

US Supreme Court lifts stay, allows Missouri execution to proceed

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The state of Missouri executed Herbert Smulls late Wednesday evening after the US Supreme Court lifted a stay in his case. It was the third execution in the state since November, and the third since Missouri switched to the drug pentobarbital in lethal injections in response to a shortage of previously-used drugs.

Smulls, 56, was sentenced to death for the 1991 fatal shooting of Stephen Honickman in the course of a jewelry store robbery. Smulls, who did not make a final statement, mouthed a few words to two unidentified witnesses, then breathed heavily before succumbing at the state prison in Bonne Terre. He was pronounced dead at 10:20 p.m., about nine minutes after being administered the lethal drug.

Cheryl Pilate, lawyer for the condemned prisoner, had sought to block the execution, arguing that the drug to be used, pentobarbital, carried a substantial risk of causing severe pain, therefore constituting cruel and unusual punishment under the Eighth Amendment. Pentobarbital is a short-acting barbiturate used in the euthanasia of animals.

Supreme Court Justice Samuel Alito granted a temporary stay Tuesday night, following the State of the Union address, blocking the imminent execution. But the high court then lifted the stay late Wednesday afternoon and denied two other petitions in Smulls's case, allowing Missouri authorities to proceed with the execution. The court provided no explanation for why it lifted the stay.

Smull's defense team had sought a court order to identify the compounding pharmacy where the lethal chemical was mixed, as well as the laboratory where it was tested. Ms. Pilate argued that there were no safeguards in place to guarantee that the drug would not cause undue pain during the execution procedure.

Despite a federal judge's order that Missouri officials

turn over the information on the drug's source to Smulls's attorneys, state officials refused to provide it, arguing that since the compounding pharmacy is part of the execution team they were not required to disclose its identity. The officials were also reportedly concerned that the supplier would be subject to protests by opponents of the death penalty.

In a 7-to-3 ruling last Friday, the full Eighth Circuit Court of Appeals reversed the federal judge's decision on releasing the information on the drug and dismissed the appeal. The majority judges stated that Smulls's attorneys would have to show that the state possessed a more humane method of execution, but had decided against using it.

The court placed Smulls and his defense in the untenable position of showing that alternative, more humane protocols were available to the execution team. "The plaintiffs do not allege that the [Missouri Department of Corrections] director, in the exercise of his discretion, has employed anything other than the most human method of execution available," the judges stated.

The court added, "That a former method of execution is no longer available does not mean that adoption of the next best method is an unconstitutional increase in punishment. The punishment—death—has not changed." In other words, as with the US Supreme Court's decision to lift the stay, the judges of the Eighth Circuit's majority were motivated primarily by upholding the constitutionality of the death penalty itself.

Ms. Pilate and the defense team named the Apothecary Shoppe of Tulsa Oklahoma as the compounding pharmacy that provided the pentobarbital on the basis of information obtained through open-records requests on publicly available documents.

Compounding pharmacies are not regulated by the Food and Drug Administration but are overseen by state authorities.

The use of pentobarbital and other new lethal chemicals has been prompted by a shortage of previously-used drugs after companies in Europe blocked the export of drugs to be used to execute prisoners in the United States.

Two recent executions with pentobarbital have raised concerns about suffering endured by prisoners undergoing lethal injections with the drug. On January 9, Michael Lee Wilson was put to death in Oklahoma's death chamber utilizing a three-drug cocktail including pentobarbital. Witnesses reported that Wilson cried out, "I feel my whole body burning," following injection of the toxic chemicals.

Another Oklahoma death row inmate, Kenneth Eugene Hogan, executed January 23, stated, "There's a chemical taste in my mouth," according to witnesses, and "I'm going, I'm going, I'm going," after a similar three-drug mixture was injected into his veins.

The State of Ohio used a two-drug protocol of midazolam and hydromorphone to execute Dennis McGuire on January 16. The condemned prisoner's botched execution took over 25 minutes to complete, during which he was reported to have made "several loud snorting or snoring sounds" and strained against the straps on the gurney as the toxins took effect.

With traditional lethal drugs in short supply, and negative publicity about the apparent suffering of prisoners put to death by the use of new, unregulated chemical mixtures, some of the 32 US states that continue to practice capital punishment are looking to gruesome methods of the past to keep the state killing machine in operation. These include the firing squad, electrocution and the gas chamber.

In fact, many states still authorize some of these methods as options, while others are considering reviving them. In Wyoming, a lawmaker introduced a bill this month to allow the use of the firing squad, saying this would be far less costly than rebuilding the gas chamber. Oklahoma maintains the use of firing squads, but only if lethal injection and electrocution are deemed unconstitutional.

Earlier this month, Missouri state Representative Rick Brattin, a Republican, proposed making firing squads an option. "This isn't an attempt to time warp

back into the 1850s or the wild, wild west or anything like that," he said. "It's just that I foresee a problem, and I'm trying to come up with a solution that will be the most humane yet economical for our state."

Condemned prisoners may choose the electric chair in Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee and Virginia, while Delaware, New Hampshire and Washington state still allow death row inmates to choose hanging. In Virginia, legislation is afoot that would make electrocution an option if lethal-injection drugs are not available.

The Missouri attorney general has broached the subject of rebuilding the state's gas chamber. Gas chamber executions are presently allowed in Arizona, Missouri and Wyoming.



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