STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 14-29

Constitutionality of Electrocution If Lethal Injection Unavailable

QUESTION

Whether Senate Bill 2580/House Bill 2476 of the 108th Tennessee General Assembly (hereinafter "SB2580"), which would permit the use of electrocution in executions if the ingredients required for execution by lethal injection are unavailable, violates any provision of the Tennessee and United States Constitutions.

OPINION

No. SB2580 is constitutionally defensible under current authority.

ANALYSIS

SB2580 would amend Tenn. Code Ann. § 40-23-114 by adding a new subsection:

> (e) For any person who commits and [sic] offense on or after July 1, 2014, for which the person is sentenced to the punishment of death, the method of carrying out the sentence shall be by lethal injection unless subdivision (e)(1) or (e)(2) is applicable. If subdivision (e)(1) or (e)(2) is applicable, the method of carrying out the sentence shall be by electrocution. The alternative method of execution shall be used if:
>
> > (1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction in the manner described in subsection (d); or
> >
> > (2) The commissioner of correction certifies to the governor that one (1) or more ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.

S.B. 2580, 108th Gen. Assem., § 1 (2014).

The most likely constitutional challenge to the proposed legislation would be that electrocution as a method of execution constitutes cruel and unusual

punishment. The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The current Tennessee Constitution likewise directs "[t]hat excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Tenn. Const. art. I, § 16. "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890).

The United States Supreme Court has rejected challenges to electrocution as a method of capital punishment, although the Court has not addressed this subject recently. *See In re Kemmler*, 136 U.S. at 449 (affirming New York's imposition of electrocution as a means of capital punishment); *see also Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 464 (1947) (subjecting prisoner to electrocution for a second time did not constitute cruel and unusual punishment).

The United States Court of Appeals for the Sixth Circuit has affirmed the constitutionality of electrocution more recently. *See In re Sapp,* 118 F.3d 460 (6th Cir. 1997). In *Sapp,* the Sixth Circuit upheld the district court's determination that it lacked jurisdiction to consider a petition to stay an execution by the State of Ohio. The Court further found that even if jurisdiction were proper, the inmate's constitutional challenge to death by electrocution was not likely to succeed on the merits.

> Electrocution has never been found to be cruel and unusual punishment by any American court. No legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently-effective court decision. The very practice of electrocution has been upheld by other courts within the past year, and there is no argument even plausible that there are differences in the level of "evolving decency" among the different circuits or states of the union, or over the last very few years.

Id. at 464 (citations omitted). The Sixth Circuit has cited the holding in *In re Sapp* with approval in several subsequent cases. *See, e.g., Williams v. Bagley,* 380 F.3d 932, 965 (6th Cir. 2004) (also noting that challenge to electrocution was moot because lethal injection is now designated as sole means of execution in Ohio); *Smith v. Mitchell,* 348 F.3d 177, 214 (6th Cir. 2003); *Buell v. Mitchell,* 274 F.3d 337, 370 (6th Cir. 2001) (noting that Ohio allows choice between electrocution and lethal injection and that "[e]lectrocution has yet to be found cruel and unusual punishment by any American court. We decline to be the first.") (citation omitted); *Greer v. Mitchell,* 264 F.3d 663, 691 (6th Cir. 2001) (noting that constitutionality of electrocution has been consistently upheld and that Ohio allows alternative choice

of lethal injection). *See also Moore v. Rees,* No. 06-CV-22-KKC, 2007 WL 1035013, at *9 (E.D. Ky. Mar. 30, 2007) ("Nor is there any reason to believe that in the six years since the Sixth Circuit's decisions in *Buell* and *Greer* the polity has undergone any sea change in its 'evolving standards of decency' with respect to electrocution.")

Current precedent, however, would not necessarily immunize the legislation from constitutional challenge. In *Trop v. Dulles*, 356 U.S. 86 (1958), the United States Supreme Court noted that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. The Court has also commented that Eighth Amendment issues are examined "in light of contemporary human knowledge." *Robinson v. California,* 370 U.S. 660, 666 (1962). More recently, the Nebraska Supreme Court held that electrocution was unconstitutional under its state constitution, whose cruel-and-unusual-punishment language mirrors that of the federal and Tennessee Constitutions. *See State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). The court noted that it had upheld electrocution as constitutional as recently as 2000 but stated that its previous decision had not relied on a factual record "showing electrocution's physiological effects on a prisoner." The court also noted that Nebraska was the only state imposing electrocution as its sole method of execution. *Mata,* 275 Neb. at 32, 745 N.W.2d at 256-57.

If enacted as proposed, SB2580's conditional imposition of electrocution would be defensible against a challenge under the constitutional prohibition against cruel and unusual punishment.

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