

US federal appeals court ruling could speed up executions

By Kate Randall
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A federal appeals court ruling Wednesday could clear the way for the US Department of Justice (DOJ) to allow states to expedite death penalty inmates' appeals through federal court. A three-judge panel of the Ninth US Circuit Court of Appeals threw out a lower court ruling that blocked the DOJ's certification process for fast-track appeals of death sentences.

The ruling comes as executions in the US are at their lowest level in two and a half decades, with 28 people executed in 2015. The numbers reflect declining public support for the death penalty, the inability of states to obtain lethal injection drugs and increasing exonerations of death row inmates.

The Ninth Circuit said the legal organizations that challenged the DOJ's criteria for certifying states for the fast-track program lacked legal standing to bring the lawsuit. The ruling could clear the way for states to apply for certification for the fast-track appeals process, potentially leading to swifter executions.

The appeals court threw out a 2013 lawsuit brought by the Habeas Corpus Resource Center in California and the Office of the Federal Public Defender for the District of Arizona, which challenged a DOJ policy that in certain states would shorten the amount of time—from one year to six months—that prisoners have to challenge their conviction in federal court after state appeals are exhausted.

The fast-track process stems from the Antiterrorism and Effective Death Penalty Act (AEDPA) signed into law under the Clinton administration in 1996 and revised by the Obama Justice Department in 2013. Regulations finalized by DOJ in 2013 also require federal courts to act faster on inmates' petitions and require courts to appoint an attorney to represent indigent capital inmates unless an inmate rejects the attorney.

Although no states have yet been approved for the fast-track process, Arizona and Texas have both asked to be allowed to use it. On October 18 Federal District Judge Claudia Wilken issued a temporary restraining order to prevent certification of any state application, resulting in an indefinite delay in the applications from Arizona and Texas. The DOJ appealed and the Ninth Circuit ruled in its favor.

The plaintiffs, representing death row inmates with federal appeals, argued that the Justice Department rulings were too vague, causing them concern over how to commit limited attorney time and financial resources in capital cases. The Ninth Circuit sided with the DOJ, overturning the lower court ruling. Attorneys for the plaintiffs will ask a larger Ninth Circuit panel to review the ruling, and until the court takes up or denies that request the fast-track policy will remain on hold.

“We're living in a time where our system of capital punishment is being exposed for its critical flaws,” Marc Shapiro, an attorney for the legal organizations that sued, told Associated Press. “There's a heightened need for assuring we're not sending innocent or otherwise undeserving people to the execution chamber.”

According to a study from the University of North Carolina at Chapel Hill, more than a third of those defendants sentenced to death from 1976 to 2013 had their sentences or convictions reversed on state or federal appeal. Opponents of the fast-track process say it would force attorneys representing death-row inmates to rush to file appeals and possibly lead to some cases being neglected.

Shapiro told the *Wall Street Journal*, “We think there needs to be greater opportunities for courts to review these cases” but that the “DOJ is seeking to do exactly the opposite, and slide the cases through federal court.”

The pro-death penalty Criminal Justice Legal Foundation, based in Sacramento, California, filed a friend of the court brief in the case before the Ninth Circuit on behalf of two family members of murder victims, one each in California and Arizona. CJLF, which has worked for the adoption of the AEDPA fast-track program, argued that the plaintiffs did not have a legal right to challenge the law and that it was not appropriate for the appeals court to review any challenge at this time.

The Ninth Circuit panel drew on CJLF's brief, writing in its opinion, "We find the challenges to the substance of the [AEDPA] Final Regulations not ripe for review at this time." They rejected plaintiffs' arguments that the vagueness in the DOJ's fast-track regulations created "significant confusion" for defender organizations, causing them to be "making urgent decisions regarding their litigation, resources and strategy."

The panel dismissed out of hand the plaintiffs' arguments that the defender organizations representing clients facing the death penalty had any standing in the case, writing, "Assisting and counseling clients in the face of legal uncertainty is the *role* of lawyers, and, notably, the Defender Organizations have not cited any authority suggesting that lawyers suffer a legally cognizable injury in fact when they take measures to protect their clients' rights or alter their litigation strategy amid legal uncertainty."

This ruling potentially expediting executions comes as the number of death row exonerees continues to grow. According to the Death Penalty Information Center (DPIC) Innocence List, 156 individuals convicted and sentenced to death have been exonerated since 1973—either having been acquitted of all charges that placed them on death row, had the charges dismissed by the prosecution, or been granted a complete pardon based on evidence of innocence.

The vast majority of defendants in capital cases cannot afford their own attorneys and are represented by court-appointed legal counsel, who are overworked and underpaid. The quality of legal representation is one of the key contributing factors in determining whether a defendant receives a death sentence. Fast-tracking of death penalty appeals will place further strains on a system already biased against capital defendants, who are overwhelmingly working class and

poor and disproportionately African-American and Latino.

According to DPIC, there were 2,942 inmates on death row across the US as of January 1, 2016. Since the US Supreme Court reinstated the death penalty in 1976, 1,431 people have been executed. Individuals sent to their deaths have included those convicted of crimes committed as juveniles, the mentally impaired, and foreign nationals denied their consular rights.

Thirty-one US states, along with the US government and military, still have capital punishment on the books. So far this year, nine people have been put to death by lethal injection: five in Texas, two in Georgia, and one each in Florida and Alabama. There are 13 executions scheduled for the remainder of 2016. Barring any last-minute reprieves, Texas will execute John Battaglia on Wednesday; Georgia is set to execute Joshua Daniel Bishop on Thursday.

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