

**COMPETENCY TO BE EXECUTED -  
AMENDMENTS**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: David L. Gladwell**

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**LONG TITLE**

**General Description:**

This bill establishes procedures regarding addressing issues of incompetency that may arise after a defendant has been sentenced to death.

**Highlighted Provisions:**

This bill:

▶ defines elements of incompetency to be executed, which include if the inmate is not aware of the impending execution and if the inmate does not understand that the execution is for committing the crime of murder;

▶ provides a procedure for the Department of Corrections to give notice to the court if an inmate sentenced to death may be incompetent;

▶ provides the procedure for filing a petition requesting an inquiry into the inmate's competency to be executed;

▶ provides the process for an examination of the inmate;

▶ provides for a court hearing and determination;

▶ provides for treatment for the inmate;

**§ ▶ PROVIDES THE SCOPE OF APPROPRIATE MENTAL HEALTH TREATMENT, INCLUDING THE USE OF PSYCHOACTIVE MEDICATION; §**

▶ provides that the Department of Corrections and the Department of Human Services pay for the competency examination of the inmate; and

▶ provides that the prosecution may appeal from a finding that an inmate is not competent to be executed.

**Monies Appropriated in this Bill:**



28 None

29 **Other Special Clauses:**

30 None

31 **Utah Code Sections Affected:**

32 AMENDS:

33 **77-18a-1**, as last amended by Chapter 11, Laws of Utah 2003

34 **77-19-8**, as last amended by Chapter 13, Laws of Utah 1994

35 ENACTS:

36 **77-19-201**, Utah Code Annotated 1953

37 **77-19-203**, Utah Code Annotated 1953

38 **77-19-204**, Utah Code Annotated 1953

39 **77-19-205**, Utah Code Annotated 1953

40 **77-19-206**, Utah Code Annotated 1953

41 RENUMBERS AND AMENDS:

42 **77-19-202**, (Renumbered from 77-19-13, as last amended by Chapter 13, Laws of Utah  
43 1994)



45 *Be it enacted by the Legislature of the state of Utah:*

46 Section 1. Section **77-18a-1** is amended to read:

47 **77-18a-1. Appeals -- When proper.**

48 (1) An appeal may be taken by the defendant from:

49 (a) the final judgment of conviction, whether by verdict or plea;

50 (b) an order made after judgment that affects the substantial rights of the defendant;

51 (c) an interlocutory order when upon petition for review the appellate court decides the  
52 appeal would be in the interest of justice; or

53 (d) any order of the court judging the defendant by reason of a mental disease or defect  
54 incompetent to proceed further in a pending prosecution.

55 (2) An appeal may be taken by the prosecution from:

56 (a) a final judgment of dismissal, including a dismissal of a felony information  
57 following a refusal to bind the defendant over for trial;

58 (b) an order arresting judgment;

- 59 (c) an order terminating the prosecution because of a finding of double jeopardy or
- 60 denial of a speedy trial;
- 61 (d) a judgment of the court holding a statute or any part of it invalid;
- 62 (e) an order of the court granting a pretrial motion to suppress evidence when upon a
- 63 petition for review the appellate court decides that the appeal would be in the interest of justice;
- 64 (f) under circumstances not amounting to a final order under Subsection (2)(a), a
- 65 refusal to bind the defendant over for trial on a felony as charged or a pretrial order dismissing
- 66 or quashing in part a felony information, when upon a petition for review the appellate court
- 67 decides that the appeal would be in the interest of justice;
- 68 (g) an order of the court granting a motion to withdraw a plea of guilty or no contest;
- 69 [or]
- 70 (h) a finding pursuant to Title 77, Chapter 15a, Exemptions from Death Penalty in
- 71 Capital Cases, that a capital defendant is exempt from a sentence of death, when upon a
- 72 petition for review the appellate court decides that the appeal would be in the interest of
- 73 justice[-]; or

74 (i) a finding pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that

75 an inmate sentenced to death is incompetent to be executed.

76 Section 2. Section **77-19-8** is amended to read:

77 **77-19-8. Judgment of death, when suspended, and by whom.**

78 A judge, tribunal, or officer, other than the governor or the Board of Pardons and

79 Parole, may not suspend the execution of a judgment of death, except:

80 (1) a temporary stay of judgment of death may [~~issue~~] be issued by a court of

81 competent jurisdiction when the judgment is appealed, automatically reviewed, or subjected to

82 collateral attack in a post conviction proceeding; or

83 (2) in cases of suspected incompetency or pregnancy of the defendant, execution may

84 be temporarily suspended by the executive director of the Department of Corrections or his

85 designee under Section [~~77-19-13~~] 77-19-202.

86 Section 3. Section **77-19-201** is enacted to read:

87 **Part 2. Competency for Execution**

88 **77-19-201. Definition.**

89 As used in this part, "incompetent to be executed" means that if, due to mental

90 condition, an inmate is unaware § OF § either § [;  
 91 —— (1) of the fact of the inmate's impending execution; or  
 92 —— (2) that the inmate is to be executed for the murder or murders for which he was  
 93 sentenced to death.] THE PUNISHMENT HE IS ABOUT TO SUFFER OR WHY HE IS TO SUFFER IT. §

94 Section 4. Section **77-19-202**, which is renumbered from Section 77-19-13 is  
 95 renumbered and amended to read:

96 **[77-19-13]. 77-19-202. Incompetency or pregnancy of person sentenced to death**  
 97 **-- Procedures.**

98 (1) If, after judgment of death, ~~[there is]~~ the executive director of the Department of  
 99 Corrections has good reason to believe [the defendant is incompetent to proceed under this  
 100 chapter, or] that an inmate sentenced to death is pregnant, or has good reason to believe that an  
 101 inmate's competency to be executed under this chapter should be addressed by a court, the  
 102 executive director of the Department of Corrections or his designee shall immediately give  
 103 written notice to the court in which the judgment of death was rendered, to the prosecuting  
 104 attorney, and counsel for ~~[defendant]~~ the inmate. The judgment shall be stayed pending further  
 105 order of the court.

106 (2) (a) On receipt of the notice under Subsection (1) of good reason for the court to  
 107 address an inmate's competency to be executed, the court shall order that the mental condition  
 108 of the [defendant] inmate shall be examined under the provisions of [Title 77, Chapter 15]  
 109 Section 77-19-204.

110 (b) If the ~~[defendant]~~ inmate is found incompetent, the court shall immediately transmit  
 111 a certificate of the findings to the Board of Pardons and Parole ~~[and enter an order for~~  
 112 commitment under Title 77, Chapter 15] and continue the stay of execution pending further  
 113 order of the court.

114 (c) If the ~~[defendant]~~ inmate is subsequently found competent at any time, the judge  
 115 shall immediately transmit a certificate of the findings to the Board of Pardons and Parole, and  
 116 shall draw and have delivered another warrant under Section 77-19-6, together with a copy of  
 117 the certificate of the findings. The warrant shall state an appointed day on which the judgment  
 118 is to be executed, which may not be fewer than 30 nor more than 60 days from the date of the  
 119 drawing of the warrant **§ [; at an hour determined by the Department of Corrections] § .**

120 (3) (a) If the court finds the ~~[defendant]~~ inmate is pregnant, it shall immediately

121 transmit a certificate of the finding to the Board of Pardons and Parole and to the executive  
 122 director of the Department of Corrections or his designee, and the court shall issue an order  
 123 staying the execution of the judgment of death during the pregnancy.

124 (b) When the court determines the [~~defendant~~] inmate is no longer pregnant, it shall  
 125 immediately transmit a certificate of the finding to the Board of Pardons and Parole and draw  
 126 and have delivered another warrant under Section 77-19-6, with a copy of the certificate of the  
 127 finding. The warrant shall state an appointed day on which the judgment is to be executed,  
 128 which may not be fewer than 30 nor more than 60 days from the date of the drawing of the  
 129 warrant ~~§ [;at an hour determined by the Department of Corrections] §~~ .

129a **§ (4) THE DEPARTMENT OF CORRECTIONS SHALL DETERMINE THE HOUR, WITHIN THE**  
 129b **APPOINTED DAY, AT WHICH THE JUDGMENT IS TO BE EXECUTED.** §

130 Section 5. Section 77-19-203 is enacted to read:

131 **77-19-203. Petition for inquiry as to competency to be executed -- Filing --**  
 132 **Contents -- Successive petitions.**

133 (1) If an inmate who has been sentenced to death is or becomes incompetent to be  
 134 executed, a petition under Subsection (2) may be filed in the district court of the county where  
 135 the inmate is confined.

136 (2) The petition shall:

137 (a) contain a certificate stating that it is filed in good faith and on reasonable grounds to  
 138 believe the inmate is incompetent to be executed; and

139 (b) contain a specific recital of the facts, observations, and conversations with the  
 140 inmate that form the basis for the petition.

141 (3) The petition may be based upon knowledge or information and belief and may be  
 142 filed by the inmate alleged to be incompetent, legal counsel for the inmate, or by an attorney  
 143 representing the state.

144 (4) Before ruling on a petition filed by an inmate or his counsel alleging that the inmate  
 145 is incompetent to be executed, the court shall give the state and the Department of Corrections  
 146 an opportunity to respond to the allegations of incompetency.

147 (5) If a petition is filed after an inmate has previously been found competent under  
 148 either this chapter or under Title 77, Chapter 15, Inquiry into Sanity of Defendant, no further  
 149 hearing on competency may be granted unless the successive petition:

150 (a) alleges with specificity a substantial change of circumstances subsequent to the  
 151 previous determination of competency; and

152 (b) is sufficient to raise a significant question about the inmate's competency to be  
153 executed.

154 Section 6. Section **77-19-204** is enacted to read:

155 **77-19-204. Order for hearing -- Examinations of inmate -- Scope of examination**  
156 **and report.**

157 (1) When a court has good reason to believe an inmate sentenced to death is  
158 incompetent to be executed, it shall stay the execution and shall order the Department of  
159 Human Services to examine the inmate and report to the court concerning the inmate's mental  
160 condition.

161 (2) (a) The inmate subject to examination under Subsection (1) shall be examined by at  
162 least two mental health experts who are not involved in the inmate's current treatment.

163 (b) The Department of Corrections shall provide information and materials to the  
164 examiners relevant to a determination of the inmate's competency to be executed.

165 (3) The inmate shall make himself available and fully cooperate in the examination by  
166 the Department of Human Services and any other independent examiners for the defense or the  
167 state.

168 (4) The examiners shall in the conduct of their examinations and in their reports to the  
169 court consider and address, in addition to any other factors determined to be relevant by the  
170 examiners:

171 (a) the inmate's awareness of the fact of the inmate's impending execution;

172 (b) the inmate's understanding that the inmate is to be executed for the crime of  
173 murder;

174 (c) the nature of the inmate's mental disorder, if any, and its relationship to the factors  
175 relevant to the inmate's competency; and

176 (d) whether psychoactive medication is necessary to maintain or restore the inmate's  
177 competency.

178 (5) The examiners who are examining the inmate shall each provide an initial report to  
179 the court and the attorneys for the state and the inmate within 60 days of the receipt of the  
180 court's order. The report shall inform the court of the examiner's opinion concerning the  
181 competency of the inmate to be executed, or, in the alternative, the examiner may inform the  
182 court in writing that additional time is needed to complete the report. If the examiner informs

183 the court that additional time is needed, the examiner shall have up to an additional 30 days to  
184 provide the report to the court and counsel. The examiner shall provide the report within 90  
185 days from the receipt of the court's order unless, for good cause shown, the court authorizes an  
186 additional period of time to complete the examination and provide the report.

187 (6) (a) All interviews with the inmate conducted by the examiners shall be videotaped,  
188 unless otherwise ordered by the court for good cause shown. The Department of Corrections  
189 shall provide the videotaping equipment and facilitate the videotaping of the interviews.

190 (b) Immediately following the videotaping, the videotape shall be provided to the  
191 attorney for the state, who shall deliver it as soon as practicable to the judge in whose court the  
192 competency determination is pending.

193 (c) The court shall grant counsel for the state and for the inmate, and examiners who  
194 are examining the inmate under this part access to view the videotape at the court building  
195 where the court is located that is conducting the competency determination under this part.

196 (7) Any written report submitted by an examiner shall:

197 (a) identify the specific matters referred for evaluation;

198 (b) describe the procedures, techniques, and tests used in the examination and the  
199 purpose or purposes for each;

200 (c) state the examiner's clinical observations, findings, and opinions on each issue  
201 referred for examination by the court, and indicate specifically those issues, if any, on which  
202 the examiner could not give an opinion; and

203 (d) identify the sources of information used by the examiner and present the basis for  
204 the examiner's clinical findings and opinions.

205 (8) (a) When the reports are received, the court shall set a date for a competency  
206 hearing, which shall be held within not less than five and not more than 15 days, unless the  
207 court extends the time for good cause.

208 (b) Any examiner directed by the Department of Human Services to conduct the  
209 examination may be subpoenaed to provide testimony at the hearing. If the examiners are in  
210 conflict as to the competency of the inmate, all of them should be called to testify at the hearing  
211 if they are reasonably available.

212 (c) The court may call any examiner to testify at the hearing who is not called by the  
213 parties. An examiner called by the court may be cross-examined by counsel for the parties.

214 (9) (a) An inmate shall be presumed competent to be executed unless the court, by a  
 215 preponderance of the evidence, finds the inmate incompetent to be executed. The burden of  
 216 proof is upon the proponent of incompetency at the hearing.

217 (b) An adjudication of incompetency to be executed does not operate as an  
 218 adjudication of the inmate's incompetency to give informed consent for medical treatment or  
 219 for any other purpose, unless specifically set forth in the court order.

220 (10) (a) If the court finds the inmate incompetent to be executed, its order shall contain  
 221 findings addressing each of the factors in Subsections (4)(a) through (d).

222 (b) The order finding the inmate incompetent to be executed shall be delivered to the  
 223 Department of Human Services, and shall be accompanied by:

224 (i) copies of the reports of the examiners filed with the court pursuant to the order of  
 225 examination, if not provided previously;

226 (ii) copies of any of the psychiatric, psychological, or social work reports submitted to  
 227 the court relative to the mental condition of the inmate; and

228 (iii) any other documents made available to the court by either the defense or the state,  
 229 pertaining to the inmate's current or past mental condition.

230 (c) A copy of the order finding the inmate incompetent to be executed shall be  
 231 delivered to the Department of Corrections.

232 Section 7. Section **77-19-205** is enacted to read:

233 **77-19-205. Procedures on finding of incompetency to be executed -- Subsequent**  
 234 **hearings -- Notice to attorneys.**

235 (1) (a) § (i) § If after the hearing under Section 77-19-204 the inmate is found to be  
 236 incompetent to be executed, the court shall continue the stay of execution and the inmate shall  
 237 receive appropriate mental health treatment.

237a **§ (ii) APPROPRIATE MENTAL HEALTH TREATMENT UNDER SUBSECTION (1)(a)(i) DOES NOT**  
 237b **INCLUDE THE FORCIBLE ADMINISTRATION OF PSYCHOACTIVE MEDICATION FOR THE SOLE**  
 237c **PURPOSE OF RESTORING THE INMATE'S COMPETENCY TO BE EXECUTED. §**

238 (b) The court shall order the executive director of the Department of Human Services  
 239 to provide periodic assessments to the court regarding the inmate's competency to be executed.

240 (c) The inmate shall be held in secure confinement, either at the prison or the State  
 241 Hospital, as agreed upon by the executive director of the Department of Corrections and the  
 242 executive director of the Department of Human Services. If the inmate remains at the prison,  
 243 the Department of Human Services shall consult with the Department of Corrections regarding  
 244 the inmate's mental health treatment.

245 (2) (a) The examiner or examiners designated by the executive director of the  
246 Department of Human Services to assess the inmate's progress toward competency may not be  
247 involved in the routine treatment of the inmate.

248 (b) The examiner or examiners shall each provide a full report to the court and counsel  
249 for the state and the inmate within 90 days of receipt of the court's order. If any examiner is  
250 unable to complete the assessment within 90 days, that examiner shall provide to the court and  
251 counsel for the state and the inmate a summary progress report which informs the court that  
252 additional time is necessary to complete the assessment, in which case the examiner has up to  
253 an additional 90 days to provide the full report, unless the court enlarges the time for good  
254 cause. The full report shall assess:

255 (i) the facility's or program's capacity to provide appropriate treatment for the inmate;  
256 (ii) the nature of treatments provided to the inmate;  
257 (iii) what progress toward restoration of competency has been made;  
258 (iv) the inmate's current level of mental disorder and need for treatment, if any; and  
259 (v) the likelihood of restoration of competency and the amount of time estimated to  
260 achieve it.

261 (3) The court on its own motion or upon motion by either party may order the  
262 Department of Human Services to appoint additional mental health examiners to examine the  
263 inmate and advise the court on the inmate's current mental status and progress toward  
264 competency restoration.

265 (4) (a) Upon receipt of the full report, the court shall hold a hearing to determine the  
266 inmate's current status. At the hearing, the burden of proving that the inmate is competent is on  
267 the proponent of competency.

268 (b) Following the hearing, the court shall determine by a preponderance of evidence  
269 whether the inmate is competent to be executed.

270 (5) (a) If the court determines that the inmate is competent to be executed, it shall enter  
271 findings and shall proceed under Subsection 77-19-202(2)(c).

272 (b) § (i) § If the court determines the inmate is still incompetent to be executed, the inmate  
273 shall continue to receive appropriate mental health treatment, and the court shall hold hearings  
274 no less frequently than at 18-month intervals for the purpose of determining the defendant's  
275 competency to be executed.

275a **§ (ii) CONTINUED APPROPRIATE MENTAL HEALTH TREATMENT UNDER SUBSECTION (1)(a)(i)**  
275b **DOES NOT INCLUDE THE FORCIBLE ADMINISTRATION OF PSYCHOACTIVE MEDICATION FOR THE**  
275c **SOLE PURPOSE OF RESTORING THE INMATE'S COMPETENCY TO BE EXECUTED. §**

276 (6) (a) If at any time the clinical director of the Utah State Hospital or the primary  
277 treating mental health professional determines that the inmate has been restored to competency,  
278 he shall notify the court.

279 (b) The court shall conduct a hearing regarding the inmate's competency to be executed  
280 within 30 working days of the receipt of the notification under Subsection (6)(a), unless the  
281 court extends the time for good cause. The court may order a hearing or rehearing at any time  
282 on its own motion.

283 (7) Notice of a hearing on competency to be executed shall be given to counsel for the  
284 state and for the inmate, as well as to the office of the prosecutor who prosecuted the inmate on  
285 the original capital charge.

286 Section 8. Section **77-19-206** is enacted to read:

287 **77-19-206. Expenses -- Allocation.**

288 The Department of Human Services and the Department of Corrections shall each pay  
289 1/2 of the costs of any examination of the inmate conducted pursuant to Sections 77-19-204  
290 and 77-19-205 to determine if an inmate is competent to be executed.

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**Legislative Review Note**  
**as of 1-27-04 11:00 AM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**

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**Fiscal Note**  
**Bill Number SB0049**

**Competency to Be Executed - Amendments**

*05-Feb-04*

*10:15 AM*

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**State Impact**

Provisions of this legislation can be handled within existing budgets.

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**Individual and Business Impact**

No fiscal impact.

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**Office of the Legislative Fiscal Analyst**