



Media Release

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Revised Execution Protocol Remains Unconstitutional Protocol creates unreasonable risk of cruel and unusual punishment, violates separation of powers

HELENA, MT — Recent changes to Montana’s lethal injection protocol by the Montana Department of Corrections create an unreasonable risk of subjecting prisoners to cruel and unusual punishment and violate the separation of powers between the legislative and executive branches of government.

The ACLU of Montana today submitted a brief in District Court calling for the protocol to be declared unconstitutional under the U.S. and Montana Constitutions

“This new policy, written by Department of Corrections’ staff, was created without any input from medical or scientific professionals and it reflects that lack of expertise. The two-drug protocol is untested and not in use in any other state in the country. There is no clarity about the drugs to be used, and prisoners are at risk of dying in agony as they slowly suffocate while still conscious,” said ACLU of Montana Staff Attorney Anna Conley.

In 2012, District Court Judge Jeffrey Sherlock ruled that the execution protocol was unlawful because the staff charged with carrying it out were not medically qualified to perform their duties in a way that prevented cruelty to the prisoner, and because the three-drug process differed from the statutory two-drug protocol created by the Legislature, violating separation of powers.

“All three of these concerns create a substantial risk of serious harm violative of the Plaintiffs’ right to be protected from cruel and unusual punishment,” Sherlock wrote in his order.

The new two-drug protocol makes Montana the only state in the country to utilize this unscientific and untested method of execution, and creates an unacceptable risk that the prisoner may be conscious while his body is paralyzed by the second drug, resulting in him suffocating to death. Many states are moving toward a one-drug method in which one strong anesthetic both renders the prisoner unconscious and kills him. Montana is moving in a direction of heightened risk of gratuitous and unnecessary suffering.

Another major problem with the revised protocol is that it does not specify the drugs to be used. It 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, an intermediate-acting barbiturate, as a substitute and allows for any other unspecified drug to be substituted. This creates unreasonable uncertainty about the drug to be used and the risks associated with that drug.

In addition, The Montana statute governing executions specifies using an ultra-fast-acting barbiturate. Thus, the new policy still violates the separation of powers in that the DOC, an executive agency, is blatantly ignoring a clear directive from the legislature to use an ultra-fast-acting barbiturate.

Finally, the policy was created in violation of the state's rule-making procedures outlined in the Montana Administrative Procedures Act. The act mandates public notice and a public hearing, which are essential to ensure public participation in the creation of administrative rules. No public input whatsoever was solicited or considered in the revision of this lethal injection protocol. Because the DOC executes people in the name of the people of Montana, the people of Montana should have a say in the method of execution.

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.

Smith's execution was stayed in 2011 pending the outcome of this lawsuit. Smith is also awaiting a decision from Montana Gov. Steve Bullock on his petition for clemency.

"This revised protocol creates more problems than it fixes, and creates an unacceptable risk that prisoners will unconstitutionally be subjected to a slow agonizing death," said Waterman. "If the state insists on imposing the death penalty, it has an obligation to do so in a manner that upholds the U.S. and Montana Constitutions."

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