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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair  
2021 - 2022 Regular

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**Bill No:** AB 2657                      **Hearing Date:** June 21, 2022  
**Author:** Stone  
**Version:** June 8, 2022  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** MK

**Subject:** *Incarcerated person's competence*

### HISTORY

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

**Prior Legislation:** AB 2512 (Stone) Chaptered 331, Stats. 2020  
SB 1381 (Pavley) Chapter 457, Stats. 2012  
SB 3 (Burton) Chapter 700, Stats. 2003  
SB 51 (Morrow) 2003, Failed Senate Public Safety  
AB 557 (Aroner) 2002; failed on Assembly Concurrence  
AB 1512 (Aroner) 2001; not heard in Assembly Appropriations  
AB 1455 (Isenberg) 1993-94; failed Assembly Floor

**Support:** California Attorneys for Criminal Justice; California Catholic Conference; Californians for Safety and Justice; 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 Association of Social Workers, California Chapter; NextGen California; Smart Justice California; The Young Women's Freedom Center

**Opposition:** None known

**Assembly Floor Vote:** 56 - 18

### PURPOSE

*The purpose of this bill is to change 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.*

*Existing law* 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)

*Existing law* 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)

*Existing law* 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)

*Existing law* 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)

*Existing law* 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)

*Existing law* 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)

*Existing law* requires the district attorney to attend the hearing, and authorizes the district attorney to produce witnesses before the jury. (Penal Code § 3702)

*Existing law* 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)

*Existing law* 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)

*Existing law* 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)

*Existing law* 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)

*Existing law* 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.)

*Existing law* requires the court, if the defendant appears without counsel, to appoint counsel to represent him at said hearing. (Penal Code § 3704)

*Existing law* 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)

*Existing law* 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* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* requires the court, during the course of the proceedings, to consider whether the petitioner is permanently incompetent to be executed, as specified.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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."

*This bill* 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.

*This bill* 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.

*This bill* provides that the court may decline to hold a hearing if the parties stipulate that no hearing is necessary.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* provides that a petition filed by an incarcerated person constitutes a claim that the petitioner is ineligible for a sentence of the death.

*This bill* says that it does not alter, change, or amend any of the statutory provisions of the Death Penalty Reform Act.

*This bill* 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.

*This bill* provides that these provisions apply retroactively.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* 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.

*This bill* provides that the prosecution bears the burden of proving by a preponderance of the evidence that the incarcerated person is competent to be executed.

*This bill* 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.

*This bill* makes legislative findings and declarations.

*This bill* provides that the provisions of the bill are severable.

*This bill* repeals existing provisions of law that conflict with the provisions of this bill.

## COMMENTS

### 1. Need for This Bill

According to the author:

AB 2657 authorizes California courts to act in a timely fashion to remove permanently incompetent people, who are ineligible for execution, from death row, and instead resentence them to life in prison without the possibility of parole.

So far, ten people on death row have asked California courts to determine that they are permanently incompetent. While some courts have vacated death sentences for permanently incompetent people, other courts refuse to consider incompetence petitions until an execution date has been set.

The bill eliminates pointless litigation of post-conviction proceedings in capital cases when a person has become permanently incompetent, thus preventing the California and federal government from wasting significant resources on futile litigation.

### 2. Brief Overview of California's Death Penalty:

California has the largest condemned population in the country. There are currently 691 people on death row. (<https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-summary-report/>) [last viewed Mar. 31, 2022].). As of November 2021, only 33 of them were eligible to be executed. (Committee on Revision of the Penal Code, Death Penalty Report (Nov. 2021) at p. 4 <[http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_DPR.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf)> [last visited Mar. 30, 2022].) According to the Commission on Revision of the Penal Code, “More than 1,000 people have been sentenced to death since 1978 in California, but no executions have occurred in the last 15 years. Only 13 executions have taken place since reinstatement of the death penalty in 1978. During that time, 235 death sentences have been reversed as unconstitutional or otherwise improper.” (*Ibid.*)

On March 13, 2019, Governor Gavin Newsom issued an executive moratorium on the death penalty. The order states that “death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation.” The order also ordered the death chamber at San Quentin to be shuttered. (Governor’s Exec. Order No. N-09-19 (Mar. 13, 2019).)

### 3. Unconstitutional to Execute Someone Who Is Incompetent

The Supreme Court has ruled that it is unconstitutional to execute someone who is mentally incompetent. (*Ford v. Wainwright* (1986) 477 U.S. 399). As Justice Marshall wrote,

[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this nation. Faced with such widespread evidence of a restriction upon sovereign power, this

Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. (*Ford v. Wainwright*, *supra*, at p. 409 [internal citations omitted].)

Two decades later, the Supreme Court considered whether the Eighth Amendment allowed for the “execution of a prisoner whose mental illness deprives him of the mental capacity to understand that he is being executed as a punishment for the crime.” (*Panetti v. Quarterman* (2007) 551 U.S. 930, 954.) The Court said it did not. In his opinion for the Court, Justice Kennedy explained, “The potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication are called into question...if the prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.” (*Id.* at 958-959.)

Despite this prohibition, persons who are permanently incompetent and thus cannot be executed have spent years on California’s death row. “What depths of insanity are involved here?,” The L.A. Times editorial board asked. “One inmate continually bangs his head against the wall, believing he is controlled by computer chips and says he dies every night only to be reborn the next morning. Another seesaws between delusions and catatonia, spending days at a time naked and smeared with his own feces on the floor of his cell.” (Editorial Board, *Editorial: A sane approach to dealing with mentally ill death row inmates*, L.A. Times (June 11, 2016) <<https://www.latimes.com/opinion/editorials/la-ed-death-row-mentally-ill-20160607-snap-story.html>> [Mar. 31, 2022].) Another person on death row “cascaded between mute catatonia and rabid mania, declaring he was decapitated by the governor of California”; he “has been barely able to grunt” since 2013. (St. John, *On California’s death row, too insane to execute*, L.A. Times (June 5, 2016) <<https://www.latimes.com/projects/la-me-ln-death-row/>> [last visited Apr. 1, 2022].) Another “speaks to a wife and child that do not exist” and “hoards his feces.” (*Ibid.*) An incompetent incarcerated person’s living condition have gotten so bad that corrections officers have had to don masks before entering his cell “to hose it down.” (*Ibid.*)

The Committee on Revision of the Penal Code found that, as of November 2021, at least six persons on death row may be permanently incompetent, and that the number is likely to grow as the death row population ages. (Death Penalty Report, *supra*, at p. 4.)

#### **4. California Commission on Revision of the Penal Code’s Death Penalty Report**

The Committee on Revision of the Penal Code was established to study and recommend statutory reforms to the Penal Code. (Gov. Code, § 8290.5.) In November 2021, the Committee issued a report on the history and practice of capital punishment in California. The Committee wrote, “More than forty years of experience have shown that the death penalty is the opposite of a simple and rational scheme,” concluding that the death penalty should be repealed. (Death Penalty Report, *supra*, at p. 4.) Until then, the Committee urged, among other things, the removal of people from death row who could not be executed because of permanent mental incompetence. It wrote:

The United States Supreme Court has... forbidden executing people who are “incompetent,” meaning they do not understand the nature of or reasons for their execution. California’s Attorney General has recognized two people on death row as “permanently incompetent,” individuals whose intellectual functioning or psychological conditions have deteriorated (such as from age-related dementia) so

dramatically during their incarceration that they have little likelihood of regaining competency. In seven other cases, the Attorney General has agreed that the issue of someone's permanent incompetence to be executed should be resolved because it may mean that the person could never be executed. This number is likely to increase with time as the death row population continues to age. There is no statute or clear legal process for resentencing these individuals to remove them from death row, creating confusion in the Superior Courts about how to proceed. (*Id.* at p. 28.)

The Commission recommended “modify[ing] existing statute regarding incompetence proceedings to create a clear process to resentence people who are permanently incompetent and cannot be legally executed.” (*Id.* at p. 7.)

This bill establishes a process as recommended by the Commission.

Generally the bill requires the secretary to select and appoint 3 psychiatrists or licensed psychologists to examine the incarcerated person and investigate and report whether the incarcerated person is competent to be executed. A copy of the report shall be provided to the incarcerated person, the Attorney General, the district attorney of the county in which the incarcerated person was sentenced, and to the Governor.

If there is good reason to believe that an incarcerated person has become incompetent to be executed the warden shall notify the district attorney of the county in which the incarcerated person was sentenced, the Attorney General, and the incarcerated person's counsel,. If the warden issues that notice, the Attorney General to file a petition, identifying that there is reason to believe that the incarcerated person is incompetent to be executed, with the court if the incarcerated person's counsel fails to file the petition or the incarcerated person does not have counsel.

If there is reason to believe the incarcerated person is presently incompetent to be executed, as specified, or if there is reason to believe the incarcerated person is permanently incompetent to be executed, this bill requires the court to hold a hearing. The bill would require the court to vacate the sentence or sentences of death if the court finds by a preponderance of the evidence that the incarcerated person is permanently incompetent to be executed, and would require the court to resentence the incarcerated person to life without the possibility of parole.

## 5. Argument in Support

The California Death Penalty Coalition opposes 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

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



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

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