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California's first execution in five years delayed by legal issues

Appeals court orders judge to reconsider ruling allowing Albert Greenwood Brown to be put to death.

By Carol J. Williams, Los Angeles Times

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A federal appeals court in San Francisco late Monday ordered a trial judge to reconsider a ruling that allowed for a convicted murderer and rapist to be executed this week at San Quentin State Prison.

Albert Greenwood Brown was scheduled to die at 9 p.m. Thursday for the 1980 killing of a 15-year-old Riverside girl.

But the U.S. 9th Circuit Court of Appeals said U.S. District Judge Jeremy Fogel erred by offering Brown a choice of a one-drug lethal injection or a three-drug cocktail.

"The district court's decision to provide Brown the choice of a one-drug option is not consistent with California state law and procedures. California law does not provide the condemned a choice between a three-drug protocol or a one-drug option," the ruling said.

The appeals court ordered the judge to schedule a new hearing.

The court's order came hours after Gov. Arnold Schwarzenegger ordered a one-day delay in Brown's execution, citing a procedural complication in the state's attempt to carry out its first death sentence in nearly five years.

The governor's reprieve coincided with an announcement by the attorney general's office that further lethal-injection sentences in California would have to wait until at least next year due to a nationwide shortage of the key drug used to render condemned prisoners unconscious.

Lawyers for the state had advised a federal judge in filings over the weekend that San Quentin has only 7.5 grams of sodium thiopental on hand, and as much as 6 grams could be used. The scheduled execution time was just a few hours before the drug reaches its expiration date Friday, according to court papers filed by the attorney general's office.

But the governor's order delaying the execution was attributed to an unexpired period for Brown to petition the California Supreme Court for review of an appeals court ruling that lifted a ban on executions. That Sept. 20 appeals court ruling won't take effect until Thursday, the governor

noted in issuing the reprieve that he said would expire at 11:59 p.m. Wednesday.

Brown, who raped and killed a 15-year-old Riverside girl in 1980, had been scheduled to be put to death at 12:01 a.m. Wednesday.

If the execution is carried out, it will likely be the last in the state for months, due to the shortage of sodium thiopental that has forced other states to postpone executions as well.

The California Department of Corrections and Rehabilitation "has been unable to secure sodium thiopental to perform any executions after Sept. 30," said attorney general spokeswoman Christine Gasparac. "This office will recommend that future executions be scheduled when [the corrections department] expects the drug to be available."

The drug manufacturer, Hospira Inc. of Lake Forest, Ill., blamed the shortage on a third-party supplier's failure to provide the crucial pharmaceutical ingredient for its pentothal product. The company said it expected to have more available in the first quarter of 2011. But a spokesman also reiterated the company's objections to their product being used in executions.

"Hospira manufactures this product because it improves or saves lives, and the company markets it solely for use as indicated on the product labeling. The drug is not indicated for capital punishment, and Hospira does not support its use in this procedure," said spokesman Daniel Rosenberg, adding that the company informed corrections departments of its position earlier this year.

A federal judge Friday denied Brown's petition for a stay of his execution. The prisoner had argued that the state's newly revised lethal-injection procedures could subject him to unconstitutional pain and suffering if insufficient sodium thiopental is used. Only 1.5 grams of the powerful barbiturate is used to anesthetize the prisoner in the three-drug sequence, while 5 grams is administered in single-injection executions.

California's procedures govern the three-drug execution method, but Fogel gave Brown the option of choosing the single-injection method used in Ohio and Washington. The judge noted that nine executions using the single dose of the anesthesia have been carried out without problems, which he deemed "undisputed and significant."

But Brown failed to say whether he preferred the single-injection method by the noon Monday deadline set by Fogel. That allowed the state to go forward with its three-drug method, said a spokeswoman for the corrections department.

Brown's lawyers asked the U.S. 9th Circuit Court of Appeals for review of Fogel's ruling. That challenge was upheld late Monday.