

**COMPETENCY TO BE EXECUTED -
AMENDMENTS**

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: David L. Gladwell

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 punishment he is about to suffer or why he is to suffer it;
- ▶ 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:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

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

ENACTS:

77-19-201, Utah Code Annotated 1953

77-19-203, Utah Code Annotated 1953

77-19-204, Utah Code Annotated 1953

77-19-205, Utah Code Annotated 1953

77-19-206, Utah Code Annotated 1953

RENUMBERS AND AMENDS:

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

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

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

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

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

- (a) the final judgment of conviction, whether by verdict or plea;
- (b) an order made after judgment that affects the substantial rights of the defendant;
- (c) an interlocutory order when upon petition for review the appellate court decides the appeal would be in the interest of justice; or

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

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

- (a) a final judgment of dismissal, including a dismissal of a felony information following a

refusal to bind the defendant over for trial;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

(e) an order of the court granting a pretrial motion to suppress evidence when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;

(f) under circumstances not amounting to a final order under Subsection (2)(a), a refusal to bind the defendant over for trial on a felony as charged or a pretrial order dismissing or quashing in part a felony information, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;

(g) an order of the court granting a motion to withdraw a plea of guilty or no contest;

[or]

(h) a finding pursuant to Title 77, Chapter 15a, Exemptions from Death Penalty in Capital Cases, that a capital defendant is exempt from a sentence of death, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice[-]; or

(i) a finding pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that an inmate sentenced to death is incompetent to be executed.

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

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

A judge, tribunal, or officer, other than the governor or the Board of Pardons and Parole, may not suspend the execution of a judgment of death, except:

(1) a temporary stay of judgment of death may ~~issue~~ be issued by a court of competent jurisdiction when the judgment is appealed, automatically reviewed, or subjected to collateral attack in a post conviction proceeding; or

(2) in cases of suspected incompetency or pregnancy of the defendant, execution may be temporarily suspended by the executive director of the Department of Corrections or his designee under Section ~~[77-19-13]~~ 77-19-202.

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

Part 2. Competency for Execution

77-19-201. Definition.

As used in this part, "incompetent to be executed" means that if, due to mental condition, an inmate is unaware of either the punishment he is about to suffer or why he is to suffer it.

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

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

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

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

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

(c) If the ~~[defendant]~~ inmate is subsequently found competent at any time, the judge shall immediately transmit a certificate of the findings to the Board of Pardons and Parole, and shall draw and have delivered another warrant under Section 77-19-6, together with a copy of the certificate of the findings. The warrant shall state an appointed day on which the judgment is to

be executed, which may not be fewer than 30 nor more than 60 days from the date of the drawing of the warrant~~[, at an hour determined by the Department of Corrections]~~.

(3) (a) If the court finds the ~~[defendant]~~ inmate is pregnant, it shall immediately transmit a certificate of the finding to the Board of Pardons and Parole and to the executive director of the Department of Corrections or his designee, and the court shall issue an order staying the execution of the judgment of death during the pregnancy.

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

(4) The Department of Corrections shall determine the hour, within the appointed day, at which the judgment is to be executed.

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

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

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

(2) The petition shall:

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

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

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

(4) Before ruling on a petition filed by an inmate or his counsel alleging that the inmate is

incompetent to be executed, the court shall give the state and the Department of Corrections an opportunity to respond to the allegations of incompetency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) The examiners who are examining the inmate shall each provide an initial report to the court and the attorneys for the state and the inmate within 60 days of the receipt of the court's order. The report shall inform the court of the examiner's opinion concerning the competency of the inmate to be executed, or, in the alternative, the examiner may inform the court in writing that additional time is needed to complete the report. If the examiner informs the court that additional time is needed, the examiner shall have up to an additional 30 days to provide the report to the court and counsel. The examiner shall provide the report within 90 days from the receipt of the court's order unless, for good cause shown, the court authorizes an additional period of time to complete the examination and provide the report.

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

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

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

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

(a) identify the specific matters referred for evaluation;

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

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

(d) identify the sources of information used by the examiner and present the basis for the

examiner's clinical findings and opinions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Appropriate mental health treatment under Subsection (1)(a)(i) does not include the forcible administration of psychoactive medication for the sole purpose of restoring the inmate's competency to be executed.

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

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

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

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

The full report shall assess:

(i) the facility's or program's capacity to provide appropriate treatment for the inmate;

(ii) the nature of treatments provided to the inmate;

(iii) what progress toward restoration of competency has been made;
(iv) the inmate's current level of mental disorder and need for treatment, if any; and
(v) the likelihood of restoration of competency and the amount of time estimated to
achieve it.

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

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

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

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

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

(ii) Continued appropriate mental health treatment under Subsection (1)(a)(i) does not
include the forcible administration of psychoactive medication for the sole purpose of restoring
the inmate's competency to be executed.

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

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

own motion.

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

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

77-19-206. Expenses -- Allocation.

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