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Wrangle Over Oklahoma Executions Bounces From Court to Court

By ERIK ECKHOLM APRIL 21, 2014

Oklahoma's plan to kill two convicted murderers by lethal injection, one of them on Tuesday, has turned into a tangled Kafkaesque legal showdown. Last month, the two men successfully challenged the legality of Oklahoma's secrecy in obtaining lethal drugs. But no one has granted a stay of execution as the state's top two courts both have declared, repeatedly, that only the other can do so.

On Monday, lawyers for Clayton Lockett, who is to be executed at 6 p.m. Tuesday, and Charles Warner, who is to be executed at 6 p.m. next Tuesday, filed the latest of several appeals to the Oklahoma Supreme Court, asking it to set aside its odd jurisdiction battle and grant a delay while there is still time.

"The irreparable harm that would result from their executions cannot be overstated," the lawyers wrote.

The case for a delay would seem to be airtight, many legal experts say. In March, a state district court declared that a 2011 supplier-secrecy law, which officials said they needed to coax companies to supply scarce execution drugs, was unconstitutional.

In effect, the court agreed that the condemned have a right to know how they will be put to death and to question, at least, whether the untested drug combination the state says it will use, from sources it refuses

to reveal, could amount to cruel and unusual punishment.

“I’ve never seen anything like this,” said Eric M. Freedman, a professor of constitutional law and death penalty expert at the Hofstra University Law School said of the hall-of-mirrors handling of the stay request. “The judges are allowing legalisms to get in the way of basic justice.”

The case is part of a growing legal battle nationally over secrecy in methods of execution, as traditional drugs have become scarce and states have engaged in covert scrambles to find new drug combinations and manufacturers. Oklahoma officials say they must offer secrecy because potential manufacturers fear reprisals for involvement with the death penalty.

The decision overturning Oklahoma’s drug-secrecy law, made March 26 by Judge Patricia Parrish, is now under appeal. But in the meantime, the district judge said, it was up to the state’s Court of Criminal Appeals to issue a stay of execution while the issue plays out.

The defendants applied to that court, which asserted that under its governing statute it had no jurisdiction because the condemned men had no pending case before their court, such as an appeal of their convictions or sentences.

So the lawyers appealed to the Oklahoma Supreme Court. Last Thursday, in the latest of several increasingly pointed go-rounds, the Supreme Court said the Oklahoma Constitution gives it the authority to decide matters of court jurisdiction and that the Court of Criminal Appeals was misreading its own statute and should handle the request for an emergency stay.

“We urge the appellate criminal court to be cognizant of the time restraints,” it added.

On Friday, the criminal court responded with the bureaucratic equivalent of “mind your own business,” saying the Oklahoma Supreme Court does not have the power “to manufacture jurisdiction” in the criminal court “by merely transferring it here.” Once again, it said in a

three-to two decision, the “application for stays of execution is DENIED.”

Two dissenting judges on the criminal court wrote that despite the majority’s “erudite and accurate analysis” of the statute, it should have granted a stay to avoid “a miscarriage of justice.”

Madeline Cohen, an assistant federal defender based in Denver who has handled Mr. Warner’s appeals and is advising his current Oklahoma lawyers, said: “I was sick to my stomach when I saw that decision on Friday afternoon. The idea these men can be executed in the face of a decision in their favor requiring disclosure about the drugs is horrifying and takes secrecy to a new level.”

The attorney general, Scott Pruitt, hailed Friday’s decision by the criminal appeals court and vowed to proceed with the executions. The drug suit and stay appeals are “shell games designed to delay the punishment handed down by a jury for the brutal murders,” said Diane Clay, a spokeswoman for the office.

James L. Hankins, a prominent defense lawyer in Edmond, Okla., who is not involved in this case, called the wrangling absurd. He said: “It is unseemly, in my view, that we have our highest appellate courts squabbling over statutory interpretations like this. There are considerations here beyond Warner and Lockett on the way that the death penalty is carried out, the secrecy in how the state acquires the drugs, and how that will impact future executions.”

The executions of Mr. Lockett and Mr. Warner were already delayed by one month after state officials admitted in March that they had been unable to locate suitable drugs despite what they called “herculean” efforts.

This month, they notified the lawyers that they had acquired and planned to use three drugs for this month’s executions: midazolam as a sedative, vecuronium bromide as a paralytic, and potassium chloride to stop the heart.

“The only known use of this combination was in Florida, whose protocol called for five times more midazolam, leaving serious questions

about whether the execution will comport with the Eighth Amendment's ban on cruel and unusual suffering," said Ms. Cohen, the defense lawyer.

"We still don't know where they are getting these drugs and we have nothing beyond their assurance that they are from F.D.A. approved manufacturers," said Ms. Cohen.

Ms. Cohen declined to describe how the condemned men were responding to the legal battles beyond saying that it has been "unbelievably stressful and terrifying."

Mr. Lockett received the death penalty for the 1999 kidnapping, rape and murder of a 19-year-old woman; Mr. Warner, for the 1997 murder and rape of an 11-month-old girl.

On Monday, according to the state's detailed protocol for executions, officials of the Oklahoma State Penitentiary in McAlester "will examine the execution area to ensure it is secure and operational." Early Tuesday morning, if no stay is granted, Mr. Lockett will be transferred from Death Row to a special "execution holding cell."

On the day of execution, the protocol says, the inmate may be served a last meal between noon and 3 p.m. "The offender's last meal request must be available on a menu of a local restaurant," it says, and the cost is "not to exceed \$15."

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