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FAX page #1

High court takes up lethal injection

■ States have kept the execution process shrouded in secrecy.

By Henry Weinstein

FRANKFORT, KY.—The legal battle over lethal injection, which comes before the U.S. Supreme Court today, has been conducted in unusual secrecy, with courts permitting states across the country to keep from lawyers and the public precisely how death row inmates are executed.

In state after state, defense lawyers contending that the execution method inflicts unnecessary pain complain that judges have denied them access to crucial information, including the identity of executioners and details about the drug cocktail used in the fatal injections.

State officials have successfully argued that releasing such information could compromise prison security and the safety of personnel. But lawyers for death row inmates say the restrictions have hampered their efforts to question not only the drugs, but how they are administered.

They say lethal injection is carried out by sloppy, untrained prison personnel unqualified to conduct the sophisticated medical procedure. During a 2006 execution in Florida, for example, Angel Nieves Diaz, 55, appeared to grimace in pain and struggle for breath for half an hour until a second round of lethal drugs was administered. Yet lawyers for death row inmates still were not allowed to question the execution team.

The nation's highest court will hear oral arguments in a Kentucky case. At issue is whether the execution method violates the constitutional ban on cruel and unusual punishment. The stakes are high: Executions across the country have been on a de facto moratorium since the Supreme Court agreed in September to consider the issue.

"What we know about how states and the federal government currently execute people in the United States is deeply troubling," Alison J. Nathan, a Fordham University law professor, wrote in an article recently published online in the University of Pennsylvania Law Review. "But the real danger of lethal injection as currently practiced lies in what we do not know."

It is not clear whether access to information will be discussed during the hearing. But legal experts said it could come up when justices question the lawyers.

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Constitutionality debate

When attorneys in some cases were allowed to examine lethal injection closely, they uncovered evidence that convinced federal judges in California, Missouri and Tennessee that the way lethal injection is carried out is unconstitutional.

In California, for example, a federal judge in December 2006 said there was "more than adequate" evidence that the state was violating the U.S. Constitution after hearing testimony that lethal injection procedures were performed in a dark, cramped room by men and women who knew little about the drugs they administered.

Medical experts in the case testified before U.S. District Judge Jeremy Fogel in San Jose that they could not rule out the possibility that one or more inmates had been conscious and experienced an excruciating sensation of drowning or strangulation before death.

Prosecutors across the nation have consistently maintained that the legal challenges are frivolous, a bid to stall executions. Executioners traditionally have not been named or subjected to questioning, they point out.

Clay Crenshaw, the assistant attorney general in charge of capital litigation in Alabama, said the reason for shielding executioners should be obvious. "You have a lot of nuts on the other side who, if they found out the names, would post them on anti-death penalty websites," he said.

But attorneys for the American Civil Liberties Union and the Rutherford Institute, a religious freedom organization, said the restrictions have choked off full investigation of a compelling public interest.

"Many states have cloaked their lethal injection protocols and executions in secrecy, insulating them from meaningful scrutiny," they said in their brief submitted to the Supreme Court in the Kentucky case in November.

In three dozen states, including California and Kentucky, a three-drug cocktail is administered intravenously by a team of prison employees. The first drug, sodium thiopental, is a fast-acting barbiturate that is supposed to render the inmate unconscious before the second two drugs are delivered: pancuronium bromide, which paralyzes the body, and potassium chloride, which causes cardiac arrest.

The thrust of the legal challenges is that executioners do not give enough of the first drug to protect inmates from severe pain, which is masked by the paralytic agent. Five prominent veterinarians filed a friend-of-the-court brief in the Kentucky case stating that the fatal concoction does not meet that state's minimum humane standards for putting down animals.

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Execution details unclear

In the Kentucky case, David Barron of the state Department of Public Advocacy, who represents death row inmates Ralph Baze and Thomas Clyde Bowling Jr., was not allowed to question the execution team. Barron's copy of the state's written instructions for lethal injection executions was redacted. The unredacted version was submitted to the Supreme Court under seal.

Kentucky disclosed the dosage but not the concentration of the first anesthetic. A state judge denied defense lawyers' request to question Kentucky corrections personnel about procedural changes they made after the lawsuit was filed. Despite the restrictions, lawyers learned that Kentucky had allowed its execution team to insert catheters in an inmate's neck through a carotid artery or jugular vein.

Although Kentucky Judge Roger L.

Crittenden in 2005 nevertheless upheld most of the state's execution procedures, he barred use of the catheter, saying it created "a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death."

Crittenden also noted that Kentucky's execution plan had been developed by people who "were apparently given the task without the benefit of scientific aid or policy oversight."

The jurist said he saw little reason why the state could not make its execution procedures public.

"The citizens of this Commonwealth are entitled to know the method and manner for implementing their public policy," Crittenden said.

Still, the written plan remains under wraps.

The Kentucky attorney general's office declined to comment.

In Texas, which conducted the nation's first lethal injection execution in 1982, lawyers only recently were allowed to depose the warden in charge of death row inmates. They still have not been allowed to question any member of the execution team.

Attorneys Carol Gardner and David A. Harris, representing the Texas Correctional Institutions Division, said in court documents that execution team members "fear that if their identity is divulged they will suffer reprisals from the anti-death penalty community and bodily harm to themselves and their families from gang members and relatives of the executed inmates."

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Qualifications unknown

Kevin Mohr, the lead lawyer for Texas inmate Charles Raby, said he had no interest in unmasking executioners but wanted to research them before he questioned them.

In separate cases, judges in Arizona, Florida, Pennsylvania and Texas said that state corrections officials did not have to reveal what drugs they use in the lethal injection process.

Virginia conducted its first lethal injection in 1995 but did not reveal its drug formula until 2004, after its 60th execution. The state did not disclose the training or qualifications of its executioners.

Lawyers in several states have had to pledge not to reveal the identity of executioners in order to question them.

Alabama's Crenshaw said the importance of anonymity was emphasized when "some crazies" went to the office of a physician involved in executions in another state and posted a sign saying, 'Killer doctor.' "

Heather McDevitt, the attorney for Alabama death row inmate Willie McNair, said Crenshaw's point "is a bit of a red herring." The state fought "tooth and nail" to stop lawyers from questioning executioners, even with an agreement to keep them anonymous, she said.

In Missouri, a doctor who participated in five dozen executions testified from behind a screen, and during testimony by Maryland executioners, reporters had to listen from another room.

At the Missouri hearing, the doctor admitted that he suffers from a form of dyslexia that affects his ability to prepare the lethal drug cocktail. Subsequently, a federal judge barred him from participating in state executions.

After a St. Louis Post-Dispatch reporter revealed the doctor's name and malpractice lawsuit history, the Missouri legislature passed a law making it a crime to publicly identify any member of the execution team.

The doctor is now working on federal executions, according to court papers. A growing number of critics assert that the secrecy has enabled untrained and unqualified executioners to flourish across the country.

In California, for example, lawyers challenging lethal injection learned that an execution team member had smuggled illegal drugs into San Quentin State Prison.

Gary Clements, director of Louisiana's Capital Post-Conviction Program, was one of the first lawyers to question lethal injection officials in that state under oath. Clements asked the prison pharmacy director, Donald Courts, how the state chose the chemicals it used.

"It wasn't a medical decision. It was based on the other states that had all used a similar dose," Courts said.

Clements also asked Annette Viator, former chief counsel for the prison system, what went into developing the state's execution schema. Her reply: "The only thing that mattered was that the guy ended up dead."

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Deadly cocktail

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