

# Secret Drugs, Agonizing Deaths

By MEGAN McCracken and JENNIFER MORENO APRIL 13, 2014

BERKELEY, Calif. — FACING a critical shortage of lethal injection drugs, prison officials in a number of states have recently engaged in an unseemly scramble to obtain new execution drugs, often from unreliable and even illegal sources. Not only does this trend raise serious questions about the constitutionality of executions, it also undermines the foundations of our democratic process. In the name of security, states are now withholding vital information about their death penalty procedures — from death row prisoners' lawyers and from judges, whose stamp of approval they need to impose the ultimate sanction, as well as from the public, in whose name the sentence is carried out.

States have long shielded the identities of executioners, a reasonable policy that should not interfere with judicial review of execution procedures. But in the past year, Georgia, Missouri, Tennessee and other states have expanded the reach of their secrecy laws to include not just the execution drugs used, but even the pharmacies that supply them.

These laws hide the information necessary to determine if the drugs will work as intended and cause death in a humane manner. For states to conceal how they obtain the execution drugs, whether those purchases comply with the law and whether the drugs themselves are legitimate prevents courts from analyzing the legality and constitutionality of death penalty procedures. And that deprives the public of informed debate.

For more than 30 years, every state carrying out executions by lethal injection used the anesthetic thiopental, in combination with other drugs. In 2011, the American pharmaceutical firm Hospira stopped making thiopental. Departments of corrections at first responded by importing it from abroad, but the federal courts ruled that the Food and Drug Administration was prohibited from allowing in the unapproved drugs.

Other states replaced thiopental with pentobarbital, which eventually became the new norm. But Lundbeck, a Danish manufacturer of pentobarbital, did not want its name or its product (Nembutal) associated with executions. Changing its distribution system, it made sodium pentobarbital unobtainable for executions.

With that avenue closed, most states bought pentobarbital from compounding pharmacies, which mix small batches of drugs to order, and whose products are not approved by the F.D.A. Other states have turned to new drugs, including midazolam and hydromorphone.

Even as states adopted riskier and untested drugs, they argued that the identities of the suppliers must remain secret to insulate them from criticism. But that consideration can hardly trump the Eighth Amendment's protection against cruel and unusual punishments.

These are not academic concerns. Both compounded pentobarbital and the mixture of midazolam and hydromorphone have resulted in executions that went very wrong.

After receiving an execution dose of pentobarbital, an inmate should quickly lose consciousness and be without awareness until death occurs. But according to The Associated Press, after the drug was administered to Eric Robert in South Dakota in October 2012, he "appeared to be clearing his throat and then began gasping heavily," and "his eyes remained opened throughout." His heart beat for 10 minutes after he stopped breathing, suggesting the drug was not fully effective.

When compounded pentobarbital was administered to Michael Lee Wilson on Jan. 9, in Oklahoma, he cried out, "I feel my whole body burning." Seven days later, Ohio executed Dennis McGuire with midazolam and hydromorphone. A witness reported: "His body strained against the restraints around his body, and he repeatedly gasped for air, making snorting and choking sounds for about 10 minutes. His chest and stomach heaved; his left hand, which he had used minutes earlier to wave goodbye to his family, clenched in a fist." Mr. McGuire took more than 20 minutes to die.

No wonder prisoners have been demanding to know how they will be executed — even as departments of corrections refuse to tell them. Recently, courts in three states have addressed such legal battles. An Oklahoma trial court decided in favor of the inmates, ruling that Oklahoma's secrecy law violated the state Constitution's right of access to the courts. Similarly, federal courts in Louisiana ordered the department of corrections to produce information about what drugs would be used in a coming execution and whether they had been tested.

But the prisoners usually don't win. More typical are two Texas cases with April execution dates. Although longstanding precedent requires the Texas Department of Criminal Justice to disclose the source of execution drugs, the department has refused to reveal the identity of its new supplier. A federal judge halted one execution at least until disclosure was made, but the department won an appeal and the United States Supreme Court declined to intervene. Both executions went ahead.

The Eighth Amendment requires that the ultimate punishment our society can impose and the means by which it is carried out are subject to the highest level of scrutiny. If prison officials conceal crucial information from judges, lawyers and the public, we have only their word that the drugs will cause death in a manner that complies with the Constitution. Clearly, we can't leave that to trust.

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