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As execution drugs grow short, states scramble on capital punishment

Gregg Zoroya USA Today Religion News Service | Mar. 10, 2014

Prison guards meet in the desert to hand off chemicals for executions. A corrections boss loaded with cash travels to a pharmacy in another state to buy lethal sedatives. States across the country refuse to identify the drugs they use to put the condemned to death.

This is the curious state of capital punishment in America today.

Manufacturers are cutting off supplies of lethal injection drugs because of opposition to the death penalty, and prison officials are scrambling to make up the deficit -- sharing drugs, buying them from under-regulated pharmacies or using drug combinations never employed before in putting someone to death.

At the same time, growing numbers of states are ending capital punishment altogether. Others are delaying executions until they have a better understanding of what chemicals work best. And the media report blow-by-blow details of prisoners gasping, snorting or crying out during improvised lethal injection, taking seemingly forever to die.

Legal challenges across this new capital punishment landscape are flooding courts, further complicating efforts by states that want to keep putting people to death.

"I've done everything I can do to carry out the executions that have been ordered in my state, and if somebody has an idea of how we can do that, I'd like to hear it," says Arkansas Attorney General Dustin McDaniel.

Arkansas has 33 people on death row, no executions since 2005 and a death penalty sidelined last month by a state judge complaining that the Arkansas law for lethal injection isn't clear about what drugs should be used.

"I don't know where it will all end up," says an exasperated McDaniel. "I know that in the near future we will see more litigation. We will see fewer executions. We will see states scrambling to come up with alternative methods. And there will be a lot of finger-pointing."

The number of executions in the U.S. has decreased from nearly 100 in 1999 to 39 last year; death sentences fell 75 percent, from 315 in 1996 to 80 in 2013.

Pressures on the death penalty are myriad, say those who study it. Juries are less willing to dispense it, and prosecutors less likely to seek it. More states are choosing to abandon it.

"There's been quite a radical change," says Richard Dieter, executive director of the nonprofit Death Penalty Information Center, a Washington-based clearinghouse for information and an opponent of executions.

And while a majority of Americans still support capital punishment, according to Gallup surveys, that 60 percent is the lowest number since 1972. Meanwhile, 3,000 people linger on death rows nationwide.

The biggest hurdle in recent years has been a very practical one -- in a nation in which the overwhelming

method of execution is via lethal injection, corrections officials are having difficulty getting their hands on the drugs they need.

The result is improvisation. The first four people put to death this year -- one each in Florida, Oklahoma, Ohio and Texas -- were killed four different ways with various combinations of drugs.

Ohio executed Dennis McGuire, who raped and murdered a pregnant woman in 1989, with a cocktail of the anti-seizure medicine midazolam and the opioid hydromorphone.

No state had ever tried this combination before. It took 26 minutes for McGuire to die. Media reports described him as snorting, arching his back, clenching his arms, hands and shoulders and appearing to gasp for air.

His family complained that this was a case of cruel and unusual punishment. Three weeks later, Ohio Gov. John Kasich postponed the next scheduled execution for eight months while the state tries to figure out what happened in McGuire's death.

Supporters of the death penalty say the dispute over lethal injection is purely political.

"There are anesthesiologists across the country rolling their eyes," says Scott Burns, executive director of the National District Attorneys Association. "This isn't about obtaining the drugs or cruel and unusual punishment. This is about those opposed to the death penalty coming up with yet another issue to try to halt, delay or continue the debate."

For many years, states uniformly relied on a so-called "three-drug protocol" to execute prisoners, beginning with an anesthetic to render the condemned unconscious, then a muscle relaxant to keep them still and, finally, a chemical to stop the heart.

Five years ago, drugmakers and pharmacies that sell them -- particularly those in Europe, where capital punishment is anathema -- began cutting off production or were barred from exporting drugs for U.S. executions.

The sedative sodium thiopental, used for decades in lethal injections, no longer was available. The Danish-based manufacturer of a fallback drug, the fast-acting anesthetic pentobarbital, blocked its sale for capital punishment.

State correction officials were left begging and borrowing, some hoarding what they had and refusing to share.

"We keep beating the bushes," then-Kentucky corrections official Phil Parker emailed in 2010. "Perhaps some pharmacy somewhere has some on the shelve (sic)."

Court documents and media public-records requests reveal an almost Wild West frenzy.

California launched a "secret mission" to swap some of its muscle relaxant for vials of Arizona's sodium thiopental in 2010. A team of California guards, picking up "the package" from Arizona, shuttled it north on Interstate 5, handing it off in the San Joaquin Valley to a second team that took it to San Quentin's Death Row.

Scott Kernan, a California prison executive at the time, exulted over the mission's success in an email that became grist for Comedy Central's "Colbert Report": "You guys in AZ are life savers. By (sic) you a beer next time I get that way."

Elsewhere, Mississippi officials explored obtaining sedatives from a veterinary school. Kentucky discussed how to mask the purpose of ordered drugs to avoid "ethics or moral concerns."

More recently, Missouri corrections officer Dave Dormire testified that he personally delivered $11,000 to a

pharmacy he found in the Yellow Pages for testing and purchasing of pentobarbital.

"I take them cash," he told lawyers suing to block an execution in January.

Texas, the most prolific death penalty state, modified its three-drug protocol in 2011 and switched to one drug in 2012, all because of shortages, says corrections spokesman Jason Clark. "A single, lethal dose of pentobarbital is now administered," he said.

But The Associated Press says the state will run out of that barbiturate by the end of this month, with three executions slated for April. Clark says officials are looking for more drugs.

Oklahoma solves the problem of embarrassed pharmacies by buying drugs with cash, avoiding a paper trail. "It was one way we could expend cash and help hide the identify of people we are paying money to," says Jerry Massie, an Oklahoma corrections spokesman.

Seven states have passed laws in recent years to keep drug providers secret. Missouri makes them part of its "execution team," an already confidential group.

"So it makes it really virtually impossible for a death sentence prisoner to know how he or she will be executed," says Megan McCracken, a legal consultant with the Death Penalty Clinic at Berkeley Law at the University of California.

Meanwhile, the roster of death penalty states keeps shrinking. New York, New Jersey, New Mexico, Illinois, Connecticut and Maryland have abolished the death sentence in the past seven years. Thirty-two states still have it, but courts in Georgia, Arkansas,Tennessee and Louisiana have halted it amid questions about lethal injection. Governors in Washington, Colorado and Oregon have suspended executions.

California, always deliberate about capital punishment, did not resume executions until 1992, 16 years after restrictions on the state's death penalty were lifted. It has since put 13 people to death and has 731 on death row, more than any other state. While wrestling with a proper lethal injection protocol, however, California has not carried out an execution in eight years.

State legislators in New Hampshire and Missouri have suggested reinstating earlier forms of execution such as electrocution or firing squad. But Arkansas' McDaniel doubts the public would want to reverse a trend toward what many view as more humane methods.

"The euthanasia element of lethal injection," he said, "has allowed the public to temper their desire for the ultimate justice with their delicate sensibilities."

[Gregg Zoroya writes for *USA Today*.]

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