

<http://www.latimes.com/news/local/la-me-lethal6oct06,1,5855714.story?coll=la-headlines-california>

Judge Considering Constitutionality of Lethal Injection Posing Tough Questions

Prosecutors and defense attorneys are wary after being asked to suggest ways the manner of execution can be improved.

By Henry Weinstein
Times Staff Writer

October 6, 2006

A federal judge considering the constitutionality of the way California kills condemned inmates has asked prosecutors and defense lawyers a series of questions — including how the lethal injection procedures could be improved — that pose difficulties for both sides, experts say.

Searching for a better execution method is laudable, but lawyers should not be asked to come up with ways to kill an inmate, said Fordham University law professor Deborah Denno, an expert on methods of punishment.

"The lethal injection procedure should not constitute a patchwork quilt of written ideas gathered together by different parties with wide-ranging interests in response to a judge's questions," Denno said.

Lawyers for condemned inmate Michael Morales and the California attorney general's office, which is seeking to uphold the current lethal injection protocol, must respond by Oct. 27.

U.S. District Judge Jeremy Fogel in San Jose said his questions "should not be read as indicating in any way how" he intended to rule, but both proponents and opponents of capital punishment said the questions certainly sound as if he is contemplating a decision that would require changes in the state's procedures.

"It looks like he is interested in having" corrections officials "tweak the procedure some more," said Kent Scheidegger, an attorney with the Criminal Justice Legal Foundation in Sacramento, which frequently files friend-of-the-court briefs seeking to uphold death sentences. State officials modified the procedure this year after Morales' execution was postponed because of the legal challenge.

Fogel's questions grew out of a four-day hearing last week.

Executions in California have been put on hold while he considers Morales' lawsuit, which asserts that the state's lethal injection procedure creates an unnecessary risk that an inmate will suffer excessive pain during an execution, in violation of the constitutional bar against cruel and unusual punishment.

Among the things Fogel asked is what steps state corrections officials "can and should ... take" to "improve their actual implementation" of the three-drug procedure used to execute prisoners in California.

Morales' lawsuit contends that inmates are insufficiently anesthetized by the first drug — sodium thiopental — and that the second drug — pancuronium bromide, which paralyzes the condemned inmate, who is strapped to a gurney — prevents the prisoner from screaming while he experiences excruciating pain from the third drug — potassium chloride — which causes cardiac arrest.

Fogel said he also wanted input on the qualifications of execution team members and on the physical aspects of the execution chamber, including the amount of space, sight lines and other things.

Assuming that the state continues to use three drugs, the judge asked, what steps should corrections personnel take to monitor inmates' levels of unconsciousness before and after injection of the drugs, including whether heart and brain monitors would improve the reliability of the execution procedures.

He also asked whether medical professionals should be involved in executions, and if so, what types. No doctors now take part, except to pronounce the inmate dead.

Also, the judge wants the two sides to tell him their views on "the advantages and disadvantages" of using a longer-acting barbiturate as part of a three-drug combination or of using a single drug, such as sodium thiopental or pentobarbital.

Fogel's questions show what a complicated issue he is grappling with and pose challenges for both sides, said Elisabeth Semel, who runs the death penalty clinic at UC Berkeley's Boalt Hall School of Law. "If it was clear to the judge that the state method was just fine, why would he ask all these questions?"

henry.weinstein@latimes.com

Copyright 2006 Los Angeles Times | [Privacy Policy](#) | [Terms of Service](#)
[Home Delivery](#) | [Advertise](#) | [Archives](#) | [Contact](#) | [Site Map](#) | [Help](#)

partners:  