SUPREME COURT OF ARKANSAS

No. 11-1128

RAY HOBBS and THE ARKANSAS DEPARTMENT OF CORRECTION

APPELLANTS/CROSS-APPELLEES

V.

JACK HAROLD JONES; STACEY JOHNSON; KENNETH WILLIAMS; DON DAVIS; JASON MCGEHEE; TERRICK NOONER; ALVIN JACKSON; BRUCE WARD; MARCEL WILLIAMS; and FRANK WILLIAMS

APPELLEES/CROSS-APPELLANTS

Opinion Delivered June 22, 2012

DISSENTING OPINION.

KAREN R. BAKER, Associate Justice

The majority holds that granting discretion to the Director of the Department of Correction to administer the death penalty is a violation of the separation-of-powers provision of our constitution. With this holding, Arkansas becomes the only state to find such a violation. In addition, Arkansas is left no method of carrying out the death penalty in cases where it has been lawfully imposed. Because there is no basis for holding that the MEA violates our state constitution's separation-of-powers doctrine, I dissent.

Texas, which has a separation-of-powers provision that is identical to Arkansas's, has addressed a similar challenge to their statute. *See Ex parte Granviel*, 561 S.W.2d 503 (Tex.

Crim. App. 1978).[1] Granviel argued that the Texas lethal-injection statute constituted an improper delegation of legislative power to the director of the Texas Department of Corrections in violation of the state constitution. The court noted that while the legislature generally cannot commit its legislative powers to another agency, the legislature does possess many powers that it may exercise either directly or indirectly through the agency of another body. *Id.* The court observed that the line between a "proper grant of authority to perform acts not strictly legislative" and an unlawful delegation is difficult to define. *Id.* at 514. Where a legislative body has declared a policy and fixed a primary standard, it may generally delegate the authority to establish rules, regulations, or minimum standards that are reasonably necessary to execute the expressed purpose of the act. *Id.* The court stated that "[s]o long as the statute is sufficiently complete to accomplish the regulation of the particular matters falling within the Legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with the administration of the statute." *Id.* The delegation of authority for an administrative officer to exercise discretion does not cause a statute to be

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[1]The Texas statute that the prisoner challenged in *Granviel* provided as follows:

> Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day of sentence, as the court may adjudge, 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.*

Granviel, 561 S.W.2d at 507 (emphasis supplied) (quoting Acts 1977, 65th Leg., ch. 138, p. 287). Texas's separation-of-powers provision is identical to the provision in article 4 section 1 of the Arkansas Constitution. *See* Tex. Const. Art. II, § 1.

unconstitutional where there are standards for guidance, although the guidance may be general, that are capable of being reasonably applied. *Id.* The legislature exercised its constitutional power to enact a law that states that the penalty for capital murder shall be death or life imprisonment. *Id.* The legislature then amended the statute to provide that lethal injection "by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death" shall be the mode of execution. *Id.* at 515. The legislature stated that the director of the department of corrections was to determine the procedure to be used in carrying out the execution. *Id.* The court concluded that the legislature "declared a policy and fixed a primary standard and delegated to the said Director power to determine details to carry out the legislative purpose which the Legislature cannot practically or efficiently perform itself." *Id.*

Delaware has likewise concluded that its lethal-injection statute, granting the commissioner of the Department of Corrections discretion in carrying out the manner of the execution. *State v. Deputy*, 644 A.2d 411 (Del. Super. 1994), aff'd 648 A.2d 423 (Del. 1994).[2] In *Deputy*, the court stated that "[n]o requirement exists that the state statute itself must establish detailed procedures for the administration of the death penalty." *Id.* at 420. The court upheld the statute against a challenge that leaving the procedures to the discretion of the

[2]At the time of Deputy's appeal, the Delaware statute on lethal injection read in pertinent part as follows: "Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, *and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction.*" *Deputy*, 644 A.2d at 417 (emphasis supplied) (quoting Del. Code Ann. tit. 11, § 4209(f)).

Commissioner constituted an unlawful delegation of legislative authority.

Idaho has also found that its statute giving the director of the Department of Corrections discretion in carrying out the death penalty by lethal injection passed constitutional muster under a challenge based on an unauthorized grant of legislative authority. *State v. Osborn*, 631 P.2d 187 (Idaho 1981).[3] The supreme court in *Osborn* relied heavily on *Granviel* in reaching its conclusion:

> [T]he existence of an area for exercise of discretion by an administrative officer under delegation of authority does not render delegation unlawful where standards formulated for guidance and limited discretion, though general, are capable of reasonable application[.]
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> . . . .
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> It appears that the Legislature has declared a policy and fixed a primary standard and delegated to the said Director power to determine details so as to carry out the legislative purpose which the Legislature cannot practically or efficiently perform itself. The statute is sufficiently complete to accomplish the regulation of the particular matters falling within the Legislature's jurisdiction.

Osborn, 631 P.2d at 201 (quoting *Granviel*, 561 S.W.2d at 514–15).

The Florida Supreme Court has also upheld its lethal-injection statute in the face of a separation-of-powers argument.[4] *Diaz v. State*, 945 So.2d 1136 (Fla. 2006). The court

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[3] The statute in Idaho at the time of *Osborn*, Idaho Code Ann. § 19-2716, read as follows:

> The punishment of death must be inflicted by the intravenous injection of a substance or substances in a lethal quantity sufficient to cause death until the defendant is dead. The director of the department of corrections shall determine the substance or substances to be used and the procedures to be used in any execution.

Osborn, 631 P.2d at 201.

[4] Florida's lethal-injection procedure calls for the use of "the drug or drugs necessary to compound a lethal injection." Fla. Stat. Ann. § 922.105.

reached its conclusion after noting that it traditionally had applied a "strict separation of powers doctrine" that included a prohibition on the legislature's ability to delegate "the power to enact a law or the right to exercise unrestricted discretion in applying the law." *Id.* (quoting *State v. Sims*, 754 So.2d 657, 668 (Fla. 2000)). The court observed that

> the Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

Id. at 1143 (quoting *Sims*, 754 So.2d at 668 (quoting *State v. Atlantic Coast Line R.R. Co.*, 47 So. 969, 976 (Fla. 1908)). The court quoted from *Sims*, where it gave four reasons for not finding Florida's lethal-injection statute an unlawful delegation of legislative authority:

> First, the statute clearly defines the punishment to be imposed (i.e., death). Thus, the DOC is not given any discretion to define the elements of the crime or the penalty to be imposed. Second, the statute makes clear that the legislative purpose is to impose death. [The Secretary of the Department of Corrections] testified that the purpose of the DOC's execution day procedures were to achieve the legislative purpose "with humane dignity." Third, determining the methodology and the chemicals to be used are matters best left to the Department of Corrections to determine because it has personnel better qualified to make such determinations. Finally, we note that the law in effect prior to the recent amendments stated simply that the death penalty shall be executed by electrocution without stating the precise means, manner or amount of voltage to be applied.

Id. at 1143 (quoting *Sims*, 754 So.2d at 670). In *Sims*, the court observed "that most of the states employing lethal injection leave the task of implementing procedures for administering lethal injection to an administrative agency." *Sims*, 754 So. 2d at 669.

In addition to the foregoing, a multitude of other states provide general guidance in the form of granting discretion to the director of the department of corrections to administer a substance or substances in a quantity sufficient to cause death. *See, e.g.*, Ohio Rev. Code

Ann. § 2949.22; Ky. Rev. Stat. Ann. § 431.220 (upheld in *Baze v. Rees*, 553 U.S. 35 (2008)); Kan. Stat. Ann. § 22-4001; Va. Code Ann. § 53.1-233; 22 Okla. Stat. Tit. 22, § 1014; Ga. Code Ann. § 17-10-38; Ind. Code § 35-38-6-1; La. Rev. Stat. Ann § 15:569; Nev. Rev. Stat. § 176.355.

I disagree that *Venhaus v. State ex rel. Lofton*, 285 Ark. 23, 684 S.W.2d 252 (1985), *State v. Bruton*, 246 Ark. 293, 437 S.W.2d 795 (1969), and *Walden v. Hart*, 243 Ark. 650, 420 S.W.2d 868 (1967), compel a conclusion that the grant of discretion to the Director in the MEA violates our separation-of-powers doctrine. Unlike *Venhaus*, *Walden*, and *Bruton*, where the statutes at issue contained no guidance to assist with the delegation, the General Assembly has provided a general framework in the MEA within which the Director must exercise his discretion in carrying out capital punishment. The legislature determined that Arkansas's method of capital punishment is death by lethal injection, stating that the "sentence of death is to be carried out by intravenous lethal injection of one (1) or more chemicals[.]" Ark. Code Ann. § 5-4-617(a)(1). The Director is given discretion in carrying out the lethal injection, with some guidance: the chemical(s) injected may include one or more of the substances set forth in subsection (a)(2), which is a list of the three chemicals commonly used in this country to implement death by lethal injection. Thus, the legislature provided a general framework in stating that the death penalty shall be carried out by lethal injection, that the injection shall be intravenous, and by listing chemicals that may be used in the injection. In *Venhaus*, we acknowledged that once the legislature sets out the law, it can delegate the authority or discretion to carry out the law. *Venhaus*, 285 Ark. at 28, 684 S.W.2d at 255. We stated that

such a delegation is useful where the execution of the law "must be a subject of inquiry and determination outside the halls of legislation." *Id*; *see also Bakalekos v. Furlow*, 2011 Ark. 505, ___ S.W.3d ___ (noting that discretionary power may be delegated by the legislature to a state agency as long as reasonable guidelines are provided). In *Bruton*, we held that the statute gave the State Penitentiary Board the authority *to enact a penal statute*, which is far different than the discretion that the MEA gives the Director to carry out a punishment, death, that the legislature has set forth in the manner that the legislature has set forth, by lethal injection. *See Bruton, supra.*

Here, the legislative delegation contained in the MEA is not the delegation of the authority to make the law, but rather is the delegation of the authority and discretion to carry out the law. The execution of this law is precisely the type of delegation of "details with which it is impracticable for the legislature to deal directly." *Leathers v. Gulf Rice Ark., Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999) (quoting *Currin v. Wallace*, 306 U.S. 1, 15 (1939)). The standards for applying the method of execution, although general, are capable of being reasonably applied where the General Assembly has (1) clearly defined the punishment, death by lethal injection; (2) made clear that the statute's purpose is to impose death; and (3) the methodology and chemicals are best left to the discretion of the Director because the ADC personnel are better qualified to make such determinations and the methodology and chemicals are details with which it is impracticable for the legislature to deal directly. *See Diaz, supra*; *see also Gulf Rice, supra.* Also, as in *Diaz*, the prior law in Arkansas provided that the death penalty shall be administered by electrocution without any description

of the method or manner of carrying it out. *See Diaz, supra.*

The majority, in contrast, does not allow for the legislature to grant the Director any discretion at all in determining the chemicals or procedures used in carrying out the lethal-injection procedure. They find the MEA constitutionally flawed because the guidance found in subsection (a)(2) is "not mandatory." However, a guideline is a recommended practice that allows discretion in its implementation rather than a "mandatory" directive. Guidance does not require a dictation of all terms, and such a construction is antithetical to our case law. *See, e.g.*, *Holloway v. Ark. State Bd. Of Architects*, 352 Ark. 427, 101 S.W.3d 805 (2003) (clearly rejecting the argument that a statute must spell out all details, leaving no discretion vested with the administrative body). While the current MEA does not give mandatory directives to the Director as to the chemicals and procedure used in carrying out lethal injection, it does provide guidance.

Further, appellants' discretion is not "unfettered" because they are at all times bound by the constraints of our federal and state constitutions against cruel and unusual punishment. We have noted that a the failure of a statute to incorporate the terms of the constitution does not render the statute constitutionally deficient. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974). In other words, it is not necessary to write the constitution into every legislative act. In addition, the Eighth Circuit Court of Appeals has specifically determined that the Arkansas's lethal-injection protocol does not violate the Eighth Amendment prohibition against cruel and unusual punishment in a case brought by one of the appellees. *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010), cert. denied, 131 S. Ct. 569 (2010). In reviewing the

protocol, the court noted that Arkansas uses the same three-drug protocol that at least thirty other states use, which had been developed "to cause as little pain as possible." *Id.* at 601 (citing *Baze v. Rees*, 552 U.S. 945 (2007)).

Based on the foregoing, I would reverse the circuit court's finding that the MEA is unconstitutional.

Special Justice BYRON FREELAND joins.