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Texas Statutes Amended to Provide for Execution by Intravenous Injection of a Lethal Substance.

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STATUTE NOTE

CRIMINAL PROCEDURE—Capital Punishment—Texas Statutes Amended to Provide for Execution by Intravenous Injection of a Lethal Substance

Tex. Laws 1977, ch. 138, arts. 43.14 and 43.18, at 287-88.

On May 11, 1977, Texas became the second jurisdiction to provide statutorily for the execution of capital offenders by the intravenous injection of a lethal substance.[1] The revised law provides that the executioner will no longer be the Director of the Texas Department of Corrections, but rather a designee of the Director.[2]

In order to withstand constitutional challenge, a statute prescribing a method of execution must not be vague,[3] violate the prohibition against ex post facto legislation,[4] nor allow cruel and unusual punishment.[5] A statute is not unconstitutionally vague, generally, if its provisions are definite enough to be understood and consistently applied.[6] A law is ex post facto only when it creates or aggravates a crime, changes the rules of evidence, or increases the punishment for an activity which has already been performed.[7] As to the third potential challenge, courts have had difficulty in

1. Tex. Laws 1977, ch. 138, art. 43.14, at 287 provides that the sentence of death be executed "by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections." A similar law was enacted in Oklahoma one day earlier. *See* 1977 Okla. Sess. Law Serv., ch. 41, § 1014, at 89-90.

2. The law provides that "[t]he Director of the Texas Department of Corrections shall designate an executioner to carry out the death penalty provided by law." Tex. Laws 1977, ch. 138, art. 43.18, at 288.

3. *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950); Texas Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970); *Ex parte* Halsted, 182 S.W.2d 479, 482 (Tex. Crim. App. 1944).

4. U.S. CONST. art. I, § 10.

5. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Supreme Court in Francis v. Resweber, 329 U.S. 459, 464 (1947), held that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Accord,* Powell v. Texas, 392 U.S. 514, 531-32 (1968). *See generally* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law,* 79 HARV. L. REV. 635 (1966).

6. *Ex parte* Halsted, 182 S.W.2d 479, 482 (Tex. Crim. App. 1944); *see* American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950); Texas Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970).

7. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798); *cf.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (law which punished act not punishable when committed declared ex

precisely defining the parameters of the eighth amendment prohibition against cruel and unusual punishment.[8] The United States Supreme Court, however, has consistently held that the imposition of the death penalty is not cruel and unusual punishment per se,[9] and Texas courts have been in accord with this position.[10] To be considered violative of the eighth amendment, the means used to impose death must be "inhuman and barbarous, something more than the mere extinguishment of life."[11] This prohibition historically encompassed various types of torturous punishment[12] as well as any method calculated to cause unnecessary pain or a lingering death.[13]

Prior to 1923 the prescribed method of execution of capital offenders in Texas was hanging.[14] In 1923 the Texas Legislature, in an attempt to supplant an antiquated system of inflicting death with one it deemed more humane,[15] chose to incorporate electrocution as the state's new mode of capital punishment.[16] The legislature also designated the warden of the state penitentiary as executioner and further specified his replacement should he be unable to perform his duties.[17] Although minor changes were made concerning these procedures after 1923,[18] electrocution remained the

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post facto); Graham v. Thompson, 246 F.2d 805, 807 (10th Cir. 1957) (law which changed or increased punishment for act previously committed declared ex post facto); Johnson v. Morris, 557 P.2d 1299, 1303 (Wash. 1976) (en banc) (law which inflicted greater punishment for crime than that annexed to crime when committed declared ex post facto).

8. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 258 (1972) (concurring opinion); Trop v. Dulles, 356 U.S. 86, 99 (1958); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878).

9. *See, e.g.*, Gregg v. Georgia, ___ U.S. ___, ___, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859, 882-83 (1976); Jurek v. Texas, ___ U.S. ___, ___, 96 S. Ct. 2950, 2954, 49 L. Ed. 2d 929, 936 (1976); Proffitt v. Florida, ___ U.S. ___, ___, 96 S. Ct. 2960, 2964, 49 L. Ed. 2d 913, 920 (1976); Furman v. Georgia, 408 U.S. 238, 241 (1972) (concurring opinion); *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878).

10. *See, e.g.*, Livingston v. State, 542 S.W.2d 655, 662 (Tex. Crim. App. 1976); Cherry v. State, 488 S.W.2d 744, 755 (Tex. Crim. App.), *cert. denied*, 411 U.S. 909 (1972); David v. State, 453 S.W.2d 172, 179 (Tex. Crim. App. 1970).

11. *In re* Kemmler, 136 U.S. 436, 447 (1890); *accord*, Weems v. United States, 217 U.S. 349, 370 (1910).

12. *See, e.g.*, State v. Williams, 77 Mo. 310, 312-13 (1883) (drawing and quartering, cutting off ears and limbs, burning alive, starvation, boiling alive); *In re* Calhoun, 94 N.E.2d 388, 391 (Ohio Ct. App. 1949) (drawing and quartering, cutting off ears and limbs, disemboweling); Hart v. Commonwealth, 109 S.E. 582, 587 (Va. 1921) (drawing and quartering).

13. *See* Estelle v. Gamble, ___ U.S. ___, ___, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976); *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135 (1878).

14. An Act Punishing Crimes and Misdemeanors, § 52 (1836), 1 H. GAMMEL, LAWS OF TEXAS 1254-55 (1898).

15. *See* Tex. Laws, 2d Spec. Sess. 1923, ch. 51, § 14, at 113-14.

16. *See id.* § 1, at 111.

17. *Id.* § 2, at 111.

18. *See, e.g.*, Tex. Laws 1975, ch. 341, § 6, at 911 (changing executioner); Tex. Laws 1965, ch. 722, art. 43.18, at 507 (changing executioner); Tex. Laws 1951, ch. 423, § 1, at 772 (changing executioner).

method of imposing the death penalty in Texas from its initial authorization to the present.[19]

Recently the Texas Legislature again changed the method of imposing the death penalty. The amended statute provides that death shall be caused by the intravenous injection of a lethal substance.[20] The person designated as executioner has also been changed to allow the Director of the Texas Department of Corrections to appoint an executioner to administer the lethal dose.[21]

The legislation changing the manner of execution was introduced primarily because of a belief by proponents that death by lethal injection is more humane and more dignified than death by electrocution.[22] Opposition to the amendment, however, was based primarily upon a conviction that capital punishment imposed by any method, including lethal injection, is cruel and unusual,[23] although other reasons for opposition were cited.[24] While it is unclear whether lethal injection is in fact cruel and unusual, the characterization of all forms of capital punishment as cruel and unusual appears erroneous in light of the numerous decisions upholding death as a constitutionally permissible punishment.[25]

Any criminal law, in order to be valid, must not violate the constitutional prohibition against ex post facto legislation.[26] In an early decision the Supreme Court defined an ex post facto law as "one which renders an act punishable in a manner in which it was not punishable when . . . committed."[27] The Court retreated somewhat from this position in *Rooney v. North Dakota*,[28] where it held that a change in the manner or extent of

19. *See* TEX. CODE CRIM. PROC. ANN. art. 43.14 (1966).

20. Tex. Laws 1977, ch. 138, art. 43.14, at 287.

21. *Id.* art. 43.18, at 288.

22. Interview with Ben Z. Grant, Member, Texas House of Representatives and sponsor of H.B. 945, by telephone, in Marshall, Texas (July 26, 1977).

23. H.B. 945 on Third Reading, TEX. H.R.J. 1918 (1977) (Representative George Leland's disapproval of capital punishment in any form); Interview with Joe L. Hernandez, Member, Texas House of Representatives, by telephone, in San Antonio, Texas (July 26, 1977); Interview with Lou Nelle Sutton, Member, Texas House of Representatives, by telephone, in San Antonio, Texas (July 26, 1977); Interview with Ron Waters, Member, Texas House of Representatives, by telephone, in Houston, Texas (July 26, 1977).

24. Interview with T.H. McDonald, Sr., Member, Texas House of Representatives, by telephone, in Mesquite, Texas (July 26, 1977) (stating lethal injection not sufficiently severe punishment for those who have committed violent crimes); Interview with Ron Wilson, Member, Texas House of Representatives, by telephone, in Houston, Texas (July 26, 1977) (stating fear that juries may hand down more death sentences under new law).

25. See cases cited note 9 *supra*.

26. U.S. CONST. art. I, § 10. In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) the Supreme Court stated that "a law is ex post facto only where it creates or aggravates the crime or *increases the punishment* or changes the rules of evidence for the purpose of conviction." *Id.* at 390-91 (emphasis added).

27. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

28. 196 U.S. 319 (1905).

punishment is not ex post facto when the punishment is mitigated by the change or if the change is of no practical consequence to the prisoner.[29] This principle was subsequently applied to a case dealing specifically with a change in the mode of execution in *Malloy v. South Carolina.*[30] There the Court held that the prohibition against ex post facto legislation does not apply to the "mere alteration in conditions deemed necessary for the orderly infliction of humane punishment."[31] Further it noted that producing death by electocution rather than by hanging did not increase the punishment and therefore was not unconstitutional under the ex post facto prohibition of the Federal Constitution.[32] In *Ex parte Johnson*[33] the Texas Court of Criminal Appeals, citing the decision in *Malloy,* held that a criminal convicted and sentenced to die by hanging could instead be electrocuted without violating the ex post facto provision of the Constitution.[34] The court stated further that the use of the phrase "by hanging until dead" recited during sentencing was merely surplusage and therefore did not explicitly require that the sentence of death be carried out in that manner.[35] Thus, it appears reasonable to conclude from a logical extension of the *Malloy* and *Johnson* holdings that execution by lethal injection may be imposed upon a criminal sentenced to die by electrocution without violating the constitutional prohibition against ex post facto legislation.

A statute may be deemed unconstitutionally vague unless its provisions are readily susceptible to a definite understanding and application.[36] While absolute clarity is not required, a reasonable degree of certainty is necessary in order to prevent the invalidation of the statute because of unconstitutional vagueness.[37] The new capital punishment statute in Texas authorizes the intravenous injection of a lethal substance,[38] but neither the *exact* substance to be injected nor the procedures surrounding the administration of the lethal dose are expressly set forth.[39] Where similar wording has

29. *Id.* at 326.

30. 237 U.S. 180 (1915).

31. *Id.* at 183.

32. *Id.* at 184-85; *accord,* Hernandez v. State, 32 P.2d 18, 24 (Ariz. 1934); Woo Dak San v. State, 7 P.2d 940, 941 (N.M. 1931); State *ex rel.* Pierre v. Jones, 9 So. 2d 42, 46 (La.), *cert. denied,* 317 U.S. 633 (1942); State v. Gee Jon, 211 P. 676, 681 (Nev. 1923); Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943); McInturf v. State, 20 Tex. Crim. 335, 353 (1886).

33. 96 Tex. Crim. 473, 258 S.W. 473 (1924).

34. *Id.* at 474-75, 258 S.W. at 473.

35. *Id.* at 474, 258 S.W. at 473.

36. *Ex parte* Halsted, 182 S.W.2d 479, 482 (Tex. Crim. App. 1944); *see* American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950); Texas Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970).

37. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); *see* Roth v. United States, 354 U.S. 476, 491 (1957); United States v. Wise, 550 F.2d 1180, 1186 (9th Cir. 1977).

38. Tex. Laws 1977, ch. 138, art. 43.14, at 287-88.

39. *See id.* at 287-88.

been used in statutes authorizing death by the administration of a lethal gas,[40] several courts have held that such wording is not unconstitutionally vague merely because the exact substance and procedures are not specified in the statute.[41] In *State v. Gee Jon*[42] the Nevada Supreme Court conceded that a gas could be selected which would produce a painful death. It was assumed, however, that "the officials entrusted with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment."[43] The court noted that to invalidate a law merely because the possibility existed that a pain-producing gas might be selected would effectively limit the role modern science plays in the search for a more humane method of execution.[44] This same rationale has been exhibited by the California courts, and the United States Supreme Court has refused to rule that the California statute is unconstitutionally vague.[45] Since a similar challenge to the new Texas injection statute would be one of first impression, it is only speculation as to what the courts may decide.

Although intravenous injection of a lethal substance has never been authorized as a means of execution in the United States, it does not appear that this method will be deemed violative of the eighth amendment merely because it is new and unusual. Previous changes in the mode of execution have been evaluated by an "evolving standard of decency" in light of public opinion and social progress.[46] So long as the manner of execution is not deemed inhumane and barbarous, the fact that it has never been used before does not make it "unusual" as forbidden by the Constitution.[47]

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40. *See* CAL. PENAL CODE § 3604 (Deering 1971); NEV. REV. STAT. § 176.355(1) (1973).

41. *In re* Anderson, 447 P.2d 117, 130, 73 Cal. Rptr. 21, 34 (1968) (en banc), *cert. denied*, 406 U.S. 971 (1972); People v. Daugherty, 256 P.2d 911, 922-23 (Cal.), *cert. denied*, 346 U.S. 827 (1953); State v. Gee Jon, 211 P. 676, 682 (Nev. 1923). There are no cases that indicate a contrary result.

42. 211 P. 676 (Nev. 1923).

43. *Id.* at 682.

44. *Id.* at 682.

45. *See In re* Anderson, 447 P.2d 117, 130, 73 Cal. Rptr. 21, 34 (1968), *cert. denied*, 406 U.S. 971 (1972); People v. Daugherty, 256 P.2d 911, 922-23 (Cal.), *cert. denied*, 346 U.S. 827 (1953).

46. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958). The phrase cruel and unusual "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101; *accord*, Weems v. United States, 217 U.S. 349 (1910). What is cruel and unusual "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378; *see* Estelle v. Gamble, ___ U.S. ___, ___, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 258-59 (1976).

47. *See In re* Storti, 60 N.E. 210, 210-11 (Mass. 1901).

> When . . . the means adopted [to adminster the death penalty] are chosen with . . . intent, and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, . . . they are not forbidden by the constitution, although they should be discoveries of recent science and never should have been heard of before. . . . The word "unusual" . . . cannot be taken so broadly as to prohibit every

The eighth amendment prohibition against cruel and unusual punishment is directed generally at the method and kind of punishment imposed.[48] Since death is a constitutionally permissible type of punishment,[49] the constitutionality of this new method of execution in Texas will likely depend upon the procedures and substances used to administer the sentence.[50] The substance and procedures selected to perform the execution must not inflict undue pain or cause a lingering death in order to withstand the expected eighth amendment challenge.[51] The substance selected by the Department of Corrections to serve as the lethal dose is sodium thiopental.[52] Several medical experts have exhibited a belief that death by intravenous injection of this substance or a similar barbituate will be swift[53] and painless.[54] It appears, therefore, that the new statute will be within the acceptable criteria of the eighth amendment so long as sodium thiopental

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humane improvement not previously known. . . .

Id. at 210-11.

48. *See* Powell v. Texas, 392 U.S. 514, 531-32 (1968); Francis v. Resweber, 329 U.S. 459, 464 (1947). Recent Supreme Court decisions have expanded the scope of the eighth amendment to protect against the arbitrary and capricious actions of juries in death penalty cases. *See, e.g.*, Gregg v. Georgia, ___ U.S. ___, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Jurek v. Texas, ___ U.S. ___, 96 S. Ct. 2950, 49 L. Ed. 2d 949 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

49. See cases cited note 9 *supra.*

50. *See* Francis v. Resweber, 329 U.S. 459, 464 (1947) where the Court stated "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment. . . ." *Id.* at 464.

51. See cases cited notes 12-13 *supra.*

52. Interview with Ron Taylor, Spokesman for the Texas Department of Corrections, by telephone, in Huntsville, Texas (Sept 8, 1977). "Sodium Thiopental is an ultrashort-acting depressant of the central nervous system which induces hypnosis and anesthesia, but not analgesia. It produces hypnosis within 30 to 40 seconds of intravenous injection." PHYSICIANS' DESK REFERENCE at 540 (30th ed. 1976). *See generally* R. DRIPPS, J. ECKENHOFF & L. VANDAM, INTRODUCTION TO ANESTHESIA: THE PRINCIPLES OF SAFE PRACTICE 179-184 (3rd ed. 1967).

53. One physician estimated that unconsciousness would occur within a matter of seconds with death occurring a few minutes thereafter. Interview with Dr. Roy Chapman, Oklahoma State Medical Examiner, by telephone, in Oklahoma City, Oklahoma (July 27, 1977). Another physician estimated that unconsciousness would occur within three to five seconds and death would follow within two to four minutes. Interview with Dr. Charles A. Walton, Assistant Dean for Clinical Programs, University of Texas Health Science Center at San Antonio, by telephone, in San Antonio, Texas (July 28, 1977). An extensive British study indicated that death would occur within one to two minutes. ROYAL COMMISSION ON CAPITAL PUNISHMENT 257 (1953).

54. Dr. Roy Chapman believes that death by injection would be like "drawing a curtain" with no discomfort whatsoever. Interview with Dr. Roy Chapman, Oklahoma State Medical Examiner, by telephone, in Oklahoma City, Oklahoma (July 27, 1977). Dr. Charles A. Walton stated a belief that the subject would feel nothing at all. Interview with Dr. Charles A. Walton, Assistant Dean for Clinical Programs, University of Texas Health Science Center at San Antonio, by telephone, in San Antonio, Texas (July 28, 1977). The British survey indicated that the subject would feel nothing after the prick of the needle. ROYAL COMMISSION ON CAPITAL PUNISHMENT 257 (1953).

or a drug exhibiting similar characteristics is used.

An additional problem which may confront those selected to administer the lethal dose concerns the difficulty with the procedure of venipuncture itself. Often venipuncture is difficult and, in some instances, impossible when the person to be injected possesses certain physical abnormalities.[55] This problem may be overcome, however, by surgically exposing the vein with little or no pain to the subject.[56] At least one physician has expressed doubts as to whether a doctor could perform this surgery without violating the Hippocratic oath.[57] If the surgery could not be performed and venipuncture therefore was infeasible, execution of the convict under the new statute would be impossible since no alternative to intravenous injection is provided.[58]

It appears certain that the substance selected to extinguish life under the new statute will guarantee a swift and painless death. There is little doubt, therefore, that the statute will fall well within the acceptable criteria of the eighth amendment. Furthermore, in light of the decisions in *Malloy* and *Johnson,* death row inmates originally sentenced to die by electrocution may now be executed by lethal injection without violating the constitutional prohibition against ex post facto legislation. One viable challenge, however, may be on the grounds that the statute is unconstitutionally vague. If Texas courts follow the lead of Nevada and California in their interpretation of the statute, such a challenge clearly will fail.

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55. The Royal Commission stated that physical abnormalities such as flat veins or fat covered veins would make venipuncture difficult in 1 in 500 cases and impossible in 1 in 3000. ROYAL COMMISSION ON CAPITAL PUNISHMENT 258 (1953). Dr. Walton stated that aside from the abnormalities mentioned by the Royal Commission's report, trauma caused by the prisoner's surroundings might cause dehydration and consequently make venipuncture extremely difficult. Interview with Dr. Charles A. Walton, Assistant Dean for Clinical Programs, University of Texas Health Science Center at San Antonio, by telephone, in San Antonio, Texas (July 28, 1977).

56. Dr. Walton stated that this surgery, known as a "cut-down procedure" is often used when venipuncture of hospital patients becomes difficult. Interview with Dr. Charles A. Walton, Assistant Dean for Clinical Programs, University of Texas Health Science Center at San Antonio, by telephone, in San Antonio, Texas (July 28, 1977).

57. *Id.*

58. *See* Tex. Laws 1977, ch. 138, art. 43.14., at 287.