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CRIMINAL PROCEDURE

Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocution to Lethal Injection

CODE SECTIONS: O.C.G.A. §§ 17-10-33, -38, -41, -44
(amended)
BILL NUMBER: HB 1284
ACT NUMBER: 734
SUMMARY: The Act amends state law on the death penalty by providing a different method of execution for capital crimes committed on or after May 1, 2000. Execution of these defendants will be performed by lethal injection instead of electrocution. If either the United States Supreme Court or the Supreme Court of Georgia declares that electrocution is unconstitutional, defendants who were sentenced to death for crimes that were committed before May 1, 2000 will be executed by lethal injection. The Act further provides that the state will not require physicians to participate in the execution of a death sentence by lethal injection.
EFFECTIVE DATE: May 1, 2000

History

As the Georgia General Assembly’s 2000 session began, “The Green Mile” was showing in theaters across the state.

2. The Green Mile (Castle Rock Films 1999). The motion picture takes place on death row in a fictional Southern prison and depicts several executions by electric chair, including one that goes awry. See Steve Murray, Death Row Dazzle: Tackling Big Questions in a Heart-Rending Way, Mystically Charged “Green Mile” Walks the Walk,

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Southeast of the Capitol, in Butts County, 126 men sat on death row in the Georgia Diagnostic and Classification Prison, and in the Capitol's neighboring county of DeKalb, the sole female under a death sentence in Georgia sat on death row in the Metro State Prison for Women. Elsewhere in the country, Columbia University School of Law professors were completing a study of death sentences at the request of the United States Senate Judiciary Committee.

The United States Supreme Court was scheduled to hear arguments in February 2000 in *Bryan v. Moore*. In that case, an inmate on Florida's death row challenged the constitutionality of his impending electrocution. He was encouraged by the strongly worded dissents of three Florida Supreme Court Justices in the four-to-three denial of another death row prisoner's appeal in *Provenzano v. Moore*. In response to these developments, the Florida legislature met in a three-day special session and passed a bill on January 6, 2000, making lethal injection Florida's main method of capital punishment.
Eighteen days later, the United States Supreme Court dismissed its writ of certiorari on Bryan, characterizing it as "improvidentially granted" since the petitioner's execution would now be by lethal injection unless he affirmatively chose electrocution. On February 3, the Court stayed the execution of Robert Lee Tarver to consider his plea that execution in the Alabama electric chair was cruel and unusual punishment. It lifted its order on February 22, 2000, after support was garnered from only four of the five Justices needed for the Court to proceed with a writ of habeas corpus.

After the change was made in Florida, Georgia remained one of only three states still using the electric chair as its exclusive means of carrying out a death sentence, which left it vulnerable to a charge that its execution device was an "unusual" if not "cruel" means of punishment under a constitutional analysis.

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9. See Bryan v. Moore, 120 S. Ct. 1003 (2000) (denying certiorari). Michael Radelet, chairman of the sociology department at the University of Florida, remarked that the Florida lawmakers had "conceded defeat before the big ballgame." Michael Boedy, Florida To Offer Lethal Injection Option, IND. FLA. ALLIGATOR, Jan. 10, 2000, available in Westlaw, U-WIRE. Radelet, who has studied the death penalty for over twenty years, estimated that the state would have had a sixty percent chance of keeping the electric chair after Supreme Court review. See id. Petitioner Anthony Bryan was executed in Florida by lethal injection on February 24, 2000. See Executions in the U.S. 2000, supra note 7.

10. See Richard Willing, Appeal of Alabama Execution Denied by High Court Law, USA TODAY, Feb. 28, 2000, at 5A.


12. The other states using electrocution exclusively were Alabama (with 185 inmates on death row as of Jan. 1, 2000) and Nebraska (with 9 inmates on death row as of Jan. 1, 2000). See Death Penalty Information Center, State by State Death Penalty Information (last modified June 8, 2000) <http://www.essential.org/dpic/>.

13. See generally Deborah W. Denno, Getting to Death: Are Executions Constitutional?, 82 IOWA L. REV. 319, 388 (1997) (discussing reasons that states change execution methods, including staying a step ahead of constitutional challenges on their old methods). While three states had the electric chair as their only means of carrying out a death sentence, a total of eleven states (Alabama, Arkansas, Florida, Georgia, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, and Virginia) provided for death in the electric chair in early 2000, though in most states it was an alternative means of execution. See Death Penalty Information Center, Authorized Methods of Execution by State (visited Sept. 7, 2000) <http://www.deathpenaltyinfo.org/methods.html>. A total of five methods of execution were on the books for use in the United States in early 2000: electrocution, lethal injection (thirty-five states, the United States military, and the federal system), gas chamber (five states), hanging (three states), and firing squad (three states). See id. All of the states using the last three methods had lethal injection as an alternative method. See id. Twelve states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan,
Georgia was no stranger to the national spotlight in matters related to the death penalty, for both Furman v. Georgia,\textsuperscript{14} the landmark United States Supreme Court case that suspended capital punishment in the United States, and Gregg v. Georgia,\textsuperscript{15}

14. 408 U.S. 238 (1972). William Henry Furman was a 28-year-old with a sixth grade education and mild-to-moderate mental deficiency who, during his escape from an attempted house burglary in August 1897, in Savannah, accidentally tripped over a wire, which caused his gun to go off and fire through a closed kitchen door from the outside. See id. at 232, 285; see also Kevin Clarke, Suspended Sentence: How the U.S. Almost Put Capital Punishment to Death (visited July 8, 2000) <http://salt.clarettanpubs.org/issues/death/hiccap.html>. Furman had unknowingly killed William Micke, husband and father of five, and he was apprehended by police following a brief pursuit. See id. On June 29, 1972, the high Court reversed Furman's death sentence, striking down the death penalty across the nation in a five-to-four decision. See id. Each of the nine Justices submitted a concurring or dissenting opinion, with only Justices Brennan and Marshall maintaining that capital punishment was unconstitutional and unsupportable under all circumstances. See Furman v. Georgia, 408 U.S. 238, 375 (1972) (Burger, J., dissenting). William Furman, who had begun serving in August 1897 what was, in 1972, commuted to a life sentence with possibility of parole, was ultimately released from prison in April of 1983. See Georgia Dept. of Corrections, Offender Query (visited July 9, 2000) <http://www.dpac.state.ga.us/OffenderQuery/asp/offender>.

15. 428 U.S. 153 (1976). Troy Leon Gregg, 25, and a male traveling companion, 16, were picked up hitchhiking on the Florida Turnpike in November 1973 by Fred Simmons and Tex Moore. See Gregg v. Georgia, 210 S.E.2d 659, 661-62 (Ga. 1974). As they drove north, the car broke down and Simmons bought a used car with cash to replace it. See id. at 682. After letting out a third hitchhiker in Atlanta, the men stopped along the road in Gwinnett County for a rest stop. See id. Gregg laid in wait and took aim at Simmons and Moore as they walked back toward the car; he killed both men and then emptied their pockets. See id. After the third hitchhiker tipped the authorities, they caught Gregg in North Carolina the next day. See id. A Georgia jury imposed four death sentences on Gregg. See id. at 666. On July 2, 1976, a majority of the United States Supreme Court affirmed the Gregg conviction, noting the Court's satisfaction with the new guidelines instituted in Georgia that eliminated the unfettered discretion of juries and allowed the death penalty to be administered in a rational, predictable, and just manner. See Gregg v. Georgia, 428 U.S. 153, 197 (stating approvingly that "[n]o longer can a Georgia jury as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or discretion, decide whether he should live or die"). In July 1980, Troy Leon Gregg and three other condemned murderers participated in the first death row breakout in Georgia history. See Bill Montgomery, Jurors Told of Escape Try as Issue Awaits Sentence, ATLANTA J. & CONST., Jan. 27, 1988, at A9. Clad in homemade guard uniforms complete with fake badges, the four escaped through their cell bars and drove away from the prison in a car that had been left in the visitor's parking lot by one of the convict's aunts. See id. Gregg was beaten to death later that night in a "biker bar" in North Carolina, and the authorities captured the other convicts three days after the escape. See id.; see also Clarke, supra note 14.
the equally prominent Supreme Court case that effectively reinstated capital punishment four years later, began their judicial journeys in the state.16

Until 1859, Georgia executed its condemned prisoners at a public hanging.17 That year, the General Assembly passed a law that “no person sentenced to death . . . shall be publicly executed,” and gallows began to be excluded from public view.18 In 1924, the General Assembly replaced private hanging with death by electrocution as Georgia’s sole means of execution, and it would be seventy-five years before the state seriously considered legislating another method.19

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16. See June D. Bell, Century’s Top Historic Cases for Georgia, U.S., FULTON COUNTY DAILY REP., Dec. 30, 1899, at 1 (discussing Georgia cases such as Furman that have had national impact).

17. See 1880 Ga. Op. Att’y Gen. 255 (1880). Public hanging had become the preferred method of execution in England by the seventeenth and eighteenth centuries as older methods of execution such as burning alive, boiling alive, disemboweling, and drawing and quartering were abandoned over time. See Pamela S. Nagy, Hang by the Neck Until Dead: The Resurgence of Cruel and Unusual Punishment in the 1890s, 26 Pac. L.J. 85, 88-87 (1994).

18. 1859 Ga. Laws 62, § 1, at 62-63. In 1834, Pennsylvania was the first state in the union to prohibit public hangings. See Nagy, supra note 17, at 88.

19. See 1924 Ga. Laws 185, § 1, at 185. In 1888, New York was the first state to adopt use of an electric chair for executions. See Nagy, supra note 17, at 88. A term for the procedure was needed, and Thomas Edison suggested “electrocution” along with the alternatives of “dynamort” and “electrocide.” See John Cook, Pulling the Plug on the Electric Chair, MOTHER Jones, May 1, 2000, at 27. After the New York governor expressed concern that hanging was “from the dark ages,” the New York legislature charged a committee with finding “the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.” In re Kemmler, 130 U.S. 436, 444 (1880). The committee recommended electrocution. See id. Electrocution passed muster when the first New Yorker sentenced to die in the electric chair appealed to the United States Supreme Court, which, while declining to apply the Eighth Amendment to the states, observed that “[p]unishments are cruel when they involve torture or a lingering death . . . something inhuman and barbarous – something more than the mere extinguishment of life.” Id. at 447. The Court concluded that the application of electricity resulted in “instantaneous, and consequently in painless, death.” Id. at 443-44. But see the more recent opinion of Justice Souter, joined by Justices Blackmun and Stevens, writing separately in Payne v. Murray, 508 U.S. 901, 903 (1993) (denying certiorari), observing that “[t]he Court has not spoken squarely on the . . . issue of electrocution as a possible violation of the Eighth Amendment] since In re Kemmler, . . . and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question.”
When New York appointed a commission in 1888 to study the most humane means of implementing the death penalty, it considered lethal injection. The commission rejected lethal injection because the medical profession did not want hypodermic needles to be associated with execution, fearing the public would link medical practices with death. It was 1977 before Oklahoma became the first state to adopt lethal injection as a means of execution. Since that time, no state that has changed methods or added an alternative method of execution has selected anything other than lethal injection. On December 2, 1982, Texas used lethal injection for the first time, and Charles Brooks became the first person in the nation to be executed by the method. Use of the electric chair began to decline rapidly; for instance, while eleven states were using electrocution as their sole means of execution in 1993, only four states were doing so at the close of the decade.

The Georgia General Assembly took interest in lethal injection, as well as the constitutionality of the electric chair, at least as early as 1996. A House bill proposed that year by Representative Mitchell A. Kaye (R-Marietta) and others would have drawn a dividing line at January 1, 1997, with individuals convicted after that date being executed by lethal injection and individuals convicted before that date having the opportunity to

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20. See Nagy, supra note 17, at 88.
21. See Denno, supra note 13, at 373.
22. See id.
24. See Denno, supra note 13, at 364.
26. See Nagy, supra note 17, at 119 n.254. House Majority Leader Larry Walker, characterizing Georgia in 2000 as “one of the few states in the country that still electrocute,” said the testimony on death in the electric chair he heard in the fall of 1999 in a special Judiciary Committee hearing was “the most sobering, graphic testimony I’ve heard in my twenty-eight years in the legislature.” Lawmakers 2000 (GPTV broadcast, Feb. 2, 2000) (remains by Rep. Larry Walker) (on file with the Georgia State University Law Review). He elaborated that “[e]lectrocution is not just a quick, easy way of killing someone. It’s a series of electrical shocks. Sometimes it doesn’t kill them initially. The body gets so hot they have to let it cool off before they can electrocute them again.” Id. See generally: Jonathan Ringel, Legislative Hearing Set on Execution Method, FULTON COUNTY DAILY REP., Nov. 4, 1999, at 4.
27. See Jonathan Ringel, Florida Case May Unplug Georgia’s Electric Chair, FULTON COUNTY DAILY REP., Nov. 1, 1999, at 1.
choose lethal injection instead of electrocution. Another bill, solely sponsored by Representative Doug Teper (D-Atlanta), would have provided the condemned person the option of the guillotine instead of the electric chair, ostensibly to facilitate inmate organ donation. A third bill, sponsored by Representative E.C. Tillman (D-Brunswick) and others, would have drawn a line at July 1, 1996, with those receiving death sentences after that date being lethal injected and those convicted before that date being lethally injected rather than electrocuted if electrocution were found to be unconstitutional. All these efforts failed, with Representative Kaye later recalling that House Speaker Thomas B. Murphy (D-Bremen) opposed such changes because the Speaker believed that even the change of a comma or period in the death penalty statute could provide condemned prisoners with new grounds for appealing their sentences.

Representative Kaye introduced a slightly different version of the bill in 1998, providing for Georgia inmates to be executed by lethal injection only in the event that the electric chair was found to be unconstitutional. However, he had no co-sponsors, and the bill did not advance past the second reading. The idea that a court might throw out the practice of electrocution and leave Georgia without a way to execute was, he declared in late 1999, his “worst nightmare.”

31. See Ringel, supra note 27, at 1. Speaker Murphy's misgivings were shared by House Majority Leader Larry Walker, who said, “We've been fearful of providing an alternative method of execution because we were fearful it would open up our entire death penalty law for appeal and delay.” Lawmakers, supra note 26.
34. See Ringel, supra note 27, at 1. Representative Kaye said, “Personally, I don't care how these criminals are executed under a legally imposed sentence, but it's important that we do have a proper legal means of execution.” Audio Recording of House Proceedings, Feb. 21, 2000 (remarks by Rep. Mitchell Kaye) <http://www.ganet.org/services/leg/audio/2000archive.html> [hereinafter House Audio]. Representative Kaye provided his fellow representatives with an account of what happened to the twelve Georgia prisoners on death row when the Furman decision came down: ten of the twelve were ultimately paroled. See id. He said that his objective was that the “128 individuals on death row today … not walk outside of a prison in Georgia.” Id. He went on to say that Georgia in essence doesn't have a death penalty because “[w]e've executed only twenty-three people in the State of Georgia since 1976. We're
HB 1284

Introduction

Representative E.C. Tillman of the 173rd District sponsored HB 1284, which was introduced on February 1, 2000.\(^{35}\) Co-sponsors were Representatives Earl O'Neal of the 75th District, Gerald E. Greene of the 158th District, and, significantly, Speaker Thomas B. Murphy of the 18th District.\(^{29}\) The inclusion averaging about one a year and recently, . . . most, if not all, of those individuals on death row will probably die of old age." \textit{Id.}.

35. \textit{See} HB 1284, as introduced, 2000 Ga. Gen. Assem. House Judiciary Committee Chairman Jim Martin timed the lethal injection bill to facilitate passage, taking the position he needed to make sure there's some consensus first." Jonathan Ringel, \textit{"War Wages Over Lawyers' Bid To Allow Venue Choices}, FULTON COUNTY DAILY REP., Jan. 10, 2000, at 1. Chairman Martin noted that more and more lawmakers were moving away from their fear of tampering with the statute and the challenges it might bring because they realized that something needed to be done. \textit{See Attorney General Expects Georgia To Take Wait-and-See Attitude on Electric Chair}, supra note 8. The bill's sponsor, Representative Tillman, a minister, saw electrocution as cruel, and he wanted a more humane method that would lend dignity to the situation, especially for the sake of the convicted individual's family. \textit{See Russ Bynum, Georgia Legislature Passes Switch to Lethal Injection}, AP NEWSWIRE, Mar. 23, 2000, available in Westlaw, GANEWS. He noted that even babies take injections. \textit{See id.; see also House Audio, supra note 34 (remarks by Rep. Tillman). He told the House he had made a vow to try to eliminate the electric chair: "I said to . . . [an electrocuted Florida convict's] mother and . . . to others from that day on that if I ever got the chance, to make sure that we do not use this barbaric method [of the electric chair], that I would do it." \textit{Id.} The Attorney General's office had begun pushing for a move away from the electric chair in the fall of 1999, fearing that execution by the electric chair would be overturned in court, and Georgia would find itself without an enforceable death penalty. \textit{See Dave Williams, Senators Approve Injection: Legislators Vote To Decommission Georgia's Electric Chair in Response to Recent Challenges in Court}, AUGUSTA CHRON., Mar. 16, 2000, at B7. Attorney General Thurbert Baker's original advice was that the General Assembly craft a bill that would provide an alternative to the electric chair that would take effect only if the electric chair were ruled unconstitutional. \textit{See Senator Wants Choice Between Electric Chair and Lethal Injection}, AP NEWSWIRE, Jan. 14, 2000, available in Westlaw, GANEWS. Despite signals of interest in the issue from the United States Supreme Court, the Eleventh Circuit had not entertained arguments on the constitutionality of the electric chair. \textit{See, e.g., United States v. Battle, 173 F.3d 1343, 1345 (1999), cert. denied, 120 S. Ct. 1428 (2000) (stating defendant's claim that electrocution was a cruel and unusual mode of punishment lacked merit and declining to discuss it.). The members of the Georgia Supreme Court have shown interest in the issue, however, on more than one occasion; for example, Justice Leah Ward Sears commented in an order affirming a death sentence in late 1999 that "it's time to examine whether Georgia's current method of enforcing the death penalty and its attending consequences are compatible with the dignity, morality, and decency of society's enlightened consciousness and is reflective of a humane system of justice." Bell, supra note 10.}

of Representative Mitchell Kaye of the 37th District on the list of sponsors made the bill bipartisan.37

HB 1284 was assigned to the House Judiciary Committee, which favorably reported the bill, as substituted, on February 8, 2000.38 Following debate on February 21, 2000, during which two floor amendments were defeated and one floor amendment was adopted, the House adopted the Judiciary Committee substitute, as modified by floor amendment, and passed the bill.39 On February 22, 2000, the bill was assigned to the Senate Judiciary Committee, which favorably reported the bill, as substituted, on March 14, 2000.40 The Senate adopted the Senate Judiciary Committee substitute and passed the bill on March 15, 2000.41 The bill was returned to the House on March 20, 2000, and the House amended the Senate substitute.42 The bill traveled back to the Senate on March 22, 2000, and the Senate concurred with the House amendment to the Senate substitute.43 The General Assembly forwarded the bill to Governor Roy Barnes, who signed HB 1284 into law on April 28, 2000.44

Consideration by the House Judiciary Committee

Upon introduction, the House assigned HB 1284 to its Judiciary Committee, which created a substitute bill, primarily by removing language.45 The bill as originally introduced noted

Murphy took note that when Florida changed its main method of carrying out the death sentence from electrocution, the U.S. Supreme Court had dismissed its review of the Bryan case. See Lawmakers, supra note 28 (remarks by Speaker Thomas Murphy).


39. See Georgia House of Representatives Voting Record, HB 1284 (Feb. 21, 2000). The vote was 162 to 10. See id.


41. See Georgia Senate Voting Record, HB 1284 (Mar. 15, 2000). The vote was 44 to 3. See id.

42. See State of Georgia Final Composite Status Sheet, Mar. 22, 2000; see also Georgia House of Representatives Voting Record, HB 1284 (Mar. 20, 2000).

43. See Georgia Senate Voting Record, HB 1284 (Mar. 22, 2000).


that Georgia was one of only two states left with death by the
electric chair.\textsuperscript{46} It stated that the malfunction of electrocution
equipment can cause more suffering than is needed for the
death of the condemned.\textsuperscript{47} The bill further noted that the
electric chair is a potential subject of litigation that can create
a delay in execution.\textsuperscript{48} Two objectives were set forth in providing
for a different method of execution.\textsuperscript{49} First, the bill, as
introduced, indicated the General Assembly wanted a method
that would not violate the prohibition in the Constitution
against “cruel and unusual punishment.”\textsuperscript{50} Second, it wanted a
method that would not unduly delay the execution of the death
sentence.\textsuperscript{51}

The Committee substitute no longer cited the number of
states using electrocution for death sentences, and it did not
contain remarks about electrocution causing excessive suffering
or creating execution delays due to litigation.\textsuperscript{52} The Committee
also deleted the two objectives of the General Assembly in
making the changes.\textsuperscript{53} The Committee pared down the bill’s
stated intent to indicate only that the General Assembly
intended that persons sentenced to death for capital crimes
committed on or after July 1, 2000 be executed by lethal
injection.\textsuperscript{54} If electrocution were declared unconstitutional by
the Supreme Court of either the United States or Georgia, the
bill would have provided that those sentenced to death for

\begin{itemize}
\item[46.] See HB 1284, as introduced, 2000 Ga. Gen. Assem. The actual tally of states using

electrocution as their exclusive method of execution in early 2000 was three. \textsuperscript{See supra

\item[47.] See HB 1284, as introduced, 2000 Ga. Gen. Assem.

\item[48.] See id.

\item[49.] See id.

\item[50.] See id.; see also U.S. CONST. amend. VIII, “Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted.” \textsuperscript{Id.} The Georgia

Constitution has an identically worded provision that adds “nor shall any person be

abused in being arrested, while under arrest, or in prison.” \textsuperscript{GA. CONST. art. I, \S 1, \S XVII.

\item[51.] See HB 1284, as introduced, 2000 Ga. Gen. Assem.

\item[52.] Compare HB 1284, as introduced, 2000 Ga. Gen. Assem., \textit{with} HB 1284 (HCS), 2000


\item[53.] Compare HB 1284, as introduced, 2000 Ga. Gen. Assem., \textit{with} HB 1284 (HCS), 2000


\item[54.] Compare HB 1284, as introduced, 2000 Ga. Gen. Assem., \textit{with} HB 1284 (HCS), 2000

capital crimes committed before July 1, 2000 would be executed by lethal injection.\textsuperscript{55}

\textit{From the House Judiciary Committee to the House Floor}

\textit{Failed Floor Amendments and Substitutes}

Representative Ben Allen of the 117th District offered a substitute for HB 1284 that would have eliminated the death penalty altogether in the Code sections affected.\textsuperscript{56} Representative Allen's bill would also have changed references throughout the Georgia Code that relate to the death penalty, including references to capital felonies, punishment by death, death sentences, and capital punishment.\textsuperscript{57} In his substitute, capital felonies were restated to be felonies "for murder, aircraft hijacking, treason, rape, armed robbery, or kidnapping."\textsuperscript{58} The maximum punishment provided by law in Representative Allen's bill substitute was life imprisonment.\textsuperscript{59} He provided that the bill would go into effect on either the date approved by the Governor or on the date it became law without the Governor's approval, as appropriate.\textsuperscript{60}

On February 21, when the bill came out of Committee and onto the floor of the House for discussion, Representative Allen offered an extensive amendment to the Judiciary Committee substitute, eliminating references to the death penalty, providing for a sentence of life without parole, and providing for re-sentencing of prisoners on death row.\textsuperscript{61} He proposed a completely new Code Section 17-10-30 that would have provided the offenses that could lead to a new maximum sentence, life

\textsuperscript{55} Compare HB 1284, as introduced, 2000 Ga. Gen. Assem., with HB 1284 (HCS), 2000 Ga. Gen. Assem. The reason for leaving existing sentences of death unaffected unless electrocution was declared unconstitutional was to "not open new grounds for appeals in existing cases." House Audio, supra note 34 (remarks by Rep. Jim Martin); see also Bynum, supra note 35 (quoting Rep. Martin as saying, "We didn't want to do anything that could reopen existing cases" and adding they had "at least solved the problem for the future").


\textsuperscript{57} See id.

\textsuperscript{58} Id.

\textsuperscript{59} See id.

\textsuperscript{60} See id.

without parole.62 These offenses were aircraft highjacking, treason, and statutory aggravating circumstances, including murder, rape, armed robbery, or kidnapping by a convicted felon or one who created the risk of death to more than one person in a public place, murder for pay, murder of certain judicial and executive branch officers because they had exercised their official duties, murder by a prison escapee, and murder while evading arrest or custody.63

Representative Allen’s floor amendment failed, and since the House considered only the language of the House Committee substitute, not Allen’s substitute, when voting on Allen’s floor amendment, Allen’s substitute became out of order and moot.64 Representative Mark Burkhalter of the 41st District also proposed a floor amendment that would have provided for execution by electrocution or lethal injection, but with only electrocution used unless the Supreme Court of the United States or the Supreme Court of Georgia found electrocution unconstitutional.65 However, Representative Burkhalter’s floor amendment was defeated by a 33 to 139 vote.66

**Adopted Floor Amendment**

Representatives E.C. Tillman, Jim Martin, and Tom Campbell of the 173rd, 47th, and 42nd Districts, respectively, proposed a floor amendment to the Committee substitute that advanced the effective date to May 1, 2000.67 While lethal injection would apply to capital crimes committed on or after May 1, 2000, Code section 17-10-38 as it existed prior to HB 1284 would still apply to crimes committed before that date unless electrocution was held to be unconstitutional.68 The amendment also clarified that

62. See id.
63. See id.
64. See Georgia House of Representatives Voting Record, HB 1284 (Feb. 21, 2000); see also House Audio, supra note 34 (remarks by Speaker Thomas Murphy).
66. See Georgia House of Representatives Voting Record, HB 1284 (Feb. 21, 2000).
68. Compare HB 1284 (HCS), 2000 Ga. Gen. Assem., with HB 1284 (HCSFA), 2000 Ga. Gen. Assem. Representative Martin stated that this provision “makes it clear that the current Code section applies…to crimes that occurred prior to May 1st, so that no one could argue that we have somehow eliminated a method of execution for people who are
the provisions in the bill regarding constitutionality dealt with the United States Constitution, in the case of the United States Supreme Court, and with the Georgia Constitution, in the case of the Supreme Court of Georgia. The House adopted the Committee substitute, as altered by the floor amendment of Representatives Tillman, Martin, and Campbell, and the House passed HB 1284.

From the House Floor to the Senate Judiciary Committee

Once HB 1284 reached the Senate, it was assigned to the Senate Judiciary Committee. In response to concerns expressed by the Medical Association of Georgia on behalf of physicians, the Senate Judiciary Committee added a new section to the bill. That section provided that no state official, agency, or department could compel physicians to "participate in the execution of a death sentence." Participation was defined as selecting a site for the lethal injection; starting an intravenous line that would be used as a port for the lethal injection; prescribing, preparing, administering, or supervising the administration of the lethal drugs; inspecting, testing, or maintaining the injection devices; or advising in these matters. Certifying the death of a condemned person, if the physician were the first person to declare the executed individual dead,


69. Compare HB 1284, as introduced, 2000 Ga. Gen. Assem., with HB 1284 (HCSFA), 2000 Ga. Gen. Assem. Three days after the bill passed the House, the Georgia Supreme Court voted 4 to 3 to consider an appeal from Troy Anthony Davis, a prisoner under a death sentence for the shooting of Savannah police officer Mark Allen McPhall in 1989. See Execution Challenge to be Heard: State High Court to Consider Whether To End Electric Chair Use in Favor of Lethal Injection, AUGUSTA CHRON., Feb. 28, 2000, at D2. Davis claims that Georgia's electric chair is cruel and unusual punishment under the United States and state constitutions. See id.

70. See Georgia House of Representatives Voting Record, HB 1284 (Feb. 21, 2000).


would also be participation in execution of the type that could not be imposed on doctors against their will.\textsuperscript{75}

\textit{From the Senate Judiciary Committee to the Senate Floor}

On March 15, Senator Rene' Kemp spoke on behalf of HB 1284 and explained the reasons behind the Committee substitute in that doctors believed that requiring them to participate in executions by lethal injection would be “a complete violation of their Hippocratic oath.”\textsuperscript{76} Senator Kemp also explained that no state currently using lethal injection allows organ donations because the poison administered harms every organ in the body.\textsuperscript{77} He recommended a favorable vote on the Senate Committee substitute.\textsuperscript{78} The Senate adopted the Committee substitute and passed the bill by a vote of 44 to 3.\textsuperscript{79}


\textsuperscript{77} \textit{See} id. But see Denno, supra note 13, at 388 (suggesting organ donation is possible for lethally injected prisoners).

\textsuperscript{78} \textit{See Senate Audio, supra} note 76. Senator Eric Johnson of the 1st District also addressed the Senate. \textit{See} id. (remarks by Sen. Eric Johnson). He stated that he had authored a similar Senate bill but that he and the other sponsors, Senator Kemp and Senator George Hooks, had decided to support the slightly different House version. \textit{See} id. Representative Johnson's bill would have provided an effective date of May 1, 2000, and allowed those under death sentences both before and after that date to opt for execution by either lethal injection or electrocution. \textit{See} SB 337, as introduced, 2000 Ga. Gen. Assem. The Johnson bill provided a different definition of lethal injection: “continuous intravenous infusion of a lethal quantity of a ultra short-acting barbiturate in combination with such other drug or drugs, as the Department of Corrections deems appropriate, until death is pronounced by a licensed physician according to accepted standards of medical practice.” \textit{Id}.

With the General Assembly out of session for three-quarters of the year, Senator Johnson felt it was important to do something in this session to protect the death penalty and not get "stuck." \textit{See} Senator Wants Choice Between Electric Chair and Lethal Injection, supra note 35. While he recognized that some people believed electrocution was the proper way to execute those who committed heinous crimes, with lethal injection, society was continuing along a path where people realized that putting people to death for their crimes was just, but need not be torturous. \textit{See} Senate Audio, supra note 76 (remarks by Sen. Eric Johnson).

\textsuperscript{79} \textit{See} Georgia Senate Voting Record, HB 1284 (Mar. 15, 2000).
From the Senate Floor to Final Passage

The House reviewed the Senate version of the bill on March 20, 2000.\textsuperscript{80} Representatives Tillman and Martin proposed an amendment to strike the prohibition against requiring doctors to certify death once the execution was complete.\textsuperscript{81} The House adopted the amendment by a vote of 132 to 8\textsuperscript{82} and sent its amended version back to the Senate.\textsuperscript{83}

The Senate agreed to the House version on March 22, 2000, achieving final passage for the lethal injection bill a few hours before the 2000 legislative session ended.\textsuperscript{84} Governor Roy Barnes, a death penalty supporter,\textsuperscript{85} signed HB 1284 into law on April 28, 2000, just three days before the effective date established by the General Assembly.\textsuperscript{86}

The Act

The Act amends four Code sections that set forth Georgia’s execution procedures.\textsuperscript{87} The Act provides that lethal injection will be used to execute defendants convicted of capital crimes committed on or after the effective date of the Act, May 1, 2000.\textsuperscript{88} The Act defines lethal injection as “the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person


\textsuperscript{82} See Georgia House of Representatives Voting Record, HB 1284 (Mar. 20, 2000).


\textsuperscript{84} See Georgia Senate Voting Record, HB 1284 (Mar. 22, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000; see also Bynum, supra note 35.

\textsuperscript{85} See Bynum, supra note 35.

\textsuperscript{86} See 2000 Ga. Laws 947, § 8, at 950. A Barnes spokesperson indicated at the end of the legislative session that the Governor had not yet made a decision to sign the bill into law and needed time to review it. See Bynum, supra note 35.


is dead." The Act adds a new paragraph to Code section 17-10-38, which states that prescribing, preparing, compounding, dispensing, and administering lethal injection to carry out a court-authorized death sentence does not constitute the practice of medicine in Georgia, nor the practice of any other health care profession that is subject to regulation, licensing, or certification.

The Act adds a new paragraph to Code section 17-10-38, which precludes the State from requiring a physician to participate in an execution by lethal injection. "Participation" includes selecting a site for the injection; starting an intravenous line as a port for the injection; prescribing, preparing, administering, or supervising the use of lethal injection drugs, including providing advice on dosage and types; and otherwise consulting with or supporting those who administer a lethal injection.

The Act replaces "he," "his," and "-man" references in Code sections 17-10-33 and -41 with gender-neutral references. It replaces phrases in Code sections 17-10-33 and -44 that reference electrocution with phrases that reflect the execution of a death sentence in a more generic way. The Act deletes the requirement in Code section 17-10-41 that "electricians" be present at an execution and replaces it with a requirement that "technicians" be present.

Opposition to HB 1284

The most obvious opposition to HB 1284 came from those who object to capital punishment regardless of the method of execution. Representative Ben Allen spoke for six minutes on

the House floor, urging his peers to be "courageous" and consider whether or not the state should impose the death penalty, rather than merely examining the means by which the death penalty is carried out. Representative Arnold Ragas was concerned about the number of innocent people who are convicted in the justice system. On the other hand, some members of the General Assembly were reluctant to abandon the electric chair as the execution device for capital crimes.

When the House Judiciary Committee held hearings on a possible change to lethal injection in the fall of 1999, criminal defense lawyers expressed their opposition. Death penalty

98. See House Audio, supra note 34 (remarks by Rep. Ben Allen). In support of his position, Representative Allen referenced the Illinois moratorium on executions, statements by the American Bar Association and the United States Justice Department, the disparate impact of race and income on death sentences, DNA evidence showing that innocent people have been sentenced to death, and Biblical teachings. See id. He pointed out that those who committed heinous crimes need not be set free, but could spend their lives in prison without hope of parole. See id. Although public support for the death penalty is strong, some polls suggest that support is declining. See Jen Heath, Death Penalty: Support Softening?, ATLANTA J. & CONST., June 21, 2000, at A6. Representative Allen noted at the end of the session that it was "a little twisted" that the General Assembly had spent more time debating whether to make it a felony to torture animals than it had spent debating the wisdom of the death penalty. See Bynum, supra note 35.

97. See House Audio, supra note 34 (remarks by Rep. Arnold Ragas) (admonishing the House that "[t]he question we should be asking is, how many innocent people is it okay to kill in order to kill some guilty?"). Senator Vincent Fort voted against the bill in the Senate, commenting that an alarming number of innocent people have been convicted and executed. See Dave Williams, Lethal Injection Gets OK, Senate Bill Goes Back to House, FLA. TIMES-UNION, Mar. 16, 2000, at B1; see also Carl M. Cannon, The Problem with the Chair, NAT'L REV., June 19, 2000, at 28, 30 (discussing reporter's experience with conviction of innocent Columbus, Georgia man). Representative Jim Martin subsequently stated, "In candor, as an individual member of this body with one vote and not as Chairman of the House Judiciary Committee, I oppose the death penalty. Others have spoken more eloquently than I about what is wrong with the death penalty. All that said, however . . . House Bill 1284 . . . must be passed by this body." House Audio, supra note 34 (remarks by Rep. Jim Martin).

98. For example, Representative Robert Ray asked if the House Committee had looked at giving judge and jury the option of sentencing a defendant in a particular case to execution in the electric chair instead of lethal injection. See House Audio, supra note 34 (remarks by Rep. Robert Ray).

99. See Lawmakers, supra note 26 (remarks by Rep. Larry Walker) (commenting on defense lawyers' attendance at the hearings and stating, "That makes me suspect. That makes me think that they think that there's a possibility that the Georgia method of executing people is going to be declared unconstitutional and these people are going to escape the death penalty.").
defense lawyers said that they "warned the legislators that they should leave the law alone."\textsuperscript{103}

Shortly after the bill was passed, the Georgia Supreme Court questioned lawyers on both sides of a capital case about how the new legislation would affect the points they were arguing before the court.\textsuperscript{101} The District Attorney maintained that the jury had voted on the result, that is, the death sentence, and not on the method of execution by which it would be carried out.\textsuperscript{102} The defense lawyer argued that his client was entitled to a new sentencing trial.\textsuperscript{103}

The first real challenge to the lethal injection law came in the Carroll County death penalty case of \textit{Jeffrey v. McGee}.\textsuperscript{104} Lawyers Kenneth M. Krontz and Michael Mears went over the "minutiae" of Georgia's death penalty laws and found that Code section 17-10-33 still appears to give the Governor the power to stay an execution, though that power has been reserved to the Board of Pardons and Paroles since the Georgia Constitution was changed in 1983.\textsuperscript{105} House Judiciary Committee Chairman Jim Martin called the issue raised by Mears and Krontz "a very interesting point," but noted that if there is a conflict between the Constitution and the statute, the Constitution prevails.\textsuperscript{106} Thus, the lethal injection law drew an initial challenge not because of changes the General Assembly made to the affected Code sections in 2000, but because of changes it did \textit{not} make.\textsuperscript{107}

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\textsuperscript{102} See id.

\textsuperscript{103} See id.

\textsuperscript{104} See Renaud, supra note 100.

\textsuperscript{105} See id.

\textsuperscript{106} See id.

\textsuperscript{107} See id.