SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 516 (Eggman)
Version: February 17, 2021
Hearing Date: April 6, 2021
Fiscal: Yes
Urgency: No
JT

SUBJECT

Certification for intensive treatment: review hearing

DIGEST

This bill provides that a person's medical condition may be considered in determining their mental condition for purposes of certifying them for a 14- or 30-day involuntary detention for treatment and evaluation under the Lanterman-Petris Short (LPS) Act.

EXECUTIVE SUMMARY

The *parens patriae* authority gives the state the power to intervene on behalf of those who cannot act in their own best interests. California's approach to wielding this power over people with mental illnesses shifted dramatically beginning in the second half of the 20th century, as it sought to move from a heavy-handed paternalistic model to a more libertarian model that better protected civil rights. This effort culminated with the passage of the LPS Act, which established a process for involuntarily detaining and treating a person found to be gravely disabled or a danger to self or others.

Because a conservatorship involves a major curtailment of liberty, the LPS Act contains several significant procedural safeguards, including a carefully calibrated series of temporary detentions for evaluation and treatment of people who may ultimately necessitate a conservatorship. This process begins with a 72-hour "5150" detention for evaluation and treatment, which may be extended by certification for 14 days of intensive treatment and an additional 30-day period for further intensive treatment, provided that at each juncture probable cause to continue the detention is found at a certification review hearing.

This bill would provide that the evidence submitted in support of the certification may include information regarding the person's medical condition and how that condition bears on certifying the person as a danger to self or others or as gravely disabled. The bill would require the hearing officer to consider such information. The bill also

requires, if the person needs continuing medical treatment after the termination of the involuntary detention, that they be informed that continuing medical treatment is recommended.

The bill is a reintroduction of AB 2015 (Eggman, 2020). As introduced, that bill, like this one, did not define "medical condition." In response to opposition concerns and findings by the State Auditor—namely, that expanding the LPS Act's criteria for involuntary treatment could potentially infringe upon people's liberties, and there is no evidence to justify such a change—the author amended the bill to ensure the medical condition is serious and the person is incapable of treating it due to their mental illness. Similar amendments are proposed below in starting on page 18.

The bill is sponsored by the Psychiatric Physicians Alliance of California and supported by the California State Association of Psychiatrists. The bill is opposed by the California Behavioral Health Planning Council and the County Behavioral Health Directors Association of California. If the bill passes this Committee, it will be referred to the Senate Health Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the LPS Act, which provides for the involuntary detention for treatment and evaluation of people who are gravely disabled or a danger to self or others. (Welf. & Inst. Code § 5000 et seq.)[1] Defines "grave disability" as a condition in which a person, as a result of a mental disorder, or impairment by chronic alcoholism, is unable to provide for the person's basic personal needs for food, clothing, or shelter. (§ 5008(h)(1)(A),(2).)

2) Provides that, if a person is gravely disabled as a result of mental illness, or a danger to self or others, then a peace officer, staff of a designated treatment facility or crisis team, or other professional person designated by the county, may, upon probable cause, take that person into custody for a period of up to 72 hours for assessment, evaluation, crisis intervention, or placement in a designated treatment facility. (§ 5150.)

3) Provides that a person who has been detained for 72 hours may be further detained for up to 14 days of intensive treatment if the person continues to pose a danger to self or others, or to be gravely disabled, and the person has been unwilling or unable to accept voluntary treatment. (§ 5250.) Provides for an additional 30 days of intensive treatment if the person remains gravely disabled and is unwilling or unable to voluntarily accept treatment. (§ 5270.15.)

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

4) Requires that when applying the definition of mental disorder for purposes of, among other provisions, section 5250, that the historical course of the person's medical disorder be considered, and defines "historical course" to include evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient. (§ 5008.2.)

5) Generally requires, for a person to be certified for the additional 14 days, that a notice of certification be signed by a professional person or a qualified designee in charge of the agency or facility providing evaluation services, as well as a second person who participated in the evaluation who is a physician or, if possible, a board-certified psychiatrist. (§ 5251.) The certification notice must be personally delivered to the person, their attorney or a designated advocate, and sent to anyone else the person designates. (§ 5253.)

6) Requires that the person be informed, at the time of delivery of the notification, that they are entitled to a certification review hearing, to be held within four days of the date of certification unless judicial review is requested, to determine whether probable cause exists to detain the person for intensive treatment related to the mental disorder or impairment by chronic alcoholism. Requires that the person be informed of their rights with respect to the hearing, including the right to the assistance of another person to prepare for the hearing or to answer other questions and concerns regarding their involuntary detention or both. (§ 5254.)

7) Requires that the person be informed of their right to judicial review by habeas corpus and their right to counsel, including court-appointed counsel. (§ 5254.1.)

8) Requires, when a person is certified for intensive treatment for the 14-day or 30-day hold, that, unless judicial review has been requested, a certification review hearing be held within four days of the certification unless postponed by request of the person, their attorney, or advocate. (§ 5256.)

9) Requires, at the certification review hearing, that evidence in support of the certification decision be presented by a person designated by the director of the facility. In addition, either the district attorney or the county counsel may, at their discretion, elect to present evidence at the certification review hearing. (§ 5256.2.)

10) Provides that, at a certification review hearing, a person certified has the following rights:
    a) Assistance by an attorney or advocate.

b) To present evidence on their own behalf.
c) To question persons presenting evidence in support of the certification decision.
d) To make reasonable requests for the attendance of facility employees who have knowledge of, or participated in, the certification decision.
e) To make the person conducting the hearing aware if they have received medication within a specified timeframe of the hearing, and of the probable effects of the medication.
f) To an impartial hearing conducted in an informal manner not bound by the rules of procedure or evidence applicable to judicial proceedings.
g) Reasonable attempts must be made by the mental health facility to notify family members or any other person designated by the patient, of the time and place of the certification hearing, unless the patient requests that this information not be provided.
h) All evidence that is relevant to establishing that the person certified is or is not as a result of a mental disorder or impairment by chronic alcoholism, a danger to self or others, or gravely disabled, must be admitted at the hearing and considered by the hearing officer.
i) Although resistance to involuntary commitment may be a product of a mental disorder, this resistance does not, in itself, imply the presence of a mental disorder or constitute evidence that a person meets the criteria of being dangerous to self or others, or gravely disabled. (§ 5256.4.)

11) Provides that if, at the conclusion of the certification review hearing, the person conducting the hearing finds that there is not probable cause to believe that the person certified is, as a result of a mental disorder or impairment by chronic alcoholism, a danger to others or self, or gravely disabled, then the person certified may no longer be involuntarily detained. (§ 5256.5.) If, however, there is probable cause, then the person may be detained for involuntary care, protection, and treatment related to the mental disorder or impairment by chronic alcoholism for an additional 14-day or 30-day period, as provided. (§ 5256.6.)

12) Requires that a person's involuntary 14-day or 30-day detention be terminated only if the psychiatrist directly responsible for the person's treatment believes, as a result of their personal observations, that the person certified no longer is, as a result of mental disorder or impairment by chronic alcoholism, a danger to self or others, or gravely disabled. (§ 5257.)

13) Allows the professional person in charge of a facility providing 72-hour, 14-day, or 30-day treatment to recommend an LPS conservatorship to the county conservatorship investigator for a person who is gravely disabled and is unwilling or unable to voluntarily accept treatment, and requires the conservatorship investigator, if they concur with the recommendation, to petition the superior court to establish an LPS conservatorship. (§ 5350 et seq.)

This bill:

1) Allows for the evidence presented in support of the certification decision to include information regarding the person's medical condition and how that condition bears on certifying the person as a danger to self or others or as gravely disabled. Requires the hearing officer to consider the information in the determination of probable cause.

2) Requires, if the person needs continuing medical treatment after the termination of the involuntary detention, that they be informed that continuing medical treatment is recommended.

3) Makes other conforming, stylistic, and clarifying changes.

COMMENTS

1. Author's statement

The author writes:

> There is no question that we must do more to invest in community resources and provide early intervention to avoid unnecessary hospitalizations for a mental disorder. However, when individuals need acute psychiatric care provided in a hospital, we should assure that it is available to them consistent with due process protection of their civil liberties, when they object. When surveyed psychiatrists identified that they often felt they had to release patients that no longer met the current criteria for a hold although the patient was so disabled by a severe mental illness that they lacked the capacity to manage their health issues and seek sufficient medical care. The failure in the law to specifically address health conditions means patients suffering from a debilitating mental illness miss the opportunity to have neglect of health conditions considered as evidence of a danger to self or others, or of grave disability. Individuals who qualify for a further short-term hold because of neglect of a health condition will have opportunity to have further mental health treatment as well as the opportunity to have their health conditions addressed. This bill seeks to support individuals that face serious health risks by ensuring that they have the opportunity and resources to manage medical issues that are or can become serious or acute without medical treatment to the extent that they risk grave bodily harm or death.

2. Homelessness, substance abuse, and mental illness

Between 2018 and 2019, according to the U.S. Department of Housing and Urban Development's point-in-time count, California's homeless population increased nearly

17 percent to 151,278.[2] While some of this population has access to transitional housing programs or emergency shelters, 72 percent remain unsheltered, living in cars, tent encampments, or on the street.[3] One out of every nine Americans live in California but about one in four homeless Americans, including the majority of the nation's unsheltered people, live in California.[4] African-Americans are disproportionately represented among the state's unhoused population, as are LGBTQ people.[5] Seniors are falling into homelessness at an increasing rate.[6] These figures will likely become even grimmer as a result of the COVID-19 pandemic and ensuing economic devastation.

There are various causes of homelessness, including mental health problems, addiction, trauma, poverty, and interaction with the criminal justice system. However, the primary cause of homelessness in California is the rising cost of rent.[7] Low-income people with serious mental illnesses are often housed in board-and-care facilities. But because state subsidies have remained stagnant while housing prices and the minimum wage have increased, several of these facilities have been shuttered.[8] Since 2012, San Francisco has lost more than a third of licensed residential facilities serving people under 60 and more than a quarter of those serving older people.[9] From 2018 through 2019, Los Angeles lost more than 200 beds for low-income people with serious mental illnesses.[10]

While some people only temporarily fall into homelessness, governments and service providers generally focus their efforts on the chronically homeless. Typically, these individuals suffer from a disability and have experienced homelessness on multiple occasions or for a prolonged period. Roughly 34,000 Californians fall into this category.[11]

Although mental illness and substance abuse contribute to homelessness, the extent is not clear. Last year, the *Los Angeles Times* examined more than 4,000 questionnaires and found that about 67 percent had either a mental illness or a substance abuse disorder.[12]

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[2] *The 2019 Annual Homeless Assessment Report to Congress* https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf (as of Mar. 27, 2021).
[3] *Id.*
[4] *California's homelessness crisis – and possible solutions – explained.* Calmatters (Jan. 8, 2020) https://calmatters.org/explainers/californias-homelessness-crisis-explained/ (as of Mar. 27, 2021).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Vanishing board-and-care-homes leave residents with few options*, Calmatters (Apr. 15, 2019) https://calmatters.org/projects/board-and-care-homes-closing-in-california-mental-health-crisis/ (as of Mar. 27, 2021).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Are many homeless people in L.A. mentally ill? New findings back the public's perception* (Oct. 7, 2019) https://www.latimes.com/california/story/2019-10-07/homeless-population-mental-illness-disability (as of Mar. 27, 2021).

However, the Los Angeles Homeless Services Authority interpreted this data more strictly, finding that 14 percent had a substance use disorder and 25 percent had a serious mental illness.[13] Confounding this issue is the fact that living without a secure home can cause mental health problems and lead to substance abuse, and these conditions may be mutually reinforcing. For example, some drugs, such as methamphetamine, exacerbate mental illness.[14]

3. Involuntary detention for treatment and evaluation under the LPS Act

Before the 1950s, people with serious mental illnesses were typically confined in expansive state-run institutions, often for their entire lives, based on a mere finding by a physician that the person had a mental illness and was in need of treatment. Following a series of exposes[15] and the advocacy efforts of civil rights attorneys and mental health professionals, this model gave way to an approach that instead privileged individual liberty. States like California began "deinstitutionalizing" psychiatric patients, allowing them to seek treatment in their own community, premised on the largely unrealized expectation that the resources to provide the treatment would be available.

Signed into law in 1967 by Governor Ronald Reagan, the LPS Act includes among its goals "ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (§ 5001.)

Under the LPS framework, "[o]ne of the principal powers which the court may grant a conservator is the right to place a conservatee in an institution." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223 (*Roulet*).) A person found to be gravely disabled may be involuntarily confined for up to one year. (§ 5361.) If, at the end of that year, the conservator determines that the conservatorship is still required, the conservator may

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[13] *2019 Greater Los Angeles Homeless Count – Los Angeles Continuum of Care* https://www.lahsa.org/documents?id=3422-2019-greater-los-angeles-homeless-count-los-angeles-continuum-of-care.pdf (as of July 31, 2020).

[14] *California's homelessness crisis – and possible solutions – explained. Calmatters* (Jan. 8, 2020) https://calmatters.org/explainers/californias-homelessness-crisis-explained/ (as of Mar. 27, 2021).

[15] One journalist described "the frightful squalor these unfortunates live in--beds jammed against one another, holes in the floor, gaping cracks in the wall, long rows of hard, unpainted benches, dirty toilets, dining halls where the food is slopped out by unkempt patient attendants and, above all, the terrifying atmosphere of hopelessness in institutions where thousands of patients are penned in day after day and night after night endlessly staring at blank walls." Another author described mental hospitals as "buildings swarming with naked humans herded like cattle and treated with less concern, pervaded by a fetid odor so heavy, so nauseating, that the stench seemed to have almost a physical existence of its own." (Gordon, Sara, *The Danger Zone: How the Dangerousness Standard in Civil Commitment Proceedings Harms People with Serious Mental Illness* (2016) 66 Case W. Res. 657, 660, fn. 30.)

petition the superior court for reappointment (*id.*), a process that may repeat itself for as long as the person remains gravely disabled. "In effect, these statutes assure in many cases an unbroken and indefinite period of state-sanctioned confinement. 'The theoretical maximum period of detention is *life* as successive petitions may be filed . . . .' [Citation.]" (*Roulet*, *supra*, 23 Cal.3d at 224; italics in original.) "In addition to physical restraint, '[t]he gravely disabled person for whom a conservatorship has been established faces the loss of many other liberties …'" (*Id.* at 227.) "Moreover, a person suffering from a grave mental disorder is obviously in a poor position to influence or monitor counsel's efforts on his behalf. Accordingly, the Legislature and this court have built several layers of important safeguards into conservatorship procedure." (*Conservatorship of Ben C.* (2007) 40 Cal. 4th 529, 540.)

"Before a person may be found to be gravely disabled and subject to a year-long confinement, the LPS Act provides for a carefully calibrated series of temporary detentions for evaluation and treatment." (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541.) The act limits involuntary commitment to successive periods of increasingly longer duration, beginning with a 72-hour detention for evaluation and treatment (§ 5150), which may be extended by certification for 14 days of intensive treatment (§ 5250); that initial period may be extended for an additional 14 days if the person detained is suicidal. (§ 5260.) The 14-day certification may be extended for an additional 30-day period for further intensive treatment. (§ 5270.15.)

After the initial 72-hour detention, the 14-day and 30-day commitments each require a certification hearing before an appointed hearing officer to determine probable cause for confinement unless the person has filed a petition for the writ of habeas corpus. (§§ 5256, 5256.1, 5262, 5270.15, 5275, 5276.) When two professional persons sign the certification, notice of the certification must be personally delivered to the person, their attorney or a designated advocate, and sent to anyone else the person designates. (§§ 5251, 5253.) When the notice is delivered, the person must be informed of their rights with respect to the hearing, including the right to the assistance of another person to prepare for the hearing or to answer other questions and concerns regarding their involuntary detention or both. (§ 5254.) At the hearing, which must be held within four days of delivery of the notice (§ 5256), a designee of the director of the psychiatric facility must present evidence in support of the certification decision, and the district attorney or the county counsel may present additional evidence. (§ 5256.2.) The hearing must be conducted in an impartial and informal manner to encourage free and open discussion by participants. (§ 5256.4(b).) The person has the right to: assistance by an attorney or advocate, present evidence, request the attendance of facility employees, and question persons presenting evidence in support of the certification. (*Id.* at (a).) All evidence that is relevant to establishing that the person certified is or is not, as a result of mental disorder or impairment by chronic alcoholism, a danger to others or self, or gravely disabled, must be admitted at the hearing and considered by the hearing officer. (*Id.* at (d).)

4. Allows medical conditions to be considered in LPS certification review hearings

Over the last few years, as the state's mental health and homelessness crises have intensified, several policy disagreements have played out in the Legislature with respect to the causes of, and solutions to, these crises. One prominent fault line centers on the state's power to intervene on behalf of those who cannot act in their own best interests. Some argue that the LPS Act should be expanded to provide counties additional discretion to assert legal control over people who are incapable of surviving safely on their own. Others argue that this focus is misguided because many counties currently do not provide adequate community-based services to help individuals avoid deteriorating into a condition that necessitates a conservatorship.

Several bills have attempted to expand the "gravely disabled" criteria to expressly address a person's inability to provide for their own medical treatment.[16] Perhaps the most noteworthy is AB 1971 (Santiago, 2018), which was passed by this Committee as a pilot program applicable until 2024 in Los Angeles County. As amended in this Committee, the bill would have expanded the definition of "gravely disabled" for the purpose of the LPS Act to also include a condition in which a person, as a result of a mental health disorder, is unable to provide for their basic personal needs for medical treatment, if the failure to receive medical treatment, as defined, results in a deteriorating physical condition that a medical professional, in their best medical judgment, attests in writing, will more likely than not, lead to death within six months, as specified. The bill passed this Committee by a vote of 5-1 but was later ordered to the Senate inactive file.

This bill is a reintroduction of AB 2015 (Eggman, 2020). As introduced that bill, like this one, did not define "medical condition." After the bill passed out of the Assembly, the State Auditor released an audit of the implementation of the LPS Act in Los Angeles, San Francisco, and Shasta Counties. The Auditor concluded:

> […] the LPS Act's criteria for involuntary treatment allows counties sufficient authority to provide short-term involuntary treatment to people. Expanding the LPS Act's criteria to include additional situations in which individuals may be involuntarily treated could potentially infringe upon people's liberties—and we found no evidence to justify such a change.
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> Perhaps most troublingly, many individuals were subjected to repeated instances of involuntary treatment without being connected to ongoing care that could help them live safely in their communities. […][17]

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[16] See "Related Legislation" section below for additional details.

[17] *Lanterman-Petris-Short Act: California Has Not Ensured That Individuals With Serious Mental Illnesses Receive Adequate Ongoing Care* (July 28, 2020) Report 2019-119, Public Letter, available at https://www.auditor.ca.gov/reports/2019-119/index.html (as of Mar. 27, 2021).

The Auditor further concluded that a dearth of community-based mental health treatment services is the major reason that individuals with mental health challenges deteriorate or relapse into a condition that necessitates a conservatorship.[18] In response to opposition concerns and the findings by the State Auditor, the author amended AB 2015 to ensure the medical condition is one that is indicative of a mental illness that is severe enough to survive safely in the community. However, the author decided to table the bill after receiving feedback that the amendments were too restrictive.

Compared to previous bills, this bill takes a generally narrower approach to the issue of a person's inability to provide for their own medical care. Whereas its predecessors would have applied to the LPS conservatorship itself, this bill only applies to the 14-day and 30-day detentions that may be preludes to the one-year conservatorship. Instead of amending the "gravely disabled" definition, the bill expands the scope of admissible evidence that may be considered in the certification review hearing. Specifically, the bill would authorize the evidence presented in support of the certification decision to include information regarding the person's medical condition and how that condition bears on certifying the person as a danger to themselves or to others or as gravely disabled. The bill would require the hearing officer to consider the information in the determination of whether there is probable cause that the person is gravely disabled or a danger to self or others.

However, predecessor bills attempted to define medical conditions that rise to the level of justifying involuntary mental health treatment, thereby providing some limits on the discretion of counties. Because this bill does not define "medical condition," it is broader than its predecessors in this respect.

5. Support

The bill's sponsor, Psychiatric Physicians Alliance of California, in a letter echoed by supporter California State Association of Psychiatrists, writes:

> Current law rightfully protects personal freedoms and self-determination when it comes to mental health treatment. However, some cases do not allow appropriate intervention on behalf of the welfare of people who suffer from a severe mental illness and are incapable of assessing their own medical condition. Poor nutrition, exposure to the elements, injuries from accidents and altercations, and inadequate access to proper hygiene leave many people experiencing severe mental illness with serious physical ailments. Failure to provide adequate medical treatment results in further physical harm or death before releasing an individual from a temporary hold.

[18] *Id.*

6. Constitutional considerations and involuntary civil commitment

a. What's at stake

Courts have recognized that the stakes of civil commitment are comparable to criminal punishment. "From the perspective of the person who resists this confinement, there is little to distinguish it from incarceration in a penal institution. Because the mental facility is authorized to administer drugs to him against his will, detention there might be considered more severe than confinement in a penal institution." (*Doe v. Gallinot* (C.D.Cal. 1979) 486 F.Supp. 983, 991, aff'd, (9th Cir. 1981) 657 F.2d 1017 (*Doe*).) The United States Supreme Court has stated in this regard that "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" (*In re Gault* (1967) 387 U.S. 1, 50.) In a subsequent opinion, the Supreme Court reiterated, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards . . . ." (*In re Winship* (1970) 397 U.S. 358, 365-366.) And the California Supreme Court, rejecting a respondent's "reliance on a civil label," stated that the "respondent takes false comfort in the fact that appellant's commitment is only a 'civil' confinement for remedial purposes. However, these are mere labels. Appellant's stay in Camarillo State Hospital was not any less involuntary because the state called her incarceration by one name rather than another."(*Roulet*, *supra*, 23 Cal.3d at 225.)

Justice Brennan in his concurring and dissenting opinion in *Parham v. J. R*. (1979) 442 U.S. 584 described the consequences of institutionalization as follows:

> Commitment to a mental institution necessarily entails a "massive curtailment of liberty," [citation], and inevitably affects "fundamental rights." [Citation.] Persons incarcerated in mental hospitals are not only deprived of their physical liberty, they are also deprived of friends, family, and community. Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted, may violate their right to bodily integrity. […] Furthermore, as the Court recognizes, [citation] persons confined in mental institutions are stigmatized as sick and abnormal during confinement and, in some cases, even after release.

(*Id.* at 626-627.)

b. Danger to self or others

In *Baxstrom v. Herold* (1966) 383 U.S. 107, which reviewed the procedural prerequisites for continued confinement of a mentally ill person at the expiration of a prison term, the United States Supreme Court stated the person could not be further confined "without a judicial determination that he is dangerously mentally ill." (*Id.* at 110.) The court held that it must be shown that the person "is presently mentally ill and such a danger to

others that the strict security of a Department of Correction Hospital is warranted." (*Id.* at 115.) And in *Humphrey v. Cady* (1972) 405 U.S. 504, the Supreme Court signaled approval of a Wisconsin statute that conditioned confinement "not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." (*Id.* at 509.)

The seminal case in this area is *O'Connor v. Donaldson* (1975) 422 U.S. 563. In that case, a paranoid schizophrenic was repeatedly denied release from a psychiatric hospital despite the fact that he had not shown any evidence of suicidality or intentions to harm others. The Supreme Court, holding that the confinement violated the due process clause of the federal constitution, stated as follows:

> The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. [Citations.] Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed. [Citation.]
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> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.
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> […]
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> *In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends*.

(*Id.* at 574-576; emphasis added.)

In a decision affirmed by the Ninth Circuit, the United States District Court, Central District of California upheld California's "gravely disabled" standard against the assertion that it was unconstitutionally vague and overbroad. The District Court stated that "[s]tandards for commitment to mental institutions are constitutional only if they require a finding of dangerousness to others or to self. [Citations.] … '[T]he threat of harm to oneself may be through neglect or inability to care for oneself.'" (*Doe*, *supra*, 486 F.Supp. at 991.) The court contrasted California's standard with other unconstitutionally vague involuntary commitment standards that applied upon a finding that a person was "mentally ill." (*Ibid.*) Such standards were described as unconstitutional because

they "set forth a process under which a person whose affliction, in the view of a given court, falls anywhere within a vast, uncontoured description of mental ills, is subject to both temporary and indefinite commitment, whether his particular ill presents a realistic threat of harm to himself or to others." (*Ibid.*, citing *Bell v. Wayne County General Hospital* (E.D.Mich.1974) 384 F. Supp. 1085.) By contrast, the court in *Doe* stated that "California's 'gravely disabled' standard is not too vague to meet this test. It implicitly requires a finding of harm to self: an inability to provide for one's basic physical needs. It further limits the standard to an inability arising from mental disorder rather than other factors." (*Doe*, *supra*, 486 F.Supp. at 991.)

The California Supreme Court has admonished that "[the] law must still strive to make certain that only those truly unable to take care of themselves are being assigned conservators under the LPS Act and committed to mental hospitals against their will." (*Conservatorship of Roulet*, *supra*, 23 Cal.3d at 225.) Consequently, evidence must be shown that the person cannot survive safely in the community. (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461.) Thus, a person who would otherwise qualify as gravely disabled cannot be conserved if responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter. (*Ibid.*; see § 5350(e)(1).)

This principle is illustrated by *Conservatorship of Smith* (1986) 187 Cal.App.3d 903 (*Smith*). Smith was a 43-year-old mother of seven with no fixed income or home address, who was adjudicated gravely disabled under the LPS Act. She spent most of her time conducting a vigil outside a local church and had been jailed, although never convicted, on 10 occasions for disturbing church services. (*Id.* at 906.) At trial, a psychiatrist diagnosed Smith as suffering from a paranoid delusion, manifested by her fixation surrounding the church. (*Id.* at 907.) The psychiatrist opined that Smith was gravely disabled because her mental disorder "caused behavior which brought her into conflict with the community." (*Ibid.*) However, the psychiatrist admitted that "her cognitive intellect and most of her personality was intact and . . . she could feed and clothe herself and provide for her own place to live." (*Ibid.*) Other witnesses testified that they had given Smith food and money over the past year and that "'lots of people offered to help her.'" (*Ibid.*) The *Smith* court reversed the judgment, holding that, although Smith's case was a close call, "[b]izzare or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual *helpless to fend for herself or destroys her ability to meet those basic needs for survival*." (*Id.* at 911; emphasis added.)

c. Present condition

Consistent with the requirement that a person be a danger to themselves in order to justify the power to commit them to a mental treatment facility, courts have long held that the "gravely disabled" standard must be based on the conservatee's current

condition. For example, in *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, a conservatee had been placed under LPS conservatorship for alcoholism. At the hearing on the petition for reappointment, medical witnesses opined that if the conservatorship were terminated, he would once again indulge in alcohol and become greatly disabled. However, they acknowledged that he was competent to manage his own affairs. The trial court reaffirmed the appointment, stating as follows:

> Well, the problem, of course, is that the present condition of Mr. Murphy is such, as he sits here today, that he does not appear to be [gravely] disabled, however, the reasonable probabilities are, and I think the great weight of the evidence is, that if he were to be left to his own devices, he would very shortly be back in the realm of those who are greatly disabled because of the intoxication problem and the ingestion of alcohol. It may sound like rampant paternalism, but in my view, that is a characteristic which is currently present in part of his make-up, and has to be taken into account in determining grave disability. As a result, and because of the core prognosis and lack of motivation from refraining from those things that cause him to be gravely disabled, it's my conclusion that the evidence does establish his grave disability and therefore the order re-appointing conservator is re-affirmed and the existing orders will continue in effect.

(*Id.* at 17-18; quotation marks omitted.) The Court of Appeal, however, reversed, finding that no evidence had been offered to show Murphy was *presently* gravely disabled; the reappointment was based entirely on a "likelihood" that if released, Murphy would at some future point return to the use of alcohol. (*Id*. at 18-19.)

Similarly, in *Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, the court held that "Benvenuto is not presently gravely disabled but medical witnesses thought he would likely soon become so because of his propensity not to take the drug Prolixin." (*Id.* at p. 1034.) The court stated it could "discern no principled basis for distinction between these circumstances" and Murphy's. (*Ibid.*) The court concluded: "[i]f LPS conservatorship may be reestablished because of a perceived likelihood of future relapse, many conservatees who would not relapse will be deprived of liberty based on probabilistic pessimism. This cost is unwarranted in view of the statutory procedures available to rapidly invoke LPS conservatorship if required." (*Id.* at 1034, fn. 2; see also *Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689.)

7. Amendments to define "medical condition"

   a. Concerns arising from the lack of a definition

This bill would expand the scope of admissible evidence in the certification hearing for the 14-day and 30-day detention periods under the LPS Act. Specifically, the bill would provide that the evidence presented in support of the certification decision may include information regarding the person's medical condition and how that condition bears on

certifying the person as a danger to self or to others or as gravely disabled. The bill would require the hearing officer to consider the information in the determination of probable cause.

Despite the State Auditor's conclusion that counties currently have sufficient authority under the LPS Act, the bill is intended to enable counties to detain and involuntarily treat for mental health conditions some individuals who, under existing law, cannot be so detained due to a lack of probable cause that they are gravely disabled or a danger to self. Thus, some individuals who technically have legal capacity under existing law would, following the enactment of the bill, be deemed to no longer have such capacity. The deciding factor in close cases, then, would be evidence of a "medical condition," a term not defined in the bill.

Put differently, if two individuals are borderline cases whose mental illnesses do not quite rise to the level of gravely disabled or danger to self, but one of them has a "medical condition," this bill would make it so that the one without the medical condition may be released into the community following a 5150 hold, whereas the one with the medical condition would be detained for involuntary treatment for an additional 14 or 30 days.[19] The medical condition would not be the sole basis for detention; rather, it would be evidence that must be considered in determining if there is probable cause that the person is gravely disabled or a danger to self. But if the bill has any effect, it would be to tip the scales in borderline cases, resulting in detentions that would not otherwise occur.

While a person's physical condition can be a good window into their mental health condition, the lack of a definition is potentially problematic in several respects. To be sure, medical ethics will guide professionals in the implementation of these provisions, and judicial oversight will deter and remedy unscrupulous practices. But the bill does not rule out abuses. It allows for virtually unfettered discretion to consider any medical condition without regard to its severity, likelihood of harm, or the person's capacity to treat it. It does not preclude substance abuse disorders,[20] nor consideration of conditions arising from one's station in life, such as a lack of health insurance, being a

[19] Although the bill does not apply to the 1-year conservatorship, bringing more people into the system could lead to more conservatorships. On the other hand, earlier intervention could prevent some individuals from deteriorating to a point that eventually necessitates a conservatorship.

[20] The issue of conservatorships for individuals with co-occurring and mutually-exacerbating substance abuse disorders and mental illnesses was painstakingly addressed in recent legislation that created a pilot program that establishes a novel type of conservatorship known as a "housing conservatorship." SB 1045 (Weiner, Ch. 845, Stats. 2018) and the follow-up bill, SB 40 (Weiner, Ch. 467, Stats. 2019), established a pilot program, applicable in Los Angeles, San Diego, and San Francisco counties, that provides for the appointment of a conservatorship for a person who is incapable of caring for their own health and well-being due to a serious mental illness and substance use disorder, as evidenced by eight detentions under a section 5150 hold for treatment and evaluation within a 12-month period. The program is in the early stages of implementation in San Francisco and information is being gathered as to its effectiveness. Arguably, legislation that touches on this issue is premature.

victim of violence, or being homeless. And while the bill requires, if the person needs continuing medical treatment after the termination of the involuntary detention, that they be informed that continuing medical treatment is recommended, the bill does not require that the person actually receives treatment during their detention. This raises the possibility that the medical condition can be used as a mere pretext by an overweening government to detain individuals to impose mental health treatment against their will.

In opposition, the California Behavioral Health Planning Council writes:

> SB 516 would allow the inclusion of medical conditions in the evidence presented in Lanterman-Petris-Short (LPS) Act 5250 certification decision. However, "Medical condition" is not defined in the bill and it is concerning as individuals with mental health conditions who have an untreated medical condition unrelated to their mental illness could be certified for 14 days and 30 days of intensive treatment following an initial 72-hour involuntary hold. As written, this medical condition may include a lack of insurance, conditions of homelessness, or a substance use disorder. A person could be considered a threat to themselves or others for refusing medical treatment of a condition that is not related to the psychiatric condition, with no parameters for the severity of the condition.

In opposition, the County Behavioral Health Directors Association of California writes:

> This bill would allow medical evidence to be used in the determination that an individual is a harm to themselves or others outside the scope of mental illness. A person could be considered a threat to themselves or others for refusing medical treatment of a condition that is not related to the psychiatric condition, with no parameters for the severity of the condition. Some examples of this include an individual experiencing homelessness who is unable to refrigerate or safely store medication, an individual with depression who refuses to receive treatment for high blood pressure, or an individual with a primary substance use disorder with a related excoriation disorder. If an individual under these circumstances is determined a threat to themselves or others due to a non-mental health related medical condition, they may be inappropriately placed in a high intensity setting when they may have been better treated in the community. The bill also, as currently written, does not exclude individuals who make informed, albeit unusual or even unwise, decisions to forgo medical treatment. While current law does not include medical conditions under the definition of "gravely disabled" pursuant to Welfare and Institutions Code 5008(h), the bill opens up risk of civil rights abuses, as refusal for treatment of a medical condition could be considered that the individual is a danger to self. Additionally, CBHDA would note that the capacity of medi-psych treatment beds across the state are few that

have the capacity to treat both a psychiatric condition and co-morbid physical health ailment.

b. AB 2015 amendments

AB 2015, as introduced, was the same as this bill, and the same concerns were raised about the bill. In response, the author amended the bill to narrow the definition of "medical condition" to serious medical conditions that the person is incapable of treating due to their mental illness. This determination would be made jointly by the physician and psychiatrist who treat the person during their initial 5150 hold. The physician must confirm the seriousness of the medical ailment—specifically, a condition that poses a serious risk of great bodily harm or death within three months—as well as the appropriate treatment, and a plan for administering that treatment during and after the person's subsequent detention. The physician must also advise the person on the purpose, nature, risks, and benefits of the medical condition and the treatment, consistent with existing requirements for obtaining informed consent.

AB 2015, as amended, also would have required that the treating psychiatrist separately determine whether the person's mental illness renders them incapable of managing their own treatment of the medical condition. This determination is based on a finding that (1) the person is incapable of forming a rudimentary understanding of the nature of the medical condition and lacks insight into the need for treatment, or (2) has a demonstrated history of being unable to comply with the treatment, or a treatment for a similar medical condition, as a result of their medical condition, and this pattern is likely to recur. To ensure that a person is not deemed unable to provide for their own care due to their station in life, the bill, with respect to chronic conditions that existed before the person was detained, would have required the psychiatrist to find that the person was consistently unable to comply with the treatment due to their mental health conditions. This forecloses the possibility that a prior inability to provide for one's care was not principally due to lack of access to care.

Finally, the AB 2015 amendments expressly excluded from the definition of medical condition (1) a condition that predominantly involves a substance use disorder, (2) exposure to potential harms resulting from the individual's personal circumstances, including lack of health care insurance, poverty, or homelessness, and (3) medical information that is more than four years old.

After receiving feedback that the above framework was too restrictive, however, the author opted to table the bill and reintroduced it without a definition of "medical information."

Writing in opposition to the bill, the County Behavioral Health Directors Association of California calls for the bill to be amended using the AB 2015 amendments:

> Informed consent for treatment of medical conditions should be respected as a basic right for an individual—except for in cases of an emergency or life-threatening condition. The August 6th, 2020 version of AB 2015 (Eggman) narrowly defined that a medical condition means a serious chronic or acute physical ailment, without treatment, that the medical condition poses a serious risk that the person, within three months, will suffer great bodily harm or death. Additionally, AB 2015 required the physician and psychiatrist to attempt to obtain informed consent. AB 2015 also rightfully excluded substance use disorders, lack of health insurance, poverty, or homelessness as being considered as part of if the individual is not treating their medical condition.

c. The author and sponsor argue that more flexibility is needed to make this bill effective

The author argues that the AB 2015 amendments were too rigid and that more flexibility is needed for the goals of this bill to be achieved. In particular, the author argues that defining the harm as occurring within three months is too short and that six months is more appropriate. The author writes:

> There are several situations in which the dangerousness of a medical condition may not be immediately present, but which can risk great bodily harm or death within six months if not appropriately managed. Some examples of these conditions include the ingestion of toxic substances, infections, and concussions. Also, within the medical context, six months is a standard that is used with a number of medical conditions as a demarcation point between acute and chronic conditions. We can more confidently predict acute conditions based on available evidence out to six months. The six month standard is also in place with the definition of "Terminal disease" in the End of Life Option Act which means an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, result in death within six months. Also, the standard for ordering/authorizing hospice care is reasonable medical certainty that the patient will die within six months.

The sponsor provides an example of a person who had schizophrenia and diabetes. Because she was able to verbalize to the court that she was able to care for her food, clothing, and shelter needs, she was decertified. But she didn't believe she needed any medications, including her diabetes medication. She was soon hospitalized, stabilized, and sent back to a psychiatric treatment facility.

d. Amendments

In view of the issues set forth above, the author has agreed to amend the bill to limit the scope of medical information that may be considered in determining if a person should be detained for involuntary mental health treatment. These amendments adopt a framework similar to the AB 2015 amendments but provide more flexibility by: (1)

extending the timeframe in which the medical condition could result in great bodily harm or death from three months to six months; (2) enabling a psychiatrist to consult with a physician instead of having a psychiatrist and physician separately certify their respective conclusions about the person's mental health; and (3) providing that the definition of medical condition applies at the point the evidence is considered by the person conducting the certification review hearing instead of when it is presented for the hearing by the district attorney or county counsel.

The amendments would be as follows:

Amendment 1

In the title, in line 1, strike out "5256.2, 5256.6," and insert:
5256.6

Amendment 2

On page 2, strike out lines 1 to 14, inclusive, in line 15, strike out "SEC. 2." and insert:
SECTION 1.

Amendment 3

On page 2, in line 17, after "5256.6." insert:
(a)

Amendment 4

On page 3, in line 6, strike out "This" and insert:
(b) The evidence considered in the certification review hearing may include information regarding the person's medical condition and how that condition bears on certifying the person as a danger to themselves or to others or as gravely disabled.
(c) (1) For purposes of this section, "medical condition" means a serious chronic or acute physical ailment for which, in the evidence submitted as part of the certification process, a psychiatrist, with documentation of consultation with an appropriate physician, certifies that all of the following apply:
(A)Without treatment, the medical condition poses a serious risk that the person, within six months, will suffer great bodily harm or death.
(B) The treatment is consistent with generally accepted standards of practice, the person will receive the treatment, as necessary, if detained pursuant to Section 5250 or 5270.15, and, upon release, the person will be provided with a treatment plan and directed to services that will facilitate appropriate treatment.
(C) During the process of detention pursuant to Section 5150, a physician advised the person on the purpose, nature, risks, and benefits of the medical condition and the treatment, consistent with the requirements for obtaining informed consent under Section 5326.2.
(D) If the medical condition is a chronic condition that existed before the person was detained pursuant to Section 5150, the person was consistently unable to comply with treatment due to their mental health condition.

(E) If released into the community, the person, due to their mental health condition at the time of certification, is likely to remain consistently unable to comply with the treatment due to either of the following:
(i) Despite the advice given, as described in subparagraph (C), the person remains unable to comply with the treatment because they cannot achieve a rudimentary understanding of the nature of the medical condition and continue to lack insight into the need for treatment.
(ii) The person understands the nature of the medical condition and wishes to comply with the treatment, but, due to the person's mental health condition, has a demonstrated history of being consistently unable to comply with the treatment, or a treatment for a similar medical condition, and this pattern is likely to recur if the person is released into the community.
(2) "Medical condition" does not include any of the following:
(A) A condition that predominantly involves a substance use disorder.
(B) Exposure to potential harms resulting from the person's personal circumstances, including, but not limited to, lack of health care insurance, poverty, or homelessness.
(C) Medical information that is more than four years old.
(d) This

Amendment 5

On page 3, in line 10, strike out "SEC. 3." and insert:
SEC. 2.

SUPPORT

Psychiatric Physicians Alliance of California (sponsor)
California State Association of Psychiatrists

OPPOSITION

California Behavioral Health Planning Council
County Behavioral Health Directors Association of California

RELATED LEGISLATION

Pending Legislation:

SB 340 (Stern, 2021) would require a court to allow a family member, friend, or acquaintance who is knowledgeable about a person who is the subject of any hearing under these provisions to testify at the hearing. The bill is pending in the Senate Health Committee. If it passes that committee, it will be referred to this one.

SB 507 (Eggman & Stern, 2021) revises criteria for assisted outpatient treatment to ensure former conservatees are eligible. The bill is scheduled to be heard in this Committee on the same day as this bill.

SB 565 (Jones, 2021) requires the State Department of State Hospitals to develop and implement a plan to expand the capacity of its facilities to reduce wait times for LPS conservatees to 60 days or less. The bill is pending in the Senate Health Committee. If it passes that committee, it will be referred to this one.

SB 578 (Jones, 2021) clarifies and strengthens privacy protections in LPS proceedings. The bill passed this Committee by a vote of 11-0.

SB 782 (Glazer, 2021) provides a procedure to ensure former conservatees are eligible for assisted outpatient treatment. The bill is scheduled to be heard in this Committee on the same day as this bill.

AB 574 (Chen, 2021) is a reintroduction of SB 1254 (Moorlach, 2020), described below. The bill is pending the Assembly Health Committee.

AB 1340 (Santiago, Friedman & Stern, 2021) is similar to SB 640, described below. The bill is pending the Assembly Health Committee.

Prior Legislation:

SB 1251 (Moorlach, 2020) would have authorized any county to adopt the "housing conservatorship" program established by SB 40, which is described below. SB 1251 was referred to this committee but was not heard.

SB 1254 (Moorlach, 2020) would have provided for the establishment of a guardian ad litem for a person who, upon petition to a court, is determined to lack the capacity to make rational informed decisions regarding medical care, mental health care, safety, hygiene, shelter, food, or clothing with a rational thought process due to a mental illness, defect, or deficiency. The bill would have provided that a guardian may make medical care, mental health care, safety, hygiene, shelter, food, or clothing decisions on behalf of the person lacking capacity. SB 1254 was referred to this committee but was not heard.

AB 1946 (Santiago & Friedman, 2020) would have expanded the definition of "gravely disabled" for the purpose of the LPS Act to also include a condition in which a person, as a result of a mental health disorder, is unable to provide for their basic personal needs for medical treatment, if the failure to receive medical treatment, as defined, results in a deteriorating physical condition that a medical professional, in their best medical judgment, attests in writing, will more likely than not, lead to death within 6 months, as specified. AB 1946 was referred to the Assembly Health Committee but was not heard.

AB 2679 (Gallagher, 2020) would have expanded authorized the County of Butte to adopt the "housing conservatorship" program under SB 40, which is described below. AB 2679 was referred to the Senate Health Committee but was not heard.

SB 40 (Weiner, Ch. 467, Stats. 2019) refined a pilot program, established by SB 1045 (Weiner, Ch. 845, Stats. 2018), applicable in Los Angeles, San Diego, and San Francisco counties, which provides for the appointment of a conservatorship for a person who is incapable of caring for their own health and well-being due to a serious mental illness and substance use disorder, which is initially evidenced by eight detentions under a section 5150 hold for treatment and evaluation within a 12-month period.

SB 640 (Moorlach, 2019) would have expanded the "gravely disabled" standard to apply to a person who, as a result of a mental health disorder, is incapable of making informed decisions about, or providing for, the person's own basic personal needs for food, clothing, or shelter without significant supervision and assistance from another person and, as a result of being incapable of making these informed decisions, the person is at risk of substantial bodily harm, dangerous worsening of concomitant serious physical illness, significant psychiatric deterioration, or mismanagement of the person's essential needs. The bill failed passage in the Senate Health Committee.

AB 1572 (Chen, 2019) was virtually identical to SB 640 and also would have created a grant program to fund conservatorship cases. The bill was referred to the Assembly Health Committee but was not heard.

AB 1971 (Santiago, Chen, & Friedman, 2018) was similar to AB 1946 (2020) but would have been limited to a pilot program in the County of Los Angeles until 2024. The bill was ordered to the inactive file on the Senate floor.

AB 2156 (Chen, 2018) would have changed the definition of "gravely disabled" for LPS Act purposes to read, in part, a condition in which a person, as a result of a mental health disorder, is incapable of making informed decisions about, or providing for, their own basic personal needs for food, clothing, shelter, or medical care without significant supervision and assistance from another person and, as a result of being incapable of making these informed decisions, the person is at risk of substantial bodily harm, dangerous worsening of a concomitant serious physical illness, significant psychiatric deterioration, or mismanagement of their essential needs that could result in bodily harm. The bill was held in the Assembly Health Committee.

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