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From the Los Angeles Times

New death penalty rules rejected by California court

With no legal method for lethal injection, state must keep delaying executions and let death row expand.
By Carol J. Williams

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Death penalty opponents and the attorneys for two condemned men at San Quentin won another round in their quest to delay executions in California when a state appeals court on Friday held that newly revised rules for administering lethal injections are illegal.

The ruling by the 1st District Court of Appeal in San Francisco means the execution chamber is likely to remain idle through much of 2009, if not longer, pending a likely appeal to the California Supreme Court and possibly another lengthy review and redrafting of the procedures.

Californians have repeatedly supported capital punishment at the ballot box, but opponents have successfully limited its practice with legal challenges that have caused the average time between conviction and execution to grow to about 25 years.

The state has the largest death row population in the country, with 677 condemned to die. The last execution was nearly three years ago, when Clarence Allen was put to death in January 2006.

Executions have been officially suspended since December 2006, when U.S. District Judge Jeremy Fogel of San Jose ruled that the state's method of administering the three-drug lethal injection cocktail amounted to cruel and unusual punishment in violation of the Constitution.

An investigation into the 13 executions conducted in California since 1977 raised concerns that some of those killed hadn't been fully anesthetized by the first shot of a powerful barbiturate before injection of the paralyzing agent, which would prevent the recipient from expressing pain, and the final dose of potassium chloride that stops the heart.

Gov. Arnold Schwarzenegger assigned a task force last year to draw up protocols that ensure the condemned don't suffer excessive pain when put to death.

Before Fogel could pass judgment on whether the new procedures were acceptable, attorneys for death row inmates Michael Morales and Mitchell Sims challenged the legality of the measures because they hadn't been submitted for public comment, as required by state law.

A year ago, Marin County Judge Lynn O'Malley Taylor deemed the execution procedures illegal for their lack of public scrutiny and review by an independent state agency. State Atty. Gen. Jerry Brown appealed, which led to Friday's ruling upholding Taylor's judgment.

Brown's office was asked if it planned to appeal to the state high court on behalf of the California Department of Corrections and Rehabilitation, but did not respond immediately.

Brad Phillips, who represented Morales in the challenge to the new protocols, said that he expected the state to ask the high court to overturn the decisions but that he was confident the justices would take the same position as Taylor and the appeals court.

"Alternatively, the state could simply acknowledge that this is a very important piece of regulation that should go through the Administrative Procedures Act and the public given the opportunity to comment on it," Phillips said.

No matter whether the state chooses to appeal or seek public comment, a court-approved set of protocols is unlikely to be ready for Fogel's consideration before summer.

"Our preferred alternative is to see the death penalty eliminated," Phillips said, while conceding that was unlikely.

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