

STORAGE NAME: h4819.cor

DATE: July 16, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CORRECTIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 4819 (PCB COR 98-02)

RELATING TO: Executions

SPONSOR(S): Committee on Corrections and Representative Trovillion

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CORRECTIONS YEAS 6 NAYS 1

(2)

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I. SUMMARY:

HB 4819 will codify an existing Department of Corrections' rule prohibiting electronic or mechanical devices in the execution observation room.

HB 4819 will take effect upon becoming law.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Cameras in the Execution Chamber

America's last public execution took place in Galena, Mo., on May 21, 1937. Although Florida allows certain specified persons to witness an execution, including media representatives, such executions are not open to the general public. Moreover, executions are not broadcast publicly, as Florida prohibits electronic or mechanical devices, such as cameras, in the electrocution chamber. Florida's policy regarding electronic and mechanical devices is not enacted into statute.

There are currently thirty-eight states that authorize capital punishment. Pursuant to a request by the House of Representatives Committee on Corrections, between March 30 and April 1, 1998 the staff of the Florida Corrections Commission conducted a telephone survey of the policies of all thirty-eight states. The information was obtained mostly from the public information officers of their respective departments of corrections. The questions asked were:

- (1) Does the state allow video equipment or cameras during the execution process?
- (2) Is this approach established in statute or by department policy?
- (3) Has the state received any legal challenges regarding this statute/policy?

All of the thirty-eight states contacted responded. None of the respondents allow video equipment or cameras during the execution process. Seven of the responding states have established their policy by statute, 27 have established it by policy, and the remaining 4 responding states have no policy, generally because executions have not been performed in recent years. Finally, the following twelve states do not have the death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The District of Columbia also does not allow the death penalty. Table 1 on the following page details the responses of the states to the survey.

Table 1. Responses of Surveyed States

STATE	ALLOW VIDEO	STATUTE/ POLICY	CHALLENGES
Alabama	No	Policy	No
Arizona	No	Statute	No
Arkansas	No	Statute	No
California	No	Policy	Yes
Colorado	No	Policy	No
Connecticut	No	N/A	N/A (No capital protocol)
Delaware	No	Policy	No
Florida	No	Policy	Yes
Georgia	No	Policy	No
Idaho	No	Policy	No
Illinois	No	Policy	No
Indiana	No	Statute	Yes
Kansas	No	N/A	N/A (No capital protocol)
Kentucky	No	Policy	No
Louisiana	No	Statute	No
Maryland	No	Policy	No
Mississippi	No	Statute	No
Missouri	No	Policy	No
Montana	No		
Nebraska	No	Policy	No
Nevada	No	Policy	No
New Hampshire	No Policy	N/A	No
New Jersey	No	Statute	No
New Mexico	No	Policy	No
New York	No	Policy	No
North Carolina	No	Policy	Yes
Ohio	No	Policy	No
Oklahoma	No	Policy	No
Oregon	No	Policy	No
Pennsylvania	No	Policy	No
South Carolina	No	Policy	No
South Dakota	No	None	No
Tennessee	No	Policy	No
Texas	No	Policy	No
Utah	No	Statute	No
Virginia	No	Policy	No
Washington	No	Policy	Yes.
Wyoming	No	Policy	No

Rules Regarding News Media Access Following Issuance of Death Warrants

In 1977, following the reinstatement of the death penalty in Florida, the Florida Department of Corrections (the department) promulgated rules in Chapter 33-15, F.A.C. regarding news media access to institutions after the issuance of death warrants. The chapter includes the following rules¹:

R. 33-15.001- provides procedures for determining which representatives of the news media will be present at the execution.

R. 33-15.002 - provides procedures to be followed by news media representatives in attending the execution. Includes when the media representative must sign in at the prison, a prohibition on electronic or mechanical devices in the observation room, security clearance and escort procedures before and after the execution, penalties for noncompliance with the procedures, and provision for final statements by the condemned inmate.

R. 33-15.003 - provides procedures for news media interviews for condemned inmates prior to execution.

R. 33-15.004 - requires person requesting access under this chapter to be responsible for presenting sufficient evidence of entitlement to access early enough for verification.

These rules were promulgated to implement §922.11 and §944.23, and cite to §922.11 and §944.09 for specific legislative authority.

§922.11 provides regulations for carrying out executions. In designating who may attend an execution, the statute provides, "Representatives of news media may be present under rules approved by the Secretary of Corrections."²

§944.09 provides the department with a broad grant of rulemaking authority. Subsection (1) of the statute allows the department to adopt rules "governing the administration of

¹ The full text of the rules found in Chapter 33-15 can be found on page 8.

² 922.11. Regulation of execution

(1) The superintendent of the state prison or a deputy designated by him or her shall be present at the execution. The superintendent shall set the day for execution within the week designated by the Governor in the warrant.

(2) Twelve citizens selected by the superintendent shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of religion requested by the convicted person may be present. Representatives of news media may be present under rules approved by the Secretary of Corrections. All other persons, except prison officers and correctional officers, shall be excluded during the execution.

(3) The body of the executed person shall be delivered to the medical examiner for an autopsy. After completion of the autopsy, the body shall be prepared for burial and, if requested, released to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or to be disposed of in the same manner as are bodies of prisoners dying in the state prison.

the correctional system and the operation of the department.” Subsection (1) then provides a list of issues such rules shall relate to, including:

(e) The operation and management of the correctional institution or facility and its personnel and functions.

(r) Such other rules as in the opinion of the department may be necessary for the efficient operation and management of the correctional system.

§944.23 relates to persons who are specifically authorized to visit all state correctional institutions at their pleasure. The statute also authorizes the department to promulgate rules regarding permitting other unspecified persons to enter state correctional institutions.

Revised Standards for Rulemaking Under the New APA

The 1996 Legislature adopted a comprehensive rewrite of the Administrative Procedures Act (APA).³ Among many other changes, the revised APA modified the standards which authorize agencies to make rules. The 1996 revisions were designed to require a closer relationship between an agency rule and the implementing statute, thereby improving legislative oversight of agency rulemaking.

Prior to the revisions, a line of court decisions held that agencies had wide discretion in adopting rules. Under some of these cases, a rule was held to not exceed the legislative grant of rulemaking authority if it was reasonably related to the purposes of the enabling legislation and was not arbitrary or capricious. Additionally, it was accepted that a rule was valid when it implemented general legislative intent or policy. Therefore, under this line of decisions, agencies had wide discretion in adopting rules, whether the statutory basis for the rule was clearly conferred or implied from the enabling statute.

In revising the APA and creating §120.536, the Legislature specifically and effectively overturned this line of cases and imposed a much stricter standard for authorizing agencies to make rules. Under the new APA, an agency may only adopt a rule that implements a specific law.⁴ Furthermore, only rules that *implement, interpret or make specific* the particular powers and duties granted by the enabling statute will be deemed valid. Therefore, agencies now need more than a grant of rulemaking authority or a statement of general legislative intent in order to implement a rule. Instead, rules must be based on specific grants of powers and may not address subjects on which the Legislature was silent.

³ See CS/SBs 2290 and 2288.

⁴ 120.536(1) states:

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

Review for Compliance with the New Standard

As a means to address existing rules that may exceed the authority of an implementing statute, all agencies were directed to identify those rules existing prior to October 1, 1996 that exceeded the new standard for rulemaking.⁵ Agencies were required to report the rules identified as exceeding rulemaking authority to the Joint Administrative Procedures Committee (JAPC) by October 1, 1997. Rules that were not identified and reported to JAPC could be challenged under the new standard beginning November 1, 1997. However, rules that were identified and reported were shielded from challenge under the new standard until the Legislature had the opportunity in the 1998 Regular Session to consider both whether the identified rules are necessary and whether authorizing legislation should be enacted.

After the 1998 session, agencies must initiate repeal procedures for those rules reported to JAPC, but not authorized in the session, by January 1, 1999. The shield protecting agency's rules identified and reported to JAPC will be removed on July 1, 1999, and JAPC or substantially affected parties may petition for the repeal of any remaining rule identified as exceeding rulemaking authority for which authorizing legislation was not enacted.

Department of Corrections' Participation in Review

According to JAPC, a final count of approximately 5,580 rules or portions of rules were reported in October 1997. Of these, 3,610 rules were identified by various local school boards, whose rules are not contained in the Florida Administrative Code (FAC). However, 2,240 rules contained in the FAC were reported by various state agencies as exceeding statutory authority for rulemaking under s. 120.536, F.S. Out of this total, the Department of Labor & Employment Security reported a total of 153 rules and the Department of Health reported a total of 489 rules.

⁵ 120.536(2) states:

(2) By October 1, 1997, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 1999, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 1999, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

In responding to the directive for review, the department compiled a list of 22 rules to submit to JAPC in October 1997. These rules were primarily identified by the department based on the rules' redundancy or obsolescence.⁶ The department did not identify any rules of continuing necessity that were in need of increased statutory authority.

In explaining their position that no existing department rules were in need of additional legislative authorization under the new standard, the department provided JAPC with the following statement:

It is important to note that most of the Department's rulemaking authority is found in s. 944.09(1), FS, which provides a list of specific areas for which rules must be adopted, along with several broad grants of rulemaking authority to enable the Department of Corrections to carry out its responsibilities in managing the correctional system. The Legislature intentionally granted the Department of Corrections broad rulemaking authority to carry out its responsibilities and functions in managing the prison system for the State of Florida. Rather than attempting to foresee all areas in which rulemaking would be necessary, the Legislature deferred to correctional professional expertise by providing authority for all rules necessary for the operation and management of the correctional system. Section 120.536, Florida Statutes, requires that an agency must have a specific grant of rulemaking authority and a specific law to be implemented. Section 20.315, FS, charges the Department of Corrections with protection of the public through incarceration of offenders and vests the department with authority for the operation and management of the correctional system. Section 944.09, FS grants the department the authority to adopt all rule necessary for the operation and management of the correctional system. These provisions together meet the requirements of s. 120.536, FS. However, since s. 944.09 also provides specific rulemaking mandates for certain areas of correctional management, enclosed are proposed revisions to s.944.09 which provide clarity by setting forth additional specific rulemaking mandates for department rules which are not already enumerated in 944.09(1)(a) through (r).

944.09 Rules of the department; offenders, probationers, and parolees.--

(1) The department shall adopt rules governing the administration of the correctional system and the operation of the department, which rules shall relate to:

(s) Care of inmates.

(t) Inmate property.

(u) Inmate work programs.

(v) Inmate welfare trust fund and canteen operation.

(w) Copying services and copying costs.

(x) Law libraries.

(y) Control of contraband.

(z) Searches of inmates, visitors and employees.

(aa) Use of force.

(bb) Confinement.

(cc) Inmate deaths.

⁶ The department repealed the 22 submitted rules in November and December. As a result, the department is not currently seeking legislative authorization for the 22 specific rules submitted to JAPC in October.

(dd) Inmate telephone use.

(ee) Inmate marriages.

(ff) Chaplaincy services.

(gg) Inmate bank trust fund.

(hh) Transfer of inmates.

(ii) Confidential records.

(jj) Use of inmates' committed names.

(kk) Temporary release of inmates.

(ll) Discharge of inmates.

(mm) Provision of inmate health care and mental health services.

(nn) Payment of reward for capture of escapees.

(oo) Provision of community supervision.

(pp) Staff housing.

(qq) Staff training.

The amendment recommended by the department does not include a provision relating to procedures for the media representatives to adhere to when attending executions. The department has stated that the inclusion of such a provision is unnecessary, based on the current provision in §922.11(2) that "representatives of news media may be present under rules approved by the Secretary of Corrections."

First Amendment Issues

Although the United States Supreme Court has never directly examined this issue, two lower federal courts have upheld the power of a state to restrict media broadcasts from executions. In 1977, the 5th Circuit Court of Appeals held that "the protection which the first amendment provides to the news gathering process does not extend to matters not accessible to the public generally, such as filming of executions in Texas state prison." Garrett v. Estelle, 556 Fd2d 1274, 1276 (5th Cir. 1977), cert. denied, 483 U.S. 914 (1978). Thirteen years later, the District Court for the Northern District of California also upheld the state's authority to exclude television cameras based on security concerns. KQED v. Vasquez, No.90-CV-1383 (N.D. Cal. June 7, 1991).

Full Text of Rules Contained in Chapter 33-15 Florida Administrative Code

33-15.001 Representation of News Media at Executions.

(1) Representatives of the news media may be present at the executions of offenders sentenced to death. The representatives of the news media shall be chosen as follows:

(a) The Florida Editor of the United Press International Wire Service may designate one news reporter to be its media representative.

(b) The Florida Bureau Chief of the Associated Press Wire Service may designate one news reporter to be its media representative.

(c) The Florida Association of Broadcasters, through its Executive Vice-President, may designate five pool news reporters to be the representatives for radio and television media within the State, including one from within the county where the offense occurred.

(d) The Florida Press Association, through its Executive Director, may designate five pool news reporters to be the representatives for newspapers within the State, including one pool reporter from a newspaper published within the county where the offense occurred.

(2) The names of the news reporters who will represent each of the above-mentioned classes of news media and designated alternates shall be sent in writing to the Secretary of the Department of Corrections and signed by the person authorized to make the designation. Properly designated representatives whose names are received by the Secretary at least 72 hours prior to the execution shall be admitted to witness the execution. In the event that any designee fails to appear as set out in Rule 33-15.002, Florida Administrative Code, the next available alternate designated for such class shall be admitted to attend in the absent designee's place.

(3) In the event that more than one execution is conducted in any single day, the same media representatives shall be the designees for those executions, with the exception of the representatives of the county newspaper and county broadcaster if the crimes of offenders to be executed occurred in different counties.

33-15.002 Procedures to Be Applied to News Media Representatives Attending Executions.

(1) The following procedures shall apply to representatives of the news media who are selected to witness executions:

(a) The media representatives shall sign in at Florida State Prison one (1) hour prior to the time set for execution.

(b) No electronic or mechanical devices, including but not limited to still, moving picture or video-tape cameras, tape recorders or similar devices, or artistic paraphernalia, will be permitted in the execution observation room.

(c) News media representatives will be escorted as a group to the main prison building, where they will be cleared for security purposes. After clearing security, the media group will be escorted to the execution observation room by correctional staff.

(2) The failure to comply with these procedures, Department or institution rules, or directions of authorized staff may cause the individual in question, at the discretion of the Secretary, the Superintendent or a deputy designated by him, to be refused admittance to witness the execution. If already admitted, the individual may be removed therefrom, and shall not be eligible to attend future executions without specific approval of the Secretary.

(3) Offenders sentenced to death will be permitted to final statements immediately before execution if they wish.

(4) When execution procedures are complete, news media representatives will immediately be escorted out of the prison by correctional staff.

33-15.003 News Media Access to Inmates Under Sentence of Death.

(1) Regularly scheduled news media interviews with inmates under sentence of death will be permitted each week on Tuesday, Wednesday, and Thursday, between the hours of 1:00 p.m. and 3:00 p.m., and will be contingent upon the consent of the inmate. If a state holiday falls on Tuesday, Wednesday, or Thursday, the Superintendent may set interviews on another day during the week at his discretion. The Superintendent may authorize additional visits if staff are available and the need exists. News media representatives who have made prior arrangements with the Superintendent may be allowed admittance to regularly scheduled news media interviews to the extent that accommodations are available and security risks are not created.

(2) The Secretary may temporarily suspend news media interviews with inmates under sentence of death if an extraordinary situation has developed in the prison which creates a substantial risk or danger to persons, property, or security.

(3) During the calendar week of a scheduled execution, all regularly scheduled news media interviews with offenders sentenced to death are canceled.

(4)(a) During the calendar week of the execution, the offender sentenced to death will be allowed to have one (1) group interview with a total of thirty media representatives and one (1) individual interview with a news media representative selected by the offender sentenced to death, provided the inmate requests said interviews in writing. Said interviews will be conducted within forty-eight (48) hours prior to the scheduled time of execution at a place and time designated by the Superintendent of Florida State Prison and shall not exceed one (1) hour each in duration.

(b) Within a reasonable period of time prior to the scheduled group interview, the Secretary or a person designated by the Secretary will notify the office of the Florida Editor of the United Press International Wire Service, the office of the Florida Bureau Chief of the Associated Press Wire Service, the Florida Association of Broadcasters, and the Florida Press Association of the date, time and place of the group interview. A total of thirty media representatives will be permitted to attend the group interview. The United Press International and the Associated Press will each be entitled to two representatives at the group interview. The Florida Association of Broadcasters and the Florida Press Association will each be permitted to designate thirteen representatives and designated alternates. Such representatives may include photographers, cameramen and sound operators, and they may bring and use a reasonable amount of appropriate equipment and paraphernalia.

(c) A print media representative selected for the individual interview may use a tape recorder and may designate a bona fide still photographer to participate in the interview. A radio representative selected may use a tape recorder and may designate a technical assistant for the interview. A television representative selected may designate a camera operator and sound operator to assist during the interview.

33-15.004 Evidence of Entitlement to Access.

It is the responsibility of any person requesting access under Rules 33-15.001, 15.002, 15.003 to present evidence sufficient to establish to the Superintendent that he is entitled to access under the provisions of those Rules, and to present it sufficiently in advance of visitation that it may be verified.

B. EFFECT OF PROPOSED CHANGES:

HB 4819 will codify the current department rule that prohibits electronic or mechanical devices from the execution observation room. Such devices include, but are not limited to,

- still picture recorders,
- moving picture recorders,
- videotape recorders or similar devices, or
- artistic paraphernalia.

HB 4819 will be effective upon becoming law.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

HB 4819 codifies an existing rule of the Department of Corrections.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

HB 4819 codifies the current rule prohibiting mechanical devices from the electrocution viewing area. Therefore, it does not increase or decrease individuals' current options.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

The activity prohibited by HB 4819 is currently prohibited by rule, but is not specifically addressed in the statute.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

- N/A

- (2) Who makes the decisions?

- N/A

- (3) Are private alternatives permitted?

- N/A

- (4) Are families required to participate in a program?

- N/A

- (5) Are families penalized for not participating in a program?

- N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

- N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

- N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

§922.11 will be amended.

E. SECTION-BY-SECTION RESEARCH:

None.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the revenue raising authority of local governments.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state shared tax with local governments.

V. COMMENTS:

Capitol News Service and Mike Vasilinda have filed a petition at the Division of Administrative Hearings pursuant §120.56(3), alleging that Rule 33-15.002 is an invalid exercise of delegated legislative authority. The hearing is scheduled for April, 1998.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

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