SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	SB 1317	**Hearing Date:**	April 16, 2024
Author:	Wahab		
Version:	February 16, 2024		
Urgency:	No	**Fiscal:**	No
Consultant:	SC		

Subject: ***Inmates: psychiatric medication: informed consent***

HISTORY

Source: Santa Clara County

Prior Legislation: SB 827 (Committee on Public Safety), Ch. 434, Stats. 2021
AB 720 (Eggman), Ch. 347, Stats. 2017
AB 1907 (Lowenthal), Ch. 814, Stats. 2012

Support: California State Association of Psychiatrists; California State Sheriffs' Association; Los Angeles County Sheriffs' Department; Steinberg Institute

Opposition: None known

PURPOSE

The purpose of this bill is to remove the sunset on the provision of law authorizing involuntary medication of county jail inmates who are awaiting arraignment, trial or sentencing.

Existing law, *until January 1, 2025*, authorizes the administration of psychotropic medication on an involuntary basis to county jail inmates who are awaiting arraignment, trial, or sentencing if a psychiatrist determines that the inmate should be treated with psychiatric medication and specified procedures are followed. (Pen. Code, § 2603, subd. (b).)

Existing law, *until January 1, 2025*, authorizes the administration of medication without a defendant's consent on a nonemergency basis only if all of the following conditions have been met:

- A psychiatrist or psychologist has determined that the inmate has a serious mental disorder;
- 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;
- A psychiatrist has prescribed one or more 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;

- 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;

- The jail has made 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 the physical health needs, if any, of the inmate and upon the agreement of the facility. In enacting the act that added this paragraph, it is the intent of the Legislature to recognize the lack of community-based beds and the inability of many facilities to accept transfers from correctional facilities;

- 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;

- 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 inmate and counsel are provided with written notice of the hearing at least 21 days prior to the hearing, unless emergency medication is being administered, in which case the inmate would receive an expedited hearing;

- In the hearing described in paragraph (6), 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, 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;

- The historical course of the inmate's mental disorder, as determined by available relevant information about the course of the inmate's mental disorder, shall be considered when it has direct bearing on the determination of whether the inmate is a danger to self or others, or is gravely disabled and incompetent to refuse medication as the result of a mental disorder; and,

- An inmate is entitled to file one motion for reconsideration following a determination that they may receive involuntary medication, and may seek a hearing to present new evidence, upon good cause shown. This paragraph does not prevent a court from reviewing, modifying, or terminating 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. (Pen. Code, § 2603, subd. (c).)

Existing law, *until January 1, 2025*, provides that an order by the court authorizing involuntary medication of an inmate awaiting arraignment, trial or sentencing shall be valid for no more than 180 days and the court shall review the order at intervals of not more than 60 days to determine whether the ground for the order remains. At each review, the psychiatrist shall 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 affidavit shall be provided to the defendant and the defendant's attorney. (Pen Code, § 2603, subd. (e)(1)(B).)

Existing law, *until January 1, 2025*, states that in determining whether the criteria for involuntary medication still exist, the court shall consider the affidavit of the psychiatrist or psychiatrists and any supplemental information provided by the defendant's attorney. The court may also require the testimony from the psychiatrist, if necessary. The court, at each review, may continue the order authorizing involuntary medication, vacate the order, or make any other appropriate order. (*Ibid*.)

Existing law, *until January 1, 2025*, 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 and follows the same requirements in the initial order authorizing involuntary medication. (Pen Code, § 2603, subd. (h)(3)(B).)

Existing law, *until January 1, 2025*, required 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. (Pen. Code, §2603, subd. (l).

Existing law sunsets the provisions authorizing involuntary medication of inmates detained in county jail while awaiting arraignment, trial or sentencing on January 1, 2025.

This bill removes the sunset date and deletes the lapsed reporting requirement.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> Spending time in a county jail is hard on anyone's mental health. But those with truly severe mental health challenges who won't voluntarily accept treatment are at a major risk of deterioration, victimization, or harming themselves or others. They often languish in horrid conditions in their cells, refusing to eat, bathe, or care for themselves. These troubling circumstances reflect the unfortunate reality that have led county jails to serve as de facto mental health institutions. It is a reality that we cannot ignore. To let a person who is gravely disabled or a danger to self or others exist in such conditions is inhumane. In such cases, involuntary medication is a form of harm reduction. The process to seek a judicial order to administer involuntary medication in county jail settings (Penal Code section 2603) has already been in statute for 12 years. Specifically tailored for county jail settings, it safeguards the rights of those in custody who are in need of psychiatric medication and reduces delays in the delivery of vital treatment. Further, this statutory procedure to authorize involuntary medication – sought only for those individuals whose condition is truly dire and deteriorating – is critical to counties' ability to address the most acute mental health treatment needs of those in local custody. Without action by this Legislature, the statute will expire on January 1, 2025.

2. 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 themselves 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 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, taking account of less intrusive alternatives, is significantly necessary 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 them 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 they are 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 *Loughner* court 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 their will, if the inmate is dangerous to themselves or others and the treatment is in the inmate's medical interest." (*Loughner, supra,* 672 F.3d at 752 (citing *Harper, supra* at 227.)

3. Involuntary Medication of County Jail Inmates

County jails house inmates that have already been through the criminal process and have been sentenced, and they also house individuals who are detained in jail while they face criminal charges. In 2012, the Legislature enacted law providing procedures for involuntary medication which specifically applied to the portion of the county jail population that have been sentenced to imprisonment in the county jail. (AB 1907 (Lowenthal), chapter 814, statutes of 2012.) In 2017, The Legislature extended the involuntary medication procedure to inmates confined in county jail but not yet sentenced, including, but not limited to, 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. (AB 720 (Eggman), chapter 347, statutes of 2017.)

Generally, an inmate confined in a county jail shall not be administered any psychiatric medication without their prior informed consent. (Pen. Code, § 2603, subd. (a).) However, 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, either on an emergency basis or nonemergency basis as specified in the law. (Pen. Code, § 2603, subd. (b).) Emergency medication requires a showing that 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).) The initial authorization period for medication in an emergency is 72 hours. (*Ibid*.)

For nonemergency involuntary medication of a county jail inmate, if a psychiatrist determines that an inmate should be treated with psychiatric medication, involuntary psychiatric medication may be administered if the following conditions are met:

- A psychiatrist or psychologist has determined that the inmate has a serious mental disorder;

- 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;

- A psychiatrist has prescribed one or more 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;

- 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;

- The jail has made 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 the physical health needs, if any, of the inmate and upon the agreement of the facility. In enacting the act that added this paragraph, it is the intent of the Legislature to recognize the lack of community-based beds and the inability of many facilities to accept transfers from correctional facilities;

- 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;

- The inmate is provided counsel at least 21 days prior to the hearing, unless emergency or interim medication is being administered, in which case the inmate is to receive expedited access to counsel. If the inmate is awaiting arraignment, the inmate shall 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, and the hearing shall be held no more than 30 days after the filing of the notice with the superior court, unless the date is extended;

- The inmate and counsel are provided with written notice, containing specified information; of the hearing at least 21 days prior to the hearing, unless it is an emergency basis, in which the inmate shall get an expedited hearing;

- At the hearing, the judge, 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 and due to the 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, as specified;

- The historical course of the inmate's mental disorder, as determined by available relevant information about the course of the inmate's mental disorder, shall be considered when it has direct bearing on the determination of whether the inmate is a danger to self or others, or is gravely disabled and incompetent to refuse medication as the result of a mental disorder; and,

- An inmate is entitled to file one motion for reconsideration following a determination that they may receive involuntary medication, and may seek a hearing to present new evidence, upon good cause shown. A court is not prevented from reviewing, modifying, or terminating an involuntary medication order for an inmate awaiting trial, trial if there is a showing that the involuntary medication is interfering with the inmate's due process rights in the criminal proceeding. (Pen. Code, § 2603, subd. (c)(1)-(11).)

The law provides that in the case of an inmate awaiting arraignment, trial or sentencing, the involuntary medication order shall be valid for no more than 180 days. The court is required to review the order at intervals of not more than 60 days to determine whether grounds for the order remain. At each review, the psychiatrist is required to file an affidavit with the court affirming that the person who is the subject of the order continues to meet the criteria for involuntary medication. In making its decision, the court is required to consider the affidavit of the psychiatrist or psychiatrists and any supplemental information provided by the defendant's attorney. The court may also require the testimony from the psychiatrist, if necessary. The court, at each review, may continue the order authorizing involuntary medication, vacate the order, or make any other appropriate order. (Pen. Code, § 2603, subd. (e)(1).)

When the provisions authorizing involuntary medication of pretrial inmates was first enacted, the Legislature put in a sunset date of January 1, 2022 and required each county that administers medication to this population to submit a written report containing specified information to the Legislature no later than January 1, 2021. In 2021, the Legislature extended the sunset date until January 1, 2025. However, the reporting requirement was not extended. To date, the committee has not received data from the counties that administers involuntary medication to the county jail pretrial population. It is unclear which counties are currently using the involuntary medication procedure for pretrial inmates and when they started using this procedure. At least one county has indicated that they started using the procedure after the reporting deadline had lapsed. The committee has also been informed that some counties cannot easily access information regarding the crime for which the inmate was arrested and the total time the inmate was detained while awaiting arraignment, trial, or sentencing.

4. Amendments to be Adopted in Committee

The author intends to amend this bill to renew the reporting requirement with additional language to clarify that for information about the crime for which the inmate was arrested and the total time the inmate was detained pretrial, the counties shall include in their report if practically feasible. The amendments would also add in a sunset date of 5 years on the operation of its provisions to allow the Legislature to review the data reported by counties.

5. Argument in Support

According to the Steinberg Institute:

> Existing law authorizes psychiatrists in county jails to obtain an involuntary psychiatric medication order for persons in custody who are a danger to themselves, a danger to others, or suffering from grave disability. To ensure due process, state law also sets forth the procedures and timelines for providing notice, legal counsel, and judicial review of such orders. Current law is set to sunset at the end of this year.
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> This law has been critical in enabling counties' to address the needs of those in county jails with the most severe mental health treatment needs. Involuntary administration of medication is a drastic measure of last resort sought by Custody Health psychiatrists only for those individuals whose condition is truly dire and deteriorating.

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