



Media Release

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Drugs Used in Montana Executions to Go to Trial

HELENA, MT — District Court Judge Jeffrey Sherlock ruled today that Montana's use of pentobarbital in executions must go to trial to determine what the Montana Legislature meant when it specified use of an 'ultra-fast-acting barbiturate' in lethal injections, and if pentobarbital meets that definition.

All Montana executions are stayed until that trial is complete.

"We are pleased that the issue of whether pentobarbital complies with the Montana Legislature's statute on executions will go to trial since it is not an ultra-fast-acting barbiturate and does not comply with the state statute," said cooperating attorney Ron Waterman. "Still, the fact remains that the state has no pentobarbital and it cannot buy it."

What makes the issue to be tried unusual is the fact that the Montana Department of Corrections has no pentobarbital in stock and has no way to purchase any through Food and Drug Administration-approved channels, leaving open the very real possibility that Montana could use an untested combination of drugs or a combination that has recently resulted in botched executions in Ohio and Oklahoma.

The DOC protocol calls for using sodium pentothal as an ultra-fast-acting barbiturate -- a drug that is no longer produced in the U.S., is unavailable for purchase and is illegal to import. It offers pentobarbital as a substitute and allows for another unspecified drug to be substituted if pentobarbital is unavailable. Since, like sodium pentothal, the State does not have and cannot purchase pentobarbital for executions (other than through risky, unregulated compounding pharmacies), the reality is that the State could use another unnamed drug, as has recently happened in Oklahoma and Ohio.

Across the country, states are grappling with how to obtain lethal injection drugs that are illegal to import into the country or are simply no longer available. Some are buying drugs of questionable origin. Others are turning to compounding pharmacies. And still others are using drugs never intended for executions. The results have been disastrous.

Last month, Oklahoma botched its execution of Clayton Lockett when, using an untested protocol with secretly obtained drugs, the state administered one drug, declared Lockett unconscious, and then administered the second and third drugs. It quickly became clear that Lockett was not unconscious as he writhed, breathed heavily, mumbled, clenched his teeth and tried to rise off the bed in what his lawyer described as "torture." After dropping the blinds to prevent witnesses from seeing what was happening, the warden called off the execution, announcing Lockett's "vein had blown," and they did not know how much of the drugs he had received. Lockett died of a heart attack one hour and 44 minutes after being strapped to the gurney.

Other new drug combinations have had similarly distressing results. Just months earlier, Oklahoman Michael Lee Wilson's last words after being injected with compounded pentobarbital were, "I feel my whole body burning." Also in January, Ohio media eyewitness reports of the Dennis McGuire execution by an untested two-drug combination, which took more than 20 minutes, observed, "McGuire started struggling and gasping loudly for air, making snorting and choking sounds which lasted for at least 10 minutes, with his chest heaving and his fist clinched. Deep, rattling sounds emanated from his mouth."

"We are disappointed with the Court's conclusion that the state's plan to use an untested two-drug protocol does not violate the Constitution. Both Ohio and Oklahoma have used untested drug combinations that resulted in prolonged botched executions that caused extreme pain and suffering," said ACLU of Montana Staff Attorney Anna Conley. "We don't want Montana to travel down that same path. And with the Montana Constitution's human dignity clause and its enhanced prohibition on 'cruel and unusual punishment,' we cannot use death row prisoners as human guinea pigs."

In another part of the decision, Judge Sherlock ruled that the Department of Corrections did not violate the Montana Administrative Procedures Act, despite the fact that it conducted its rewrite of the execution protocol without any input from medical or scientific professionals and without any public notice or opportunity for public input. This is an issue which may become the subject of an appeal to assure that the public retains its ability to participate in this important governmental function rather than it being cloaked in secrecy.

Ron Waterman of Gough, Shanahan, Johnson and Waterman, in cooperation with the ACLU of Montana, filed the lawsuit *Smith v. Ferriter* on behalf of death row inmate Ronald Allen Smith in 2008, challenging the lethal injection procedure in Montana as a violation of cruel and unusual punishment and Montana's right of human dignity. The lawsuit now also includes Montana's only other prisoner on death row, William Gollehon.

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