).)

Proof of an inmate defendant's violent conduct has been done through live testimony by the victim or witnesses, or through hearsay testimony from the state's mental health expert.

Presenting live testimony risks traumatizing the victims. Hearsay - a statement made out of court to prove a fact in a trial or hearing – is a less reliable form of evidence and is generally inadmissible unless an exception to the hearsay rule applies.

4. California Supreme Court Decision Barring Hearsay by an Expert to Establish That an Alleged MDO Committed a Qualifying Violent Crime

The Court of Appeal produced conflicting opinions as to whether the state could validly use hearsay evidence to prove the facts of an inmate's allegedly violent commitment offense. (*People v. Miller* (1994) 25 Cal.App.4th 913 and *People v. Baker* (2014) 204 Cal.App.4th 1234.) The California Supreme Court resolved the conflict by finding that hearsay is not admissible to prove the facts of the conviction. (*People v. Stevens* (2015) 64 Cal.4th 325.) The court acknowledged the settled rules that expert opinion is admissible to help the jury understand an issue beyond common experience and that hearsay is admissible if it "reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (*Id*., at p. 336. quoting Evid. Code § 801, subd. (b).)

The Supreme Court agreed that an expert psychiatrist or psychologist may properly use hearsay in forming and stating an opinion as to whether a defendant's mental disorder was one of the causes or an aggravating factor in the commission of the underlying crime. "But proof of a qualifying conviction under the MDO Act is based on facts rather than on defendant's psychological condition, and thus does not call for a mental health expert's opinion testimony." (*Stevens,* at p. 336)

The court in *Stevens* noted that the Legislature had authorized an expert in an MDO case to rely on certified records to establish the requirement that the inmate received 90 days of treatment in the prior year. The court then ruled:

> We conclude that in a commitment hearing under the MDO Act, the People may not prove the facts underlying the commitment offense (that are necessary to establish the qualifying offense) through a mental health expert's opinion testimony. We note that the Legislature is free to create exceptions to the rules of evidence as it has done in the SVP context. We therefore reverse the Court of Appeal judgment, and remand the matter for proceedings consistent with our conclusion. (*Id*., at p. 338.)

The purpose of this bill to create the hearsay exception to which the *Stevens* court referred. It appears that the Legislature is free to enact the hearsay exception in this bill because an MDO proceeding is civil in nature. In a criminal case there is developing consensus that the 5th Amendment bars admission of hearsay presented by an expert to prove specific facts that constitute the basis of the expert's opinion. This development is part of the relatively slow implementation and application of the decision of the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36. The California Supreme Court has explained:

> [T]he prosecution's use of testimonial out-of-court statements "ordinarily violates the defendant's right to confront the maker of the statements unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." Although the high court has not agreed on a definition of "testimonial," testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of

> formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution. The high court justices have not, however, agreed on what the statement's primary purpose must be. (*People v. Dungo* (2012) 55 Cal.4th 608, 619, italics added.)

5. Parallel Evidentiary Provisions in the SVP Law and the MDO Law, as Amended by this Bill, are not Consistent

The author's statement notes that documentary evidence is authorized in SVP cases. The provision in this bill concerning documentary evidence in MDO cases appears to be directly drawn from the parallel SVP provision. The relevant provision in the SVP law states:

> Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior [sexually violent] convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals. (Welf. & Inst. Code § 6600, subd. (a)(3).)

The documentary evidence provision in this bill for MDO cases is nearly the same as in the SVP law. However, this bill includes an arguably confusing and uncertain phrase concerning the testimony of an expert who evaluated the inmate and gave an opinion that the inmate was an SVP. The provision in this bill reads as follows:

> (f) For purposes of meeting the criteria set forth in this section, the existence or nature of the crime, as defined in paragraph (2) of subdivision (e), for which the prisoner has been convicted may be shown with documentary evidence ***or pursuant to the testimony of the psychologist or psychiatrist who evaluated the prisoner regarding the mentally disordered offender criteria***. The details underlying the commission of the offense that led to the conviction, including the use of force or violence, causing serious bodily injury, or the threat to use force or violence likely to produce substantial physical harm, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals, ***or pursuant to the testimony of the psychologist or psychiatrist who evaluated the prisoner regarding the mentally disordered offender criteria.***

It is unclear why this bill includes a specific reference to the testimony of an expert evaluator. Testimony about the sexually violent and predatory nature of a prior conviction or convictions in an SVP is typically presented through the testimony, as in an MDO case. The real issue as to the testimony of the expert is what the testimony can be based on and consider, not the fact of the expert's appearance as a witness. In that sense, the reference to testimony by an expert appears to be unnecessary. As to the violent nature of a prior conviction, apart from the testimony of a victim or direct witness to the crime, the expert evaluator is in no better or worse position to testify about the facts of the prior offense. Allowing the expert to testify about the facts of the

prior offense would appear to be efficient, as the expert would be expected to give an expert opinion that is based on the nature of the prior conviction and the alleged MDO's mental disorder.

However, courts interpreting this bill would need to determine if there is a substantive purpose for the reference to expert testimony. A maxim of statutory construction holds that statutory terms must be presumed to not be unnecessary "surplasage." (*People v. Black* (1982) 32 Cal.3d 1, 5.) This could lead to litigation and inconsistent standards for SVP and MDO cases on the same issue, although "the purpose of the MDO Act and the SVPA is the same: to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders." (*People v. Harrison* (2013) 57 Cal.4th 1211, 1226 -1228; quoting *People v. McKee* (2010) 47 Cal.4th 1172, 1203.)

If there is no compelling need for the specific reference to expert testimony in this bill, it is suggested that that provision be stricken from the bill. The amendment would make the MDO law and the SVP law consistent on the same evidentiary issue. The author has agreed to amend the bill in this fashion.

SHOULD AUTHOR'S AMENDMENTS BE ADOPTED TO MAKE THE EVIDENTIARY RULES FOR PROVING THE FACTS OF AN UNDERLYING MDO CONVICTION THE SAME AS THE RULES THAT APPLY TO AN EQUIVALENT DETERMINATION IN AN SVP CASE?

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