

IN THE SUPREME COURT OF OHIO

James Derrick O’Neal,	:	
	:	
	:	
Appellant,	:	On Appeal from the Franklin
	:	County Court of Appeals
v.	:	Tenth Appellate District
	:	
	:	
The State of Ohio, et al.,	:	Court of Appeals
	:	Case No. 19AP-260 and 19AP-289
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JAMES DERRICK O’NEAL

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents three distinct but closely related issues regarding the reach and constitutionality of the authority that has been exercised by the Ohio Department of Rehabilitation and Correction (hereinafter ODRC) in adopting Ohio's death penalty execution protocol 01-COM-11(October 7, 2016). The issues are (1) whether 01-COM-11 is an administrative rule subject to the rule-making requirements of R.C. 111.15 and R.C. Chapter 5120, (2) whether 01-COM-11 so altered the execution method set out by the General Assembly in R.C. 2945.22(A) that ODRC unconstitutionally usurped legislative power and thus violated the separation of powers, and (3) whether the General Assembly unconstitutionally delegated its power to define Ohio's execution method to ODRC thus violating the separation of powers. Because these issues involve Ohio's administrative rule-making requirements and adherence to the separation of powers, the Court of Appeals decision reaches beyond this case and impacts administrative agencies and the constitutional separation of powers statewide. Ohioans also have a public and great general interest in insuring that the method of execution chosen by their elected representatives is constitutionally applied by the executive branch administrative agency that carries out Ohio's executions.

A. 01-COM-11 is a Rule Subject to R.C. 111.15.

R.C. 2949.22(A) requires that "a death sentence shall 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."

ODRC adopted in 01-COM-11 an execution method in which no injection is used but which instead uses a low-pressure saline drip into which three drugs are sequentially administered and delivered to the inmate through tubes extending from an adjacent room into the

death chamber where they are attached to the inmate's body. Only the last of the three drugs used causes death and it is known to cause pain: the first drug is to induce unconsciousness, the next paralyzes the inmate, and the third induces death by stopping the heart. This process is intended to take 15 to 20 minutes. Although no injection is applied to the inmate, ODRC refers to this process as "IV Injection." 01-COM-11 VI.H.1.

R.C. 5120.01 requires of ODRC that "All duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under the rules and regulations that the director prescribes" and R.C. 5120.42 requires that the ODRC "shall make rules for the proper execution of its powers."

All rules made by the ODRC are subject to the requirements of R.C. 111.15 unless the General Assembly otherwise indicates. R.C. 111.15(A)(2) & (B)(1), *State ex rel. Bd. of Edn. of N. Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. 55, 57, 186 N.E.2d 862 (1962) (R.C. 111.15 requirements apply whether agency was aware of them) and see *State ex rel. United Auto Aero. & Agric. Workers v. Ohio Bur. Workers Comp.*, 95 Ohio St. 3d 408, 2002-Ohio-241, 768 N.E.2d 1129, ¶11 (R.C. 119 rulemaking requirements apply in the absence of exemption).

Under R.C. 111.15(D), rules must be submitted for review by the joint committee on agency rule review (JCARR). The JCARR review includes assessment under R.C. 106.021 to determine whether the rule exceeds the scope of the submitting agency's statutory authority or conflicts with the statutory intent. R.C. 106.021 (A)&(B). ODRC did not comply with R.C. 111.15 in adopting 01-COM-11. Decision, ¶18. Failure to comply with R.C. 111.15 invalidates the noncompliant rule. *State ex rel. Bd. of Edn. of N. Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. at 57, 186 N.E.2d 862, 862 (1962) and see *State ex rel. Ryan v. St. Teachers Retirem't Sys.*, 71 Ohio St.3d 362, 366, 643 N.E.2d 1122, 1126 (1994).

1. The Court of Appeals decision invalidates R.C. 111.15.

The Court of Appeals held that because the General Assembly had not “expressly directed ODRC to adopt rules under R.C. 111.15” ODRC was not required to comply with R.C. 111.15 when adopting 01-COM-11. Decision, ¶23, Recon. Dec., ¶20.

R.C. 111.15 is a self-executing statute and has been treated as such since its enactment. By finding that the General Assembly must make specific reference to R.C. 111.15 in every statute or it will be deemed to have exempted the otherwise covered agency from complying with R.C. 111.15’s rulemaking requirements, the Court of Appeals has opened the door to allowing every agency to avoid compliance with R.C. 111.15 except where the General Assembly makes specific reference to R.C. 111.15 in individual statutes. Allowing this aspect of the Court of Appeals decision to stand effectively invalidates R.C. 111.15 for all agencies otherwise subject to its rule-making requirements.

2. Characterizing 01-COM-11 as an order does not exempt it from R.C. 111.15.

R.C. 111.15(A) defines “rule” as “any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency.” 01-COM-11 is promulgated under R.C. 5120.01. Decision, ¶31. ODRC admitted that 01-COM-11 has general operation in all executions in the State of Ohio. Ans. O’Neal’s Comp., p. 8, ¶35; Mohr 12/22/16 Depo., p. 141-42; Gray Depo., p. 67. Moreover, this Court has held, addressing an earlier version of the protocol, that “the state must comply with the protocol as amended. Strict compliance with the protocol will ensure that executions are carried out in a constitutional manner.” *State v. Broom*, 146 Ohio St. 3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶53. Ensuring constitutional compliance in applying the state’s execution method identifies the protocol as a matter requiring general and uniform operation and public or great general interest.

The Court of Appeals held, however, that 01-COM-11 is not a rule but “an order respecting the duties of employees” and thus exempt from R.C. 111.15’s coverage. The Court of Appeals recognized that the protocol “establishes the methods, processes, and procedures to be employed by ODRC personnel in carrying out” Ohio executions. Decision, ¶21. And in denying reconsideration, the Court of Appeals found that the matters covered by 01-COM-11 “affect non-employees.” Recon. Dec., ¶21. Even so, it held that the inclusion of some matters that could be considered orders to employees made 01-COM-11 to be exempt from R.C. 111.15. *Id.*

If including an order respecting the duties of employees in rules and regulations that have general and uniform operation exempts the agency from complying with R.C. 111.15, every agency covered by R.C. 111.15 can avoid its rule-making obligation simply by requiring that employees abide by whatever regulation is adopted. Here the Court of Appeals recognized that 01-COM-11 establishes the “methods” of execution to be implemented by ODRC employees. As noted above, the method in 01-COM-11 is not the method set out in R.C. 2929.22(A). Administrative agencies cannot use orders to employees as a backdoor method of legislating. Under the Court of Appeals reasoning agencies can with impunity “order” employees to take actions that are beyond the scope of the agency’s administrative authority and avoid review.

R.C. 5120.01 requires that “All duties conferred on the various divisions and institutions of the department by law or **by order of the director** shall be performed under the rules and regulations that the director prescribes.” (Emphasis added) This specific requirement takes precedence over the general exemption of orders to employees from the rule making requirements of R.C. 111.15. The Court of Appeals decision eliminated R.C. 5120.01’s requirement that all duties conferred on the ODRC – even duties imposed by order of the director – are to be carried out pursuant to rules adopted under R.C. 111.15.

B. ODRC Usurped Legislative Power – The failure to define words in a statute is not a delegation of power. Undefined words must be given their ordinary and common meaning.

The Court of Appeals also found that ODRC did not usurp legislative power because “The General Assembly has not defined the pertinent terms set forth in R.C. 2949.22(A)” and the General Assembly’s decision “not to expressly define these terms evidences its intention that determinations as to the methodology and the drugs to be utilized in conducting a court ordered execution are matters best left to ODRC.” Decision, ¶37.

The Court of Appeals’ decision abandons long standing and firmly established Ohio law holding that “[i]n the absence of a definition of a word or phrase used in a statute, words are to be given their common, ordinary, and accepted meaning.” *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 17 citing *State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 39, citing *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus; see also *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 17. An administrative agency has no greater authority than the courts in this regard. *McFee v. Nursing Care Mgmt. of Am. Inc.*, 126 Ohio St. 3d 183, 2010-Ohio-2744; 931 N.E.2d 1069, ¶27. The General Assembly is not required to define every word in a statute, nor does it cede its legislative power when it uses undefined words. Furthermore, “the intention of the grant of power, as well as the extent of the grant, must be clear; . . . in case of doubt that doubt is to be resolved not in favor of the grant but against it.” *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917).

The Court of Appeals ruling that the use of undefined words in a statute demonstrates a legislative intention to delegate power to an administrative agency to define the meaning of the statute threatens the separation of powers. If all an executive branch administrative agency has to do is find an undefined word in a statute in order to revise the law to its liking, the balance of

power between the two branches is gone. If the decision below is allowed to stand administrative agencies will become *de facto* law makers anytime an undefined word appears in a statute.

C. Unconstitutional Delegation of Legislative Power

The Court of Appeals found that the General Assembly, by failing to define the words used in R.C. 2949.22(A), had delegated the authority to ODRC to adopt 01-COM-11. Decision, ¶37. “[T]he General Assembly is precluded from delegating its legislative function.” *Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St. 2d 256, 259, 416 N.E.2d 614 (1980). When it does so, the grant of power must be clear. Delegating discretionary functions is not unconstitutional if the General Assembly “establishes, through legislative policy and such standards as are practical, an intelligible principle to which the administrative officer or body must conform and further establishes a procedure whereby exercise of the discretion can be reviewed effectively.” *Id.* at 260. “As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional.” *Matz. v. J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 279, 7 N.E.2d 220 (1937) syllabus 6.

The delegation found by the Court of Appeals was an unconstitutional violation of the separation of powers. The ODRC Director testified repeatedly that ODRC had received no legislative guidance on how to implement R.C. 2949.22(A). Mohr Depo, Sept. 25, 2018, p. 24, 51, 52, 53. See also Gray Depo., p. 41, 42, 105, 106-109.

The Court of Appeals found that “the current version of R.C. 2949.22 requiring death by lethal injection is not so indefinite as to constitute an improper delegation of legislative power.” Decision, ¶54. The Court further said that the law and public policy were sufficiently established to guide ODRC in adopting 01-COM-11 because “In enacting R.C. 2949.22, the General Assembly clearly defined the punishment to be imposed . . . i.e. death.” Decision, ¶52. The Court

also found that the statute “sets forth the method . . . i.e., lethal injection.” *Id.* The Court recognized that ODRC had not been given “any discretion to determine a different execution method,” *id.*, but found that the statute “generally identifies the means to accomplish the purpose” thus delegating to ODRC the power to “determine the details and implement a policy to carry out the law.” *Id.* at ¶54. The Court of Appeals did not identify any “procedure whereby exercise of the discretion can be reviewed effectively” yet erroneously found no unconstitutional delegation of legislative power. Decision, ¶56.

The Court of Appeals decision undermines the established law of the state. It found that the General Assembly’s use of undefined words evidenced its intention to delegate the authority to define Ohio’s execution method to ODRC yet found the same undefined words clear enough to provide the guidance required for the delegation of authority to adopt 01-COM-11. The Court of Appeals view that R.C. 2949.22(A) “generally identifies the method to be used” when in fact it specifies that an “injection” be applied to the inmate opens the door for other agencies to ignore legislative directions and re-write the legislation under which they carry out their duties.

This case involves a substantial constitutional question concerning the separation of powers between the legislative and executive branches of government. Ohio’s Constitution is based on the principle of the separation of power among the three branches of government. *State v. Thompson*, 92 Ohio St.3d 584, 586 (2001), *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, ¶ 55. By permitting executive branch administrative agencies like ODRC to invade the legislative function public confidence in dealing with administrative agencies will be diminished. In order for administrative agencies to function, the people subject to their rules must be able to trust that those rules actually reflect the law as adopted by their legislative representatives. This is true in all contexts but exceptionally so where the use of capital

punishment is involved. The legislative authority to use death as a penalty for crime is the most extreme use of power against an individual that can be exercised by the state. In Ohio “the authority to define and propose penalties for felonies is limited to the General Assembly.” *State Ex Rel. Sensible Norwood, et al., v. Hamilton County Bd. of Elections*, 148 Ohio St.3d 176, 2016-Ohio-5919, 69 N.E.3d 696, ¶12, *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978), *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885, paragraph 1 of the syllabus (1922). In addition, 01-COM-11 in its sweeping application goes far beyond the execution itself and violates federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments by restricting/impeding access to counsel just before and on the day of execution, impeding access to the courts by limiting counsel’s access to communication devices on the day of execution, cutting off privileged attorney-client communication on the day of execution. The series of drugs used not only violates Ohio’s requirement that the drugs used be those that cause a quick and painless death but also violates the principle recognized in *Ford v. Wainwright*, 477 U.S 399, 410 (1986), by making the inmate unconscious, that “killing one who has no capacity to come to grips with his own conscience or deity” violates the Eighth Amendment.

STATEMENT OF THE CASE AND FACTS

Appellant O’Neal is under sentence of death in the State of Ohio. Pursuant to R.C. 2949.22(A), death sentences are carried out by the “application . . . of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.” On October 7, 2016, the ODRC adopted 01-COM-11 that defines as the method of execution in Ohio the administration of a series of three drugs, into a low-pressure saline drip that will travel to the condemned inmate in the next room through IV tubing. The process from administration of the first drug to death, is to take 15-20 minutes. ODRC is a department of the executive branch of Ohio’s government. R.C. 121.02(P). As a governmental entity created by statute, the ODRC is a

state agency subject to the rule-making requirements of R.C. 111.15.

O’Neal filed a declaratory judgment action under R.C. 2721.03, in the Franklin County Court of Common Pleas, seeking a declaration that ODRC was required to comply with R.C. 111.15 in adopting 01-COM-11, that ODRC had usurped the legislative authority of the Ohio General Assembly in adopting 01-COM-11, and/or that the General Assembly had unconstitutionally delegated legislative authority, in violation of Ohio Constitution, Article II, in allowing ODRC to adopt 01-COM-11. The Court of Common Pleas found that 01-COM-11 is an internal management rule but erroneously granted summary judgment to Appellees. O’Neal appealed. The Franklin County Court of Appeals found that R.C. 111.15 is not self-executing but requires a specific reference from the General Assembly in order for an agency to be subject to its rulemaking requirements, that 01-COM-11 is not a rule but is an “order” to employees that is not subject to R.C. 111.15; that ODRC did not usurp legislative power in adopting 01-COM-11, and that the General Assembly had not unconstitutionally delegated its power to ODRC. The Court of Appeals declined to give the words of R.C. 2949.22(A) their ordinary and common meanings but found that the definitions were “best left” to ODRC.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: ODRC’s execution protocol 01-COM-11 is subject to the rule-making requirements of R.C. 111.15 and is invalid for failing to comply with the statute.

The Court of Appeals found that 01-COM-11 is exempt from the rule-making requirements of R.C. 111.15 “Because the General Assembly has not expressly directed ODRC to adopt rules under R.C. 111.15.” Decision, ¶23. However, R.C. 111.15 is self-executing and the General Assembly so indicates by the effective date of the statute. R.C. 111.15 has been in continuous effect (with periodic revisions) since September 17, 2002. ODRC adopted 01-COM-

11 on October 7, 2016. There is no requirement that the legislature specify in every statute whether those operating under it are obligated to comply with R.C. 111.15.

In addition, R.C. 5120.01 requires of ODRC that “All duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under the rules and regulations that the director prescribes” and R.C. 5120.42 requires that the ODRC “shall make rules for the proper execution of its powers.” This Court has found directive language less rigorous than that of R.C. Chapter 5120 to reflect the General Assembly’s intent that an administrative agency follow rulemaking procedures. In *Ohio Nurses Assn., Inc. v. Ohio State Bd. of Nursing Edn. & Nurse Registration*, 44 Ohio St.3d 73, 76, 540 N.E.2d 1354 (1989), the words “may make and prescribe all rules necessary for its government and control of its actions and business affairs” required that rulemaking procedures be followed. *Id.* at 76.

The Court of Appeals also found that 01-COM-11 is an “order” exempt under R.C. 111.15 from its general definition of “rule”. Decision, p. 7, ¶21. R.C. 5120.01 is the General Assembly’s directive that whatever characterization is given, all duties of the ODRC must be performed under rules prescribed by the director. Characterizing 01-COM-11 as an order does not exempt it from the specific directives of the General Assembly in R.C. Chapter 5120 that require duties carried out “by order of the director” be performed under “rules and regulations” prescribed by the director. The Court of Appeals found that 01-COM-11 is promulgated under R.C. 5120.01. Decision, p.10, ¶31. The specific directions of R.C. 5120.01 are that “orders” of the director must be performed under “rules and regulations.” The R.C. 111.15 exemption for orders is overridden by R.C. 5120.01’s specific inclusion of orders in its rulemaking directive.

Moreover, 01-COM-11 does not have the character of an order to employees. It infringes constitutional rights when it impedes attorney-client consultations, denies denying privileged

consultations on the day of execution, it changed the statutory requirement to use drugs that cause a quick and painless death to a series of drugs intended to render the inmate unconscious, then paralyze him and only then cause death. U.S. Const. amend. VI, VIII, XIV. The reach of 01-COM-11 goes beyond an order. It defines the execution method for the entire State of Ohio.

Proposition of Law No. 2: ODRC usurped the legislative power when it changed Ohio's execution method by adopting 01-COM-11.

The Court of Appeals accepted, without first considering the meaning of the language used in R.C. 2949.22(A), that the statute required interpretation. It said that because the General Assembly had not defined “lethal injection” or the type of drug or drugs to be used, or what constitutes a “sufficient dosage” it had expressed its intention that ODRC make these determinations. Decision, ¶37. While each of these terms has plain meaning that is apparent on the face of the statute (for example a lethal injection is an injection applied to the inmate that causes death; the type of drug or drugs are those that cause a quick and painless death; and sufficient dosage is explicitly identified as being enough to cause a quick and painless death), even if the words were not plain they were to be given their ordinary and common meaning. *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 17.

The word injection is commonly understood and needs no definition; resort to the dictionary proves it. The common and ordinary meaning of “inject” at the time R.C. 2949.22 was enacted was: “**1** to force or drive (a liquid) into some passage, cavity, or chamber; esp., to introduce or force (a liquid) into some part of the body by means of a syringe or hypodermic needle, etc.” The word “injection” meant “**1** an act or instance of injecting.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY, 4th Ed., IDG Books Worldwide, Inc. (2001) p. 735.

Furthermore, the General Assembly used at the time R.C. 2949.22(A) was enacted and continues to use the word “injection” without defining it for the obvious reason that it is

commonly understood. See for example R.C. 4729.41 Administration of Adult Immunizations (eff. 3-12-01); R.C. 4729.41, Adult Immunizations (eff. 4-9-19); R.C. 3719.172(A)(1)(3), Possession, Sale, and Disposal of Hypodermics (eff.7-1-76); R.C. 3719.172(A)(1)(3), Possession, Sale, and Disposal of Hypodermics (eff. 7-22-98). The General Assembly distinguishes injections from intravenous procedures. See for example R.C. 4723.67 “Administration of medications by aides” (eff. 10-12-16):

(D) A medication aide shall not administer prescription medications by any of the following methods:

- (1) Injection;
- (2) Intravenous therapy procedures;
- (3) Splitting pills for purposes of changing the dose being given.

The class of drugs that will cause a quick and painless death by injection is limited – to barbiturates – and thus the use of 1) an injection applied to the inmate 2) of drugs that will cause a quick and painless death answers all the questions. “Barbiturates are a family of compounds that have sedative and hypnotic activities and act as nonselective central nervous system (CNS) depressants.” National Institutes of Health, LiverTox, Overview: Barbiturates, <https://livertox.nih.gov/Barbiturates.htm> (last viewed 5/29//2020). See, Francisco López-Muñoz, Ronaldo Ucha-Udabe, and Cecilio Alamo, THE HISTORY OF BARBITURATES A CENTURY AFTER THEIR CLINICAL INTRODUCTION, (Review) Neuropsych. Disease & Treat. 2005 Dec. 1(4): 329–343, (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2424120/>) (noting that “Some authors went as far as describing these drugs as providing the ‘ideal form of euthanasia’”). ODRC was aware that barbiturates are what the statute calls for and previously used them. ODRC changed drugs when barbiturates became unavailable. Mohr 12/22/2016 Depo., p. 108, 109. When what the law calls for became unavailable, the answer was not to allow ODRC to re-write the statute but was to go back to the legislature so the General Assembly could decide the proper course of action.

The other words in the R.C. 2949.22(A) are just as clear. The “application to the person” of the injection means the inmate receives the shot. “Quick” means rapid or fast and anticipates the efficient application of the process described, here an injection: The 15-20-minute time frame is not quick for an injection. Painless means it does not hurt.

By ignoring the words of the statute and adopting a new execution method based on the drugs it could get, regardless of the properties of those drugs, ODRC usurped the legislative power. “An agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute.” *McFee v. Nursing Care Mgmt. of Am. Inc.*, 126 Ohio St. 3d 183, 2010-Ohio-2744; 931 N.E.2d 1069, ¶25. Before barbiturates became unavailable, ODRC had adopted in the November 30, 2009 version of 01-COM-11 the intramuscular injections - the very process described in R.C. 2949.22(A). When an execution method that fits the statutory language is available, and an administrative agency chooses a method that is different, the agency has usurped legislative authority.

Proposition of Law No. 3: The General Assembly unconstitutionally delegated legislative authority to ODRC to change Ohio’s execution method.

The Court of Appeals held that the General Assembly delegated the authority to ODCR by failing to define the words it used in R.C. 2949.22(A). This delegation of authority was unconstitutional and violated the separation of powers. Failing to define the words in a statute is not a clear grant of authority. To delegate authority, the “intention of the grant of power, as well as the extent of the grant, must be clear.” *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917).

Furthermore, the General Assembly could not delegate the authority to legislate or to make public policy. Ohio Constitution, art. II, Sec. 1., *McFee*, 126 Ohio St. 3d at ¶25, *D.A.B.E., Inc. v. Toledo-Lucas County Bd. Of Health*, 96 Ohio St.3d 250, 260, 773 N.E.2d 536 (2002)

Matz. v. J.L. Curtis Cartage Co., 132 Ohio St. 271, 7 N.E.2d 220 (1937), syllabus 6. The General Assembly has the exclusive power “to define and classify and prescribe punishment for felonies committed within the state.” *State v. O’Mara*, 105 Ohio St. 94, 136 N.E. 885, paragraph 1 of the syllabus (1922), *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978), *State Ex Rel. Sensible Norwood, et al., v. Hamilton County Bd. of Elections*, 148 Ohio St.3d 176, 2016-Ohio-5919, 69 N.E.3d 696, ¶12. 01-COM-11 defines Ohio’s execution method.

“An agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute.” *Mcfee*, 126 Ohio St. ed at ¶25. 01-COM-11 changed Ohio’s execution method from lethal injection to a low-pressure saline drip that is neither quick nor painless. This change made by ODRC reflects a policy that is not expressed in R.C. 2949.22(A) and is contrary to the established policy of the state regarding the character of execution methods. The General Assembly has always chosen simple and direct execution methods that required a quick action that continued until death occurred. See Hanging –Revised Statutes of Ohio, Title II, Ch. 7, Sec. 7338 (1880) “The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead;” Electrocutation - “A death sentence must be executed by causing a current of electricity, of sufficient intensity to cause death, to pass through the body of the convict. The application of such current must be continued until such convict is dead.” Page’s Ohio General Code, Part Fourth, Ch. 35, §13456-2 (1938).

These past execution methods required only that the condemned prisoner be placed in the execution device without the necessity of injuring him/her with needle jabs before the execution began. (See the description of failed attempt in *State v. Broom*, 146 Ohio St. 3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶3-16.) The same simplicity is true of an actual execution by “injection” under R.C. 2949.22(A) – the area of the inmate’s body where the injection is to be given needs to

be accessible and the injection given. The history of execution processes in Ohio, and the General Assembly's adoption of a similarly direct and simple execution method in R.C. 2949.22(A), establishes the public policy that simple, efficient, and direct execution procedures are to be used. By changing the simple and direct "lethal injection" called for in R.C. 2949.22 to the complex process of establishing venous access, extending tubes from the inmate to the next room where a series of drugs, only the last of which causes death, are administered in a saline infusion through a low pressure drip, ODRC changed Ohio's public policy and that is beyond the scope of any constitutional delegation of power.

A constitutional delegation of authority also requires legislative guidance for the exercise of that authority and a mechanism for review. *Redman v. Ohio Dept. of Indus. Relations*, 75 Ohio St.3d 399, 662 N.E.2d 352 (1996); *Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St. 2d 256, 259-60, 416 N.E.2d 614, 617-18 (1980), *D.A.B.E., Inc. v. Toledo-Lucas County Bd. Of Health*, 96 Ohio St.3d 250, 260, 773 N.E.2d 536 (2002). ODRC acknowledged that it received no legislative guidance and there are no provisions for review of 01-COM-11.

CONCLUSION

For the reasons set out above, this case involves matters of public and great general interest and a substantial constitutional question. Appellant O'Neal requests that this Court accept jurisdiction of this case so the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 1, 2020, a copy of this Memorandum in Support of Jurisdiction was served by email, to counsel of record for all parties, at the addresses listed below:

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APPENDIX

O’Neal v. State of Ohio, Case Nos.19-AP-000260 & 19-AP-000289 Tenth District Court of Appeals, Journal Entry on Motion for Reconsideration (April 16, 2020) A-1

O’Neal v. State of Ohio, Case No.19-AP-000260 & 19-AP-000289 Tenth District Court of Appeals, Memorandum Decision on Motion for Reconsideration (April 16, 2020) A-4

O’Neal v. State of Ohio, Case No.19-AP-000260 & 19-AP-000289, Tenth District Court of Appeals, Judgment Entry (February 19, 2020) A-11

O’Neal v. State of Ohio, Case No.19-AP-000260 & 19-AP-000289 Tenth District Court of Appeals, (February 13, 2020)..... A-13