

US Supreme Court to hear challenge to Oklahoma lethal injection protocol

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On Monday, Oklahoma Attorney General Scott Pruitt asked the US Supreme Court to stay three pending executions until the high court conducts a review of the state's lethal injection protocol. The Supreme Court announced last Friday that it would hear a challenge to Oklahoma's death penalty procedure that alleges the process amounts to cruel and unusual punishment.

It is unclear if the Supreme Court will issue a stay for the three death row inmates represented in the case. The decision to hear their cases, and Oklahoma's request for temporary stays, came too late for one prisoner, Charles Warner. He was executed January 15, after a 5-4 ruling of the high court justices allowed his execution to proceed despite the ongoing legal challenge to Oklahoma's execution protocol.

The fate of another Oklahoma prisoner, Richard Glossip, also hangs in the balance. He is scheduled to die by the lethal injection procedure in question on Thursday, barring a stay by the Supreme Court. The inmates' case, originally named *Warner v. Gross*, was changed to *Glossip v. Gross* after Warner's execution. The Supreme Court is expected to rule on the case some time this spring.

Attorney General Pruitt's request for the stays is not an indication of Oklahoma authorities' lack of support for the state's lethal injection procedure. In a written statement, Pruitt's office said: "Oklahoma's execution protocol has been affirmed as constitutional by two federal courts and has successfully been implemented in Oklahoma, as well as more than 10 similar executions in Florida. We will continue to defend the constitutionality of this protocol in order to preserve DOC's [Department of Corrections'] ability to proceed with the sentences that were given to each inmate by a jury of their peers."

The Oklahoma inmates' suit arose following the

horrific execution of Clayton Lockett last April 29. The condemned inmate writhed and grimaced in pain for 43 minutes after being injected with Oklahoma's three-drug mix of toxic chemicals before finally succumbing. The use of the first drug, the midazolam, is at issue. The inmates argue that the sedative may not provide an adequate level of sedation, and may subject those being executed to extreme pain and suffering when the other two drugs—one to paralyze, the other to cause cardiac arrest—are injected.

In another case involving a two-drug protocol including midazolam, Ohio death row inmate Dennis McGuire thrashed about in pain and gasped for breath before being pronounced dead 25 minutes later by prison authorities as his horrified family looked on. Opposing McGuire's request for a stay of execution, Assistant Ohio Attorney General Thomas Madden argued that while the US Constitution bans cruel and unusual punishment, "You're not entitled to a pain-free execution."

Following Lockett's execution, the state of Oklahoma temporarily halted executions in the state while they attempted to overhaul their lethal injection protocol to get the state killing machine up and running again. The only substantive change made was to raise the dosage of midazolam from 100 milligrams to 500 milligrams.

Justice Sonia Sotomayor, in her dissent in Warner's case, expressed concern about Oklahoma's use of midazolam, considering the experiences of "botched" executions utilizing the drug. Joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer and Elena Kagan, Sotomayor noted: "Petitioners have committed horrific crimes, and should be punished. But the Eighth Amendment guarantees that no one should be subjected to an execution that causes searing, unnecessary pain

before death.”

As in other cases that have come before the Supreme Court in the past two decades, at issue is not the constitutionality of the death penalty itself, but the methods used to inflict it. In 2008, the US Supreme Court ruled in *Baze v. Rees* that execution by lethal injection does not constitute “cruel and unusual punishment.” Ruling 7-2 in a case brought by two Kentucky inmates, the court claimed the procedure did not pose a significant enough risk of pain to render it unconstitutional.

In the majority opinion in that case, Chief Justice John Roberts wrote, “Some risk of pain is inherent in any method of execution—no matter how humane.” Roberts cynically noted, “There are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds.”

A number of the 32 US states that still practice the death penalty have scrambled to devise their own deadly cocktails of drugs as their sources have dried up due to a European ban on exporting them for use in executions. In many cases, states have turned to untested drugs produced by unnamed compounding pharmacies in an effort to keep their death chambers in operation.

In addition to Richard Glossip, three other death row prisoners face execution this week, barring last minute stays:

* Georgia is set to execute Warren Hill today, despite the determination of numerous medical experts, including those of the state, that Hill is intellectually disabled. Although the US Supreme Court ruled in 2002 that execution of “mentally retarded criminals” is unconstitutional, Georgia’s bar for proof of intellectual disability is the highest of any state that practices the death penalty. Condemned prisoners must prove that they are intellectually disabled “beyond a reasonable doubt.”

* Tomorrow in Texas, Garcia White is set to die for the murders of three people in 1989 in Houston. His appeals note his below-average IQ and brain damage suffered by White after being hit with a baseball bat. Once a college football prospect, after being sidelined by an injury he fell into addiction to crack cocaine. White’s attorneys also say that a detective exploited his intellectual deficiency to circumvent his requests for

legal representation during the interrogation in which he confessed to the killings.

* Also in Texas, another death row inmate with intellectual disabilities faces execution on Thursday. Robert Ladd has scored consistently below the IQ threshold of 70, but according to Texas law an execution can go forward if a judge rules that a defendant exhibited forethought or advance planning in committing a crime.



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