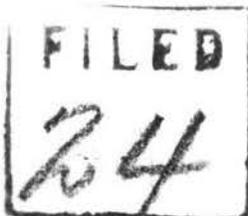


CRIMINAL LAW:

Manner of executing death sentence on convict restored to sanity after sentence to death by hanging.



September 8, 1944

Honorable Forrest C. Donnell  
Governor of the State of Missouri  
Jefferson City, Missouri

Dear Governor Donnell:

We have your letter of September 1, 1944,  
in which you submit the following for our opinion:

"There is enclosed copy of (a) letter, dated February 12, 1935, addressed TO THE SECRETARY OF STATE, signed Guy B. Park, Governor, (b) letter, dated February 26, 1935, addressed SECRETARY OF STATE, signed Guy B. Park, Governor, (c) document, dated March 20, 1935, addressed TO THE SECRETARY OF STATE, signed Guy B. Park, Governor, (d) copy of letter, dated July 1, 1943, addressed to Ira A. Jones, President, Board of Managers, State Eleemosynary Institutions, Jefferson City, Missouri, signed C.C. Ault, M.D., Superintendent, (e) letter, dated July 3, 1943, signed Ira A. Jones, President, Board of Managers, addressed to myself and (f) letter, dated August 28, 1944, signed Ira A. Jones, President, addressed to myself.

"Your opinion is respectfully requested on the following question:

"What should be done in order to execute the sentence of Paul Barbata?"

Under Article 5, Section 8 of the Constitution of Missouri, the Governor is given power to grant reprieves, commutations and pardons, except in certain cases not material here. A reprieve has been defined by the Supreme Court of Missouri in the case of Lime vs. Blagg, 131, S.W. (2d) 583, 585, as follows:

"A reprieve 'is the withdrawing of a sentence for an interval of time whereby the execution is suspended.' 46 C.J. Sec. 5, p. 1183; 20 R.C.L. Sec. 3, p. 522. As further stated in the latter work, 'it is merely the postponement of the sentence for a time. It does not and cannot defeat the ultimate execution of the judgment of the court, but merely delays it.' With reference to the effect of a reprieve 46 C.J. Sec. 46, p. 1197, says 'A reprieve does not annul the sentence, but merely delays or keeps back the execution of it for the time specified. Consequently one who has secured reprieves is not exempted from arrest on the ground that the period of sentence has meanwhile expired. Nor can one who accepted a governor's reprieve from a jail sentence complain when such reprieve is revoked.'"

From the above, it is our opinion that the order of the Governor dated March 20, 1935, suspending the sentence of Paul Barbata was a reprieve. The problem in the case submitted by you is how to terminate the reprieve and carry out the death sentence.

Article 5, Section 8 of the Constitution of Missouri provides as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.  
\* \* \*"

It will thus be observed that the Governor may grant a reprieve "upon such condition and with such restrictions and limitations as he may think proper". The reprieve under consideration was upon certain condition and contained certain restrictions and limitations in the following language:

"WHEREFOR, I Guy B. Park, Governor of the State of Missouri, by virtue of authority

in me vested by law, do hereby suspend the execution of said sentence of death until said Paul Barbata be restored to reason, and by these presents do order and direct the Sheriff of the City of Saint Louis to immediately convey said lunatic to State Hospital No. 1, located at Fulton, Missouri, there to be kept and detained until said Paul Barbata shall be restored to reason.

"AND the Superintendent of State Hospital No. 1, is hereby directed to receive said Paul Barbata from said Sheriff and him safely keep confined in said hospital and treat for insanity until restored to reason; when he, the said Superintendent, shall give due notice thereof to the then Sheriff of the City of St. Louis who shall proceed to execute said sentence upon such date as may be fixed by the Governor of the State of Missouri."

The reprieve was granted on condition that Paul Barbata be detained in State Hospital No. 1 for treatment, and was limited in duration until he was restored to reason. The said Barbata was not to be relieved of his sentence but the sentence was merely suspended until a certain situation came into being, to-wit, the restoration to reason of the convicted man.

Perhaps it may be asked as to how it shall be determined whether the convicted man has been restored to reason. Since a reprieve does not change the sentence of the convicted man in any way, but merely suspends his execution for a time, it is our opinion that the Governor has the right to revoke it. In the case of *Lime vs. Blagg*, *Supra*, the Supreme Court said: (l.c. 585):

"\* \* \*Nor can one who accepted a governor's reprieve from a jail sentence complain when such reprieve is revoked."

Further, in said opinion the Court in holding that the Governor could revoke a "sick parole" said:

"\* \* \* second, because the parole in this case was not a commutation, but a mere executive order, in the nature of a reprieve, which was subject to revocation in the Governor's discretion."

Section 4194 R. S. Mo. 1939, reads as follows:

"The inquisition of the jury shall be signed by them and by the officer in charge of said convict. If it be found that such convict is insane, the execution of the sentence shall be suspended until the officer in charge of such convict receives a warrant from the governor, or from the supreme or other court as hereinafter authorized, directing the execution of such convict."

By the foregoing section it is provided that the sentence " \* \* \* shall be suspended until the officer in charge of such convict receives a warrant from the governor, \* \* \*". Section 4195 R.S. Mo. 1939 reads as follows:

"The officer in charge of such convict shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of the convict, issue a warrant appointing the time of execution, pursuant to his sentence; or, he may, in his discretion, commute the punishment to imprisonment in the penitentiary for life."

By the latter section it is provided that when the Governor shall be convinced of the sanity of the convict he shall issue a warrant appointing the time of execution, pursuant to his sentence. Nothing is said as to how the Governor shall satisfy himself as to the restoration of the convicted man to sanity. There is no requirement that a formal inquiry be held, or that the question be submitted to a jury. In the case of Lime vs. Blagg, Supra, the Court in discussing the parole which had been granted a convict, so that he could be treated for his illness, said:

" \* \* \* Unquestionably the Governor had the right to determine further whether such treatment was necessary, or to end it. \* \* \*"

Further, in the same opinion, the Court said:

" \* \* \* Ex parte Webbe, 322 Mo. 859, 863, 30 S.W. 2d 612, 615 (1), holds 'the Governor is not confined to the statutory ground or

manner of revocation,' in view of his constitutional power, which would seem to indicate he has such power independent of statute. \* \* \*

From the above we think there is no question but that the Governor can make the determination as to the sanity of the convicted man. He probably has such power by the Constitution alone, but in any event, he has such power by virtue of the Constitution and the Statutes together. In the case of State vs. Brockington, 162 S.W. (2d) 860, 862, the Supreme Court in discussing a case similar to the case at hand, said:

" \* \* \*The statutes contemplate as did the warrant of the Governor committing Brockington to State Hospital No. 2 that those responsible for the receipt and restraint of Brockington at said Institution would give due notice of his restoration to reason to the Governor and otherwise comply with the laws and orders of the duly constituted State officials and tribunals to the end that the judgment and sentence of the court, temporarily suspended during Brockington's insanity, be carried into execution in accord with due process of law. \* \* \*

Since the Governor now has reliable information that the convicted person in question has been restored to sanity, Section 4195, R.S. Mo. 1939, would require him to issue his warrent appointing the time for the execution of the sentence. However, another question has presented itself. Barbata was sentenced to death by hanging. It is now the law of Missouri that execution of death sentences must be by administration of lethal gas at the hands of the Warden of the State Penitentiary at Jefferson City, ( Sections 4112 and 4113, R. S. Mo. 1939). The sentence as it appears in the Court record cannot therefore, be legally carried out in the manner directed by the Trial Court. In this connection attention is directed to Sections 4110 and 4111, R. S. Mo. 1939, which read as follows:

"Whenever, for any reason, any convict sentenced to the punishment of death shall not

have been executed pursuant to such sentence, and the cause shall stand in full force, the supreme court, or the court of the county in which the conviction was had, on the application of the prosecuting attorney, shall issue a writ of habeas corpus to bring such convict before the court; or if he be at large, a warrant for his apprehension may be issued by such court, or any judge thereof."

Section 4111.

"Upon such convict being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the warden of the state penitentiary at Jefferson City, Missouri, for the execution of the prisoner at the time therein specified, which execution shall be obeyed by said warden accordingly."

These two sections apply to the case in hand. (See: State vs. Brockington, Supra) Upon a hearing in such a proceeding, the Court could and should modify the judgment and sentence so as to provide for carrying out the death sentence by administration of lethal gas, as provided by Sections 4212 and 4213, Supra. Since the passage of the latter two sections, a number of cases have been before our Supreme Court wherein the defendants had been sentenced to death by hanging before said sections had been enacted. In all of them where the judgment was affirmed, the Supreme Court remanded the case with directions to the Circuit Court to modify the judgment and sentence so as to provide for carrying out the death penalty by administration of lethal gas. (State vs. Brown, 112 S.W. (2d) 568; State vs. Allen, 119 S.W. (2d) 304; State vs. Richetti, 119 S.W. (2d) 330; State vs. Kenyon, 126 S.W. (2d) 245.) In these cases the Supreme Court directed the Trial Court to cause the defendant to be brought before it and to pronounce sentence in accordance with what are now Sections 4112 and 4113, R.S. Mo. 1939. However, the Circuit Court had jurisdiction to modify the said judgment and sentence as directed. That is to say, the Supreme Court

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did not and could not add to or enlarge the jurisdiction of the Trial Court by mere direction. By Article 6, Section 2 of the Constitution of Missouri, the Supreme Court is given appellate jurisdiction only, except in cases otherwise directed by the Constitution. No other provision of the Constitution is found which gives the Supreme Court power to confer jurisdiction on the Circuit Court, or enlarge the jurisdiction which it has. In all these cases the Supreme Court was merely exercising supervisory control over the Circuit Court in accordance with the provision contained in Article 6, Section 3 of the Constitution. The Supreme Court was merely directing the Circuit Court how it should exercise its jurisdiction in particular situations. We must, therefore, conclude that the Circuit Court has jurisdiction to modify the judgment in the Paul Barbata case without specific direction from the Supreme Court so to do.

In the Brockington case the Supreme Court did not say whether it would, under proper proceedings, modify the judgment and sentence to make them conform to the present law as to executing the death sentence, but we think the decision in that case is susceptible to the inference that it would have done so had proper preliminary proceedings been had. Further, in view of Section 4111, Supra, of the statutes, the Supreme Court is vested with jurisdiction to issue its warrant to the Warden of the State Penitentiary "for the execution of the prisoner at the time therein specified." If that Court should issue its warrant, it would of course, direct the execution of the prisoner according to the law now in force, and hence it would, of necessity, have to modify the original judgment and sentence of death.

#### CONCLUSION.

It is, therefore, the opinion of this office that in the Paul Barbata case the following would be the proper steps to be taken to execute the sentence of death:

- 1) The Governor should issue a warrant appointing the time of execution pursuant to such modified sentence as the Circuit Court of the City of St. Louis, or the Supreme Court of Missouri may order.

2) The Prosecuting Attorney of the City of St. Louis, should thereupon proceed under Sections 4110 and 4111, R. S. Mo. 1939, to have the prisoner brought before one of the Courts named in Section 4110. Such Court would thereupon issue a warrant to the Warden of the State Penitentiary for the execution of the prisoner. Such Court would of necessity, have to modify the judgment and sentence so that said warrant would direct the execution of the death sentence in accordance with Sections 4112 and 4113, R. S. Mo. 1939.

Respectfully submitted,

Harry H. Kay  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

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