

Finding a Way to Execute

From the Archive: After getting a judge's stay reversed, Oklahoma officials pressed ahead with Clayton Lockett's lethal injection, only to have the botched execution leave him writhing in pain before finally dying of an apparent heart attack. In March, Richard L. Fricker sketched the case's grim background.

By Richard L. Fricker (Originally published March 28, 2014)

For the second time in less than a month Oklahoma's Republican Gov. Mary Fallin and Attorney General Scott Pruitt have suffered a judicial smackdown in their attempts to execute two inmates. This time the state legislature also took the hit as another "ideologue law" was struck down by the courts.

Oklahoma County District Court Judge Patricia Parish ruled on March 26 that the 2011 state law making execution protocol secret was unconstitutional because it denied inmates access to the courts. The law in question deprives the public access to any information as to how executions are carried out specifically the types of drugs used on inmates, suppliers, amounts paid, or names of doctors and pharmacists.

The ruling came as the result of a lawsuit filed by death row inmates Clayton Derrell Lockett and Charles Fredrick Warner, originally slated to die by lethal injection in March for separate murders committed in the 1990s. The pair challenged the state's protocol because drugs previously used are unavailable and earlier executions had been marked by claims of pain by inmates as they died and by prolonged struggles during the death process.

Attorney General Pruitt issued a statement on March 26 saying the decision would be appealed. [The ruling was later overturned.] Members of his staff have openly vowed the pair would be executed, eventually.

The debate began five years ago as manufacturers of pentobarbital, the execution drug of choice, began refusing to supply states using the drug for executions. Most of the manufacturers are owned by European corporations where the death penalty is banned. Participating in an execution at any level could result in serious sanctions and fines.

As sources for the drug began to become scarce, various states including Oklahoma and Missouri turned to "compounding pharmacies." These outlets mix designer drugs not commonly manufactured by mainline pharmaceutical companies. Compounding pharmacies are largely unregulated and were able to substitute untested combinations of drugs to induce death. In general these pharmacies were

paid in secret and in cash.

The Oklahoma legislature passed HB 1991 during the 2011 session in an attempt to protect these pharmacies and to conceal the type of drug cocktail being administered, the monies paid and the regimen for testing and maintaining the drugs. HB 1991 was enacted after a pharmaceutical supplier called Oklahoma administrators twice to say the drug would no longer be made available.

The portion of the law under challenge says, "The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings. The purchase of drugs, medical supplies or medical equipment necessary to carry out the execution shall not be subject to the provisions of the Oklahoma Central Purchasing Act."

State Sen. Constance Johnson, one of only three senators to vote against the act, said on March 26, "They rushed this thing through; it was fast-tracked. I doubt many of the senators even knew what they were voting on." Sen. Johnson, an ardent death penalty opponent, said abolitionists were celebrating the ruling. "It's wonderful" the Democrat said. "They only passed this to keep the conservative agenda going."

When the bill was introduced on Feb. 15, 2011, she said, "we didn't know all the behind-the-scenes shenanigans they were pulling." After passage, Oklahoma began substituting statute-prescribed drugs for cocktails from compounding pharmacies.

ACLU Executive Director Ryan Kiesel said Judge Parish's ruling was "a tremendous victory for both the abolitionists and the champions of transparency."

AG spokesman Aaron Cooper said in a prepared statement, "The entire reason for Oklahoma's confidentiality statute is to protect those who provide lethal injection drugs to the state from threats, coercion and intimidation."

Cooper did not address why the types of drugs, amount and source of payment should also remain secret. It is known that Oklahoma has paid out nearly \$50,000 for death drugs since HB 1991 passed from what is termed "petty cash."

Early in March, the Court of Criminal Appeals granted a stay of execution by a 5-0 vote, noting they doubted that Attorney General Pruitt would be able to secure proper drugs within the original execution timeframe. Later that month, the state announced it had changed the execution protocol, but declined to say how it intended to carry out the executions.

Judge Parish said it is precisely the unwillingness to disclose such information

that deprives the inmates of access to the courts because they have no information on which to file appeals and must accept death at the hands of the state by whatever means the state chooses.

In a state that has passed several "sanctity of life" laws against abortion and contraception, Oklahoma has shown itself vigorously up to the task of killing convicts and even installed a back-up plan if the drug scheme was rejected by the courts.

HB 1991 provides that "B. If the execution of the sentence of death as provided in subsection A of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution.

"C. If the execution of the sentence of death as provided in subsections A and B of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by firing squad."

Lockett and Warner remained under a death sentence with their execution set for April 22 and 29, respectively. [Gov. Fallin later decided to have both executions carried out on April 29, setting the stage for Lockett's botched procedure, which officials blamed on a ruptured vein. Warner's execution was then postponed.]

Politics is the backdrop of this death struggle in a state said to value life. The governor and attorney general wait nervously to see if they draw a Tea Party primary opponent who will accuse them of being soft on crime.

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