

Palm Beach Association of Criminal Defense Lawyers Calls New Lethal Injection Protocol Inhumane and Unconstitutional

The greatest deprivation of liberty the government can engage in is the killing of its own citizens by using the death penalty. Such a deprivation then should only be used if the procedure comports entirely and unambiguously with the law. The state of Florida is seeking to exercise this awesome power against Robert Henry, who is scheduled for execution on March 20, 2014.

In September of 2013, Florida changed its protocol for lethal injections. Previously, the State utilized barbiturates in step one of its three-step injection process, which put inmates in a coma-like state prior to administering the second, paralyzing drug. The sources for barbiturates have been running dry, however, because of ethical concerns in the medical profession and unwanted publicity for pharmaceutical companies. Companies inside the U.S. are refusing to sell to state governments, and most major manufacturers outside the U.S. are forbidden by law to export these drugs for executions in the states. As a quick fix to the drug shortage, Florida has changed the way it does executions: the lethal cocktail now calls for Midazolam, a drug the FDA has not approved for lethal injections.

The Florida Constitution requires the Florida Supreme Court gauge the lethal injection process to be in conformity with U.S. Supreme Court rulings. In *Baze v. Rees*, 553 U.S. 35 (2008), the U.S. Supreme Court established the requirements necessary to challenge a state's lethal injection process, holding that while a risk of future harm to the would-be executed can qualify as cruel and unusual punishment, the condemned must establish that "the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." The Court further held that the failure of the initial injection to render the prisoner unconscious, creates "a substantial, constitutionally unacceptable risk of suffocation...."

The Florida Supreme Court in *Valle v. State*, 705 So. 2d 1331 (Fla. 1997), made clear that "the condemned inmate's lack of consciousness is the focus of the constitutional inquiry" regarding lethal injection. In *Lighthbourne v. McCollum*, 969 So. 2d 326, 351 (Fla. 2007), the Court acknowledged that "[i]f the inmate is not fully unconscious when either pancuronium bromide or potassium chloride [the second and third drugs in the protocol at that time] is injected, or when either of the chemicals begins to take effect, the prisoner will suffer pain."

Due to the shortage of barbiturates, Florida is now using Midazolam for lethal injections. This stop-gap measure **is not** a substitute for anesthesia. Rather, it is in a class of drugs normally used to treat anxiety, such as Xanax. It is not a substitute for anesthesia and is **inadequate to produce the deep, coma-like unconsciousness required** before the administration of the second, paralyzing drug which shuts down the body's functions. In fact, no studies exist at all to show the effects of Florida's megadose of this drug. As a result, leading anesthesiologists report

that Midazolam's shoddy sedative properties can result in "a sensation akin to being buried alive" for the person being executed.

An execution that recently took place in Ohio clearly shows the failings of this new lethal injection process. Using this new and never tested procedure, the condemned, Dennis McGuire, gasped, snorted, and struggled for air as his chest heaved and fists clenched for approximately 26 minutes before he died, more than double the length of time under the old injection cocktail.

We believe that the lack of medical research, coupled with this recent experience in Ohio makes it abundantly plain that this new protocol for lethal injections in Florida **does not pass constitutional muster**. The experience of Dennis McGuire shows that the process fails to render the condemned unconscious before the second drug is administered. **This process is clearly inhumane and in direct violation of the Florida Constitution and the U.S. Constitution's Eight Amendment prohibition on cruel and unusual punishment.**

The Palm Beach Association of Criminal Defense Lawyers denounces this new lethal injection policy as inhumane. To allow an execution to proceed in this manner is anathema to our core Constitutional values. As lawyers committed to defending the Constitutional rights of our clients, we call on Governor Rick Scott to stay Robert's execution.

Signed,

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On behalf of the Palm Beach Association of Criminal Defense Lawyers