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Missouri Supreme Court rehears case on execution method

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The Missouri Supreme Court is taking a second look at the way the state adopted its procedures for executing condemned inmates.

In a somewhat unusual move, the state's high court heard a second round of arguments Thursday on claims that Missouri's execution protocol is invalid because it was not adopted as an official rule by the Department of Corrections.

The department contends the execution protocol is an internal management policy exempt from formal rule-making.

The effect of the procedural haggling is that executions remain on hold in Missouri. Although once among the annual leaders in lethal injections, Missouri has not put anyone to death since October 2005.

The next year, a federal judge declared Missouri's lethal injection process unconstitutional after the surgeon who previously oversaw the executions testified he sometimes transposed numbers and operated without written procedures or supervision.

The Department of Corrections responded in July 2006 by adopting written execution procedures detailing the precise amounts and order of the chemicals to be injected into condemned inmates. A federal judge upheld the protocol last year.

But a group of 17 condemned prisoners, five relatives, three clergy and two Democratic lawmakers subsequently sued in state court on grounds that the execution procedures should have been adopted as an official rule, which would require a public comment period.

A Cole County judge dismissed the lawsuit in August and the case was appealed.

Supreme Court judges heard arguments Oct. 7, with Southern District Appeals Court Judge Robert Barney sitting in for a vacant Supreme Court seat. About a week later, Judge Zel Fischer was appointed to fill the vacancy and the Supreme Court on Nov. 19 set aside the original arguments.

The court did not explain why it reheard the case Thursday, though Fischer was present this time. Attorneys said they were given no reason for the second hearing.

"All it means is the court is taking the case very seriously," said Joe Luby, an attorney with the nonprofit Public Interest Litigation Clinic in Kansas City, which is representing the condemned inmates.

Much of Thursday's arguments centered on definitions in state law.

For example, Missouri law defines a "rule" to be an "agency statement of general applicability" that implements or interprets a law or describes agency procedures.

Among the things not considered a rule, under Missouri law, are "a statement concerning only inmates" or "a statement concerning only the internal management of an agency (that) does not substantially affect the legal rights of, or procedures available to, the public."

Assistant Attorney General Michael Spillane, representing the Corrections Department, argued that both of those exceptions applied to the execution protocol.

The condemned inmates are seeking "a breathtaking expansion of the definition of rule as it now exists in Missouri," Spillane argued.

But Luby focused on the word "only" in the definitions, countering that the execution protocol affects more than just inmates and Corrections Department employees. He said the procedures also affect private-sector medical professionals hired to oversee executions, relatives of the condemned and those who witness executions.

In a separate brief filed with the Supreme Court, the Missouri Press Association also argued for the execution procedures to be treated as an official rule, asserting the general public can be affected by the outcome of the execution process.

Had the lethal injection procedures been subject to public comments, Luby said in written court briefs, his group would have "offered evidence that (the department's) method presents the distinct likelihood of an excruciatingly painful death for the prisoner."

Case is *Middleton v. Missouri Department of Corrections*, SC89571

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