SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 720	**Hearing Date:**	July 11, 2017
Author:	Eggman		
Version:	June 6, 2017		
Urgency:	No	**Fiscal:**	No
Consultant:	SC		

Subject: ***Inmates: Psychiatric Medication: Informed Consent***

HISTORY

Source: California Psychiatric Association
Los Angeles County Sheriff's Department

Prior Legislation: AB 1907 (Lowenthal), Ch. 814, Stats. 2012
AB 1114 (Lowenthal), Ch. 665, Stats. 2011
AB 2380 (Dymally), failed passage in Assembly Public Safety (2005)
AB 1424 (Thompson), Ch. 506, Stats. 2001

Support: California Association of Psychiatric Technicians; California Attorneys for Criminal Justice; California State Association of Counties; California State Sheriffs' Association; California Treatment Advocacy Coalition; Riverside Sheriffs' Association

Opposition: American Civil Liberties Union of California; California Council of Community Behavioral Health Agencies; Disability Rights California

Assembly Floor Vote: 75 - 0

ANALYSIS REFLECTS AUTHOR'S AMENDMENTS TO BE OFFERED IN COMMITTEE

PURPOSE

The purpose of this bill is to authorize specified procedures for the involuntary medication of inmates awaiting arraignment, trial, or sentencing.

Existing law prohibits a person sentenced to imprisonment in a county jail from being administered any psychiatric medication without his or her prior informed consent, except under specified circumstances. (Pen. Code, § 2603, subd. (a).)

Existing law states that if a psychiatrist determines that an inmate should be treated with psychiatric medication, but the inmate does not consent, the inmate may be involuntarily treated with the medication; or treatment may be given on either a nonemergency basis as specified, or on an emergency or interim basis as specified. (Pen. Code, § 2603, subd. (b).)

Existing law provides that a county department of mental health, or other designated county department, may seek to initiate involuntary medication on a nonemergency basis only if all of the following conditions have been met:

a) A psychiatrist or psychologist has determined that the inmate has a serious mental disorder.

b) A psychiatrist or psychologist has determined that, as a result of that mental disorder, the inmate is gravely disabled and does not have the capacity to refuse treatment with psychiatric medications, or is a danger to self or others.

c) A psychiatrist has prescribed psychiatric medications for the treatment of the inmate's disorder, has considered the risks, benefits, and treatment alternatives to involuntary medication, and has determined that the treatment alternatives to involuntary medication are unlikely to meet the needs of the patient.

d) The inmate has been advised of the risks and benefits of, and treatment alternatives to, the psychiatric medication and refuses, or is unable to consent to, the administration of the medication.

e) The inmate is provided a hearing before a superior court judge, a court-appointed commissioner or referee, or a court-appointed hearing officer, as specified.

f) The inmate is provided counsel at least 21 days prior to the hearing, unless emergency medication is being administered, in which case the inmate would receive expedited access to counsel. The hearing shall be held not more than 30 days after the filing of the notice with the superior court, unless counsel for the inmate agrees to extend the date of the hearing.

g) The inmate and counsel are provided with written notice of the hearing at least 21 days prior to the hearing, unless emergency or interim medication is being administered in which case the inmate would receive an expedited hearing. (Pen. Code, § 2603, subd. (c)(1)-(7).)

Existing law states that an order for involuntary medication from a superior court judge, a court-appointed commissioner or referee, or a court-appointed hearing officer must be supported by a determination based on clear and convincing evidence that the inmate has a mental illness or disorder, that as a result of that illness the inmate is gravely disabled and lacks the capacity to consent to or refuse treatment with psychiatric medications or is a danger to self or others if not medicated, that there is no less intrusive alternative to involuntary medication, and that the medication is in the inmate's best medical interest. (Pen. Code, § 2603, subd. (c)(8).)

Existing law provides that an inmate is entitled to file one motion for reconsideration following a determination that he or she may receive involuntary medication, and may seek a hearing to present new evidence, upon good cause shown. (Pen. Code, § 2603, subd. (c)(10).)

Existing law provides that a physician may take appropriate action in an emergency. (Pen. Code, § 2603, subd. (d).)

Existing law states that an emergency exists when there is a sudden and marked change in an inmate's mental condition so that action is immediately necessary for the preservation of life or the prevention of serious bodily harm to the inmate or others, and it is impractical, due to the seriousness of the emergency, to first obtain informed consent. (Pen. Code, § 2603, subd. (d).)

Existing law specifies that if psychiatric medication is administered during an emergency, the medication shall only be that which is required to treat the emergency condition and shall be administered for only so long as the emergency continues to exist. (*Id*.)

Existing law states that if the clinicians of the county department of mental health, or other designated county department, identify a situation that jeopardizes the inmate's health or well-being as the result of a serious mental illness, and necessitates the continuation of medication beyond the initial 72 hours pending the full mental health hearing, the county department may seek to continue the medication by giving notice to the inmate and his or her counsel of its intention to seek an ex parte order to allow the continuance of medication pending the full hearing. If an order is issued, the psychiatrist may continue the administration of the medication until the hearing is held. (*Id*.)

Existing law states that the determination that an inmate may receive involuntary medication shall be valid for one year from the date of the determination, regardless of whether the inmate subsequently gives his or her informed consent. (Pen. Code, § 2603, subd. (e).)

Existing law states that if a determination has been made to involuntarily medicate a county jail inmate, the medication shall be discontinued one year after the date of that determination, unless the inmate gives his or her informed consent to the administration of the medication, or unless a new determination is made pursuant to the procedures set forth above. (Pen. Code, § 2603, subd. (f).)

Existing law specifies that any case in which it appears to the person in charge of a jail, or juvenile detention facility, or to a judge, that a person in custody in that jail or juvenile detention facility may be mentally disordered, he or she may cause the prisoner to be taken to a facility for 72-hour treatment and evaluation and he or she shall inform the facility in writing, which shall be confidential, of the reasons that the person is being taken to the facility. (Pen. Code, § 4011.6.)

Existing law states that a person cannot be tried or adjudged to punishment while he or she is mentally incompetent. (Pen. Code, § 1367, subd. (a).)

Existing law provides that a defendant is incompetent to stand trial where he or she has a mental disorder or developmental disability that renders him or her unable to understand the nature of the criminal proceedings or assist counsel in his or her defense. (*Id*.)

This bill authorizes the administration of psychotropic medication on an involuntary basis to county jail inmates who are awaiting arraignment, trial, or sentencing.

This bill requires the jail to make a documented attempt to locate an available bed for the inmate in a community-based treatment facility in lieu of seeking to administer involuntary medication. The jail shall transfer that inmate to such a facility only if the facility can provide care for the mental health needs, and health needs if any, of the inmate and upon agreement of the facility.

This bill specifies that for inmates awaiting trial, any required hearing shall be held before, and any requests for ex parte orders shall be submitted to, a judge in the superior court where the criminal case is pending.

This bill states that for an inmate awaiting arraignment, the inmate must be provided counsel within 48 hours of the filing of the notice of the hearing with the superior court, unless counsel has previously been appointed.

This bill requires the hearing to be held not more than 30 days after the filing of the notice with the superior court, unless counsel for the inmate agrees to extend the date of the hearing.

This bill requires that the superior court judge, a court-appointed commissioner or referee, or a court-appointed hearing officer determines by clear and convincing evidence that:

- The inmate has a mental illness or disorder;
- As a result of that illness the inmate is gravely disabled;
- Lacks the capacity to consent to or refuse treatment with psychiatric medications or is a danger to self or others if not medicated; and,
- There is no less intrusive alternative to involuntary medication and the medication is in the inmate's best medical interest.

This bill requires the findings above to be made in consultation with a psychiatrist who is not involved in the treatment of the inmate at the jail, if available.

This bill states that the superior court, court-appointed commissioner or referee, or a court-appointed hearing officer shall not make a finding that there is no less intrusive alternative to involuntary medication and that the medication is in the inmate's best medical interest without obtaining information from the jail about whether the inmate could be transferred to a community-based treatment facility, as provided.

This bill provides that a court may review, modify, or terminate an involuntary medication order for an inmate awaiting trial, if there is a showing that the involuntary medication is interfering with the inmate's due process rights in the criminal proceeding.

This bill clarifies the provisions in this bill do not prohibit a physician from appropriate action in cases of an emergency.

This bill provides that an emergency exists when both of the following criteria are met:

- There is a sudden and marked change in an inmate's mental condition so that action is immediately necessary for the preservation of life or the prevention of serious bodily harm to the inmate or others; and,

- It is impractical, due to the seriousness of the emergency, to first obtain informed consent.

This bill provides when psychiatric medication is administered during an emergency, the medication shall only be that which is required to treat the emergency condition and shall be administered for only so long as the emergency continues to exist.

This bill states that in situations that necessitate the continuation of medication beyond the initial 72 hours pending the full mental health hearing, the ex parte notice to continue medication beyond the initial 72-hour period shall filed within the initial 72 hour period.

This bill specifies that an involuntary medication order for an inmate who is awaiting arraignment, trial, or sentencing, shall be valid for no more than 180 days.

This bill states that the involuntary medication order shall remain in effect only until one of the following occurs, whichever occurs first:

- The duration of the inmate's confinement ends; or,
- A court determines that the inmate no longer meets the criteria for involuntary medication.

This bill states that an inmate's period of confinement may not be extended in order to provide treatment to the inmate with antipsychotic medication pursuant to the provisions in this bill.

This bill states that in the case of an inmate awaiting arraignment, trial, or sentencing, the renewal order shall be valid for no more than 180 days.

This bill requires, at intervals of not less than 90 days, the attending psychiatrist to file an affidavit with the court that ordered the involuntary medication affirming that the person who is the subject of the order continues to meet the criteria for involuntary medication. A copy of the report shall be provided to the defendant and defendant's attorney.

This bill provides that in determining whether the criteria for involuntary medication still exists, the court shall consider the report of the treating psychiatrist or psychiatrists and any supplemental information provided by the defendant's attorney.

This bill requires that for a renewal order, a superior court judge, court-appointed commissioner or referee, or a court-appointed hearing officer shall also make a finding that treatment of the inmate in a correctional setting continues to be necessary if there are no community-based treatment facility available and the inmate does not have a health condition that prevents effective treatment in a correctional setting.

This bill defines "inmate" to mean "a person confined in the county jail, including, but not limited to, a person sentenced to imprisonment in a county jail, a person housed in a county jail during or awaiting trial proceedings, and a person who has been booked into a county jail and is awaiting arraignment."

This bill does not apply to a person housed in a county jail solely on the basis of an immigration hold, except as it applies to medication provided on an emergency or interim basis.

This bill require each county that administers involuntary medication to an inmate awaiting arraignment, trial, or sentencing to file, by January 1, 2021, a written report to the Senate Committee on Public Safety and the Assembly Committees on Public Safety and Judiciary summarizing the following:

- The number of inmates who received involuntary medication while awaiting arraignment, trial, or sentencing between January 1, 2018 and July 1, 2020;
- The crime for which those inmates were arrested;
- The total time those inmates were detained while awaiting arraignment, trial, or sentencing;
- The duration of the administration of involuntary medication;
- The reason for termination of administration of involuntary medication;
- The number of times, if any, that an existing order for the administration of involuntary medication was renewed; and,
- The reason for termination of the administration of involuntary medication.

This bills provisions sunset on January 1, 2022.

This bill contains various Legislative findings and declarations.

COMMENTS

1. Need for This Bill

According to the author:

> Current law (PEN 2603) provides a process for the involuntary medication of inmates who have been sentenced to county jail and have been determined by a psychiatrist to be gravely disabled or a danger to themselves or others. However, this section fails to include those in jail who are awaiting trial or further adjudication. With over 100,000 people receiving mental health treatment in California jails and the lack of psychiatric care in the community, many can be caught in this gap in the law until they decompensate into full psychiatric crisis. AB 720 would extend the process currently in law to those awaiting trial, while reducing the time a medication order can last for the pretrial population, specifying other criteria for ceasing medication, clarifying that this does not apply to those held for their immigration status, and ensures that the order be heard before the court in which their criminal case is pending.

2. Population of Inmates Suffering from a Mental Disorder is Growing

According to several reports, the population of inmates in county jails and in state prisons has increased over the years. A Los Angeles Times article from June 2016 reported that "the number of mentally ill inmates has grown in both county jails and state prisons, although overall inmate populations have shrunk. In L.A. County jails, the average population of mentally ill inmates in 2013 was 3,081. As of mid-May it was 4,139, a 34% increase.

"In the state prison system, the mentally ill inmate population was 32,525 in April 2013, making up 24.5% of the overall population. As of February, according to a recently released monitoring report, the overall population had fallen by 5,230 while the mental health population had grown by 4,275, and made up 29% of the total population." (Sewell, *Mentally ill inmates are swamping the state's prisons and jails. Here's one man's story* (June 19, 2016) Los Angeles Times see full article at < http://www.latimes.com/local/california/la-me-mentally-ill-inmate-snap-story.html> [as of June 7, 2017].)

Nationally, the U.S. Department of Justice Bureau of Justice Statistics reports that 64 percent of the jail population has a mental illness. (Ortiz, Addressing Mental Illness and Medical Conditions in County Jail, National Association of Counties: Why Counties Matter Series, Issue 3 (Sept. 2015).)

3. Relevant Case Law

In *Washington v. Harper*, (1990) 494 U.S. 210, the U.S. Supreme Court held that a mentally-ill prisoner who is a danger to himself or others can be involuntarily medicated. Furthermore, the Court held in *Riggins v. Nevada* (1992) 504 U.S. 127, that forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible under certain circumstances. Read together, the Court has stated that these two cases "indicate that the Constitution permits the Government to involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, talking account of less intrusive alternatives, is necessary significantly to the further important governmental trial-related interests." (*Sell v. United States* (2003) 539 U.S. 166, 179.)

In *Sell*, the Court goes on to further specify the limited circumstances when the U.S. Constitution permits the government to administer drugs to a pretrial detainee against the mentally ill criminal detainee's will when seeking to render him competent for trial.

The 9th Circuit Court of Appeal, in *United States v. Loughner*, (2012) (9th Cir.) 672 F.3d 731, considered the following issue: what substantive due process standard must the government satisfy to medicate involuntarily a pretrial detainee on the ground that he is dangerous. The court differentiated between *Harper* and *Sell*, stating that the standard that applies depends on the purpose of the involuntary medication:

> If the government seeks to medicate involuntarily a pretrial detainee on trial competency grounds, that is a matter of trial administration and the heightened standard announced in Sell applies. *See Sell*, 539 U.S. at 183. When dangerousness is a basis for the involuntary

> medication, however, . . ., the concerns are the orderly administration of the prison and the inmate's medical interests. *See Harper*, 494 U.S. at 222-25; citations omitted.

The court in *Loughner* stated, ". . . , we now hold that when the government seeks to medicate a detainee—whether pretrial or post-conviction—on the grounds that he is a danger to himself or others, the government must satisfy the standard set forth in *Harper*. '[T]he Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate' s medical interest." (*Loughner, supra,* 672 F.3d at 752 (citing *Harper, supra* at 227.)

This bill specifically authorizes the involuntary medication of inmates confined to county jail including those awaiting arraignment, trial and sentencing.

4. The Procedures for Involuntary Medication Required Under this Bill

County jails house inmates that have been through the criminal process and have been sentenced to county jails, but they also house individuals who are detained in jail while they face criminal charges. Existing law provides procedures for involuntary medication which specifically apply to the portion of the county jail population that has been sentenced. This bill would extend the involuntary medication procedure to inmates confined in the county jail, including, but not limited to, a person sentenced to imprisonment in a county jail, a person housed in a county jail during or awaiting trial proceedings, a person who has been booked into a county jail and is awaiting arraignment, transfer, or release.

Specifically, this bill authorizes procedures for involuntary medication of pretrial detainees who have a serious mental disorder and as a result of the disorder are gravely disabled, or present a danger to self or others. This bill requires the judge to determine by clear and convincing evidence (1) that the inmate has a mental illness or disorder, (2) that as a result of that illness the inmate is gravely disabled and lacks the capacity to consent to or refuse treatment with psychiatric medications or is a danger to self or others if not medicated, (3) that there is no less intrusive alternative to involuntary medication, and (4) that the medication is in the inmate's best medical interest. If the judge makes this determination, the administration of the medication must occur in consultation with a psychiatrist who is not involved in the treatment of the inmate at the jail, if available. A court is also authorized to review, modify, or terminate an involuntary medication order for an inmate awaiting trial, if there is a showing that the involuntary medication is interfering with the inmate's due process rights in the criminal proceeding.

This bill provides that the duration of the involuntary medication order is up to 180 days rather than the year that is allowed for sentenced inmates, and any renewal orders may only last up to 180 days. The order is only to remain in effect until the duration of the inmate's confinement ends or a court determines that the inmate no longer meets the criteria for involuntary medication. This bill requires the attending psychiatrist to provide an affidavit to the court, at intervals of not less than 90 days, affirming that the person who is the subject of the order continues to meet the criteria for involuntary medication and the court must make a determination whether the criteria for the order still exists. This bill specifies that an inmate's period of confinement may not be extended in order to provide treatment to unsentenced inmates.

The jail is required to first attempt to transfer the inmate to a community-based treatment facility in lieu of seeking to administer involuntary medication. The jail is required to transfer the inmate to a facility, if the facility agrees to accept the inmate and the facility has the ability to provide care for the mental health and health needs, if any, of the inmate.

The inmate must be provided a hearing before a superior court judge where the criminal case is pending prior to the administration of medication and the judge may consider whether the involuntary medication would prejudice the inmate's defense. The bill requires an inmate to be provided with counsel within 48 hours of the filing of the notice of the involuntary medication request with the superior court.

This bill also contains a sunset provision and requires counties that administer psychiatric medication on an involuntary basis to provide a report to the Legislature with specified data.

5. Argument in Support

According to the California Psychiatric Association, the sponsor of this bill:

> With the marked reduction in psychiatric hospital beds in California communities in the last 5 decades, county jails have become the de facto default destination to house untreated, often homeless, mentally ill persons. In a jail setting, many of these inmates who are admitted – often very sick with a mental disorder – become even more delusional, disorganized and disruptive in confinement.
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> Mentally ill individuals tend to spend much longer in the pretrial process than their peers without mental illness when charged with the same crimes. Many weeks, and more likely months, may pass before adjudication. Many of these inmates refuse to accept medication, in fact are so sick they are not able to recognize they are ill and need help. Under these circumstances psychotic individuals, for instance, who are delusional and experiencing hallucinations cannot follow correction officer orders, may bang their heads against walls, scream at all hours, or smear feces around their cells. They suffer mightily from their illness.
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> Case law, most recently *United States v. Loughner*, in the 9th Circuit Court of Appeal (2012), has determined that the same standards for involuntary medication of convicted inmates who are dangerous or gravely disabled because of a mental disorder apply to pretrial detainees who are dangerous or gravely disabled because of a mental disorder. The proposal in AB 720 lies squarely within these clearly defined legal parameters.

6. Argument in Opposition

According to Disability Rights California, who writes in opposition:

> We oppose this bill for several reasons. First, jails should not be facilities where people with mental health disabilities are treated. People should be moved to an appropriate treatment facility for care, if their needs are that intensive. Second, because of the

undetermined, and often short, time periods that this newly affected group is in custody, an expansion of a county jail's authority may mean the person will not be afforded due process. We suggest shortening the length of time for an involuntary medication order. Third, the uncertainty of continued access to medication raises continuity of care concerns. Fourth, it may impact a person's ability to participate in the defense of their active criminal case. We appreciate the author's amendments to help lessen this impact. Finally, the bill affects poor people disproportionately.

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