



REPORT TO THE GOVERNOR

**LETHAL INJECTION AS A CONSTITUTIONAL  
METHOD OF ENFORCING A SENTENCE OF  
DEATH**

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By

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Volume II of II

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## The statute

The statute which defines Nebraska's method of execution is currently Neb.Rev.Stat. Section 29-2532 (Reissue 1995); Laws 1973, LB 268, section 17.

## History

### *State v. Mata*

The method of execution established by Section 29-2532 (electrocution) was found to violate the Nebraska Constitution's "cruel and unusual punishment" clause in *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (Feb. 8, 2008).

### *Baze v. Rees*

On April 16, 2008, the Supreme Court of the United States found that the lethal injection protocol employed by the State of Kentucky did not violate the Eighth Amendment of our federal constitution in *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1520 (2008).

Lethal injection as a generic method of execution does not appear to be considered by any Justice of the Court to be *per se* cruel or unusual.

The *Baze* opinion noted that 27 states currently have lethal injection as their sole method of execution. Nine states provide for lethal injection as one of alternative methods of execution. Thirty of the 36 States employing lethal injection as their method of execution employ the same three substances as does Kentucky.<sup>1</sup> The federal government also employs lethal injection.

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<sup>1</sup> *Baze*, 128 S.Ct. at 1527, FN1. Kentucky employed three substances to cause the death of the condemned, injected in this order: (1) sodium thiopental (to render the prisoner unconscious); (2) pancuronium bromide (to paralyze); (3) potassium chloride (to induce cardiac arrest).

## Possible legislation

There are two distinct levels of an execution process: (1) the method of execution authorized by statute; and (2) the protocol for conducting an execution created and maintained by the government entity charged with the responsibility of enforcing a court-imposed sentence of death. Here we address possible legislation.

In order for Nebraska to have a constitutionally valid method of enforcing a valid sentence of death, Section 29-2532 must be amended. Although variations on how language authorizing lethal injection as a method of execution could vary extensively, we offer three alternatives here.

OPTION #1: Identity of substances and procedures delegated.<sup>2</sup>

A sentence of death shall be enforced by the intravenous injection of a substance or substances in a quantity sufficient to cause death. The lethal substance or substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services.

OPTION #2: Substances defined.<sup>3</sup>

A sentence of death shall be enforced by the intravenous injection of (1) an ultra-short-acting barbiturate, (2) followed by the injection of a chemical paralytic agent, (3) followed by the injection of a chemical causing cardiac arrest or another equally effective substance. The lethal substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services.

OPTION #3: Substances specifically identified.

A sentence of death shall be enforced by the intravenous injection of lethal quantities of each of the following substances in the following order: (1) sodium thiopental; (2) pancuronium bromide; and (3) potassium chloride. The lethal substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services.

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<sup>2</sup> Language similar to that of 22 states and the federal government.

<sup>3</sup> Ten states require the use of two drugs described as: "an ultra-short-acting barbiturate and a chemical paralytic agent." Three states require the use of three substances described as: an ultra-short-acting barbiturate; a chemical paralytic agent and potassium chloride.

## Recommendation: Option #1

We strongly recommend Option #1 for the following reasons:

- Twenty two States and the federal government currently employ similar language.
- Such language allows the administrative professionals to whom responsibility for conducting an execution is delegated the flexibility to comprehensively study, create and modify an execution protocol which combines current national practice and local needs/requirements/necessities.
- Such language allows the execution protocol be administratively modified should judicial decisions, advancing medical knowledge, national practice or local opinion recommend a change in an existing protocol.

We also recommend additional statutory amendments. See Attachment #2. These are recommended for two reasons. First, to allow a change to Option #1. Second, many of Nebraska's execution statutes have not been amended for years. Current statutes do not necessarily reflect the current organization and facilities of the Department of Correctional Services; do not reflect current case law on the judicial administration of the death penalty; do not anticipate the current litigation and media realities of the death penalty.

### Issues to be left for inclusion in a protocol

As we have recommended adoption of language similar to Option #1, the following matters under that option would be left to the creation of an execution protocol by the Department of Correctional Services. Nonetheless, we believe the considerations noted below are significant and should be seriously considered in either a protocol or legislative format.

In *Baze*, five justices found the Kentucky protocol did not violate the Eighth Amendment's Cruel and Unusual Punishments Clause. Two other justices concurred in the result in *Baze* without approving the Kentucky protocol.

Dissenters (Ginsburg and Souter) filed an opinion indicating that if the Kentucky lethal injection protocol contained "basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs"<sup>4</sup> that they would have found the protocol constitutional. "[I]f readily available measures can materially increase the likelihood that the protocol will cause no pain, a State fails to adhere to contemporary standards of decency if it declines to employ those measures."<sup>5</sup> The dissenting opinion cites certain "consciousness checks" following administration of the sodium thiopental as

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<sup>4</sup> *Id.*, 128 S.Ct. at 1567 (Ginsburg, dissenting).

<sup>5</sup> *Id.*, 128 S.Ct. at 1569 (Ginsburg, dissenting).

required by the Eighth Amendment in order to verify that the condemned will feel no pain during the administration of the remaining substances:

- Calling out the condemned's name
- Shaking the condemned
- Brushing the eyelashes of the condemned
- Applying a noxious stimulus<sup>6</sup>

The dissenters reference the execution protocols of Florida, Missouri, California and Alabama as containing such "consciousness checks".<sup>7</sup>

In our professional judgment, adoption of a protocol that includes some or all of the "consciousness checks" described in the Ginsburg dissent in *Baze* would arguably receive 9 favorable votes from the current Court.

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<sup>6</sup> *Id.*, 128 S.Ct. at 1569 (Ginsburg, dissenting).

<sup>7</sup> *Id.*, 128 S.Ct. at 1570-1571 (Ginsburg, dissenting).

## SUGGESTED AMENDMENTS

§ 29-2532. Mode of inflicting punishment for death. Transferred to § 83-964.

§ 29-2533. Punishment inflicted; exclude view of persons; exception.  
Transferred to § 83-969.

§ 29-2534. Execution; persons permitted. Transferred to 83-970.

§ 29-2535. Warden ~~Director of the Department of Correctional Services;~~  
military force necessary to carry out punishment; inform Governor.  
Transferred to 83-971.

§ 29-2536. Warden ~~Director of the Department of Correctional Services;~~  
inflict punishment; return of proceedings; clerk of court; duty. Transferred  
to 83-972.

§ 29-2537. Convict; appears to be mentally incompetent; notice to judge;  
suspend sentence; commission appointed; findings; suspension of  
execution; when.

If any ~~convict~~ **prisoner** under sentence of death shall appear to be mentally incompetent, the ~~warden~~ Director of the Department of Correctional Services ~~or sheriff having him or her in custody~~ shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such ~~prisoner~~ **convict**.

**The standard for the determination of competency under this statute shall be the same as the standard for determining competency to stand trial.**

If ~~he or she~~ **the court** shall determine that there is not sufficient reason for the appointment of a commission, ~~he or she~~ **the court** shall so find and refuse to suspend the execution of the convict. If the ~~judge~~ **court** shall determine that a commission ought to be appointed to examine such ~~convict~~ **prisoner**, ~~the court~~ **he or she** shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such ~~convict~~ **prisoner** was sentenced, and, if necessary, the ~~judge~~ **court** shall suspend the execution and appoint **a panel of three licensed mental health professionals employed by the State** ~~the three superintendents of the state centers at Lincoln, Hastings, and Norfolk~~ as a commission to examine such ~~convict~~ **prisoner**. The commission shall examine the convict to determine whether he or she is ~~mentally-competent~~ or ~~mentally-incompetent~~ and shall report its findings in writing to such ~~judge~~ **the court** within ten days after its appointment. ~~If for any reason any of such~~

~~superintendents cannot serve in such capacity, the judge shall appoint in his or her place one of the assistant superintendents of such center. If two of the commission shall find the convict mentally prisoner incompetent, the judge court shall suspend his or her execution until further order. Thereafter, the court shall appoint a commission annually to review the prisoner's competency and that the results of that review be provided the court. Any time thereafter, when it shall be made to appear to the judge court that the convict has become mentally competent, he or she shall appoint a commission in the manner provided in this section, who shall make another investigation as to the mental competency of the convict,. If the prisoner is subsequently found to be competent by two members of the commission, the court shall certify that finding to the Nebraska Supreme Court which shall then establish a date for the enforcement of the prisoner's sentence. and in case such convict is again declared mentally incompetent his or her execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent.~~

**§ 29-2538. Suspension of execution pending investigation; convict found sane; judge; appoint a day of execution.**

~~If a court in case such judge has suspended the execution of the prisoner convict pending an investigation as to his or her competency sanity, and the date for the enforcement of the prisoner's sentence has passed, and the prisoner is convict shall be found to be competent sane, the court shall certify that finding to the Nebraska Supreme Court which judge shall appoint a day for the enforcement of the prisoner's sentence. his execution, which shall be carried into effect in the same manner as provided in the original sentence, a certified copy of which shall be transmitted by mail to the executioner.~~

**§ 29-2539. Commission members; mileage; payment.**

The members of such commission shall each receive mileage at the rate authorized in section 81-1176 for state employees for each mile actually and necessarily traveled in reaching and returning from the place where the convict prisoner is confined and examined, and it is hereby made the duty of the commission to act in this capacity without compensation other than that already provided for them by law. All of the findings and orders aforesaid shall be entered in the district court records of the county wherein the convict was originally tried and sentenced, and the costs therefore, including those providing for the mileage of the members of the commission, shall be allowed and paid in the usual manner by the county in which the prisoner convict was tried and sentenced to death.

**§ 29-2540. Female convict; pregnant; warden ~~Director of the Department of Correctional Services~~ notify judge; procedures.**

If a female convict under sentence of death shall appear to be pregnant, the ~~warden~~ **Director of the Department of Correctional Services** ~~or sheriff~~ shall in like manner notify the judge of the district court of the county in which she was sentenced, who shall in all things proceed as in the case of a mentally incompetent convict.

**§ 29-2541. Female convict; finding convict is pregnant; judge; duties; costs.**

If the commission shall find that the female convict is pregnant, the judge shall suspend the execution of her sentence. At such time as it shall be determined that such woman is no longer pregnant, the judge shall appoint a ~~time date~~ **date** for her execution **and a warrant directing the enforcement of the sentence shall be delivered to the Director of the Department of Correctional Services,** ~~which shall be carried into effect in the same manner as provided in the original sentence.~~ The costs and expenses thereof shall be the same as those provided for in the case of a mentally incompetent convict and shall be paid in the same manner.

**§ 29-2542. Escaped convict; return; notify Governor Nebraska Supreme Court; fix time of execution.**

If any person who has been convicted of a crime punishable by death, and sentenced to ~~be electrocuted~~ **death**, shall escape, and shall not be retaken before the time fixed for his execution, it shall be lawful for the ~~warden~~ **Director of the Department of Correctional Services**, or any sheriff or other officer or person to rearrest such person and return him to the custody of the ~~warden of the Nebraska Penal and Correctional Complex~~ **Director**, who shall thereupon make return thereof to the Governor of the state, and the Governor shall thereupon **notify the Nebraska Supreme Court that such person has been returned to custody. Upon receipt of that notice, the Nebraska Supreme Court shall then issue a warrant, fixing a date for the enforcement of the sentence and appointing a day for the execution, which shall be delivered to the Director. The date of execution shall be set no later than 60 days following the issuance of the warrant.**

~~carried into effect by the warden in the same manner as herein provided in sections 83-964 through 83-972 for the execution of an original sentence of death.~~

**§ 29-2543. Establishing date of execution. ~~Person convicted of crime punishable by death; clerk of court; warrant; remove convicted person to Department of Correctional Services adult correctional facility.~~**

Whenever any person has been tried and convicted before any district court in this state of a crime punishable by death and under the conviction has been sentenced by the court to suffer death, and that sentence of death has been affirmed by the Nebraska Supreme Court on mandatory direct review, it shall be the duty of the Nebraska Supreme Court to issue a warrant, under the seal of the court, reciting therein the conviction and sentence and establishing a date for the enforcement of the sentence directed to the warden of the Nebraska Penal and Correctional Complex Director of the Department of Correctional Services, commanding him or her to proceed at the time named in the warrant. ~~the sentence~~ The date of execution shall be set no later than 60 days following the issuance of the warrant.

Thereafter, if the initial execution date has been stayed and the original execution date has expired, the Nebraska Supreme Court shall establish a new date for the enforcement of the sentence upon receipt of notice from the Attorney General that the stay of execution is no longer in effect, and issue its warrant to the Director. The date of execution shall be set no later than 60 days following the issuance of the warrant. ~~to carry the same into execution by causing the person so convicted and sentenced to be electrocuted by the passage of an electric current through the body until dead. The clerk shall deliver the warrant to the sheriff of the county in which conviction was had and such sheriff shall thereupon forthwith remove such convicted person to a Department of Correctional Services adult correctional facility of the state and there deliver him or her, together with the warrant, into the custody of the warden Director who shall receive and safely keep such convict within a Department of Correctional Services adult correctional facility until the time of execution or until otherwise ordered by competent authority.~~

**§ 29-2544. Warden; duty. REPEALED.**

**§ 29-2545. Court; day certain for execution; notice to ~~Director of the Department of Correctional Services~~ warden; duties. REPEALED**

**§ 29-2546. Reversal of judgment of conviction; warden ~~Director of the Department of Correctional Services~~ deliver convict to custody of sheriff; await further judgment and order of court.**

Whenever the Supreme Court reverses the judgment of conviction in accordance with which any convict has been sentenced to death and is confined in a Department of Correctional Services adult correctional facility as herein provided, it shall be the duty of the warden **Director**, upon receipt of a copy of such judgment of reversal, duly certified by the clerk of the court and under the seal thereof, to forthwith deliver such convict into the custody of the sheriff of the county in which the conviction was had to be held in the jail of the county awaiting the further judgment and order of the court in the case.

**83-964 Mode of inflicting punishment for death**

~~The mode of inflicting the punishment of death, in all cases, shall be by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death; and the application of such current shall be continued until such convicted person is dead. The warden of the Nebraska Penal and Correctional Complex, and in case of his death, sickness, absence or inability to act, then the deputy warden, shall be the executioner; PROVIDED, the warden may in writing specially designate and appoint a suitable and competent person to act for him, and under his direction, as executioner in any particular case. A crime punishable by death must be punished according to the provisions herein made and not otherwise.~~

A sentence of death shall be enforced by the intravenous injection of a substance or substances in a quantity sufficient to cause death. The lethal substance or substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services.

## 83-965 Protocol; Director of the Department of Correctional Services

A sentence of death shall be enforced by the Director of Correctional Services. Upon receipt of an execution warrant, the Director shall proceed at the time named in the warrant to enforce the sentence in the manner herein provided, unless the Director is informed that the enforcement of the sentence has been stayed by competent judicial authority or the sentence has been commuted or the conviction pardoned.

The Director shall create, modify, and maintain a written execution protocol describing the process and procedures by which an execution will be carried out consistent with this statute. The Director shall (1) select the substance or substances to be employed in an execution by lethal injection, (2) create a documented process for obtaining the necessary substances, (3) describe an execution team composed of one or more executioners and any other personnel deemed necessary to effectively and securely conduct an execution, (4) describe the respective responsibilities of each member of the execution team, (5) describe the training required of each member of the execution team and (6) any other details deemed necessary and appropriate by the Director.

The execution protocol shall require that the first or only substance injected be capable of rendering the prisoner unconscious and that a determination sufficient to reasonably verify that the prisoner is unconscious be made before the administration of any additional substances, if any.

The execution protocol created, modified, and maintained by the Director of the Department of Correctional Services for the execution of persons sentenced to death shall be exempt from the requirements of the Administrative Procedures Act.

The execution protocol or any portion thereof shall not be made available to any person without the express authorization of the Director or an order of the District Court of Lancaster County, issued for good cause shown, limiting those portions of the execution protocol to be produced and subject to a protective order limiting those allowed to be privy to those portions of the protocol ordered produced.

### **83-966 Medical personnel; Licensing exemption**

Notwithstanding any other provision of law,

(1) any prescription, preparation, compounding, dispensing, obtaining or administration of the substances deemed necessary to perform a lethal injection shall not constitute the practice of medicine or any other profession relating to health care which is subject by law to regulation, licensure, or certification;

(2) a pharmacist or pharmaceutical supplier may dispense the designated substances, without a prescription, to the Director or the Director's designee upon production of a written request from the Director for the designated substances necessary to conduct an execution;

(3) the obtaining, preparation, compounding, dispensing, obtaining and administration of the substance or substances designated by the execution protocol shall not violate the Uniform Controlled Substances Act or sections 71-2501 to 71-2512; and

(4) if a member of the execution team is licensed by a board or department, the licensing board or department shall not censure, reprimand, suspend, revoke, or take any other disciplinary action against that person's license as a result of that individual's participation in a court-ordered execution.

### **83-967 Confidentiality of participants**

The Director may designate any person qualified under the terms of the execution protocol to administer to the prisoner the substances necessary to comply with the execution protocol.

The identity of all members of the execution team, and any information reasonably calculated to lead to the identities of such persons, including, but not limited to, their names, residential or office addresses, residential or office telephone numbers, and social security numbers, shall be confidential, shall be exempt from the Freedom of Information Act and the Public Records Act, and shall not be subject to discovery or introduction as evidence in any civil proceeding unless extraordinary good cause is shown and a protective order is issued by a district court limiting dissemination of such information.

Without a court order directing the release of such information, the disclosure of the identity of any member of the execution team or any information reasonably calculated to lead to the identities of such persons shall be a Class I Misdemeanor. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against a person who violates this section, and be entitled to recover from any such person actual damages on a showing of a willful violation of this section.

## **83-968.02 Method found unconstitutional**

No death sentence shall be voided or reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Nebraska 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.

## **83-969 Punishment inflicted; exclude view of persons; exception.**

When any person shall be sentenced to ~~be electrocuted~~ **death**, such punishment shall be inflicted within the walls of a Department of Correctional Services adult correctional facility, ~~or within the yard or enclosure adjacent thereto~~, under the supervision of the ~~warden~~ **Director of the Department of Correctional Services**, and in such a manner as to exclude the view of all persons save those permitted to be present as provided in sections ~~29-2534 and 29-2535~~ **83-970 and 83-971**.

## **83-970 Execution; persons permitted.**

Besides the **Director of the Department of Correctional Services** and those **persons required to be present by the execution protocol**, the following ~~persons warden, the deputy warden, the executioner, in case one shall have been appointed by the warden, and his assistants, the following persons~~, and no others, except as provided in section ~~29-2535~~ **83-969**, may be present at the execution: **(1) the clergyman in attendance upon the prisoner; such other persons, not exceeding three in number as the prisoner may designate (2) no more than three persons selected by the prisoner; (3) no more than three persons representing the victim or victims of the prisoner; and (4) such other persons, not exceeding six in number, as the warden** **Director** may designate.

## **83-971 ~~Warden~~ **Director of the Department of Correctional Services**; military force necessary to carry out punishment; inform Governor.**

Whenever the ~~warden~~ **Director** shall deem the presence of a military force necessary to carry into effect the provisions of sections ~~29-2532~~ **83-964** and ~~29-2533~~ **83-969**, he shall make the fact known to the Governor of the state, who is hereby authorized to call out so much of the military force of the state as in his judgment may be necessary for the purpose.

83-972 ~~Warden~~ **Director of the Department of Correctional Services**; inflict punishment; return of proceedings; clerk of court; duty.

Whenever the warden **Director of the Department of Correctional Services** shall enforce a sentence of death, the Director shall certify to the Clerk of the Nebraska Supreme Court the Director's actions. The Clerk of the Nebraska Supreme Court shall then forward the Director's certificate to the clerk of the district court where the conviction was had, and the clerk of the district court shall subjoin the certificate to the record of conviction and sentence.

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## DEATH PENALTY PROTOCOLS

STATE	STATUTE
<b>Alabama</b> Ala. Code §§ 15-18-82 to 82.1 (Supp. 2007)	<b>*Delegates to Corrections</b> while discussing some generals: date, time, & place.
<b>Arizona</b> Ariz. Rev. Stat. Ann. § 13-704 (2001)	<b>*Explicitly delegates to Corrections</b> *Provides for confidentiality of participants and that participation in execution not grounds for revocation of a license.
<b>Arkansas</b> Ark. Code Ann. § 5-4-617 (2006)	<b>*Explicitly delegates to Corrections</b> *Calls for 2 drugs: barbiturate and chemical paralytic agent.
<b>California</b> Cal. Penal Code Ann. § 3604 (West 2000)	<b>*Explicitly delegates to Corrections</b>
<b>Colorado</b> Colo. Rev. Stat. Ann. § 18-1.3-1202 (2007)	<b>*Only 1 drug: Sodium Thiopental or equally effective substance.</b> *Other specifics delegated to Corrections
<b>Connecticut</b> Conn. Gen. Stat. § 54-100 (2007)	<b>*Explicitly delegates to corrections</b> in consultation with the Dept. of Public Health.
<b>Delaware</b> Del. Code. Ann. Tit. 11,4209 (2006 Supp)	<b>*Explicitly delegates to Corrections.</b> *Trial Court determines place, time, number of witnesses, and conditions of privacy.
<b>Federal</b>	*Law of the State in which the sentence was imposed governs the manner of execution. *If State in which sentence imposed does not provide for execution, the court designates another State.
<b>Florida</b> Fla. Stat. § 922.105 (2006)	<b>*Explicitly delegates to Corrections</b>
<b>Georgia</b> Ga. Code Ann. § 17-10-38 (2004)	<b>*Delegates to Corrections</b> *Provides that participation in lethal injection is not the practice of medicine or other health care professions.
<b>Idaho</b> Idaho Code § 19-2716 (Lexis 2004)	<b>*Explicitly delegates to Corrections</b> *Calls for 2 drugs: barbiturate and chemical paralytic agent.

<p><b>Illinois</b> Ill. Comp. Stat. ch 725 § 5/119-5 (West 2006)</p>	<p><b>*Explicitly delegates to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p>
<p><b>Indiana</b> Ind. Code § 35-38-6-1 (West 2006)</p>	<p><b>*Explicitly delegates to Corrections</b></p>
<p><b>Kansas</b> Kan. Stat. Ann. § 22-401 (2006 Cum. Supp.</p>	<p><b>*Delegates to Corrections</b></p>
<p><b>Kentucky</b> Ky. Rev. Stat. Ann. § 431.220 (West 2006)</p>	<p><b>*Delegates to Corrections</b></p> <p>*Prohibits physician involvement.</p>
<p><b>Louisiana</b> La. Stat. Ann. § 15:569 (West 2005)</p>	<p><b>*Delegates to Corrections</b></p> <p>*May not compel physician participation.</p>
<p><b>Maryland</b> Md. Crim. Law Code Ann. § 2-303 (Lexis Supp. 2007)</p>	<p><b>*Delegates specifics to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p> <p>*Administration of lethal injection is not practice of medicine.</p> <p>*Pharmacist may dispense drugs without prescription.</p>
<p><b>Mississippi</b> Miss. Code Ann. § 99-19-51 (2007)</p>	<p><b>*Delegates specifics to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent</p> <p>*County coroner or physician determines death.</p>
<p><b>Missouri</b> Mo. Rev. Stat. § 546.720 (2007 Cum. Supp.)</p>	<p><b>*Explicitly delegates to Corrections</b></p> <p>*Provides for privacy of participants and creates a cause of action against those who violate that privacy.</p>
<p><b>Montana</b> Mont. Code Ann. § 46-19-103</p>	<p><b>*Delegates specifics to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p> <p>*Coroner determines death.</p>

<p><b>Nevada</b> Nev. Rev. Stat. § 176.355 (2007)</p>	<p><b>*Explicitly delegates to Corrections</b></p> <p>*Slightly ambiguous – one section refers to “lethal drug,” while another refers to “the drug or Combination of drugs.</p>
<p><b>New Hampshire</b> N.H. Rev. Stat. Ann. § 630:5 (2007)</p>	<p><b>*Explicitly delegates to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p> <p>*Doctor determines death.</p>
<p><b>New Mexico</b> N.M. Stat. Ann. § 31-14-11 (2000)</p>	<p><b>*Delegates to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p>
<p><b>New York</b> N.Y. Correc. Law Ann. § 658 (West 2008) (held unconstitutional in People v. LaValle, 3 N.Y.3d 88, 130-131, 783 N.W.S2d 485, 817 N.E.3d 341, 367 (2004))</p>	<p><b>*Delegates to Corrections</b></p>
<p><b>North Carolina</b> N.C. Gen. Stat. Ann. § 15-187 (Lexis 2007)</p>	<p><b>*Delegates to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p>
<p><b>Ohio</b> Ohio Rev. Code Ann. § 2949.22 (Lexis 2006)</p>	<p><b>*Delegates to Corrections</b></p> <p>*Requires dosage to “quickly and painlessly cause death”</p>
<p><b>Oklahoma</b> Okla. Stat., Tit. 22, § 1014 (West 2001)</p>	<p><b>*Delegates to Corrections</b></p> <p>*Calls for 2 drugs: barbiturate and chemical paralytic agent.</p> <p>*Doctor determines death.</p>
<p><b>Oregon</b> Ore. Rev. Stat. § 137.473 (2003)</p>	<p><b>*Delegates to Corrections</b></p> <p>*3 drugs: barbiturate, chemical paralytic agent, And Potassium Chloride.</p>

<p><b>Pennsylvania</b> Pa. Stat. Ann., Tit. 61, § 3004 (Purdon 1999)</p>	<p><b>*Delegates to Corrections</b></p> <p>*Contemplates more than 2 drugs: barbiturate And chemical paralytic agents.</p> <p>*Coroner determines death.</p> <p>*Pharmacy may dispense the drug.</p>
<p><b>South Carolina</b> S.C. Code Ann. § 24-3-530 (2007)</p>	<p><b>*Delegates to Corrections</b></p>
<p><b>South Dakota</b> S.D. Codified Laws § 23A-27A-32 (Supp. 2007)</p>	<p><b>*Delegates specific to Corrections, but Describes general procedures to be followed.</b></p> <p>*Pharmacy may dispense drugs without prescription.</p>
<p><b>Tennessee</b> Tenn. Code Ann. § 40-23-114 (2006)</p>	<p><b>*Explicitly delegates to Corrections</b></p>
<p><b>Texas</b> Tex. Code Crim. Proc. Ann. Art. 43.14 (Vernon 2006 Supp. Pamphlet)</p>	<p><b>*Explicitly delegates to Corrections</b></p>
<p><b>Utah</b> Utah Code Ann. § 77-18.5.5</p>	<p><b>*Delegates to Corrections</b></p>
<p><b>Virginia</b> Va. Code Ann. § 53.1-234 (Lexis Supp. 2007)</p>	<p><b>*Delegates to Corrections</b></p>
<p><b>Washington</b> Wash. Rev. Code § 10.95.180 (2006)</p>	<p><b>*Delegates to Corrections</b></p>
<p><b>Wyoming</b> Wyo. Stat. Ann. § 7-13-904 (2007)</p>	<p><b>*Delegates to Corrections</b></p> <p>*3 drugs: barbiturate, chemical paralytic agent, and Potassium Chloride.</p> <p>*Doctor determines death.</p> <p>*Administration of injection is not the practice of medicine.</p>

United States Code Annotated Currentness

Title 18. Crimes and Criminal Procedure (Refs & Annos)

^ Part II. Criminal Procedure

^ Chapter 228. Death Sentence (Refs & Annos)

→ § 3596. Implementation of a sentence of death

**(a) In general.**--A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

**(b) Pregnant woman.**--A sentence of death shall not be carried out upon a woman while she is pregnant.

**(c) Mental capacity.**--A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

CREDIT(S)

(Added Pub.L. 103-322, Title VI, § 60002(a), Sept. 13, 1994, 108 Stat. 1967.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1994 Acts. House Report Nos. 103-324 and 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

Prior Provisions

A prior section 3596 provided civil remedies for satisfaction of unpaid fines. See Codification note preceding section 3591.

Applicability to Uniform Code of Military Justice

Section not to apply to prosecutions under the Uniform Code of Military Justice (chapter 47 [section 801 et seq.] of Title 10, Armed Forces), see section 60004 of Pub.L. 103-322, set out as a note under section 3591 of this title.

RESEARCH REFERENCES

ALR Library

195 ALR, Fed. 1, Validity, Construction, and Operation of Federal Death Penalty Act, 18 U.S.C.A. §§ 591 et Seq.

181 ALR, Fed. 549, Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence.

122 ALR 5th 145, Application of Constitutional Rule of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation Of...

111 ALR 5th 491, Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals.

20 ALR 5th 177, Propriety of Imposing Capital Punishment on Mentally Retarded Individuals.

Encyclopedias

34 Am. Jur. Proof of Facts 2d 557, Adequacy of Consent to Autopsy.

Am. Jur. 2d Sheriffs, Police, and Constables § 33, United States Marshals and Their Deputies.

Forms

Federal Procedural Forms § 20:908, Implementation of Death Sentences.

## NOTES OF DECISIONS

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### 1. Law governing

**Execution** of defendant sentenced to death after his guilty plea, in District Court in Massachusetts, to two counts of carjacking resulting in death, would be scheduled to take place in New Hampshire, despite government's preference that defendant, who could not be executed in Massachusetts due to that state's lack of **death penalty**, be executed at federal death row in Indiana; crimes and trial occurred in Massachusetts, and defendant's admission to murder in New Hampshire was aggravating factor, and thus, interests of justice favored consolidating all postconviction litigation in the case in the First Circuit rather than in another circuit, and there was strong public interest in defendant's **execution** being as accessible as possible to the people most interested in it and impacted by it. U.S. v. Sampson, D.Mass.2004, 300 F.Supp.2d 278, subsequent determination 300 F.Supp.2d 275. Sentencing And Punishment ¶ 1795

Pennsylvania law relating to implementation of sentence of death, including method and time of **execution**, applied to sentence imposed under federal **death penalty** statute in the Commonwealth of Pennsylvania, even though **execution** would take place at United States penitentiary in Indiana where the inmate was incarcerated. U.S. v. Hammer, M.D.Pa.2000, 121 F.Supp.2d 794. Sentencing And Punishment ¶ 1795; Sentencing And Punishment ¶ 1796

### 2. Mentally retarded

Murder defendant was mentally retarded, as defined by the American Association for the Mentally Retarded (AAMR) and the Diagnostic and Statistical Manual of Mental Disorders (DMS-IV-TR), and was thus ineligible for the death penalty under the Federal Death Penalty Act; all experts who testified at pre-trial evidentiary hearing acknowledged the presence of a very consistent pattern running throughout defendant's testing, specifically, very low verbal and audiological abilities coupled with a relative strength in visual processing or performance IQ. U.S. v. Nelson, E.D.La.2006, 419 F.Supp.2d 891. Sentencing And Punishment ¶ 1793

For purposes of determining defendant is mentally retarded, and thus not eligible for death penalty

under Eighth Amendment and Federal Death Penalty Act, term "mentally retarded" means condition of significantly sub-average intellectual functioning existing concurrently with significant deficits in adaptive behavior, both of which were manifested before age of 18. U.S. v. Cisneros, E.D.Va.2005, 385 F.Supp.2d 567. Sentencing And Punishment ¶ 1642

### 3. Questions for court or jury

In capital offense prosecution, determination of whether defendant, as a result of mental disability, lacked the mental capacity to understand the death penalty and why it was imposed, so as preclude implementation of a sentence of death under Federal Death Penalty Act, was a determination for the court to make prior to trial, rather than an issue for the jury. U.S. v. Sablan, D.Colo.2006, 461 F.Supp.2d 1239. Sentencing And Punishment ¶ 1791

### 4. Burden of proof

In capital offense prosecution, in order to preclude implementation of a sentence of death under Federal Death Penalty Act, defendant had to prove by preponderance of the evidence, rather than by clear and convincing evidence, that, as a result of mental disability, he lacked the mental capacity to understand the death penalty and why it was imposed. U.S. v. Sablan, D.Colo.2006, 461 F.Supp.2d 1239. Sentencing And Punishment ¶ 1642; Sentencing And Punishment ¶ 1771

18 U.S.C.A. § 3596, 18 USCA § 3596

Current through P.L. 110-317 (excluding P.L. 110-234, 110-246, and 110-315) approved 8-29-08

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