

US Supreme Court issues temporary stay of Texas lethal injection

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The United States Supreme Court granted a temporary stay of execution Tuesday morning, only hours before Texas death row prisoner Cleve Foster was set to die by lethal injection. The high court's stay was the second time this year that the condemned inmate was spared just hours before his scheduled execution.

Cleve Foster, 47, a Gulf War veteran, was convicted in 2004 for the 2002 killing of 28-year-old Nyanuer Pal, a Sudanese immigrant. Her nude body was found in a creek bed with one shot to the head. Foster's roommate Sheldon Ward was tried and convicted separately in Ms. Pal's murder. Ward died in prison of a brain tumor last year at the age of 30.

Foster was set to be the first Texas death row inmate to be executed using a new lethal mix of drugs. On Tuesday, the US Supreme Court agreed to reconsider its January order denying Foster's appeal that raised claims of innocence as well as shoddy legal counsel during his trial and early stages of his appeals.

Foster previously commented to Associated Press on his prior legal counsel, "To me, they were pretty much pulling stuff out of their hats." He claims that he was unconscious at the time of Ms. Pal's death, and that Ward pulled the trigger.

Although the high court's decision to reconsider the merits of Foster's appeal did not mention the new toxic cocktail, the case has focused attention on the lethal injection procedures utilized in Texas and the 34 other US states that practice capital punishment.

Since the US Supreme Court reinstated the death penalty in 1976, the state of Texas has sent 466 men, women and juvenile offenders to their deaths using a three-drug lethal injection procedure. A nationwide shortage in recent months of the first of these drugs, sodium thiopental, has prompted a number of states to

substitute the drug pentobarbital.

Last month, Texas prison officials announced that they were switching to pentobarbital, a sedative often used to euthanize animals and to treat seizures in humans. Pentobarbital has already been used in executions in Ohio and Oklahoma.

A report published last month by the American Civil Liberties Union (ACLU) and the Center of International Human Rights at Northwestern University School of Law examines Texas' lethal injection protocol, including state authorities' decision to introduce the use of pentobarbital.

Titled, "Regulating Death in the Lone Star State: Texas Law Protects Lizards from Needless Suffering, But Not Human Beings," the study exposes a system in which "the execution of human beings is riskier, less transparent, and has less oversight than the euthanasia of cats, dogs, birds, and lizards."

The decision of the Texas Department of Criminal Justice (TDCJ) to begin using a new drug for executions without allowing for public scrutiny or analysis by medical experts comes amid growing concerns among prominent anesthesiologists "that the three drugs used in combination could lead to an excruciatingly painful death," the report notes.

Whereas animal euthanasia laws provide strict certification requirements for technicians and regulates acceptable methods of euthanasia, in Texas, as in other states, lethal injection protocol is left to the discretion of corrections and other authorities. In Texas it is left up to the director of the TDCJ, a prison official with no medical training.

The American Veterinary Medical Association (AVMA) convenes a panel of scientists at least once every 10 years to produce its Guidelines on Euthanasia. The Texas Health and Safety Code also requires that

the state Board of Health “shall establish the requirements and procedures for administering sodium pentobarbital to euthanize an animal in the custody of an animal shelter.” Texas law also regulates such factors as lighting in the room and drug dosage.

At a national level, the US Food and Drug Administration subjects animal euthanasia drugs to further scrutiny, specifying the exact formula to be used and the amount of the drug to be used according to body weight of the animal. By contrast, the Texas Code of Criminal Procedures states simply that the executions of humans be carried out “by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death.”

Until recently, the lethal injection protocol used in states across the country consisted of three drugs: sodium thiopental, an anesthetic or sedative; pancuronium bromide, a neuromuscular paralytic; and potassium chloride, which induces cardiac arrest. The shortage of sodium thiopental prompted the TDCJ to substitute pentobarbital, a drug that has not been tested for efficacy in lethal injections.

The ACLU/Northwestern study cites the testimony of Dr. David Waisel, an expert anesthesiologist and Harvard Medical School professor, who testified in an Oklahoma lawsuit challenging the use of pentobarbital in executions, who said that use of the sedative “as part of a three-drug lethal injection protocol puts the inmate at an undue risk of suffering.”

In Texas, state law fails to put forward dosage-to-weight guidelines for the administration of anesthesia in the three-drug protocol, which means that effective measures are not in place to ensure that the prisoners are properly anesthetized when the second and third drugs are administered. This creates a situation that is potentially terrifying and excruciatingly painful for the condemned individual. This is the case whether sodium thiopental or pentobarbital is used as the sedative.

The second drug in the protocol, pancuronium bromide, causes asphyxiation by paralysis, which means that there is no way for the execution team to know whether the anesthetic has taken effect. TDCJ procedures then allow the team to immediately administer the potassium chloride “if the condemned individual exhibits no *visible* sign of being awake.” [Emphasis in original.] As the study notes, such a standard “makes little sense if the individual is

paralyzed and unable to move or even blink.”

Worse still, the paralytic effect of the second drug could mask the suffering of a conscious prisoner when the third drug is given. The study quotes from “Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia,” an article by Professor Ty Alper, who describes the administration of potassium chloride to a conscious person as “excruciating pain that has been likened to the feeling of having one’s veins set on fire.”

Animals being euthanized are protected against such potential pain. The AVMA Guidelines on Euthanasia explicitly state that “a combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent.” This means that veterinarians in Texas are prohibited from using a drug protocol that has been authorized for use in executing humans.

Professor Alper notes that in animal euthanasia the second and third drugs are simply not used. “These are the two drugs that cause the pain and suffering if the first drug does not take. On the contrary, if the injection of the anesthetic fails to achieve its desired effect during an animal euthanasia, the animal feels no pain; the solution is to simply administer a second dose of the anesthetic.”

According to Texas Department of Health regulations, “even fish, amphibians and reptiles executed with pentobarbital” must receive the proper dosage according to their weight, the ACLU/Northwestern report notes.

For prisoners on the Texas state killing assembly line, however, factors that might influence the effect of the anesthetic, including body weight, heightened adrenaline, metabolism or previous drug use or medical conditions, do not enter into the equation. The inherently barbaric practice of capital punishment is therefore rendered even more sadistic.



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