



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 26, 1995

Mr. James A. Collins  
Executive Director  
Texas Department of Criminal Justice  
P.O. Box 13084  
Austin, Texas 78711

Letter Opinion No. 95-059

Re: Whether the Texas Board of Criminal Justice may adopt a policy allowing the relatives of a murder victim to attend the execution of the perpetrator (ID# 35948)

Dear Mr. Collins:

You inform us that, on September 15, 1995, the Texas Board of Criminal Justice (the "board") voted to allow relatives of a murder victim to attend the execution of the perpetrator. The board expressly made its decision subject to an opinion of this office that such a policy is legal. You therefore ask about the board's authority to adopt the policy you have described. In particular, you question first whether persons other than those listed in article 43.20 of the Code of Criminal Procedure may attend an execution and second whether the board, through the adoption of policy, may regulate that additional attendance. We answer your first question in the affirmative. We answer your second question with a conditional affirmative.

Article 43.20 of the Code of Criminal Procedure provides as follows:

The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the Department of Corrections, two physicians, including the prison physician, the spiritual advisor of the condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections is situated, and any of the relatives or friends of the condemned person that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution.

The legislature has not amended article 43.20 since 1965. In that year, the legislature adopted a revised Code of Criminal Procedure by "revising and rearranging the statutes of this State" pertaining to criminal cases "and by making various changes in, omissions from, and additions to such statutes." See Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, 1965 Tex. Gen. Laws 317 (caption of bill). The legislation was based on a completely revised code drafted by a committee of the State Bar of Texas. Fred Erisman, "Introduction to 1965 Revision Texas Code of Criminal Procedure," 1 Code Crim. Proc.

XV-XXV. With regard to the transformation of the predecessor to article 43.20,<sup>1</sup> the Fifty-ninth Legislature enacted one relevant amendment: the legislature deleted the words "and none other" after the phrase "The following persons may be present at the execution." See Code Crim. Proc. art. 43.20 special commentary.

Senators Dorsey Hardeman and Jim Bates, the Senate sponsors of the bill, *Erisman, supra*, at XIX, proposed this amendment to article 43.20 on the floor of the Senate. S.J. of Texas, 59th Leg., at 346 (1965). We found no legislative history or newspaper articles of the time explicating the senators' intent. We found, however, a contemporary commentary on the revised Code of Criminal Procedure by John F. Onion, Jr., a member of the bar committee that drafted the proposed code. See John F. Onion, Jr., *Commentary on the Revised Code of Criminal Procedure*, 28 TEX. BAR J. 727 (1965). The commentary includes in a "listing of most articles in which there has been a material change" (emphasis added) the deletion of "and none other" from the substance of article 43.20. *Id.* at 727, 810.

We believe that the legislature's deletion of the words "and none other" suggests an intention to change the list of persons permitted to attend an execution from exclusive to inclusive. Prior to the 1965 amendments, only those persons listed in the predecessor to article 43.20 were authorized to attend an execution.<sup>2</sup> Since the 1965 amendments became effective, on the other hand, the state may not exclude the persons listed in article 43.20 from attending an execution (unless the person is a convict), but the state may permit other persons to attend as well. Nothing in the language of the article contradicts this interpretation.

In our opinion, therefore, the state may permit persons other than those listed in article 43.20 of the Code of Criminal Procedure to be present at an execution.<sup>3</sup> Of course,

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<sup>1</sup>Act approved June 4, 1923, 38th Leg., 2d C.S., ch. 51, § 7, 1923 Tex. Gen. Laws 111, 112 (codified at Code Crim. Proc. art. 804 (1925)), repealed by Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 54.02, 1965 Tex. Gen. Laws 317, 563.

<sup>2</sup>Act approved June 4, 1923, 38th Leg., 2d C.S., ch. 51, § 7, 1923 Tex. Gen. Laws 111, 112 (codified at Code Crim. Proc. art. 804 (1925)), repealed by Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 54.02, 1965 Tex. Gen. Laws 317, 563.

<sup>3</sup>Our conclusion is not contrary to the opinion of the United States Court of Appeals for the Fifth Circuit in *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), cert. denied, 438 U.S. 914 (1978). The plaintiff in *Garrett*, a television reporter, wished to film the execution of the first person to be executed in Texas since 1964. *Garrett*, 556 F.2d at 1275-76. The plaintiff contended that article 43.20 violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, the plaintiff contended that the First Amendment conferred a special right to gather news, a right which could be limited only on the basis of a compelling state interest. See *id.* at 1277.

article 43.20 expressly prohibits the state from permitting a convict to witness an execution.

We turn to your second question. In general, an administrative agency has only such powers as the legislature has expressly, statutorily delegated to it, together with any powers that must be necessarily implied from those powers and duties expressly conferred. *State v. Public Util. Comm'n*, 883 S.W.2d 190, 194 (Tex. 1994). Consequently, to conclude that the board may enlarge the list of persons who may attend an execution, we must find an express or implied delegation of such power to the board.

Section 492.001 of the Government Code provides that “[t]he board governs the [D]epartment” of Criminal Justice. See Gov’t Code § 491.001(3) (defining “department”). The board is required to employ an executive director and supervise the executive director’s administration of the Department of Criminal Justice.<sup>4</sup> *Id.* § 492.013(b).

Within the Department of Criminal Justice is the institutional division, which “shall operate and manage the state prison system.” *Id.* §§ 493.002(a)(2), .004. The director of the institutional division determines and supervises the execution procedure. Code Crim. Proc. art. 43.14. Article 43.14 specifically provides as follows:

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until

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(footnote continued)

Citing several United States Supreme Court decisions, the court found article 43.20 constitutional.

In *Branzburg* the Court said, “It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” *Branzburg v. Hayes, supra*, 408 U.S. at 684, 92 S. Ct. at 2658. Relying on *Branzburg* and *Zemel [Zemel v. Rusk]*, 381 U.S. 1 (1965) the Court has recently held, “The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require the government to accord the press special access to information not shared by members of the public generally.” *Pell v. Procurier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed. 2d 495 (1974); accord, *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S. Ct., 2811, 2815, 41 L.Ed.2d 514 (1974).

*Id.* at 1280. The court held that Garrett “cannot find his right to film Texas executions in the first amendment.” *Id.* at 1279.

<sup>4</sup>The mission of the Department of Criminal Justice is threefold: to provide public safety, to promote positive change in offender behavior, and to reintegrate offenders into society. Act of May 25, 1995, 74th Leg., ch. 321, § 1.001, 1995 Tex. Sess. Law Serv. 2774, 2774 (to be codified at Gov’t Code § 493.001).

such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

*See* Act of May 24, 1995, 74th Leg., R.S., ch. 319, § 3, 1995 Tex. Sess. Law Serv. 2764, 2770 (to be codified at Code Crim. Proc. art. 43.14). By "such execution procedure," we understand the statute to authorize the director of the institutional division to determine, for example, which substances will be used, how to ensure that a lethal quantity is given, and how to ascertain the inmate's death. We do not believe the director's authority necessarily reserves to him or her the exclusive authority to determine whether persons other than those listed in article 43.20 of the Code of Criminal Procedure may attend an execution.<sup>5</sup>

In our opinion, other statutes provide the board broad authority to regulate the Department of Criminal Justice, which includes the institutional division, and this broad authority includes power to determine whether persons other than those listed in article 43.20 may attend an execution. As we stated above, the board governs the Department of Criminal Justice. Gov't Code § 492.001. Moreover, the board may adopt rules as necessary "for operation of the [D]epartment" of Criminal Justice. *Id.* § 492.013(a).

We accordingly conclude that the board may permit persons other than those listed in article 43.20 of the Code of Criminal Procedure to attend an execution. We believe the board must extend such permission by rule, adopted in accordance with the Administrative Procedure Act of the Government Code chapter 2001. *See* Gov't Code §§ 2001.003(7), .021 - .038. You indicate that the board has adopted a "policy." You do not define this term, nor do you indicate the procedures the board has followed in promulgating it. Any policy that the board promulgates is valid so long as the board has substantially complied with the Administrative Procedure Act's rulemaking procedures in adopting the policy. *See id.* § 2001.035(a)

The board's rule must be reasonable. *See Gulf, C. & S. F. Ry. v. State*, 120 S.W. 1028, 1034 (Tex. Civ. App. 1909, writ ref'd). Finally, we caution that we do not in this opinion consider the validity of any particular rule.

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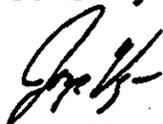
<sup>5</sup>We do not consider in this letter opinion whether the director of the institutional division may permit persons other than those listed in article 43.20 of the Code of Criminal Procedure to attend an execution.

**S U M M A R Y**

The state may permit persons other than those listed in article 43.20 of the Code of Criminal Procedure to witness an execution. Article 43.20 expressly prohibits the state from permitting a convict to witness an execution, however.

The board may permit persons other than those listed in article 43.20 of the Code of Criminal Procedure to attend an execution, but only by adopting a reasonable rule in accordance with the Administrative Procedure Act of the Government Code chapter 2001.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Jorge Vega', written in a cursive style.

**Jorge Vega**  
**First Assistant Attorney General**