SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 453	Hearing Date:	April 21, 2015
Author:	Pan		
Version:	April 6, 2015		
Urgency:	No	Fiscal:	Yes
Consultant:	JM		

Subject: ***Prisons: Involuntary Medication***

HISTORY

Source: Union of American Physicians and Dentists

Prior Legislation: AB 2186 (Lowenthal) Ch. 744, Stats. 2014
SB 1412 (Nielsen) Ch. 759, Stats. 2014
AB 2625 (Achadjian) Ch. 742, Stats. 2013
AB 1907 (Lowenthal) Ch. 814, Stats. 2012
AB 366 (Allen) Ch. 654, Stats. 2011
SB 1794 (Perata) Ch. 486, Stats. 2004

Support: American Federation of State, County and Municipal Employees

Opposition: Disability Rights California; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to 1) provide that where the treating psychiatrist of a person who is incompetent to stand trial concludes, based on the need to maintain the doctor-patient relationship, prevent harm or "other factors," that another psychiatrist should be designated to seek an order for involuntary medication, the facility director may make such a designation; and 2) require the treating psychiatrist to brief the designated psychiatrist about the case.

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

Existing law states that if the court has a doubt as to whether or not a defendant is IST, the court shall state that doubt on the record and shall seek defense counsel's opinion as to the defendant's competence. (Pen. Code § 1368, subd. (a).) The matter then proceeds as follows:

- The court shall appoint a psychiatrist or psychologist to examine the defendant.
- If the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists or psychologists.
- The examining expert shall evaluate the nature of the defendant's mental disorder; his or her ability to understand the proceedings or assist counsel in the conduct of a defense; and whether or not treatment with medications is medically appropriate and likely to restore the defendant to competency.
- The counsel for the defendant shall offer evidence in support of the allegation of mental incompetence.
- The prosecution shall present its case regarding the issue of the defendant's present mental competence.
- Each party may present rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention. (Pen. Code § 1369.)

Existing law states that if the defendant is found mentally competent, the criminal process shall resume. (Pen. Code § 1370, subd. (a)(1)(A).)

Existing law states that if the defendant is found IST, the matter shall be suspended until the person becomes mentally competent. (Pen. Code § 1370, subd. (a)(1)(B).)

Existing law includes processes for incompetence hearings, findings and orders concerning persons on mandatory supervision, post release community supervision and parole. (Pen. Code § 1367 et seq.)

Existing law states that an incompetent defendant charged with a violent felony (Pen. Code § 667.5, subd. (c)) may not be delivered to a state hospital or treatment entity that does not have a secured perimeter or a locked and controlled treatment facility. The court must determine that public safety will be protected. (Pen. Code § 1370, subd. (a)(1)(D).)

Existing law states that prior to committing an IST defendant for treatment, the court shall determine whether the defendant consents to the administration of antipsychotic medications. (Pen. Code § 1370, subd. (a)(2)(B).)

- If the defendant consents, the commitment order shall confirm that medication may be given to the defendant.
- If the defendant does not consent to the administration of medication, the court shall hear and determine whether any of the following is true:
    - The defendant lacks capacity to make decisions regarding medication, the defendant's mental disorder requires treatment with medication, and, if the defendant's mental disorder is not so treated, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm is shown by evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or has previously suffered these effects as a result of a mental disorder and his or her condition is substantially deteriorating;
    - The defendant is a danger to others, in that he or she has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical injury on another while in custody, or the defendant had inflicted, attempted to inflict, or made a

serious threat of inflicting such harm on another, for which the defendant was taken into custody, and he or she presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting such harm on others. Demonstrated danger may be based on the defendant's present mental condition, including a consideration of behavior within six years of the time the defendant attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence;

- The defendant has been charged with a serious crime against a person or property; involuntary administration of anti-psychotic medication is substantially likely to render the defendant competent; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the criminal proceedings or to assist counsel in the conduct of a defense; less intrusive treatments are unlikely to have substantially the same results; and anti-psychotic medication is in the patient's best medical interest in light of his or her medical condition. (Pen. Code § 1370, subd. (a)(2)(B)(ii)(I)-(III).); or,
- If the court finds any of these grounds to be true, the court shall authorize the treatment facility to involuntarily administer anti-psychotic medication to the defendant when and as prescribed by the defendant's treating psychiatrist. (Pen. Code § 1370, subd. (a)(2)(B)(iii).)

Existing law includes detailed procedures for review of orders for involuntary antipsychotic medication and to determine whether a person committed as IST without a medication order should be medicated. (Pen. Code § 1370, subd. (a)-(h).)

Existing law provides that where an IST in treatment withdraws consent for administration of antipsychotic medication, or if involuntary medication was not ordered upon commitment, and the treating psychiatrist believes that grounds for involuntary medication exist, the following shall occur:

- The treating psychiatrist may issue a certificate for administration of medication for up to 21 days, until a hearing before a court can be held.
- The IST defendant shall have the right to a medication review hearing before an administrative law judge (ALJ) within 72 hours.
- If the ALJ agrees that grounds for involuntary administration of medication exist, the involuntary medication may continue until a court hearing on the issue can be held.
- If the ALJ finds that grounds for involuntary administration of medication have not been established, medication may not be involuntarily administered until a court decides the issue. (Pen. Code § 1370, subd. (a)(2)(C)-(D).)

Existing law provides that if the ALJ upholds the certification by the treating psychiatrist for involuntary medication of the defendant for 21 days, the psychiatrist shall file with the court a copy of the certification and a petition for an order authorizing involuntary medications:

- The court shall provide notice to the prosecutor and counsel for the defendant of the pending hearing.
- The court shall hold the hearing within 18 days of the issuance of the certification and determine if a formal order for involuntary medication should be made.
- The court shall issue its decision within three calendar days, but no later than the expiration of the 21-day certification period. (Pen. Code § 1370, subd. (a)(2)(D).)

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- The court shall issue its decision within three calendar days, but no later than the expiration of the 21-day certification period. (Pen. Code § 1370, subd. (a)(2)(D).)

Existing law requires the court, when determining if grounds exist for ordering involuntary administration of antipsychotic medication to an IST defendant, to consider the reports prepared by the psychiatrist or psychologist who examined the defendant for mental competency purposes, per se, if those reports are applicable to the involuntary medication issue. (Pen. Code § 1370, subd. (a)(2)(B).)

Existing law provides that an order for involuntary medication shall remain valid at any facility housing the defendant for purposes of return to competency and resumption of criminal proceedings, if the medication is prescribed by the defendant's treating psychiatrist.

Existing law provides that if an administrative law judge upholds the 21-day certification by the treating psychiatrist that antipsychotic medication has become medically necessary and appropriate while the defendant is being treated, the court may extend the certification and continue the hearing for no more than 14 days, upon a showing of good cause or the stipulation of the parties. (Pen. Code § 1370, subd. (a)(2)(D).)

Existing law requires the court to review the order to administer involuntary medication at the time of the review of the initial competency report by the medical director of the treatment facility and at review of the six-month progress reports. (Pen. Code § 1370, subd. (a)(2)(B).)

Existing law allows the district attorney, county counsel, or representative of any facility where a defendant found incompetent to stand trial is committed, within 60 days before the expiration of the one-year involuntary medication order, to petition the committing court for a renewal of the order, subject to the specified conditions and requirements.

- The petition shall include the basis for involuntary medication, as specified, and requires notice of the petition to be provided to the defendant, the defendant's attorney, and the district attorney.
- The court shall hear and determine if the defendant continues to meet the required criteria for involuntary medication and that the hearing be conducted before the expiration of the current order. (Pen. Code § 1370, subd. (a)(7)(B).)

This bill provides that the treating psychiatrist of an IST patient may request the facility director to "designate another psychiatrist to act" in his or her place for the purposes of determining if an order for involuntary administration of antipsychotic medication should be sought. The request shall be based on the need to do one of the following:

- Maintain doctor-patients rapport;
- Prevent harm; or
- Other factors

This bill requires the treating psychiatrist to "brief the acting psychiatrist on the relevant facts of the case."

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight 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 February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 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).

While significant gains have been made in reducing the prison population, the state now 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

Under current law, a defendant must be competent to stand trial. If the defendant is not competent, they may be placed on antipsychotic medication, if certain standards met and findings made. The treating physician must first attempt to obtain consent from the defendant. If these efforts fail, and it is deemed medically necessary and appropriate, the treating physician can seek a judicial order for involuntary medication. A hearing is held in which the treating psychiatrist certifies and testifies that the antipsychotic drugs are necessary. If the judge agrees with the certification, the court issues an order for involuntary administration of medication.

Through 2013 and 2014, it became apparent that DSH psychiatrists were being assaulted or seriously injured following their testimony in involuntary medication hearings. To reduce the number of injuries, DSH proposed legislation that would allow a non-treating psychiatrist to testify in the hearings and expand the time superior courts could schedule a hearing. Last year, the Governor's Office convened a workgroup to propose changes to the IST process, thus postponing the proposal to allow non-treating psychiatrists to testify in an involuntary medication hearing.

2. Legislation concerning Persons who are Incompetent to Stand Trial

Due process is required in committing persons to state hospitals and administering involuntary medication. The United States Supreme Court has set requirements and standards for involuntary administration of medication to IST patients. Further, the Department of State Hospital has only recently been released from a federal court consent judgment concerning adequate treatment of patients.

Over the last 10 years, numerous measures have been enacted concerning defendants and supervised persons who are incompetent to stand trial or face punishment. The governing statutes are extremely lengthy, layered and intricate. The law must balance the interests of the state in trying and punishing offenders, protection of the rights of involuntarily committed persons and administering a treatment system for persons who may be dangerous. Much of the recent legislation has concerned involuntary administration of medication.

Staff members at DSH facilities have become increasingly concerned about safety in recent years, as the proportion of patients committed from the criminal justice system - forensic patients - have risen to over 90%. It appears that this bill is intended to reduce retributive acts against treating psychiatrists by patients who object to involuntary administration of antipsychotic medication. The bill does so by authorizing a non-treating psychiatrist to seek an involuntary mediation order, reducing the friction or conflict between the treating doctor and a patient who does not want to be medicated.

The bill, however, raises the issue of whether a designated psychiatrist will know enough about a patient to act in these matters? The bill requires the treating psychiatrist to brief the designated psychiatrist about the facts of the case, but the bill provides no guidelines or requirements to make sure that such briefings are adequate. This raises additional issues about liability in a case where some harm comes to the patient from involuntarily administered medication. Disability Rights California has addressed this issue by arguing that a designated psychiatrist should be required to examine the patients.

3. Argument in Support

The American Federation of State, County and Municipal Employees argues in support:

> AFSCME, though our affiliate the Union of American Physicians and Dentists (UAPD) represents physicians in state service, including DSH psychiatrists. SB 453 would authorize a psychiatrist designated by the facility medical director to make the determinations and certifications [about the necessity of antipsychotic medication]. AFSCME strongly supports SB 453 because we believe it is necessary to ensure the safety of DSH physicians who are often threatened by individuals who are deemed mentally incompetent. By authorizing designated psychiatrists to properly administer medication to these defendants we can ensure the safety of treating psychiatrists.

4. Argument in Opposition

Disability Rights California argues in opposition:

> Existing law identifies circumstances for the voluntary and involuntary administration of antipsychotic medication. If consent for medication is withdrawn or if the treating physician determines that medication is necessary and appropriate, the treating psychiatrist must make efforts to obtain consent for the medication. If the treating psychiatrist certifies that medication is necessary and appropriate, antipsychotic medication may be administered to the defendant for a maximum of 21 days, provided that the defendant has medication review hearing before an administrative law judge.
>
> This bill would instead authorize a psychiatrist designated by the facility medical director to make the determination and certification [of the need for medication]. The bill allows the designated psychiatrist to [act based on] a paper review without examining the patient. Current law ensures that the [person seeking a medication order] is the treating psychiatrist and thus has first-hand knowledge of the patient, such that risks, benefits and alternatives can be [fully] considered…and the patient can be properly advised …so that the patient can give informed consent if [he or she] has the capacity to do so. Unfortunately, we have seen many situations where doctors make decisions without adequate knowledge about a patient. This bill will [create] more of those situations.

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