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THIRD READING

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Bill No: AB 2657  
Author: Stone (D)  
Amended: 6/8/22 in Senate  
Vote: 21

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SENATE PUBLIC SAFETY COMMITTEE: 4-0, 6/21/22  
AYES: Bradford, Kamlager, Skinner, Wiener  
NO VOTE RECORDED: Ochoa Bogh

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 56-18, 5/25/22 - See last page for vote

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**SUBJECT:** Incarcerated person's competence

**SOURCE:** California Anti-Death Penalty Coalition

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**DIGEST:** This bill changes procedures for determining whether an incarcerated person under judgment of death, whose execution date has been set, is incompetent to be executed; and establishes a procedure for an incarcerated person whose sentence of death has been affirmed on direct appeal, any time prior to the setting of their execution date, to petition a court for relief from a sentence of death on the grounds that they are permanently incompetent to be executed.

**ANALYSIS:**

Existing law:

- 1) States that no judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom the defendant is delivered for execution unless an appeal is taken. (Penal Code § 3700)

- 2) States that, when a court enters an order setting the defendant's execution date, the warden of the state prison to whom such defendant has been delivered for execution shall notify the Secretary who shall thereupon select and appoint three alienists from CDCR medical staff to examine the defendant and investigate their sanity. (Penal Code § 3700.5)
- 3) Provides that alienists appointed by the Secretary must examine the defendant and investigate their sanity and report their opinions and conclusions, in writing, to the Governor and the warden of the prison at which the execution is to take place at least 20 days prior to the day appointed for execution. (Penal Code § 3700.5)
- 4) Requires the warden to furnish a copy of the report prepared by the alienists to counsel for the defendant upon request. (Penal Code § 3700.5)
- 5) Provides that, if, after delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such a county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. (Penal Code § 3701)
- 6) Provides that a jury of 12 persons from the regular jury list of the county must be summoned and impaneled to hear the inquiry. (Penal Code § 3701)
- 7) Requires the district attorney to attend the hearing, and authorizes the district attorney to produce witnesses before the jury. (Penal Code § 3702)
- 8) Provides that the verdict of the jury must be entered upon the minutes, and thereupon the court enter an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a CDCR medical facility, and kept in safe confinement until his reason is restored. (Penal Code § 3703)
- 9) Provides that, if it is found that the defendant is sane, the warden must proceed to execute the judgment; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order to the Governor, and deliver the defendant, together with a certified copy of such

order, to the superintendent of the medical facility named in the order. (Penal Code § 3704)

- 10) Provides that, when the defendant recovers his sanity, the superintendent of the medical facility must certify that fact to the judge of the superior court from which the defendant was committed as insane. (Penal Code § 3704)
- 11) Requires the judge, upon receiving information from the superintendent that the defendant has recovered his sanity, to fix a date for hearing before the judge to determine whether or not the defendant has in fact recovered his sanity. (Penal Code § 3704)
- 12) Requires the judge to provide 10 days written notice of the hearing to the defendant and the district attorney of the court from which the defendant was originally sentenced and the district attorney of the county from which he was committed to the medical facility. (Penal Code § 3704.)
- 13) Requires the court, if the defendant appears without counsel, to appoint counsel to represent him at said hearing. (Penal Code § 3704)
- 14) Requires the judge, upon determining that the defendant has recovered his sanity, to certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the state prison pending the execution of the judgment. (Penal Code § 3704)
- 15) Requires the judge, upon determining that the defendant has not recovered his sanity, to direct the return of the defendant to a CDCR medical facility to be kept in safe confinement until his sanity is restored. (Penal Code § 3704)

This bill:

- 1) Requires the warden to serve a copy of the report on the incarcerated person's competence to be executed to the Attorney General, to the district attorney of the county in which the person was sentenced, and to the Governor, in addition to counsel for the incarcerated person as required under existing law.
- 2) Requires the warden to notify, in addition to the district attorney of the county in which the incarcerated person was sentenced, the Attorney General and the incarcerated person's counsel if, after an execution date has been set, there is

good reason to believe that an incarcerated person under judgment of death has become incompetent to be executed.

- 3) Requires defense counsel, if they have reason to believe that the incarcerated person is incompetent to be executed, to immediately file in superior court a petition that identifies the conviction and judgment, alleges that the incarcerated person is believed to be incompetent to be executed, and asks that the question of the incarcerated person's competence to be executed be inquired into.
- 4) Requires the Attorney General to file such a petition if counsel for the incarcerated person does not file one, or if the incarcerated person does not have counsel and the warden has notified the district attorney and the Attorney General that there is reason to believe that the incarcerated person is incompetent to be executed.
- 5) Requires the court, during the course of the proceedings, to consider whether the petitioner is permanently incompetent to be executed, as specified.
- 6) Provides that an incarcerated person's execution may not proceed until the court's inquiry into the incarcerated person's competence to be executed is complete.
- 7) Provides that an incarcerated person whose judgment and sentence of death has been affirmed on direct appeal may file, at any time prior to the setting of an execution date, a petition alleging the incarcerated person's permanent incompetence to be executed.
- 8) Requires an incarcerated person's petition alleging permanent incompetence to be verified and supported by the declaration or report of a qualified expert concluding that the incarcerated person is permanently incompetent, as specified.
- 9) Provides that an incarcerated person who has submitted a petition, as specified, that did not result in a determination that the incarcerated person is permanently incompetent to be executed may submit a renewed petition.
- 10) Provides that a renewed petition must identify with specificity a change in the incarcerated person's diagnosis or prognosis or change in the law that arose after the determination of the prior request that supports the renewed petition.

- 11) Defines “incompetent to be executed” as the inability, “due to mental illness or disorder...to rationally understand either the punishment the incarcerated person is about to suffer or why the incarcerated person is to suffer it.”
- 12) Defines “permanent incompetence to be executed” to mean:
  - a) The incarcerated person is presently incompetent to be executed; and
  - b) The nature of the mental illness or disorder giving rise to incompetence is such that the incarcerated person’s competence to be executed is unlikely to ever be restored.
- 13) Requires a court to hold a hearing if there is reason to believe the incarcerated person is presently incompetent to be executed or there is reason to believe the incarcerated person is permanently incompetent to be executed.
- 14) Provides that the court may decline to hold a hearing if the parties stipulate that no hearing is necessary.
- 15) Provides that, when an incarcerated person proffers an expert opinion that the incarcerated person is incompetent to be executed, another expert’s opinion that concludes otherwise is an insufficient basis to deny a hearing.
- 16) Provides that a claim in a petition for writ of habeas corpus alleging permanent incompetence to be executed that was filed before January 1, 2023, and that is still pending, shall be treated as a petition filed alleging permanent incompetence after the judgment and sentence of death has been affirmed, as specified.
- 17) Requires a court to proceed to a hearing, as specified, if the court has already concluded that the petition made a prima facie showing of entitlement to relief, unless the parties stipulate otherwise.
- 18) Provides that a petition filed by an incarcerated person under sentence of death constitutes a petition for writ of habeas corpus and is subject to the requirements of a habeas petition.
- 19) Provides that a petition filed by an incarcerated person constitutes a claim that the petitioner is ineligible for a sentence of the death.

- 20) Says that it does not alter, change, or amend any of the statutory provisions of the Death Penalty Reform Act.
- 21) Authorizes an attorney acting on behalf of the incarcerated person who suspects that the incarcerated person may be incompetent to be executed to obtain an order from the superior court from which the incarcerated person's conviction and sentence arises directing the California Department of Corrections and Rehabilitation (CDCR) to release the incarcerated person's medical and psychiatric records to the attorney or the attorney's representative for use, as specified.
- 22) Provides that these provisions apply retroactively.
- 23) Authorizes the prosecuting agency and the incarcerated person under sentence of death to produce witnesses at any hearing held regarding a petition alleging an incarcerated person's permanent incompetence to be executed.
- 24) Requires a court, when it concludes there is reason to believe the incarcerated person is presently or permanently incompetent to be executed, to hear proof produced by either party.
- 25) Authorizes a court to compel the attendance of witnesses, by process of subpoena and attachment, and to perform all other acts necessary to a full and fair hearing and determination of the case.
- 26) Requires the court to issue a statement explaining the legal and factual basis for a decision on a petition alleging an incarcerated person's permanent incompetence to be executed.
- 27) Requires the court to deny the petition if the court finds by a preponderance of the evidence that the incarcerated person is competent to be executed.
- 28) Requires the court, if it finds that the incarcerated person is incompetent to be executed but does not find by a preponderance of the evidence that competence is unlikely to be restored, to order the warden to suspend the execution and order that the incarcerated person be taken to a CDCR medical facility and be kept in safe confinement until their competence to be execute is restored.

- 29) Requires the court, if the prosecuting agency alerts the court that it believes the incarcerated person's competence has been restored, to again initiate the procedure, as specified, and hold a hearing.
- 30) Provides that the prosecution bears the burden of proving by a preponderance of the evidence that the incarcerated person is competent to be executed.
- 31) Provides that a decision denying or granting the petition will be subject to review through a petition for a writ of mandate by either party.
- 32) Makes legislative findings and declarations.
- 33) Provides that the provisions of the bill are severable.
- 34) Repeals existing provisions of law that conflict with the provisions of this bill.

**FISCAL EFFECT:** Appropriation: No Fiscal Com.: Yes Local: No

**SUPPORT:** (Verified 8/8/22)

California Anti-Death Penalty Coalition (source)  
 California Attorneys for Criminal Justice  
 California Catholic Conference  
 California Public Defenders Association  
 Californians for Safety and Justice  
 Californians United for a Responsible Budget  
 Death Penalty Focus  
 Disability Rights California  
 Ella Baker Center for Human Rights  
 Friends Committee on Legislation of California  
 Initiate Justice  
 League of Women Voters of California  
 Los Angeles County District Attorney's Office  
 National Alliance on Mental Illness  
 National Association of Social Workers, California Chapter  
 Nextgen California  
 Smart Justice California  
 The Young Women's Freedom Center

**OPPOSITION:** (Verified 8/8/22)

None received

**ARGUMENTS IN SUPPORT:** The California Death Penalty Coalition supports this bill stating:

The California Anti-Death Penalty Coalition was formed in 2019, following Governor Newsom’s bold action to place a moratorium on executions. Our coalition is united by a shared respect for human rights, human dignity and life, and racial justice. We believe the death penalty is a reflection of an inherently punitive system of justice. We seek to promote alternatives that break the cycles of harm and to support those who suffer from violent crime.

The United States Supreme Court has concluded that the Eighth Amendment of the Constitution prohibits the execution of a person who is mentally incompetent<sup>1</sup> -- that is, someone who does not have the cognitive function to understand that they are being executed or the reasons why. Some incompetent people sentenced to death have long suffered from severe mental illness while others became incompetent as the result of severe brain injury. Currently, the most common cause of incompetence among people sentenced to death in California is dementia – a condition that is increasingly prevalent among the aging population sentenced to death in California.

To date, the California Attorney General has recognized that at least seven people sentenced to death are permanently incompetent and has urged the courts to resolve these cases, which the *Los Angeles Times* praised as an effort to “keep the state from wasting time and resources pursuing executions that are constitutionally barred from occurring.”<sup>2</sup> Although some courts have vacated a handful of death sentences of permanently incompetent people and resentenced them to life in prison without parole, at least one court has refused to consider a permanent incompetence petition until an execution date has been set.

AB 2657 requires courts to resentence people sentenced to death now if they are permanently incompetent, as established by a preponderance of the evidence, and eliminates the need for an execution date to be set. AB 2657 eliminates pointless litigation of post- conviction proceedings in capital cases in state and federal courts when a person has become

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<sup>1</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007)

<sup>2</sup> “Editorial: A sane approach to dealing with mentally ill death row inmates.” (2016, June 11). *The Los Angeles Times*.



permanently incompetent, thus saving California and federal government from wasting significant resources on futile litigation.

ASSEMBLY FLOOR: 56-18, 5/25/22

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Bloom, Boerner Horvath, Mia Bonta, Bryan, Calderon, Carrillo, Cervantes, Cooley, Daly, Mike Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gray, Grayson, Haney, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Santiago, Stone, Ting, Villapudua, Waldron, Ward, Akilah Weber, Wicks, Wilson, Wood, Rendon

NOES: Bigelow, Chen, Choi, Cunningham, Megan Dahle, Davies, Flora, Fong, Gallagher, Lackey, Mathis, Nguyen, Patterson, Salas, Seyarto, Smith, Valladares, Voepel

NO VOTE RECORDED: Berman, Cooper, Kiley, O'Donnell

Prepared by: Mary Kennedy / PUB. S. /  
8/10/22 14:24:55

\*\*\*\* END \*\*\*\*