

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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November 13, 2007

Opinion No. 07-151

Tenn. Code Ann. § 40-23-114(d)

QUESTION

In light of the recent decision by the United States District Court for the Middle District of Tennessee holding unconstitutional Tennessee's current three-drug protocol for carrying out executions by lethal injection, does Tenn. Code Ann. § 40-23-114(d) authorize the state now to proceed with an execution by means of electrocution when a death-sentenced prisoner has declined to exercise his statutory right to elect electrocution as the method of execution in his case?

OPINION

No. It is the opinion of this office that electrocution may be substituted as a method of execution for an inmate who has not chosen it only in the event that lethal injection is declared unconstitutional by the United States Supreme Court, Tennessee Supreme Court, or other appellate court specified in Tenn. Code Ann. § 40-23-114(d).

ANALYSIS

In the course of the litigation filed by Edward Jerome Harbison challenging the constitutionality of the three-drug protocol used by the Tennessee Department of Correction for carrying out executions by lethal injection in this state, the question arose under what conditions electrocution could be substituted for lethal injection. One justice of the Tennessee Supreme Court has suggested that if execution by lethal injection is found to be unconstitutional by a federal district court (and presumably a court at any level), then an execution may still proceed by electrocution pursuant to the language contained in the last sentence of Tenn. Code Ann. § 40-23-114(d). *State v. Harbison*, Order, No. M1986-00093-SC-OT-DD (Sept. 25, 2007) (Koch, J., dissenting); *see also Harbison v. Little*, Order, No. 3:06-1206 (Sept. 19, 2007) (enjoining use of state's lethal injection procedure but denying stay of execution based on last sentence of Tenn. Code Ann. § 40-23-114(d)).

It is the opinion of this office that the better reading of the statute is that electrocution may be substituted as a method of execution only in the event that lethal injection is declared unconstitutional by the United States Supreme Court, Tennessee Supreme Court, or other appellate court specified in Section 40-23-114(d).

Section 40-23-114 governs the method of execution to be used in capital cases. It states in full:

(a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.

(b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.

(c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.

(d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution. No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Tennessee or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

Section 40-23-114(a) specifies that the method for carrying out the punishment of death in Tennessee shall be by lethal injection. Subsection 114(b) provides that persons sentenced to the punishment of death for offenses committed prior to January 1, 1999, may elect to be executed by

electrocution by waiving in writing the right to be executed by lethal injection. Subsection 114(c) authorizes the department of correction to promulgate rules and regulations necessary to implement the section.

The first sentence in subsection 114(d) authorizes the state to use any other constitutional method of execution if lethal injection or electrocution is held unconstitutional by specified appellate courts. The second sentence provides that a death sentence shall not be “reduced” as a result of a method of execution being declared unconstitutional. The third sentence provides that a death sentence “shall remain in force” until it can be lawfully executed by any constitutional means if a method of execution is declared unconstitutional.

Tennessee’s transition from electrocution to lethal injection as the preferred method of carrying out death sentences was accomplished by two public acts. Public Chapter 982, adopted in 1998, specified that electrocution would be the method of execution for persons committing crimes prior to January 1, 1999, and that lethal injection would be the method of execution for persons committing crimes on or after that date. Persons committing crimes prior to January 1, 1999, could elect to be executed by lethal injection by signing a written waiver. Section 4 of the public chapter provided:

If the method of execution established by this Act is for any reason determined by a court of competent jurisdiction to be unconstitutional, the law establishing the method of execution as death by electrocution is revived and electrocution shall be the method of execution in this State. All statutory procedures, rules and departmental policy enacted or promulgated to effectuate a sentence of death by electrocution shall also be revived and shall be in full force and effect.

Public Chapter 614, adopted in 2000, significantly revised the statute governing methods of execution, resulting in the language currently found in Section 40-23-114. Public Chapter 614 effected two significant changes. The first was that persons committing crimes prior to January 1, 1999, would be executed by lethal injection unless they affirmatively chose death by electrocution, instead of being executed by electrocution unless they affirmatively chose death by lethal injection. The second was to modify the language governing successful constitutional challenges to the method of execution.

In interpreting the meaning of Section 40-23-114(d), we first look to the plain meaning of the language of the statute. The only sentence that speaks explicitly and unambiguously to the substitution of one method of execution for another is the first sentence of subsection 114(d). The sole purpose of the sentence is to authorize the substitution of one method of execution for another, and the sentence specifies in detail the limited circumstances under which that substitution can occur. Specifically, it can occur only if the method of execution is held unconstitutional by certain state and federal appellate courts. It does not allow substitution based on rulings of a federal district court or a state trial court.

In contrast, the other two sentences appear to address themselves primarily to the effect that a holding of unconstitutionality would have on a death sentence. The second sentence provides that the death sentence shall not be reduced by such a holding, and the third sentence states that the sentence shall remain in force. A similar directive is found in Tenn. Code Ann. § 40-23-117, which provides that when “from any cause” an inmate sentenced to death has not been executed, the sentence “stands in full force” and shall be carried into execution by the court in which the inmate was tried.

The conclusion that electrocution shall be substituted only if the method of lethal injection is found unconstitutional by certain appellate courts is supported by the legislative history of Public Chapter 614. According to the legislative debate, the Attorney General’s office participated in the drafting of the legislation that became the public chapter. *See, e.g.*, Tenn. House Jud. Comm., *Debate on House Bill 2978*, Mar. 1, 2000 (Statement of Rep. Jackson) (“the State Attorney General has worked closely with us ... has actually drafted the amendment to this bill....”); Tenn. Senate, *Debate on Senate Bill 2866*, Mar. 15, 2000 (Statement of Sen. Springer) (“Senator Rochelle, Amendment No. 1 was drafted in its entirety, as I understand it, by the Attorney General, so I would make the assumption that he has reviewed this.”). In testimony before the Senate Judiciary Committee, Attorney General Paul Summers stated the following about the language currently codified as subsection 114(d) (which in the bill is identified as amending subsection (e)):

It also provides a provision that we hope will reduce any appeals or any basis of appeals by making in Subsection E I believe it is ... making the provision that if a form of execution, lethal injection, or electrocution *is ever found to be unconstitutional by an appellate court*, then the method of execution that has not been found to be unconstitutional will be the default method.

Tenn. Senate Jud. Comm., *Debate on Senate Bill 2866*, Feb. 29, 2000 (Testimony of Att’y Gen. Paul Summers) (emphasis added). Accordingly, the testimony of the chief officer of the agency assisting in drafting the bill is that the substitution of electrocution as the method of execution would occur only if lethal injection were found unconstitutional by an appellate court.

Prior to the 2000 legislation, a finding of unconstitutionality by a trial court could persuasively have been argued to allow substitution of electrocution for lethal injection. Section 4 of Public Chapter 982, adopted in 1998 and replaced by Public Chapter 614 in 2000, provided that if lethal injection were determined “by a court of competent jurisdiction” to be unconstitutional, then the law establishing electrocution as the method of execution would be revived. The adoption of Section 4 illustrates that the General Assembly knew how to draft broad language that would allow substitution in response to any successful challenge to lethal injection. The repeal of Section 4 and the adoption of Public Chapter 614 illustrate that the General Assembly then chose to limit such substitution to successful appellate challenges.

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