



2007

Recent Developments: Evans v. State: The Lethal Injection Checklist Provisions of the Department of Corrections' Execution Operations Manual Constitute Regulations under Section 10-101(G) of the State Government Article and Were Not Adopted in Conformance with the Requirements of the Administrative Procedure Act and Are Therefore Ineffective

Shannon Beamer

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

Beamer, Shannon (2007) "Recent Developments: Evans v. State: The Lethal Injection Checklist Provisions of the Department of Corrections' Execution Operations Manual Constitute Regulations under Section 10-101(G) of the State Government Article and Were Not Adopted in Conformance with the Requirements of the Administrative Procedure Act and Are Therefore Ineffective," *University of Baltimore Law Forum*: Vol. 37 : No. 2 , Article 7.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol37/iss2/7>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

RECENT DEVELOPMENT

EVANS V. STATE: THE LETHAL INJECTION CHECKLIST PROVISIONS OF THE DEPARTMENT OF CORRECTIONS' EXECUTION OPERATIONS MANUAL CONSTITUTE REGULATIONS UNDER SECTION 10-101(G) OF THE STATE GOVERNMENT ARTICLE AND WERE NOT ADOPTED IN CONFORMANCE WITH THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AND ARE THEREFORE INEFFECTIVE.

By: Shannon Beamer

The Court of Appeals of Maryland held that portions of the Department of Corrections' ("DOC") execution operations manual ("EOM") constitute regulations that were not adopted in conformance with the requirements of the Administrative Procedure Act ("APA"). *Evans v. State*, 396 Md. 256, 914 A.2d 25, 80 (2006). As a result, the regulations are ineffective until properly adopted and executions by lethal injections must be halted. *Id.* at 348-50, 914 A.2d at 80.

Vernon Evans ("Evans") was sentenced to death, stemming from a contract killing for which Evans was paid \$9,000. On June 30, 1983, the State brought charges against Evans in the Circuit Court for Baltimore County, charging him with two counts of first-degree murder, conspiracy to commit murder, and using a handgun in the commission of a felony. A jury in Worcester County convicted Evans of the two murders and sentenced him to death in May 1984. Evans appealed, raising 17 separate issues. The Court of Appeals of Maryland granted certiorari, affirming the judgment and sentence of the circuit court. In 1990, Evans filed a post conviction petition and was awarded a new sentencing hearing. The case was removed from Worcester County and returned to Baltimore County where, in November 1992, a new jury sentenced Evans to death. In 1995, Evans filed another post conviction petition in the Circuit Court for Baltimore County. The circuit court, on January 24, 1997, found that the majority of Evans' complaints had previously been litigated and were without merit. Thus, the circuit court denied Evans' petition for post conviction relief. Following the 1995 motion, Evans filed numerous appeals, motions to correct his alleged illegal sentence and

successive motions to reopen post conviction proceedings. The instant case constitutes a consolidation of Evans' appeals and motions.

The issues addressed by the Court of Appeals of Maryland include the following: first, whether Evans received ineffective assistance of counsel at his 1992 re-sentencing hearing; second, whether the State exercised peremptory challenges in a racially biased manner; third, whether the Baltimore County State's Attorney's Office engaged in racially selective prosecution, thus rendering Evans' sentence unconstitutional; fourth, whether the EOM provisions governing lethal injection conflicted with the Maryland statute authorizing capital punishment; and fifth, whether the lethal injection checklist provisions of the EOM were ineffective for failure to adopt them according to APA procedures. *Evans*, 396 Md. at 269-71, 914 A.2d at 33-34.

While the Court discussed each issue at length, it was ultimately persuaded by Evans' argument regarding the DOC's failure to adopt the lethal injection provisions of the EOM. *Id.* at 349-50, 914 A.2d at 80. The Court held that the DOC was enjoined from carrying out lethal injections under its existing protocols because the protocols were "regulations" and had not been adopted according to proper APA procedure. *Id.* The Court first notes that section 3-905(2) of the Correctional Services Article of the Maryland Code indicates that punishment of death shall be by,

the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice.

Evans, 396 Md. at 337, 914 A.2d at 73 (citing MD. CODE ANN., CORR. SERVS. § 3-905(a)). The provisions in the Correctional Services Article of the Maryland Code were enacted in 1994. *Evans*, 396 Md. at 337, 914 A.2d at 73 (citing 1994 Md. Laws, Ch. 5).

Subsequent to the enactment of the code provisions in 1994, the DOC adopted the EOM to govern most aspects of implementing death by lethal injection. *Evans*, 396 Md. at 337, 914 A.2d at 73. Attached to the EOM is a lethal injection checklist, which dictates the contents of the lethal concoction and the method of injection. *Id.* at 337-38, 914 A.2d at 73. Evans challenged the accuracy and legality of the checklist in the EOM because the method of injection, the personnel enlisted, and the amount of drugs administered pursuant to the

checklist differed from the statutory language of section 3-905 of the Correctional Services Article (“section 3-905”). *Id.* at 338-39, 914 A.2d at 74. The Court concluded that the legislative history did not suggest that the legislature intended to preclude the administration of *two drugs*, as called for by the EOM, even though section 3-905 specified that injection occur by one drug. *Id.* at 343-44, 914 A.2d at 77.

Section 10-101(g) of the State Government Article of the Maryland Code sets forth particular requirements for adopting regulations by executive agencies. *Evans*, 386 Md. at 344, 914 A.2d at 77. The Department of Public Safety and the DOC are both executive agencies. *Id.* Therefore, any “regulations” adopted by the specified agencies are subject to the provisions of the APA. *Id.* To adopt a regulation, the agency must first publish the proposed regulation in the Maryland Register and submit a copy to the Joint Legislative Committee of Administrative, Executive, and Legislative Review (“AELR”). *Id.* at 344-45, 914 A.2d at 77-78 (citing MD. CODE ANN., STATE GOV’T §§ 10-110-11). The Court notes that the DOC did not follow any of the appropriate procedures prior to adopting the EOM. *Evans*, 396 Md. at 345, 914 A.2d at 78. Thus, if the execution protocols challenged by *Evans* are “regulations,” they are ineffective because they were not properly adopted. *Id.*

Section 10-101(g)(1) defines a regulation as a statement having general application and future effect in carrying out a law that the particular agency administers. *Evans*, 396 Md. at 345, 914 A.2d at 78. Directives governing only the internal management of the agency are exempted pursuant to section 10-101(g)(2). *Evans*, 396 Md. at 345-46, 914 A.2d at 78. *Evans* argued that the checklist in the EOM governing lethal injection procedures constituted a “regulation,” while the State argued that the checklist concerned the internal management of the DOC. *Id.* at 346, 914 A.2d at 78. In disagreeing with the State, the Court relies on *Massey v. Dept. of Corrections* to first indicate that the checklist portions in the EOM were regulations having “general application and future effect” because they govern the manner by which death sentences are implemented. *Evans*, 396 Md. at 346, 914 A.2d at 78 (citing *Massey*, 389 Md. 496, 886 A.2d 585 (2005)). Furthermore, as with the directives in *Massey*, the directives in the instant case were *not* simply related to the internal management of the DOC, because they “substantially affect[ed]...the legal rights of the public.” *Evans*, 396 Md. at 347, 914 A.2d at 79, (citing *Massey*, 389 Md. at 520, 886 A. 2d at 599).

The Court then determined that the true test of whether a DOC directive qualifies under the internal management exception is whether, in light of the impact of the directive, the Legislature “intended the agency to have the power to freely adopt, change, or modify the directive without legislative or public review.” *Evans*, 396 Md. at 347-48, 914 A.2d at 79. The Legislature has demonstrated a great deal of interest in reviewing all death penalty decisions. *Id.* at 348-49, 914 A.2d at 80. Furthermore, the decisions regarding the number or amount of drugs administered during lethal injection do not constitute routine internal management. *Id.* at 349, 914 A.2d at 80. The decisions affect the inmates, the correctional personnel, the witnesses allowed to observe the execution, and the public’s perception of execution procedures. *Id.* Because the EOM regulations were not adopted in conformance with the requirements of the APA, the Court of Appeals of Maryland held that they are ineffective and cannot be used until they are properly adopted. *Id.* at 349-50, 914 A.2d at 80.

By enjoining the DOC from performing lethal injections until the portions of the EOM are properly adopted, the Court of Appeals of Maryland reaffirmed the fact that administrative agencies in Maryland are subject to oversight. The Court indicated that, in the past, agencies attempted to circumvent the rule-making procedures set forth by sections 10-110 and 10-111 of the State Government Article by claiming that the policy or directive was related to internal management. In *Evans*, the Court clarified that directives affecting the rights of the public have implications beyond internal management and, as such, must be adopted by the agencies according to APA rule-making procedures. Furthermore, by curtailing the DOC’s ability to engage in lethal injection procedures, the Court suspended the death penalty in Maryland indefinitely.