

# The Right to Refuse Psychotropic Medication For Forensic Mental Health Clients

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## *Consent Rights At-A-Glance*

<b>LPS Patient</b>	Emergency Situation	<b>Welfare and Institutions Code Section 5332(e)</b> , defining “emergency” as a situation in which medicating immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent. [Welfare and Institutions Code Section 5008(m)]
	Lack of Capacity to Consent	Under <b>Welfare and Institutions Code Section 5332(b) (1)</b> the staff must consider and determine that treatment alternatives are unlikely to meet the needs of the patient; and (2) a determination of incapacity to refuse treatment must be made in a hearing held for that purpose.
	Danger to Self or Others	A finding of dangerousness under <b>Penal Code Section 5300</b> will justify involuntary medication of an LPS patient. A finding of generalized “demonstrated danger” and recent acts of violence is required.
	Other Methods	The Court can grant a conservator the power to consent to treatment. The conservatee can contest this power granted to the conservator by filing a petition for a hearing. <b>Welfare and Institutions Code Section 5358.3</b> . Right to refuse psychotropic medication can be taken away by the LPS court in letters of conservatorship
<b>MDO</b>	Emergency Situation	<b>Penal Code Section 2972(g)</b> adopting <b>Welfare and Institutions Code Section 5332(e)</b>
	Lack of Capacity to Consent	<b>Penal Code Section 2972(g)</b> adopting <b>Welfare and Institutions Code Section 5332(b)</b>
	Danger to Self or Others	<b><i>In re Qawi</i></b> , adopting <b>Penal Code Section 5300</b> .
	Other Methods	The rights can be further limited by State DMH regulations necessary to provide security for inpatient facilities under <b><i>In Re Qawi</i></b> .

<b>SVP</b>	Emergency Situation	<i>In re Calhoun</i> , granting the same rights as MDOs.
	Lack of Capacity to Consent	<i>In re Calhoun</i> , granting the same rights as MDOs.
	Danger to Self or Others	<i>In re Calhoun</i> , granting the same rights as MDOs.
	Other Methods	<i>In re Calhoun</i> , granting the same rights as MDOs.
<b>Prisoner</b>	Emergency Situation	<b>California Code of Regulation Title 15, Section 1217; Keyhea injunction Section III(J)</b>
	Lack of Capacity to Consent	<b>Penal Code Section 2600</b> requiring compliance with the <b>Keyhea injunction process</b> . A hearing that finds that the prisoner is gravely disabled and incompetent to refuse medication will justify involuntary medication.
	Danger to Self or Others	<b>Penal Code Section 2600</b> requiring compliance with the <b>Keyhea injunction process</b> . A hearing finding that the prisoner poses a danger to self or others as a result of a mental disorder will justify involuntary medication.
	Other Methods	None
<b>State Prison Transferee</b>	Emergency Situation	<i>In re Brown</i> , granting similar rights as prisoners.
	Lack of Capacity to Consent	<i>In re Brown</i> , granting similar rights as prisoners.
	Danger to Self or Others	<i>In re Brown</i> , granting similar rights as prisoners.
	Other Methods	None
<b>NGI</b>	Emergency Situation	Possibly have the same rights of prisoners under <i>In re Qawi</i> .
	Lack of Capacity to Consent	Possibly have the same rights of prisoners under <i>In re Qawi</i> .
	Danger to Self or Others	Possibly have the same rights of prisoners under <i>In re Qawi</i> .

	Other Methods	None
<b>IST</b>	Emergency Situation	<b>California Penal Code Section 1370(a)(2)(B)(iv)</b> adopting the 5008(m) definition of “emergency”
	Lack of Capacity to Consent	<b>California Penal Code Section 1370(a)(2)(B)(ii)(I)</b> requiring a court determination that the defendant lack capacity to consent; that the mental disorder requires treatment and that absent treatment, serious harm will result.
	Danger to Self or Others	<b>California Penal Code Section 1370(a)(2)(B)(ii)(II)</b> requiring a court determination that the defendant is a danger to others and presents a “demonstrated danger” of inflicting substantial bodily harm on others.
	Other Methods	Involuntary medication may be used to restore competency if a court finds that there is a substantial likelihood that medication will render the defendant competent, without substantial side effects that interfere with his defense; no alternative exists that would have the same results and medication is in the defendant’s best interests.

## I. Introduction

This publication is intended for use by advocates and clients. This publication begins with a general framework for analyzing right to refuse medication problems. It then proceeds to outline the legal rights of individuals on Lanterman-Petris-Short Act (LPS) short term holds. Even though these patients are civilly committed and are not “forensic,” both case law and California statutes have in many instances applied the legal rights of persons on LPS short term holds to forensic mental health clients. The publication then goes on to outline the other criteria that must be met in order to involuntarily medicate based on the nature of the individual’s hospital commitment. Finally, the publication concludes with a glossary of useful legal terms.

### *Which Medications are Considered Psychotropic?*

Penal Code Section 3500(c) defines a psychotropic drug as “any drug that has the capability of changing or controlling mental functioning or behavior through direct pharmacological action. Such drugs include, but are not limited to, antipsychotic [including Thorazine, Mellaril, Prolixin, and Haldol], antianxiety, sedative, antidepressant, and stimulant drugs. Psychotropic drugs also include mind-altering and behavior-altering drugs which, in specified dosages, are used to alleviate certain physical disorders, and drugs which are ordinarily used to alleviate certain physical disorders but may, in specified dosages, have mind-altering or behavior-altering effects.” [California Penal Code Section 3500(c)]

### *Note: Withdrawal of Consent*

This publication addressed the right to *refuse* antipsychotic medication. In some cases, informed consent will be given by the client, at which point the state need only ensure that the consent was “informed.”<sup>1</sup> Individuals who give informed consent may withdraw their consent at any time by stating their intention to any member of the treatment staff. [Title 9, California Code of Regulations, Section 854]

## II. Framework for Analyzing the Right to Refuse Psychotropic Medication

An individual “has a ‘significant’ constitutionally protected ‘liberty interest’ in ‘avoiding the unwanted administration of antipsychotic drugs.’”<sup>2</sup> Therefore, forensic mental health clients are presumed to have the right to refuse psychotropic medications. Accordingly, absent informed consent, the state may only force medication in two situations:

1. An “*emergency situation*” requiring forced medication. [Welfare and Institutions Code Section 5332(e)]
2. Other “*specific criteria*” are met.

### *Specific Criteria*

The specific criterion that must be satisfied depends on the nature of the client’s commitment. For purposes of this publication, forensic mental health commitments include: a Mentally Disordered Offender (MDO), a Sexually Violent Predator (SVP), a prisoner, a state prison transferee, Not Guilty by Reason of Insanity (NGI), or Incompetent to Stand Trial (IST). The specific criteria that must be met are the subject of this publication but in general involve a determination that the person lacks *capacity to refuse medication* or a determination that the patient represents a *danger to others*.

Thus, in analyzing the right to refuse treatment, the first question to ask is whether an emergency exists justifying the state’s forced medication. If not, the next question is whether the state has met the “specific criteria” required for involuntary medication. In general, if neither of these burdens is met, the individual will most likely retain the right to refuse psychotropic medication.

Since statutes and courts have granted the rights of LPS patients to other categories of committed individuals, it is appropriate to start with a brief summary of the LPS patient’s right to refuse involuntary medication.

## III. LPS Patients

### *Short-Term LPS Patients*

Short-term LPS patients (i.e., those committed under Welfare and Institutions Code Section 5150, 5250, 5260 or 5270.15) may only be involuntarily medicated in 3 situations:

- a. An emergency situation.*

### *Emergency Situation Defined*

“Emergency” is defined as a situation in which medicating against the person’s will is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent. It is not necessary for

harm to take place or become unavoidable prior to treatment. [Welfare and Institutions Code Section 5008(m)]

Additionally, emergency medications must be provided in a manner that is least restrictive to personal liberty; medications should be limited to those that are needed to treat the emergency situation. [Welfare and Institutions Code Section 5332(e); Title 9, California Code of Regulations Section 853] Emergency medication should only be administered when treatment staff have considered and determined that treatment *alternatives* are unlikely to meet the needs of the patient;

- b. . . . upon a determination of a person's incapacity to refuse the treatment, in a hearing held for that purpose. [Welfare and Institutions Code Section 5332(b)<sup>3</sup>]. (See Appendix A for Riese hearing procedures.)*

### *Determining Capacity*

Incompetence may *not* be presumed because the individual has been evaluated or treated for a mental disorder [Welfare and Institutions Code Section 5331] or because of a diagnosis of being mentally ill, disordered, abnormal, or mentally defective. [*Riese*, 209 Cal.App.3d 1303, 1315]

In determining capacity to consent for short term LPS patients<sup>4</sup>, a court is to consider 3 factors: whether the person (1) is aware of her situation/condition; (2) is able to understand the benefits and the risks of, as well as the alternatives to, the proposed intervention; and, (3) is able to understand and to knowingly and intelligently evaluate the information required to be given patients whose informed consent is sought. [*Riese*, 209 Cal.App.3d 1303 (1987)]

- c. The individual qualifies as “dangerous” within the meaning of Welfare and Institutions Code Section 5300.<sup>5</sup>*

### *Determining “Dangerousness” under Section 5300*

To effect a Section 5300 commitment, a court must find, after the initial 72 hours hold and subsequent 14 day hold, both:

- A. Generalized “**demonstrated danger**” to others which may be based on assessment of the person's present mental condition, which is based upon a consideration of past behavior of the person within six years prior to the time the person attempted, inflicted, or threatened physical harm upon another, and other relevant evidence. [Welfare and Institutions Code Section 5300.5]

In addition, one of the following findings establishing **recent acts or threats of violence** must be made: “(a) The person has attempted, inflicted, or made a serious threat of substantial physical harm upon the person of another after having been taken into custody, and while in custody, for evaluation and treatment...(b) The person had attempted, or inflicted physical harm upon the person of another, that act having resulted in his or her being taken into custody...(c) The person had made a serious threat of substantial physical harm upon the person of another within seven days of being taken into custody, that threat

having at least in part resulted in his or her being taken into custody.” [Welfare and Institutions Code Section 5300]

### *LPS Conservatees*

LPS conservatees have the right to refuse medication absent an emergency unless the conservatee is determined to lack capacity to consent in the judicial hearing creating the conservatorship, or in a subsequent hearing. [Riese v. St. Mary’s Hospital & Medical Center, 209 Cal.App3d 1303 (1987); Welfare and Institutions Code Section 5332(b)]

## **IV. Mentally Disordered Offenders (MDOs)**

### *Who can be detained as an MDO?*

Paroled offenders may be civilly committed as a condition of their parole if a specified team of mental health professionals finds that the offender: (1) has a ***severe mental disorder that is not in remission*** or cannot be kept in remission without treatment; (2) finds that by reason of his or her severe mental disorder, the prisoner represents a ***substantial danger of physical harm to others***; and (3) meets the other criteria listed in Penal Code Section 2962.

“Substantial danger of physical harm” can be demonstrated by a finding of recent dangerousness, but is not required. It can also be demonstrated when a person has not voluntarily followed the treatment plan. “Substantial danger of physical harm does not require proof of a recent overt act.” [Penal Code Section 2962 et seq.]

### *Right to Refuse*

Under *In Re Qawi*, and California Penal Code Section 2972(g)<sup>6</sup>, an individual committed to a state hospital as an MDO is granted the same rights to refuse treatment as an LPS patient. Therefore, ***absent an emergency situation***, MDOs have the right to refuse psychotropic medication unless a court finds either at the time the MDO is committed or recommitted, or in a separate proceeding, that either:

1. The MDO is ***incompetent or incapable*** of making decisions about his medical treatment; or,
2. The MDO is ***dangerous*** within the meaning of Penal Code Section 5300.

(See section III, above, explaining how both of these determinations are made.)

An MDO does not lose the right to refuse antipsychotic medication merely by being adjudicated an MDO or solely because the MDO was dangerous *in the past*. [*In Re Qawi*, 32 Cal.4th 1, 25 (2004)]

The rights of MDOs to refuse medication can be further limited by State Department of Mental Health regulations necessary to provide security for inpatient facilities. [In *Re Qawi*, 32 Cal.4th 1, 10 (2004)] See DMH Long Term Care Special Order 336.01 for State Hospital Procedures.

## V. Sexually Violent Predators (SVPs)

*Who is considered an SVP?*

A sexually violent predator is “a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” [Welfare and Institutions Code Section 6600]

In *In Re Calhoun*, 121 Cal.App.4th 1315 (2004), the California Court of Appeals granted SVPs the same right to refuse medication as MDOs.

Accordingly, ***absent an emergency***, an SVP can be medicated involuntarily only if a court, at the time the SVP is committed or recommitted, or in a separate proceeding, finds that either:

- (1) The SVP ***lacks the capacity*** to make decisions about his medical treatment; or,
- (2) The SVP is ***dangerous*** within the meaning of California Penal Code Section 5300.

(See section III, above, explaining how both of these determinations are made.)

The rights of SVPs to refuse medication can be further limited by State Department of Mental Health Regulations necessary to provide security for inpatient facilities. [In *Re Calhoun*, 121 Cal.App.4th 1315 (2004)]

## VI. Prisoners

### A. Minimal U.S. Supreme Court Requirements

The U.S. Supreme Court has stated that in order to involuntarily medicate a prisoner who is a danger to self or others, the state has the burden of demonstrating that:

- a. The inmate suffers from a ***mental disorder***;
- b. The treatment is ***medically appropriate*** (i.e., in the inmate’s best interests);
- c. The treatment sought was least intrusive, i.e., ***there are no alternatives***; and,
- d. The state has a significant state interest i.e., medication is essential for the ***safety of the prisoner or others, or, the inmate is gravely disabled***. [Riggins v. Nevada, 504 U.S. 127 (1992); Washington v. Harper, 494 U.S. 210 (1990)]

According to the U.S. Supreme Court, these determinations can be made through an internal administrative procedure<sup>7</sup>; a judicial hearing is not required. *Note: California law still requires a judicial hearing. See the following section.*

Additionally, the inmate has the right to attend the hearing, to present evidence, and to be represented by a lay advisor who understands the psychiatric issues involved, but not by a

lawyer. The inmate also has the right to appeal the panel's decision to the superintendent. [*Washington v. Harper*, 494 U.S. 210 (1990)]

*Note: Pretrial Detainees*

In *Riggins v. Nevada*, 504 U.S. 127 (1992), the court stated that pretrial detainees were extended at least as much protection as prisoners from forced medication.

## **B. Additional California Requirements**

Under Penal Code Section 2600, a state may only involuntarily medicate a prisoner:

1. In an ***emergency situation*** [Keyhea injunction Section III(J); California Code of Regulation Title 15, Section 1217; Penal Code Section 2600]; or,
2. After a ***judicial determination in compliance with the injunction process specified in Keyhea v. Rushen***, 178 Cal. App. 3d 526 (1986).

*Judicial Determination: Keyhea Injunction* (see Appendix B for more detailed procedure and appeal)

### **1. Process for Involuntary Medication for First 24 Days**

The state may administer involuntary medication for up to 72 hours. This is presumably based on the fact that a 72 hour detention requires a finding that the patient is a danger to self or others or gravely disabled; however, further medication (for up to an additional 21 days) requires that the state certify in a ***judicial hearing*** that the prisoner is:

1. ***Gravely disabled and incompetent to refuse*** medication; or,
2. Poses a ***danger to self or others*** as a result of a mental disorder. [Keyhea injunction, Section II(A)]

The hearing may, at the direction of the director, be conducted at the facility where the inmate is located. If, at the end of the hearing, the hearing officer concludes that the prisoner is neither gravely disabled and incompetent nor a danger to others or to self, involuntary medication must be discontinued. [Keyhea injunction Section II(I), (M)]

An Administrative Law Judge overseeing a prisoner's involuntary medication proceeding has the authority to order an independent forensic psychiatrist to assist inmates in the hearing.<sup>8</sup> However, courts are not required to consider less restrictive alternatives prior to ordering involuntary medication with psychotropic drugs.<sup>9</sup>

### **2. Process for Involuntary Medication Beyond 24 Days**

Involuntary medication ***beyond 24 days*** (including the initial 72 hours) requires a ***petition and court order*** from the superior court. The order authorizing involuntary medication must find, by clear and convincing evidence, as above, that the prisoner, as a result of mental disorder, is gravely disabled and incompetent to refuse medication or is a danger to self or others. [Keyhea injunction Section III(F)] ***It is not necessary to show that the inmate has made new threats since the initial petition*** to renew the compulsory

medication order, but only a renewed finding that the individual presents a demonstrated danger of inflicting substantial physical harm on others due to a mental disorder.<sup>10</sup>

## VII. Not Guilty by Reason of Insanity (NGI)

NGIs are individuals committed to state hospitals under Penal Code Section 1026.<sup>11</sup> The law governing an NGI's right to refuse is not clear.

In *In re Locks*, 79 Cal.App.4th 890 (2000), the California Court of Appeals concluded that individuals who are found to be not guilty by reason of insanity do not have a right to refuse medication. The court noted that under *Keyhea*, a judicial determination of incapacity and grave disability or that the prisoner poses a danger to self or others is required in order to involuntarily medicate; however, the *Locks* court reasoned that the judicial determination that the prisoner was not yet restored to sanity and not eligible for release under Penal Code Section 1026.2 creates the presumption that the patient is still a danger to self or others. Therefore, the NGI has no right to refuse medication.<sup>12</sup>

In *In re Qawi*, the California Supreme Court criticized the reasoning of the *Locks* court. First, the court stated that NGIs should have their own specific criteria for suspending the right to refuse and that the application of Penal Code Section 2972(g) was not obvious.<sup>13</sup> Second, the court stated that "dangerousness to others" cannot be presumed because of a denial of release. Rather, "particular findings of recent acts of dangerousness pursuant to Welfare and Institutions Code Section 5300" are required.<sup>14</sup> (See section III, above, explaining how such a determination is made.)

Further, the *Calhoun* Court's application of *Qawi*'s equal protection analysis to SVPs would seem to extend to NGIs as well. See *In re Calhoun*, 121 Cal. App. 4<sup>th</sup> 1315 (2004).

In sum, the state of the law seems to suggest that ***NGIs are covered by the same rules as prisoners*** (see section VI, above) until the courts or legislature fashion a new set of rules. Furthermore, in light of *In re Qawi*, the trend in California seems to be moving towards requiring some type of judicial determination, and away from the creation of a presumption that would grant the state automatic authority to medicate involuntarily (absent an emergency situation).

## VIII. Incompetent to Stand Trial (IST)

*Who is considered an IST?*

A defendant is considered incompetent to stand trial if, "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

[California Penal Code Section 1367(a)]

*The Right to Refuse*

There are generally 4 situations where an IST can be involuntarily medicated; however, the proper procedure that must be followed depends on the *purpose* of the medication. If the court finds any of these situations to exist, the court must issue an order authorizing a person to be involuntarily medicated when and as prescribed by his or her treating psychiatrist. [California Penal Code Section 1370(a)(2)(B)(iii)]

### **1. Involuntary Medication in Response to an Emergency**

California Penal Code Section 1370(a)(2)(B)(iv) provides that the state may involuntarily medicate an IST in an emergency, as defined by Welfare and Institutions Code Section 5008(m).

### **2. Involuntary Medication because the IST Lacks Capacity to Consent**

California Penal Code Section 1370(a)(2)(B)(ii)(I) states that involuntary medication may be administered if the court determines that:

- (I) The defendant ***lacks capacity*** to make decisions regarding antipsychotic medication; the defendant's mental disorder ***requires medical treatment*** with antipsychotic medication; and, if the defendant's mental disorder is not treated with antipsychotic medication, it is ***probable that serious harm to the physical or mental health of the patient will result***.<sup>15</sup> (See section III, above, explaining how a court makes a determination of incapacity.)

### **3. Involuntary Medication because the IST is a Danger to Others**

California Penal Code Section 1370(a)(2)(B)(ii)(II) states that involuntary medication may be administered if the court determines that:

- (II) The defendant is a ***danger to others***, in that the defendant has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another (1) while in custody, or (2) that resulted in his or her being taken into custody; and, the defendant presents, as a result of mental disorder or mental defect, a ***demonstrated danger*** of inflicting substantial physical harm on others.<sup>16</sup>

#### *Interim Authority*

Under California Department of Mental Health Long Term Care Division Special Order No. 333.04, interim authority for involuntary medication can be established to address a patient's dangerousness to others. Patients can be referred to a medical staff Psychotropic Medication Review panel to determine the necessity for psychotropic medication. A social worker or nurse must act as the patient's advocate. At least two of the three members of the panel must find that the patient meets criteria for involuntary psychotropic medication. Medication may then be ordered for 14 days.

After 14 days, the panel must review the treatment outcome again and may order continued treatment for up to 180 days. After 180 days, a new hearing is required so that the need for continued treatment may be considered. [California Department of Mental Health Special Order No. 333.04]

### Long-term Authority

After a patient has been referred to the Psychotropic Medication Review panel for the interim administration of psychotropic medication, concurrently, the state hospital is to file a letter with the court signed by the Medical Director of the facility and the treating psychiatrist attesting to the fact that the patient is a danger to self or others and requesting a court order for involuntary medication. It is not necessary for harm to become unavoidable or take place prior to treatment.

#### 4. Involuntary Medication to Restore Competency

*Note: A court may only issue an order under subsection (III) to medicate in order to restore competency if the defendant does not meet the criteria of subsections (I) and (II).<sup>17</sup>*

California Penal Code Section 1370(a)(2)(B)(ii)(III) delineates the requirements that must be met before medicating to restore competency. It is modeled after the U.S. Supreme Court decision in *Sell v. United States*.<sup>18</sup> Below is a comparison of the *Sell* requirements to their California statutory counterparts in Section 1370(a)(2)(B)(ii)(III). A trial court issuing an order to medicate under this subsection must comply with the California statutory requirements as well as its interpretation in *People v. O'Dell*, 126 Cal.App.4<sup>th</sup> 562 (2005), both listed below.

<b>Involuntary Medication for the Purpose of Restoring Competency</b>	
<i>Sell v. United States</i> requirements	Important government interest is at stake (i.e., timely prosecution and ensuring a fair trial)
	Medication would substantially further those government interests
	Medication is necessary to further the government interest
	Administration is in the defendant's best medical interests
California Penal Code Section 1370(a)(2)(B)(ii)(II I) requirements	Serious crime against property or person has been charged
	Administration of the drug is substantially likely to render the defendant competent; <i>and,</i> Medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner
	Less intrusive treatments are unlikely to have substantially the same results

	<p>Medication is in the defendant’s best medical interest in light of his or her medical condition</p>
<p>Notes from <i>People v. O’Dell</i>, 126 Cal.App.4<sup>th</sup> 562 (2005), interpreting Section 1370</p>	<p>Merely listing the serious crimes committed is insufficient. A court must consider the facts of the individual case for “special circumstances” that weigh against the government’s interest. For example, if the defendant refuses medication, he will likely be confined to an institution for a long period of time, thus diminishing the risk attached to freeing him without punishment.</p>
	<p>The hospital must specifically state which condition it is proposing to treat. It is insufficient to simply list a mental disorder without explicitly mentioning that it is the condition being treated.</p> <p>Also, a court must consider the actual medication proposed, not just the class of the antipsychotic medication (e.g. antidepressants, mood stabilizers, etc.).</p>
	<p>A hospital’s letter simply stating that there are no alternatives is insufficient for a trial court to satisfy this requirement. The hospital opinion must be substantiated with facts relating to alternatives.</p>
	<p>A trial court must consider the actual medication being proposed to make this determination.</p>

## IX. Glossary

### *a. Gravely disabled [Welfare and Institutions Code Section 5008(h)(1)]*

- A. A condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter; or,
- B. A condition in which a person, has been found mentally incompetent [to stand trial] under Section 1370 of the Penal Code and all of the following facts exist: (i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person. (ii) The indictment or information has not been dismissed. (iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner.

The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.

### *b. Emergency situation [Welfare and Institutions Code Section 5008(m)]*

"Emergency" means a situation in which action to impose treatment over the person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent. It is not necessary for harm to take place or become unavoidable prior to treatment.

### *c. Informed Consent [Welfare and Institutions Code Section 5326.2.]*

To constitute voluntary informed consent, the following information shall be given to the patient in a clear and explicit manner:

- (a) The reason for treatment, that is, the nature and seriousness of the patient's illness, disorder or defect.
- (b) The nature of the procedures to be used in the proposed treatment, including its probable frequency and duration.
- (c) The probable degree and duration (temporary or permanent) of improvement or remission, expected with or without such treatment.
- (d) The nature, degree, duration, and the probability of the side effects and significant risks, commonly known by the medical profession, of such treatment, including its adjuvants, especially noting the degree and duration of memory loss (including its irreversibility) and how and to what extent they may be controlled, if at all.
- (e) That there exists a division of opinion as to the efficacy of the proposed treatment, why and how it works and its commonly known risks and side effects.
- (f) The reasonable alternative treatments, and why the physician is recommending this particular treatment.

- (g) That the patient has the right to accept or refuse the proposed treatment, and that if he or she consents, has the right to revoke his or her **consent** for any reason, at any time prior to or between treatments.

## X. Appendix A

### Procedural Requirements for *Riese* Hearing for Persons on Short Term LPS Holds, MDOs and SVPs <sup>19</sup>

#### I. Initiation

1. In order to initiate a hearing, a ***petition must be filed with the superior court***. The director of the treatment facility or his or her designee shall personally deliver a copy of the notice of the filing of the petition for a capacity hearing to the person who is the subject of the petition.
2. The mental health professional delivering the copy of the notice of the filing of the petition to the court shall, at the time of delivery, ***inform the person of his or her legal right to a capacity hearing, including the right to the assistance of the patients' rights advocate or attorney*** to prepare for the hearing and to answer any questions or concerns. "Advocate," means a person who is providing mandated patients' rights advocacy services.
3. As soon after the filing of the petition for a capacity hearing is practicable, an ***attorney or patients' rights advocate must meet with the person*** to discuss the capacity hearing process and to assist the person in preparing for the capacity hearing and to answer questions or to otherwise assist the person, as is appropriate. (SVPs and MDOs are not represented at the hearing by the Patients' Rights Advocate)

#### II. Hearing

1. The hearing should be held ***within 24 hours*** of filing the petition. ***Hearings may be postponed*** for an additional 24 hours if either party needs more time. In cases of hardship, the hearing may be postponed another 24 hours, pursuant to local policy developed by the county mental health director and presiding judge. Hearings may not be postponed more than 72 hours.
2. The hearing must be ***held in the facility at an appropriate location***, held in a manner compatible and least disruptive to the treatment.
3. The hearing is ***conducted by a superior court judge, referee, or court-appointed commissioner or hearing officer***. A decision is made at the conclusion of the hearing and a written opinion is issued as soon as possible afterward.

#### III. Duration of Involuntary Medication

A judicial determination of incapacity shall remain in effect only for the duration of the detention period (described in Welfare and Institutions Code Section 5150, 5250 or both for LPS conservatees), or until capacity has been restored according to hospital standards, or by court determination, ***whichever is sooner***.

#### IV. Appeals

A *patient may appeal* the determination to the superior court or the court of appeal, but medication will be given forcibly pending the appeal.

## **XI. Appendix B**

### **Procedural Requirements for *Keyhea* Hearings for Prisoners and NGIs <sup>20</sup>**

#### **A. Procedures for 21 Day Certification**

**I. Petition filed in superior court after prisoner has been involuntarily medicated for 72 hours.**

**II. The superior court conducts a *Keyhea* hearing.**

A court may certify involuntary medication if:

- a. Professional staff of facility where prisoner is incarcerated has found prisoner is, as a result of a mental disorder, gravely disabled and incompetent to refuse medication or a danger to others, or a danger to self; and,*
- b. The prisoner has been advised of the need for, but has not been willing to accept medication on a voluntary basis.*

**III. Prisoner is notified of the outcome of the hearing within 5 days; involuntary medication continues.**

#### **IV. Prisoner's first level of appeal**

The prisoner has 2 ways to appeal the certification decision. (*Note: Medication will still be administered pending the appeal.*)

- 1. The prisoner has a legal right to **judicial review by habeas corpus and right to counsel**, including court appointed counsel; or,*
- 2. If a habeas corpus has not been filed, the prisoner has a legal right to a **certification review hearing and assistance of another person to prepare for the hearing within 10 days.***

#### *Certification Review Hearing*

The purpose is to determine whether probable cause exists to subject the prisoner to involuntary medication because the prisoner is gravely disabled *and* incompetent to refuse medication, or, a danger to others or self. In determining whether probable cause to believe prisoner is *incompetent to refuse medication*, the hearing officer must determine whether there is probable cause to believe the prisoner is incapable of understanding or intelligently acting on informational factors listed in the definition of "informed consent." (See Glossary.)

The hearing may be postponed for 48 hrs by the prisoner or advocate.

The attorney or advocate must be provided with timely ***access to all health care records*** which adult patients are entitled to under Health and Safety Code § 25251 et seq. and Welfare and Institutions Code § 5328 (b) and (j), the prisoner's central, medical, and

psychiatric files, and all documents and files on which defendants rely in certifying the prisoner for involuntary medication.

### *Procedural Rights in Certification Review Hearing*

A certified person has the right to:

- a. An attorney or advocate's assistance.
- b. Present evidence on his or her behalf.
- c. Cross-examine.
- d. To make reasonable requests for attendance of facility employees.
- e. If prisoner has received medication within 24 hrs or longer, the person conducting hearing shall be informed of that fact and of probable effects of the medication.

The hearing shall be conducted in impartial and informal manner; the rules of procedure or evidence do not apply. All evidence relevant to issue of incompetence, grave disability, or dangerousness may be admitted.

### *Certification Review Hearing Decision*

If the hearing officer finds no probable cause that the prisoner is gravely disabled and incompetent to refuse medication or, a danger to others or self, then involuntary medication must stop.

Alternatively, if the hearing officer finds that the prisoner lacks the capacity to refuse and is gravely disabled, or, is a danger to self or others, the prisoner may be involuntarily medicated for up to 21 days after the *initial* 72 hour medication.

The prisoner shall be orally notified at end of the hearing of the decision. The attorney or advocate and director of facility shall be provided with written notification of decision, which shall include a statement of evidence relied upon and reasons for decision.

## **V. Prisoner's second level of appeal**

The prisoner has right to file request for termination of involuntary medication and to have a hearing on request before the superior court.

## **B. Judicial Authorization for Involuntary Medication Beyond 21 Days**

This process is required in order to medicate a prisoner for more than 21 days after the initial 72 hour period. (24 days total)

### **I. Petition seeking an order to involuntarily medicate is filed in the superior court of the county in which the prisoner is confined; prisoner may respond within 5 days; prisoner is served prior to the hearing.**

The petition must be verified and must allege and set forth by medical affidavit or declaration attached thereto, all of the following so far as is known to defendants at the time the petition is filed:

1. The nature of the prisoner's psychiatric treatment which requires treatment.
2. The recommended course of psychiatric treatment considered to be medically appropriate.
3. The threat to the health of prisoner if authorization for recommended course of treatment is delayed or denied by the court.
4. The predictable or probable outcome of the recommended course of treatment.
5. Available alternatives, if any, to the course of treatment.
6. Efforts made to obtain informed consent.
7. Reference to any incidents that precipitated filing petition either by summary of incidents or attachment of any incident report.
8. That the prisoner, as a result of a mental disorder, presents a danger to others, self, or is gravely disabled and is incompetent to refuse medication.

The prisoner or his attorney may file a response to the petitioner within five days of the service of the petition on the prisoner or his attorney.

Defendants must file the petition and personally serve a copy of the petition on the prisoner and his attorney at least 15 days prior to the hearing on the petition. In place of personal service on the prisoner's attorney, the attorney for the prisoner may be served by mail at least 20 days prior to the hearing. At least 15 days prior to the hearing, defendants must serve a copy of the petition on the prisoner's next of kin (if known) or on the persons listed in the prisoner's records maintained by defendants to receive notification in case of emergency. Service on such individuals may be made by mail.

## **II. Public defender or attorney appointed or obtained within 5 days.**

The attorney shall be provided timely access to the prisoner's central, medical, and psychiatric files, and all documents and files on which defendants rely in certifying the prisoner for involuntary medication or requesting an order authorizing involuntary medication.

## **III. Judicial Hearing**

The prisoner or his attorney has the right to file a written demand for any expedited court hearing on the petition, in which case the hearing will be held within 10 days from filing.

The prisoner must be produced at the judicial hearing except in certain circumstances. (See *Keyhea* injunction, III.D.)

### *Basis for Decision*

The court must find, by clear and convincing evidence, that one or more of the following exist:

1. That the prisoner, as a result of a mental disorder, is gravely disabled and incompetent to refuse medication;

2. That the prisoner, as a result of a mental disorder, is a danger to others or a danger to self.

### *Duration of Treatment*

The duration of the treatment depends on the reason treatment is authorized. Where the prisoner is involuntarily medicated on the grounds that he or she is gravely disabled and is incompetent to refuse medication, he or she may be medicated up to a year from the date of the order or such shorter period as may be specified in the order unless defendants file a new petition with the court. However, where the prisoner is medicated on grounds that he or she is a danger to others or is a danger to self, involuntary medication may not exceed 180 days from the date of the order or such shorter period of time as may be specified in the order unless defendants file a new petition.

### **IV. Appeals**

The prisoner has the right to petition the court for a rehearing to contest whether he presently is a danger to others, a danger to self, gravely disabled, or incompetent to refuse medication. After the filing of the first petition for rehearing, no further petition for rehearing shall be submitted for a period of six months.

### **C. Note: Temporary Order**

Defendants may involuntarily medicate a prisoner for a period of no more than 23 days beyond the end of the certification period or such lesser period as may be specified in the court order if all of the following are present:

1. Defendants make a request for such a temporary order and submit an affidavit or declaration to the court clearly establishing the necessity for the temporary order;
2. Defendants provide three days notice to the prisoner and to his attorney (if an attorney has been appointed or retained) of the request for a temporary order and personally serve the petition and all documents in support of the request for a temporary order on the prisoner and his attorney at least three days prior to the court's ruling on defendants' request; and
3. Defendants obtain such an order from the court.

## XII. Endnotes

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- <sup>1</sup> See Glossary for the requirements a state must meet in order for the consent to qualify as “informed.”
- <sup>2</sup> *Sell v. US*, 539 U.S. 166 (2003).
- <sup>3</sup> California Welfare and Institutions Code Section 5332(b): “If any person subject to detention pursuant to Section 5150, 5250, 5260, or 5270.15, and for whom antipsychotic medication has been prescribed, orally refuses or gives other indication of refusal of treatment with that medication, the medication shall be administered only when treatment staff have considered and determined that treatment alternatives to involuntary medication are unlikely to meet the needs of the patient, and upon a determination of that person's incapacity to refuse the treatment, in a hearing held for that purpose.”
- <sup>4</sup> In determining the capacity to consent of *conservatees*, a court should not make the determination of incapacity unless it finds that the conservatee lacks the mental capacity to rationally understand (1) the nature of the medical problem; (2) the proposed treatment; *and*, (3) the attendant risks. [*Keyhea v. Rushen*, 178 Cal. App. 3d 526 (1986)]
- <sup>5</sup> *In Re Qawi*, 32 Cal.4th 1, 14 (2004) (explaining that 5300 individuals are not granted a right to refuse medication).
- <sup>6</sup> California Penal Code Section 2972(g): “[T]he person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those [LPS] rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code...”
- <sup>7</sup> See *Washington v. Harper*, 494 U.S. 210 (1990) (upholding a determination leading to involuntary medication by a panel composed of three members of the prison staff: a psychiatrist, a psychologist, and the associate superintendent, none of whom could be involved in the inmate’s care or treatment at the time of the hearing).
- <sup>8</sup> *Department of Corrections v. Anthony*, 53 Cal.App.4th 780, 790 (1997) (stating that the right to refuse treatment “is rendered meaningless if a person cannot adequately and through competent assistance of counsel and necessary experts challenge a psychiatric determination that he or she is competent to refuse antipsychotic medication.”).
- <sup>9</sup> *People v. Thomas*, 217 Cal.App.3d 1034 (1990).
- <sup>10</sup> *Keyhea* injunction, Section I(4), III(I)(2); *Department of Corrections v. Office of Admin. Hearings*, 66 Cal.App.4th 1100, 1108 (1998). The *Keyhea* injunction's treatment of those dangerous to others differs in from Welfare and Institutions Code Section 5300. Under Section 5300, recommitment must be based on *actual, attempted or threatened violence* within the previous 180-day commitment period. [Welfare and Institutions Code Section 5304(b)]
- <sup>11</sup> California Penal Code Section 1026, providing in part: “If the verdict or finding be that the defendant was insane at the time the offense was committed, the court, unless it shall appear to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be confined in a state hospital for the care and treatment of the mentally disordered or any other appropriate public or private treatment facility approved by the community program director, or the court may order the defendant placed on outpatient status pursuant to Title 15 (commencing with Section 1600) of Part 2.
- <sup>12</sup> *In re Locks*, 79 Cal.App.4th 890, 896 (2000).
- <sup>13</sup> *In Re Qawi*, 32 Cal.4th 1, 27 (2004).

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<sup>14</sup> *Id.*

<sup>15</sup> “Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder and his or her condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant.” California Penal Code Section 1370(a)(2)(B)(ii)(I).

<sup>16</sup> “Demonstrated danger may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within six years prior to the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence.” California Penal Code Section 1370(a)(2)(B)(ii)(II).

<sup>17</sup> California Penal Code Section 1370(a)(2)(B)(iii).

<sup>18</sup> *Sell v. United States*, 539 U.S. 166 (2003).

<sup>19</sup> Welfare and Institutions Code Section 5333, et seq.

<sup>20</sup> Adapted from *Keyhea v. Rushen*, 178 Cal. App. 3d 526 (1986).