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U.S.

Executions Stall as States Seek Different Drugs

By MANNY FERNANDEZ NOV. 8, 2013

HOUSTON — Florida ran out of its primary lethal-injection drug last month and relied on a new drug that no state had ever used for an execution. At Ohio's next scheduled execution, the state is planning to use a two-drug combination for the first time. Last month in Texas, Michael Yowell became that state's first inmate executed using a drug made by a lightly regulated pharmacy that usually produces customized medications for individual patients.

The decision by manufacturers to cut off supplies of drugs, some of which had been widely used in executions for decades, has left many of the nation's 32 death penalty states scrambling to come up with new drugs and protocols. Some states have already changed their laws to keep the names of lethal-drug suppliers private as a way to encourage them to provide drugs.

The uncertainty is leading to delays in executions because of legal challenges, raising concerns that condemned inmates are being inadequately anesthetized before being executed and leading the often-macabre process of state-sanctioned executions into a continually shifting legal, bureaucratic and procedural terrain.

In the Florida execution, which used the new drug midazolam as part of a three-drug mix, The Associated Press reported that the inmate, William Happ, appeared to remain conscious longer and made more body movements after losing consciousness than those executed with the old formula.

"We have seen more changes in lethal injection protocols in the last five years than we have seen in the last three decades," said Deborah W. Denno, a professor at Fordham Law School and a death penalty expert. "These states are just scrambling for drugs, and they're changing their protocols rapidly and carelessly."

All 32 states with legalized executions use lethal injection as their primary option for executions. Of the more than 250 executions since 2008, all but five were done with lethal injections.

Facing increasing pressure and scrutiny from death penalty opponents, manufacturers of several drugs used in lethal injections — including sodium thiopental and pentobarbital — over the past few years have ceased production of the drugs or required that they not be used in executions. Looking for alternatives, state prison systems have been more eager to try new drugs, buy drugs from new sources, keep the identities of their drug suppliers secret and even swap drugs among states.

A week before the execution of a convicted murderer, Arturo Diaz, in September, Texas prison officials received two packages of pentobarbital from the Virginia Department of Corrections, at no charge; the state with the country's second-busiest death chamber acting as ad-hoc pharmacy to the state with the busiest.

Several states have turned to compounding pharmacies, which are largely unregulated by the Food and Drug Administration and overseen primarily by the states. They have traditionally made specialized drugs, for instance, turning a medication into a cream or gel if a patient has trouble swallowing pills.

In Missouri, the availability of drugs and litigation have slowed the pace of executions. There have been two since 2009.

"We are going to continue to be affected by these pharmaceutical company decisions time and again, unless the death penalty states can find a pharmaceutical product that has some supply stability around it," said Chris Koster, the attorney general in Missouri, which dropped plans to use the anesthetic propofol after the

European Union threatened to limit exports of the drug if it was used in an execution.

The drug shortages and legal wrangling have led some officials to discuss older methods of execution. In July, Mr. Koster suggested that the state might want to bring back the gas chamber. Dustin McDaniel, the attorney general in Arkansas, which has struggled with its lethal-injection protocol, told lawmakers the state's fallback method of execution was the electric chair.

Mr. Koster and Mr. McDaniel said they were not advocating the use of the gas chamber or the electric chair, but were talking about the possible legal alternatives to an increasingly problematic method for states.

"No state has had any success with getting their hands on the cocktail that has heretofore been relied upon," Mr. McDaniel said. He said that lawyers for the state are trying to navigate the appeals process in death penalty cases while knowing that "if the legal hurdles were magically to go away, we are in no position to carry out an execution in this state."

In their rush to find drugs, death penalty states have opened a new wave of lawsuits that have delayed executions at a time when public support for the death penalty has waned and a handful of states have abolished it in recent years. A recent Gallup poll found that 60 percent of Americans favor the death penalty for convicted murderers, the lowest support in nearly 41 years.

Lawyers for seven Florida death row inmates have challenged the constitutionality of a lethal-injection protocol that uses midazolam as an anesthetic. And Missouri was sued by the American Civil Liberties Union after it added drug suppliers to its execution team. Such a move prevents the public and the courts from learning the names of the suppliers, because a state secrecy law provides anonymity to members of the execution team.

Those laws not only protect drug suppliers from negative publicity and harassment, but make it easier for prison systems to get the drugs because they can offer anonymity to reluctant suppliers. A similar law in Georgia is under review by

the State Supreme Court, delaying for months the execution of Warren Hill.

But even the method of drug payment has entered a strange new realm.

Texas prison officials bought pentobarbital at a compounding pharmacy in a Houston suburb, using a credit card instead of the usual purchase order. Oklahoma has been quietly buying its lethal injection drugs using the state prison agency's petty-cash accounts, and at one point got money for the drugs from the same account it used to pay for released inmates' Greyhound bus tickets. State prison officials said they use the petty-cash funds to leave no public paper trail of the identities of drug suppliers or the state's executioners.

"You want to be able to protect the identities of the people participating, the executioners and the supplier of the drugs," said Jerry Massie, the Oklahoma Corrections Department spokesman.

Other moves by states to get drugs, including using compounding pharmacies, have troubled death penalty opponents. In Texas, prison officials bought compounded pentobarbital without a prescription. Maurie Levin, a lawyer representing death row inmates, said the lack of a prescription raised legal questions.

Katherine Fretland contributed reporting from New Orleans.

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