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News

Del. hears arguments challenging lethal injection

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By RANDALL CHASE, Associated Press Writer

WILMINGTON, Del. — A federal judge heard arguments Thursday in a class-action lawsuit challenging Delaware's use of lethal injection but did not immediately decide whether the case should proceed to trial.

Judge Sue Robinson told attorneys after the 90-minute hearing that she would try to address the issues raised in the case as promptly as possible, but she gave no indication as to when she might rule.

The lawsuit was filed in 2006 on behalf of ax murderer Robert Jackson III and certified as a class action the following year to include all death row inmates in Delaware. The lawsuit was filed six months after the most recent execution in Delaware, a 2005 procedure in which attorneys for the plaintiffs claim Brian Steckel was put to death without proper anesthesia.

Since the lawsuit was filed, the state has changed its execution procedure to ensure that a condemned inmate is unconscious before he receives fatal and potentially painful doses of two paralytic drugs. The new approach is based on a Kentucky protocol upheld last year by the U.S. Supreme Court, but it includes additional safeguards to ensure that an inmate will not suffer unnecessary pain. Those additional safeguards include a consciousness check and a delay before the two lethal drugs are administered, deputy attorney general Elizabeth McFarlan told Robinson.

"There is no genuine dispute of material fact that the Delaware protocol is substantially similar to the Kentucky protocol approved by the Supreme Court," said McFarlan, who asked the judge to end the case without a trial by granting summary judgment for the state.

But Michael Wiseman, an attorney representing the inmates, said the plaintiffs can prove that the state has failed to abide by previous protocols and committed errors in all of its lethal injection executions, and that there is no assurance that officials would adhere to the new protocol, even if it is found to be constitutional.

"Can this court be confident that they're going to get future executions right?" he asked.

Wiseman also argued that the Delaware protocol is flawed because it does not include a backup plan in the event that officials are unable to establish an IV line in an inmate. Unlike the Kentucky case, which involved a single inmate, the Delaware lawsuit is a class-action covering all death row inmates, he noted. Any execution protocol should have a "Plan B" spelling out how the state would act if, for example, an inmate's obesity or past intravenous drug use makes it difficult for executioners to insert an IV line, Wiseman suggested.

McFarlan said that if an IV line cannot be established within an hour, the execution would simply be called off. She did not say how the state would subsequently proceed.

In Steckel's case, the plaintiffs contend that the anesthetic being administered began leaking into tissue surrounding the needle in his arm rather than going into his veins. Although the execution team allegedly switched to a second intravenous line to give Steckel another dose of sodium thiopental, prison records indicate that he did not receive the second dose before the two lethal drugs were administered, according to the plaintiffs.

Steckel's execution was so drawn out that at one point, he looked up at prison warden Thomas Carroll and asked, "Why is it taking so long?"

McFarlan said that even if thiopental has been administered incorrectly in the past, there is no evidence that Steckel or any other inmate suffered pain amounting to cruel and unusual punishment, or that state officials acted with deliberate indifference.

McFarlan argued that the new protocol includes many suggested improvements offered by the plaintiffs, but she rejected their proposal that Delaware adopt a one-drug protocol involving a massive dose of thiopental, something no other state has done.

"Enough is enough," she said.

Robinson, who wrestled with the idea of weighing alleged mistakes in the past to predict future actions by the state, also seemed dismissive of the one-drug idea.

"It's hard for me to believe it's that much better if it hasn't been adopted by any other entity," the judge said.

But Wiseman argued that summary judgment, which he likely would appeal, would not be appropriate because of the questions still surrounding Delaware's protocol. He said the best way to end the case is to develop a full record for a federal appeals court.

"Go to one drug, get a Plan B, or let's have a trial," Wiseman said.

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