

CRIMES AND PUNISHMENT:
CRIMINAL LAW:

Lethal injection may be used to
carry out the execution of those
sentenced to death prior to the

effective date of Section 546.720 as enacted by Conference
Committee Substitute for Senate Committee Substitute for House
Committee Substitute for House Bills Nos. 1340 & 1348, 84th
General Assembly, Second Regular Session (1988).

September 27, 1988

OPINION NO. 138-88

Dick D. Moore, Director
Department of Corrections & Human Resources
Post Office Box 236
Jefferson City, Missouri 65102-0236

Dear Director Moore:

This opinion is in response to your question asking:

Can the Director of the Division of Adult
Institutions utilize lethal injection,
pursuant to Section 546.720 - 546.750 of
combined House Bill Nos. 1340 and 1348 to
carry out the execution of those sentenced
to death prior to the effective date of
House Bill Nos. 1340 and 1348?

Section 546.720 as enacted by Conference Committee
Substitute for Senate Committee Substitute for House Committee
Substitute for House Bills Nos. 1340 & 1348, 84th General
Assembly, Second Regular Session (1988) (hereinafter "HB 1340 &
1348") provides:

546.720. The manner of inflicting the
punishment of death shall be by the
administration of lethal gas or by means
of the administration of lethal
injection. And for such purpose the
director of the division of adult
institutions is hereby authorized and
directed to provide a suitable and
efficient room or place, enclosed from
public view , within the walls of a
correctional institution controlled by the
division of adult institutions, and the
necessary appliances for carrying into
execution the death penalty by means of the

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administration of lethal gas or by means
of the administration of lethal
injection. (Emphasis added.)

The provisions highlighted above by underlining authorizing the administration of lethal injection were added in 1988 by HB 1340 & 1348. HB 1340 & 1348 was effective August 13, 1988.

A similar issue arose when the Missouri statutes were amended to provide for execution of the sentence of death by the administration of lethal gas rather than by hanging. In State v. Brown, 112 S.W.2d 568 (Mo. 1937), which considered the statutory change from execution by hanging to execution by the administration of lethal gas, the Missouri Supreme Court held that a change in the method of carrying out a sentence of death did not affect a change in the punishment but merely abated "some of the odious features incident to the old method." The court stated:

If, therefore, the change in the law under discussion did not affect any substantial rights of the defendant, either constitutional or statutory, but was passed for the purpose of providing a more humane manner of inflicting the death penalty, why should the new statute not apply to those cases pending at the time the change went into effect? Such statutes, as the above cases disclose, are not derogatory of any right a defendant had prior to the enactment thereof. In nature they are procedural, not substantive, and operate prospectively. The changes are intended to be a benefit and not a detriment. . . . As the Supreme Court of the United States said in the Malloy Case, supra: "The punishment was not increased, and some of the odious features incident to the old method were abated."

* * *

We therefore hold that it was the intent and purpose of the Legislature of this state that the infliction of the death penalty under the laws of this state, after

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the taking effect of the new act, should be carried out under the method prescribed by the new act.

Id. at 571.

We believe that the opinion of the court in Brown controls in the present circumstance. The apparent motivating factor behind the current legislative change is the same as the one cited by the Brown court, to remove "some of the odious features incident to the old method." Thus, the conclusion in Brown that the sentence may be carried out in accordance with the current statutory method applies here.

CONCLUSION

It is the opinion of this office that lethal injection may be used to carry out the execution of those sentenced to death prior to the effective date of Section 546.720 as enacted by Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bills Nos. 1340 & 1348, 84th General Assembly, Second Regular Session (1988).

Very truly yours,



WILLIAM L. WEBSTER
Attorney General