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From the Baltimore Sun

Lethal injection lacks protocols

Executions halted for courts' questions

By Gail Gibson

Sun reporter

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As an Oklahoma legislator in the 1970s, Bill J. Wiseman followed the will of his district and voted to restore the state's death penalty. But with deep personal reservations about capital punishment, he also sought out a more humane alternative to electrocution and became the unwitting architect of the injection protocol now used in nearly every U.S. execution.

Now, as then, Wiseman's concerns about the process run deep.

He never anticipated that lethal injection could be botched by problems of inadequate sedation or the use of a chemical to paralyze an inmate's muscles, as a widely publicized medical study reported last year.

And he never anticipated that state after state would adopt the same method and use it for more than two decades without re-examination and, in many instances, without exacting guidelines.

"What you are talking about here is a competency issue," said Wiseman, now a university administrator and Episcopal priest who says that state officials should intervene again to set right a system that across the country - and in Maryland - has become a jumble of prisoner appeals and makeshift moratoriums.

"Whatever you feel about capital punishment, properly done, this is a painless thing. It's just a question of competency."

The push to modernize lethal injection protocols has long been advocated by anti-death penalty activists. It has also gained support from capital punishment supporters, who see it as a practical way to avoid delays in carrying out death sentences.

But few states have implemented changes, even under growing pressure from the nation's courts.

The U.S. Supreme Court, in a unanimous decision last month, opened the door for death row inmates to bring new challenges to the way states use lethal injection. The court did not rule on the merits of the procedure, but it pointedly noted that a Florida inmate's challenge still "appears to leave the state free to use an alternative lethal injection procedure."

Other courts rule

In lower courts across the country, other judges have more bluntly issued the same instruction. Last week, a federal judge in Missouri put executions on hold until the state revises its lethal injection protocols, including the involvement of an anesthesiologist.

That ruling came after a surgeon who assists in Missouri's executions testified that he had used only half the usual dose of anesthesia in recent executions and acknowledged that because he is dyslexic, he sometimes transposes numbers.

Federal judges in California and Arkansas have scheduled evidence hearings to weigh the claims of death row inmates that lethal injection procedures are cruel and unusual.

And some states are acting on their own accord. In Ohio, corrections officials said they would modify protocols to avoid the kind of problem that occurred during a May execution when, after a prolonged effort to inject the deadly chemicals, inmate Joseph Lewis Clark pushed himself up on the gurney and said: "It don't work."

But most states have resisted making changes to the three-chemical cocktail that has become the standard for U.S. executions.

In Maryland last month, an administrative law judge agreed with part of the procedural challenge brought by death row inmate Vernon Lee Evans Jr. - ruling that the protocols were "legally ineffective" because they were not created with public input - but that finding was rejected by Public Safety Secretary Mary Ann Saar.

Oklahoma's highest appeals court found the state's lethal injection procedure constitutional in a ruling last month, with one judge finding that an inmate's request "to be spared the imposition of his legally imposed punishment because it might cause him to suffer or experience pain unpersuasive (and rather ironic) as his murderous acts have been the cause of the ultimate pain and suffering for the victim and her family."

After Oklahoma became the first in the country to adopt lethal injection in 1977, other states steadily followed suit. The federal government and 37 of the 38 states that allow capital punishment now use lethal injection. (Nebraska still uses the electric chair.)

1,029 executions

Since the U.S. Supreme Court reinstated the death penalty in 1976, states had conducted 1,029 executions as of the end of June - 861 of those by injection, according to the Washington-based Death Penalty Information Center.

Douglas A. Berman, an Ohio State University law professor who closely tracks sentencing issues, said there has been little incentive for states to overhaul lethal injection procedures.

"Nobody involved with the process truly has a direct interest in making it better," Berman said. The defendants themselves typically have a greater stake in blocking execution altogether, he said, while state officials fear that they will only face new challenges if they adopt a new method of execution.

"They've been doing executions like this for a long time," Berman said. "There's emerging evidence of reasons to be concerned, but we don't have enough examples like we had with the electric chair of people catching on fire or screaming out in excruciating pain."

In each state that has the death penalty, the chemical mixture used at executions is generally the same. Condemned prisoners are first injected with a sedative that is expected to make them unconscious for the rest of the procedure. They then receive injections of pancuronium bromide to paralyze the muscles and potassium chloride to stop the heart.

But there is no uniform protocol regarding who administers the drugs, how much of each chemical should be used or how prison officials should proceed if an inmate's veins are too compromised to receive injections - a problem for inmates with a history of illicit injected drug use, such as heroin addiction.

Fueling challenges to lethal injection, the British medical journal *The Lancet* published a study last year that concluded that some executed men might have suffered intense, burning pain as they died.

The study said that could have happened if the inmates were not given enough anesthesia at the start of the procedure and it

noted that because potassium chloride causes intense pain, veterinarians have been cautioned about its use in ending the lives of dogs and cats.

"You do see substantial variations among the states on who's doing the injection - even the information they provide about who's doing the injection," said Deborah W. Denno, a Fordham University law professor who has written extensively about state execution procedures.

"This process, even though it has become so much more visible to us, particularly over the last couple years, it's still incredibly underground."

In a 2002 survey that Denno conducted on state death penalty protocols, she found that just nine states published detailed information about the type and amount of chemicals used in lethal injection.

Even among those that made the information available, there was a broad range in amount used and how drugs were administered.

Not as planned

In Oklahoma, Bill Wiseman said in a recent interview that he never intended the second chemical, used to paralyze the muscles, to be part of the protocol. He said he anticipated a two-step process, in which an inmate would be heavily sedated and then given an injection to stop the heart.

Now, Wiseman said, it would be possible for states to adopt a single-step procedure, allowing inmates to be killed by a large overdose of barbiturates - essentially the same procedure that Oregon approved in allowing doctor-assisted suicides.

"It's not that hard to err on the side of giving them plenty of barbiturate. So what if you kill them? That's why we came to the dance," Wiseman said.

He opposes capital punishment broadly, but says that whatever changes are adopted, "this is probably a subject where there's no point in having 37 different good solutions. It probably ought to be one."

A turning point could come in California, where U.S. District Judge Jeremy Fogel in San Jose has scheduled a two-day evidence hearing in September to review that state's lethal injection procedures.

Earlier this year, Fogel raised questions about the state's execution protocol, prompting the state in February to call off the execution of Michael Angelo Morales.

Fogel had ruled that a professional licensed to administer intravenous medications must inject the lethal dose. But the execution could not go forward because the state was unable to find anesthesiologists willing to assist with state executions - a perceived violation of a physician's oath to do no harm.

Kent Scheidegger, legal director and general counsel for the California-based Criminal Justice Legal Foundation, which supports the death penalty, said that if the state wound up adopting changes to the lethal injection procedure that ultimately were upheld by the liberal-leaning 9th U.S. Circuit Court of Appeals, other states would have a clear template to follow.

"As a matter of policy, we should not go about gratuitously inflicting pain, but the possibility that something may go wrong, and a murderer may suffer some minute fraction of the pain he inflicted on the victim, doesn't bother me," Scheidegger said.

"I don't actually think there's anything wrong with the existing protocol, but sometimes you can make changes that simply eliminate issues."

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