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H.B. 392
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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Stewart and Plummer

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SUMMARY

- Adds nitrogen hypoxia asphyxiation to the list of methods by which a sentence of death may be executed and mandates nitrogen hypoxia asphyxiation under certain circumstances.
- Prohibits the disclosure of execution identifying information and makes execution identifying information confidential and not subject to public disclosure.

DETAILED ANALYSIS

Background – execution of death sentence

Under current law, a death sentence must be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or drugs must be continued until the person is dead.¹ Ohio has not executed a death sentence since the July 2018 execution of Robert Van Hook.²

Nitrogen hypoxia asphyxiation

Election of nitrogen hypoxia asphyxiation

The bill allows a person upon whom a death sentence was imposed to elect to have the sentence executed by lethal injection or by nitrogen hypoxia. The choice must be made in writing and must be submitted to the Director of Rehabilitation and Correction (DRC) one week

¹ R.C. 2949.22(A).

² 2023 Ohio Capital Crimes Report, Ohio Attorney General Dave Yost, available at <https://www.ohioattorneygeneral.gov/2023CapitalCrimesReport>

before the court-ordered day of execution. If a person timely elects nitrogen hypoxia, the death sentence must be executed by causing the application to the person of a lethal quantity of nitrogen gas of sufficient dosage to quickly cause death. The application of nitrogen gas must be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by DRC must ensure that the death sentence is executed.³

No election or election of lethal injection

If a person does not timely elect nitrogen hypoxia, does not elect either nitrogen hypoxia or lethal injection, or elects lethal injection, the death sentence must be executed by lethal injection pursuant to continuing law. However, if, at the time a death sentence is to be executed, the death sentence cannot be executed by lethal injection, the death sentence must be executed by nitrogen hypoxia as if the person had elected nitrogen hypoxia under the bill.⁴

Execution method determined to be unconstitutional

The bill requires execution of a sentence of death “by any different manner of execution that has not been determined to be unconstitutional” if a person is sentenced to death and if the execution of a death sentence by lethal injection or nitrogen hypoxia is found to be unconstitutional any of the following:⁵

- The Ohio Supreme Court, under the Ohio Constitution;
- The United States Supreme Court, under the U.S. Constitution;
- By the Ohio Supreme Court, under the Ohio Constitution or the U.S. Court of Appeals with jurisdiction over Ohio, under the U.S. Constitution, if the U.S. Supreme Court declines to review that judgment.

This is a departure from current law, which requires, if a death sentence by lethal injection is declared to be unconstitutional, the death sentence must be executed by a different manner *prescribed by law* on or after November 11, 2001.⁶

The bill prohibits a sentence of death from being reduced as a result of a determination that a method of execution is declared unconstitutional under the Ohio Constitution or U.S. Constitution and requires the death sentence to remain in force until the sentence can be executed by any valid method of execution.⁷

³ R.C. 2949.22(B) with conforming change in R.C. 2949.25.

⁴ R.C. 2949.22(C).

⁵ R.C. 2949.22(E).

⁶ R.C. 2949.22(E).

⁷ R.C. 2949.22(F)

The bill repeals a disclaimer in current law that states “No change in the law made by the amendment to this section that took effect on October 1, 1993, or by [the amendment that took effect on November 11, 2001] constitutes a declaration by or belief of the General Assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or United States Constitution.”⁸

Disclosure of execution identifying information

The bill prohibits a person from recklessly disclosing “execution identifying information,” except as provided under “**Confidentiality**,” below. A person who violates the prohibition is guilty of the existing law offense of “disclosure of confidential information,” a fourth degree misdemeanor.⁹ “**Execution identifying information**” is any record or information that directly or indirectly reveals a name, residential or business address, residential or business telephone number, day and month of birth, Social Security number, or professional qualifications of any person who participates in or administers the execution of a death sentence [or]¹⁰ any person that manufactures, compounds, imports, transports, distributes, prescribes, prepares, administers, or otherwise supplies any drugs or combination of drugs, active pharmaceutical ingredients, gas, or other material used in the execution of a death sentence, or any equipment used to administer any drugs or combination of drugs, active pharmaceutical ingredients, gas, or other material to any person during the execution of a death sentence.¹¹

Confidentiality

Under the bill, information or a record in possession of a public office that contains execution identifying information must be disclosed to the Ohio Ethics Commission for purposes of confirming ethics and licensing compliance, but is otherwise confidential, privileged under law, not subject to disclosure as a public record, is not subject to disclosure by or during a judicial proceeding, inquiry or process, and is not subject to discovery, subpoena, or other means of legal compulsion or disclosure to an entity.¹²

Current protections against the disclosure of execution identifying information are narrower, do not include language covering gas or other material used in the execution of a death sentence, and apply only to a specified 24-month period.¹³

⁸ R.C. 2949.22(D), repealed.

⁹ R.C. 2921.24(C).

¹⁰ A technical amendment may be needed due to a drafting error in this provision to correct the sentence to read “administers the execution of a death sentence **or** any person that”

¹¹ R.C. 2921.24(A) and 2949.221.

¹² R.C. 2949.221.

¹³ R.C. 2949.221.

Constitutional considerations

The bill offers a new method of carrying out a death sentence, allowing a person sentenced to death to opt for nitrogen hypoxia instead of lethal injection. The Eighth Amendment to the United States Constitution states, “excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment be inflicted.” No method of execution has yet been found to be per se “cruel and unusual” in violation of the Eighth Amendment.

At present Alabama, Mississippi, and Oklahoma have laws that allow nitrogen hypoxia to be used as a method of execution.¹⁴ On January 25, 2024, Alabama became the first state to use this prior-to untested method in the execution of Kenneth Smith. Although Smith challenged the use of nitrogen hypoxia, and the case was appealed up to the U.S. Supreme Court, the Court did not rule on the claims related to whether nitrogen hypoxia was a permitted method of execution.¹⁵

HISTORY

Action	Date
Introduced	02-01-24

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¹⁴ Code. Ala §15-18-82; Miss. Code §99-19-51; and 22 Okl. St. § 1014.

¹⁵ *Smith v. Hamm*, 601 U.S. ___, 144 S.Ct. 414, 217 L.Ed.2d 431 (2024).