

Board of Prison Terms

**MENTALLY DISORDERED OFFENDER
CRITERIA GUIDELINES
FOR
PENAL CODE SECTION 2962**

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MDO CRITERIA GUIDELINES

MENTALLY DISORDERED OFFENDER CRITERIA GUIDELINES FOR PENAL CODE SECTION 2962

INTRODUCTION:

The Mentally Disordered Offender (MDO) Act is *currently* codified as Penal Code sections 2960, 2962, 2964, 2966, 2970, 2972, 2976, 2978, 2980 and 2981. It may be cited as Penal Code sections 2960 et seq.

Penal Code section 2974 addresses the related topic of applicability of the Lantermann-Petris-Shor (LPS) Act to CDC. The LPS Act is codified as Welfare and Institutions Code sections 5100ff and pre-existed the MDO Act. The LPS Act is not considered part of the MDO Act despite the Penal Code section number for LPS being within the Penal Code section range of numbers.

Standards of Proof

The statute sets forth a standard of proof for the reviewing authorities for MDO evaluations. These include the CDC Chief Forensic Psychiatrist, the BPT and the Superior Court. The Chief Forensic Psychiatrist and the BPT apply a legal standard of "Preponderance of the evidence" standard and the Superior court applies a "beyond a reasonable doubt" standard generally indicating that the conclusions that are supported by evidence are 90% to 95% sure.

However, the "standard of proof" concept does not strictly apply to an expert witness in general or to the MDO evaluator. A "standard of proof" applies to the decision-maker or "trier of fact." In MDO, the decision-makers or triers of fact are the BPT or the Superior Court (judicial or unanimous jury). The MDO evaluator is not a "decision maker" or "trier of fact" in the legal sense. Therefore, neither the preponderance-of-evidence standard nor the beyond-a-reasonable-doubt standard applies to the MDO evaluator.

Case Referral From the Board of Prison Terms

Prior to release to parole, mentally ill prisoners meeting initial screening are evaluated by the California Department of Corrections (CDC) and Department of Mental Health (DMH). One evaluator must find positive on all six statutory criteria. Both CDC and DMH evaluators must agree on Criteria 1, 3 and 4 in order for an inmate to be certified. If there is a difference of opinion (DOP) on these three criteria, independent evaluations are ordered by BPT. The independent evaluators must agree on criteria 1, 3 and 4. If they do not, the prisoner is not certified as MDO and is referred to an outpatient treatment clinic upon parole. (Differences of opinion between CDC and DMH evaluators on criteria 2, 5, and 6 do not preclude MDO certification by BPT and do not require independent evaluations.)

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CRITERION SIX

Decision on Criterion Six: Use one of the following:

(a) The prisoner represents a substantial danger of physical harm to others by reason of a severe mental disorder. (YES – MEETS CRITERION SIX.)

(b) The prisoner does not represent a substantial danger of physical harm to others by reason of a severe mental disorder. (NO – DOES NOT MEET CRITERION SIX.)

This criterion is your determination of the degree of danger of physical harm, or future violence the inmate represents if released to the community. This determination should be made by reviewing the empirically or research derived risk factors that predict future violence. Although there are a number of actuarial instruments that provide levels of risk of future violence and associated probabilities, for the purpose of the MDO evaluation you are advised to use an empirically guided approach. That is to determine the presence or absence of the risk factors listed below. In general, risk of future violence is increased when more risk factors are present and risk is decreased in the absence of these risk factors. The weight or importance of any single risk factor for any individual may be variable and influential in determining increased or decreased risk. Therefore the evaluator should consider both the presence or absence of the risk factors that predict future violence as well as the weight of any particular factor.

In every case there may be situational factors that increase the inmate's risk of future violence such as the inmate's stated intention to reoffend violently or an organic condition that is associated with violent behavior. The following case factors should be considered.

- HISTORY OF VIOLENCE: Is there a prior history of forceful or violent offenses? Is there any indication that any of these were related to mental illness? If the controlling offense was not a one-time fluke, but instead reflects a habitual pattern or propensity for violent behavior, especially related to mental illness, then this increases the inmate's risk of dangerousness.
- PRIOR PERFORMANCE ON SUPERVISED RELEASE (PROBATION, PAROLE, CONDITIONAL RELEASE): What is the prior history of performance on probation or parole, if any? Was the inmate violated? What for? Was he or she compliant with mental health treatment? Did he or she refuse medications, and if so, are they the same ones he or she is now taking while incarcerated? Did he or she abuse drugs? Past history of parole failures also suggests increased risk for future parole failures.

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- COMPLIANCE WITH TREATMENT: While incarcerated, has the inmate been violent, aggressive, or non-compliant with treatment? If the inmate were non-compliant in a controlled setting, why would an Evaluator conclude that the inmate would be compliant in a less controlled setting?
- INSIGHT: What is the inmate's insight into his or her mental illness and need for treatment? Does he or she have an understanding of his or her illness, is he or she able to formulate coping mechanisms and strategies for dealing with potential problem situations? Can he or she seek help when ill and identify warning signs and stressors? What insight does the inmate have into the qualifying offenses? Does he or she understand why he or she did them and what he or she might have done differently? Is there any remorse? If not, then he or she must believe himself or herself to be justified in what he or she did and therefore is at increased risk for doing it again.
- SUBSTANCE ABUSE: Research has established that the dangerousness of the presence of a mental illness increases with the co-existence of a substance abuse problem.
- REMISSION: Is the mental illness that contributed to the qualifying offense currently in remission? This is the most basic bottom line.
- ENVIRONMENTAL RISK FACTORS: What are the plans of the inmate? With whom will he or she be living? Other aspects of the residence? Exposure to potential victims, exposure to an environment of substance abuse. Have co-habitants visited during the incarceration and are they supportive of the inmate's plans to return?

The time frame for prediction of dangerousness is specified in the MDO law as sometime in the "future." No specific time frame has been established. This standard is not a prediction over the short term such as current, present or imminent dangerousness.

Summary:

If Criterion One is negative, may insert the following phrase and proceed to the next criterion: "As reported above, I do not conclude that the inmate has a severe mental disorder as defined in the statute. Therefore, Criterion Six cannot be positive."

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After considering all of the above, state, "Given these factors, it is my professional opinion that at the present time the inmate represents (does not represent) a substantial danger of physical harm to others by reason of his (her) severe mental disorder.

CONCLUSION

Therefore, based upon information reviewed and current clinical evaluation, it is my conclusion that the inmate [insert "only" here if fewer than six criteria] meets criteria number(s) _____ [insert if appropriate "but does not meet criteria number(s) _____"] for hospitalization within a DMH State Hospital as a Mentally Disordered Offender. (The reason for the qualification "as a Mentally Disordered Offender" is that an inmate may not qualify for commitment under P.C. 2960, but may qualify under a different statute, such as WIC 6600 "Sexually Violent Predator.")

SIGNATURE BLOCK:

Do not use title "clinical" Psychologist, as the term may be seen as implying a treatment role. The date should be the date that the report is signed. Putting in a date will assist with identifying which updated version is the newest one, if an earlier version was updated.

Sheldon Smith, Ph.D., License # [PSY12345]
Independent Evaluator

Date Signed

Evaluations may be faxed to BPT at (916) 323-4804 with a hard copy sent via regular mail.

In some instances, a "short form" may be required due to an imminent parole date. The short form will be used only if approved by BPT. The short form may be handwritten, but must be legible. A full written report is due to BPT within seven (7) calendar days.

Independent evaluations requested for hearings must be clearly marked and address only the criteria being considered at the hearing as follows:

Certification Hearing: All six criteria as previously noted.

Placement Hearing: Only whether or not the individual can be safely and effectively treated in the community.