August 5, 2011

Delivered via E-mail

Birdie (Janet) Worley
Birdie.Worley@doc.state.or.us
Rules Coordinator
2575 Center St., NE
Salem, OR 97301-4667

Comments on Department of Corrections Proposed Rules Regarding Capital Punishment (Death by Lethal Injection)

Dear Ms. Worley,

The American Civil Liberties Union of Oregon (ACLU) appreciates the opportunity to comment on the clarity, specificity, accuracy, legality and appropriateness of the current proposed regulations regarding the lethal injection execution procedure for the State of Oregon.

We have serious concerns about a range of issues in the proposed rules. In general, we concur with the comments filed yesterday by Jeff Ellis of the Oregon Capital Resources Center (OCRC), but make the following additional comments which may differ in some respects.

We strongly agree with the comments made by Mr. Ellis in favor of adopting a single drug protocol in order to avoid the great risk of mishandled and excruciatingly painful executions that have occurred in other states in recent years.

It has been 15 years since Oregon last carried out an execution. Since that time, there have been dozens of actual and attempted executions in other states, too many of which have resulted in painful, agonizing and protracted executions. Oregon should learn from those mistakes, rather than adopt amended rules based on presumptions which are out of date.

In our opinion, ORS 137.473 provides discretion for the Director to adopt a single drug protocol. The statute provides in part:

> "The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and potassium chloride **or other equally effective substances sufficient to cause death**." (emphasis added)

Following consideration of comments made in writing and at a public hearing, we hope the Director agrees that this is the wisest course. If so, we urge the Director to consult with the Attorney General on this point of law. If the Attorney General concludes that a change in the statute would be required in order to implement a single drug protocol, we strongly urge the Director to request such a change from the Legislature and also to notify the Circuit Court that moving forward with an execution using a three drug protocol would greatly increase the risks of an inhumane – and unconstitutional – execution.

Our additional comments that follow address the proposed amendments in general and with regard to specific sections of the proposed amended rules.

VAGUENESS

On the whole, the proposed amendments use many terms that are undefined or vague. For instance, the rules do not indicate:

- What specific lethal substance[1] will be injected into the condemned individual;
- Whether the condemned individual will be injected with a single substance or a combination of substances;
- What quantity of substances[2] the condemned individual will be given and over what duration;
- Whether the preparation of the drug mixture up to 24 hours prior to the execution is authorized by the drug manufacturer and/or will not result in unintended consequences;
- How intravenous access to the condemned individual will be obtained by staff;

[1] We assume that proposed 291-024-0016(2)(a) and 291-024-0080(3) in using the term "lethal substances" incorporate ORS 137.473, which states: "The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances sufficient to cause death." However, the proposed rules do not define the term "lethal substances." The rules should be much more specific about exactly what substance or substances will be injected.

[2] Again, the failure of 291-024-0080(3) and ORS 137.473 to provide detail on the drugs, amounts and duration of application prevents the public from properly and intelligently commenting on the regulation.

- How consciousness of the condemned individual will be monitored and what actions Department of Corrections staff will take if the condemned individual maintains or regains consciousness;

- What the Superintendent, I.V. technician(s), and other staff will do in the event that a stay of execution is issued after the execution process has begun;

- What the I.V. technician(s), Superintendent, and other staff will do if there is a problem during the execution, including a problem obtaining access to the condemned individual's veins;

- What the qualifications of the I.V. technician(s) are, including what medical training the technician(s) possess;

- Whether a medical doctor or other medical professional will be present or participate in any part of the execution, as there is no mention of inclusion of a physician actively participating in the process;

- What the qualifications are of the "trained person" and "medically trained person" who are charged with administering the lethal injection, nor do the rules specify the professional qualification such person or persons has or have received; and

- What specific preparations are to be taken prior to an execution in order to ensure that all of the medical equipment and supplies used during the execution are in good condition and working order.

ABSENCE OF PHYSICIAN INVOLVEMENT

ORS 137.476 provides that "a licensed health care professional or a nonlicensed medically trained individual may assist…in an execution…" We understand that Oregon doctors may refuse to be involved in taking a life, for personal, professional, religious and ethical concerns. Yet, the draft rules are completely silent on the possible involvement of a physician or medical professional in the execution of an individual. The lack of commitment to include an appropriately trained medical professional throughout the execution process raises grave concerns that any medical issues that arise during the process will not be addressed in an appropriate and skilled manner. There is no indication that any licensed or certified medical professional will be included in the process at all. The failure to define "trained person" and "medically trained person" causes more concern that no one with proper medical training will be involved and/or present during the execution, allowing for potentially-gruesome errors and developments.[3]

[3] Mention of "one or more physicians" being "invited" to witness the execution, per OAR 291-024-0020 (3)(A) does not sufficiently address these concerns.

OBTAINING THE DRUGS

The proposed rules do not indicate which specific drugs by brand name are to be utilized, nor is there information about where and how these drugs will be obtained by the State. OAR 291-024-0016 (2) (a) authorizes the "lethal substances" to be purchased at "any wholesale drug outlet." ORS 689.005 defines a "wholesale outlet" as "any person who imports, stores, distributes or sells for resale any drugs including legend drugs and nonprescription drugs." In this situation and for these rules, simply importing the statutory definition is far too vague to guarantee that the drugs obtained to execute a person are proper and have been managed in an appropriate manner. Additionally, the draft rules do not discuss whether the Department of Corrections has any license which may be necessary to purchase the "lethal substances."

Recent news reports[4] indicate that the specific fatal drug which has been used in many states for lethal injection is no longer legally available in the United States or elsewhere. Apparently, some states have obtained the drug illegally from other states and illicit, foreign manufacturers and distributors. At least one state has been subject to federal confiscation of these ill-gotten drugs. In light of this information, we believe it is essential for Oregon to provide specific details regarding what drug or drugs it plans to use and how, where and when such pharmaceuticals will be obtained. The death penalty is the ultimate punishment for a person who has violated our laws. Certainly, the State of Oregon cannot engage in illegal behavior to carry out an execution and steps should be taken to spell out safeguards in the rules to ensure that any "lethal substance" used in an execution has been obtained lawfully. Beyond the issue of legality, there is an even greater risk of a botched execution if the drug(s) administered are of dubious origin.

PROTOCOLS FOR STOPPING THE EXECUTION

The proposed rules direct how the death warrant, of a condemned individual who has exhausted all appeals, will be carried out. However, in Oregon's recent history the only executions to take place have been of individuals who have waived their rights to appeal.

In such a situation, the condemned individual has a right to change his or her mind up to the last possible minute and therefore stop the execution. The current proposed rules do not account for this possibility.

The rules must be amended to provide clarity that the inmate in such a situation has the opportunity at all times prior to the execution to halt the process and exercise his or her legal rights to pursue further appeals. In addition, the rules should require the Superintendent to affirmatively confirm with the condemned individual at several points during the last 30 days prior to the scheduled execution that the inmate is aware of that right and has not changed his or her mind..

[4] For example, see: http://journalstar.com/news/state-and-regional/nebraska/article_4ec6475d-e308-5647-85e0-78769e6f4c0f.html

Similarly, rules should be developed to direct how an execution would be stopped if a stay is granted but the injection procedures have been started.

RECORD OF EXECUTION

As noted above, the fact that in recent years other states have committed serious errors which resulted in painful, agonizing and protracted executions, it is essential that the most accurate record of an execution be made and retained in order to inform the future actions of both Department personnel, the Governor and the Legislature. Since a live video camera is already required under the law and provided for in the proposed rules, we believe that camera also should be used to record the entire execution process.

The procedure in the proposed rules for creating written notes regarding the execution is completely inadequate.

Additionally, the rules do not provide for retention of the execution report, as well as procedures by which the inmate's family, attorney, or an independent pathologist retained by them, could obtain access to the report in order to investigate the circumstances of an execution if things go wrong.

The rules also do not provide for the preparation of an execution report which would be made available to the public.

POST-EXECUTION PROCEDURE

The rules make no provision for the inmate's family or attorney to request an autopsy, even if there is reason to believe that something went wrong in the administration of the lethal injection.

INMATE'S MENTAL STATE AND EMOTIONAL STABILITY

An inmate's mental state and competency are observed and considered at the time a death warrant is issued. However, from the time the death warrant is issued until the execution is carried out, the mental and emotional stability of the inmate can change. The inmate's mental state at the time of the execution is of paramount constitutional importance. The rules do not adequately address how and by whom the inmate is to be observed and assessed as the execution time draws closer.

A qualified mental health specialist, as well as the inmate's attorney, should have adequate access to the inmate throughout the time following the issuance of the death warrant and the execution. Draft OAR 291-024-0055 (2) (b) (A) provides that 48 hours prior to the execution the condemned inmate will be under a 24-hour watch and a "log of all activities" will be maintained. Subsection (B) provides that "any unusual incident shall be documented in accordance with the Department of Corrections policy on Unusual Incident Reporting Process, #40.1.6." However, the "Unusual Incident Reporting" policy is itself

vague and is inadequate guidance for observing an inmate's mental and emotional state as the inmate's execution date approaches.

OVERBROAD DISCRETION OF THE SUPERINTENDENT

The inmate has constitutional rights to access legal counsel, spiritual advisors, visitors and mail. Those rights are not adequately set forth in the draft rules but, instead, are left to the discretion of the Superintendent. The rules should include specificity in light of the fact that fundamental legal rights are at risk.

As noted above, access to counsel, spiritual advisers and visitors is especially important in the case of a condemned person who waived available appeals, but retains the right to change that decision.

ADDITIONAL ISSUES

OAR 291-024-0020 (3)(D)(c) requires that all persons witnessing the execution "be properly attired." This regulation is so vague as to be subject to abuse. The Oregon State Penitentiary has a detailed dress code. If there are specific concerns about particular attire, those requirements should be set forth in the rules so as to provide sufficient notice to a witness and eliminate risk of arbitrary enforcement.

OAR 291-024-0060(7)(c) provides that witnesses, including representatives of the news media may only use "Note pads, and pens or pencils issued by the institution" once having been cleared through security. This requirement is not necessary to maintain security and should be waived at least for members of the news media. We understand why the Department would want to prevent unauthorized photography or audio recording of an execution, but news media representatives should be able to have access to small laptops or other note-taking devices.

OAR 291-024-0060(6) provides that the emergency telephone lines to the execution room will be checked periodically during the final 24 hours before execution, including in the last half hour. We believe these checks should be documented in writing as part of the execution report.

CONCLUSION

Overall, the ACLU believes the Department of Corrections' rules for carrying out this most serious of government functions – the deliberate taking of the life of a condemned individual – lack the necessary detail needed to ensure that every step will be taken to carry out the execution in a constitutional manner. We urge the Department to add a greater level of specificity to the rules as well as make the other changes we propose.

The ACLU of Oregon, on behalf of our 10,000 members, has requested a public hearing on these proposed rule changes. We look forward to discussing these issues more at that time.

Thank you for your consideration of our comments.

Sincerely yours,

David Fidanque
Executive Director