US Supreme Court hears arguments on Oklahoma lethal injection protocol

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The US Supreme Court heard oral arguments Wednesday morning on the constitutionality of Oklahoma's protocol for execution by lethal injection. At issue is whether the state's use of midazolam as part of a three-drug lethal mixture is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

The hearing Wednesday morning came a year to the day after Oklahoma's execution of Clayton Lockett on April 29, 2014, which utilized midazolam. Lockett gained consciousness during the procedure, writhing and grimacing on the gurney after an intravenous line was improperly placed. He died almost three-quarters of an hour later.

Midazolam was also used in the January 16, 2014 execution of Dennis McGuire in Ohio, and the July 23, 2014 execution of Joseph Wood in Arizona. In both instances, the prisoners appeared to gasp and choke for extended periods before succumbing.

According to the Death Penalty Information Center (DPIC), midazolam has been used in 15 executions and in one-quarter of them inmates appeared to suffer significant pain.

The case before the high court, *Glossip v. Gross*, has been brought by Oklahoma death row inmates Richard E. Glossip, John M. Grant and Benjamin R. Cole Sr., who argue that midazolam can leave inmates conscious during executions, exposing them to "excruciating pain and suffering during their executions."

Another Oklahoma inmate, Charles Warner, was originally part of the case, but he was executed on January 15 after the Supreme Court voted 5-4 to deny him a stay of execution. While witnesses to his death reported no visible signs that he endured pain during his 18-minute execution, his last words were, "My body is on fire."

Some of the justices in Wednesday's hearing made no attempt to disguise their enthusiasm for state murder. Justice Samuel Alito Jr. argued that the current challenge amounted to an attempted end run around currently scheduled executions. Addressing Robert Konrad, an attorney representing the three Oklahoma inmates, he asked, "Is it appropriate for the judiciary to countenance what amounts to a guerrilla war against the death penalty?"

Agreeing, Justice Antonin Scalia said the "abolitionist movement" had put pressure on drug manufacturers to stop providing the drugs that would ensure that executions were not needlessly painful, leaving states no alternative but to seek out substitute drugs.

Sources have dried up as manufacturers both in the US and Europe have stopped providing drugs to be used in executions. In turn, many states have turned to less regulated sources such as compounding pharmacies for the lethal chemicals.

Justice Elena Kagan, who voted for a stay of execution in Warner's case, addressed Solicitor General Patrick Wyrick, representing Oklahoma: "Suppose that we said we are going to burn you at the stake, but before we do, are going to give you an anesthetic before we burn you alive. Maybe you will feel it; maybe you won't."

Kagan said that if an inmate is not first properly sedated, the drugs used to induce death—paralyzing agent vecuronium bromide and the heart-stopping chemical potassium chloride—could cause intense pain.

Justice Sonia Sotomayor, who also voted to stay Warner's execution, told Wyrick that she would not believe assertions about midazolam included in Oklahoma's brief unless she verified them herself.

Oklahoma Attorney General Scott Pruitt and other

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state officials argue in their brief: “Oklahoma’s lethal injection protocol does not present a substantial risk of severe pain and cannot be considered cruel.” The brief also contends that higher dosages of midazolam, as proposed by Oklahoma, would cause unconsciousness during executions.

But Oklahoma’s key expert witness, Dr. Roswell Lee Evans, has come under intense scrutiny. Evans, a board certified psychiatric pharmacist and dean of the Harrison School of Pharmacy at Auburn University in Alabama, last published a paper related to his pharmacology research in 1996.

While Evans has testified that inmates “would not sense the pain” of an execution after receiving a high dose of midazolam, he has also testified that he has never used the drug on a patient, and, in fact, has never personally induced anesthesia.

Evans’ 300-page expert witness report for *Glossip v. Gross* includes more than 150 pages of printouts from drugs.com, an online consumer website whose disclaimer reads, “not intended for medical advice, diagnosis or treatment.”

A brief filed with the Supreme Court by 16 professors of pharmacology disputes Evans’ testimony. “It is widely recognized in the scientific and medical community that midazolam alone cannot be used to maintain adequate anesthesia,” the doctors assert.

They describe how the drug’s potency does not increase with dosage—a so-called “ceiling effect”—and conclude that midazolam “is incapable of rendering an inmate unconscious prior to the injection of the second and third drugs.”

Propublica.com quotes Dr. Richard Weisman, a toxicologist and associate dean at the University of Miami Miller School of Medicine, who notes that as midazolam has never actually been tested on patients at high dosages, it would be impossible for Evans to draw the conclusions he has. “It becomes a big experiment and that’s not good for something like this,” he said.

That the testimony of Oklahoma’s expert witness cannot seriously be considered scientific is indicative of the state’s motivation in defending its lethal injection protocol: it wants to keep the state killing machine going at all costs.

Officials in 14 other states have joined in supporting briefs, arguing without scientific substantiation that when properly administered, midazolam does put prisoners into a deep coma. They make the spurious and grisly argument that if prisoners object to a particular drug combination for use in their executions, they should have to specify practical alternatives that would do a better job.

The Supreme Court last heard a case on lethal injections in 2008, when it ruled 7-2 in *Baze v. Rees* that what was then the standard three-drug combination, using the barbiturate sodium thiopental as the first agent, did not constitute “cruel and unusual punishment.’

A ruling by the Supreme Court in *Glossip* is expected in mid-June. At Wednesday’s hearing the likely swing vote, Justice Anthony Kennedy, said little to reveal how he might vote.

Oklahoma and other states facing roadblocks if the high court rules against the lethal injection protocol are lining up alternative execution methods. Last week, Oklahoma Governor Mary Fallin signed into a law a backup procedure that would allow prisoners to be put to death with nitrogen gas, applied through a mask similar to that used by dentists for anesthesia. Oklahoma also retains the electric chair and the firing squad as alternative methods.

Last month, Utah Governor Gary Herbert signed into law a bill reinstating the firing squad. Tennessee retains the electric chair as a backup.

Thirteen inmates have been executed thus far in 2015 in the US: six in Texas, three in Missouri, two in Georgia, and one each in Florida and Oklahoma.

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