Supreme Court hears oral arguments in death penalty cases

Tom Carter
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On Wednesday, the United States Supreme Court heard oral arguments in three death penalty cases from Kansas.

From any rational or humane standpoint, the oral arguments were grotesque. For the most part, the lawyers and justices droned on for two hours regarding legal issues of a relatively technical nature, while the lives of three condemned men hung in the balance.

The arguments were not concerned with the possibility of abolishing America's capital punishment system, but with fine-tuning the government death machine.

America's capital punishment system is infamous around the world for its callousness and brutality. Stories continue to emerge of horrific botched executions, prosecutorial misconduct, and innocent people exonerated after years on death row. In 2014, at least six people were proven innocent while awaiting execution.

According to revelations published in the *Oklahoman* newspaper Thursday, state officials injected an inmate with the wrong drug in January during an attempt to execute him. State officials were supposed to have used potassium chloride, but potassium acetate was injected instead, a chemical that is not on the lethal injection protocol of any state. During the execution, Charles Warner exclaimed, "My body is on fire." His last words were, "They poked me five times. It feels like acid."

Seeking authorization for Warner's execution, Oklahoma officials had argued to a federal judge in December that potassium chloride would be used. These appalling revelations warrant the arrest and indictment of all those involved in Warner's execution.

These recent exposures concerning the capital punishment system contrast sharply with the subject matter of Wednesday's arguments in the cases of condemned men Sidney J. Gleason, Reginald Carr, and Jonathan Carr, which seemed to take place in an alternate universe. (Transcripts of the two one-hour arguments are available here and here).

The first of the two issues argued Wednesday involves instructions that were provided to the juries that condemned the three men to death. A convicted person facing the death penalty has a right to ask the jury to consider mitigating circumstances, such as, for example, whether the convicted person was the victim of child abuse. Those who suffer abuse as a child are statistically far more likely to commit murder as an adult. The prosecution is also allowed to present aggravating circumstances.

Under Kansas law, aggravating circumstances must be proved beyond a reasonable doubt, while mitigating circumstances need only to be presented. The issue in the Supreme Court was whether the jury instructions in these three cases clearly explained the law, or whether they improperly implied that the mitigating circumstances would have to be proved beyond a reasonable doubt as well.

The second issue was whether it was unfair for two of the three condemned men—brothers Reginald and Jonathan Carr—to be tried together, under conditions in which the prosecution argued that one of the brothers had "corrupted" the other. The alternative would have been to "sever" the cases, or try them separately.

The Kansas Supreme Court reversed the sentences of the three men last July. The decision by the Kansas state prosecutors to appeal to the US Supreme Court, under the circumstances, can only be described as bloodthirsty.

In one particularly chilling exchange on Wednesday, the Attorney General of Kansas, Derek L. Schmidt, pointed out that "there are currently nine persons under sentence of death in Kansas," and that the same issue was "present in six of them." Accordingly, he complained that "twothirds of the death penalty cases in our State" would be "negatively affected" in the event the Supreme Court did not overturn the decision of the Kansas Supreme Court. In other words, "Let us get on with the killing!"

These are the arguments on which hinge the fates of human beings. If five out of nine individuals in black robes ultimately rule in their favor, then men who are currently condemned to death might have a chance to live out the rest of their lives. If the opposite conclusion is reached, then the three men will likely die horrible deaths by lethal injection, by the electric chair, or by firing squad.

Alternatively, the men might be subjected to nitrogen asphyxiation in Oklahoma's newly proposed execution method: nitrogen gas chambers.

In one rare glimpse of humanity during the arguments, attorney Neal K. Katyal, who represents Reginald Carr,

emphasized that "a man is being put to death." However, nobody appeared to acknowledge or take any notice of this sentiment. The arguments might just as well have been about whether swimming pools violate a local zoning ordinance, instead of about the execution of three human beings.

Last term, Justices Stephen Breyer and Ruth Bader Ginsburg, dissenting in the case of *Glossip v. Gross*, suggested that the Supreme Court consider abolishing the death penalty altogether, reflecting concerns from some sections of the political establishment that the barbaric practice and associated scandals have become an embarrassment that undermines the state's legitimacy.

However, in the arguments Wednesday, none of the justices referred to the possibility of abolishing the death penalty except Justice Antonin Scalia, the ever-vocal arch-reactionary. Scalia attempted to bait Justice Breyer over his opinion last term in the *Glossip* case. "Kansans—unlike Justice Breyer—do not think the death penalty is unconstitutional," remarked Scalia at one point during the arguments. None of the other justices responded.

Scalia would have been better cast in the role of a red-robed medieval inquisitor than a black-robed bourgeois-democratic judge. His method is not neutral and disinterested reasoning, but provocation, browbeating derision.

At one point during the arguments, Scalia attacked the attorney for one of the condemned men with a tirade—no doubt planned and rehearsed in advance—in which he recited at length all of the grisly details of the underlying crimes. Scalia sarcastically declared, "You truly think that this jury, but for the fact your client was a corrupter, would not have imposed the death penalty?"

Frederick Liu, an attorney for Reginald Carr, responded, "We do, Justice Scalia," pointing out that the jury had deliberated for a full day before imposing the death penalty, suggesting that it was not such an "easy case."

Scalia seems to take special delight in death penalty cases, seizing each oral argument as an opportunity to grandstand before his reactionary base, gloating and crowing over the execution that is about to take place.

The dominance of this Torquemada figure on the US Supreme Court is an expression of the collapse of American democracy. From Scalia's homicidal rants one can measure the massive degeneration that has taken place since the Supreme Court was staffed by figures such as Earl Warren, Robert Jackson and Louis Brandeis.

The Supreme Court's October 2015 term formally opened on October 5. By tradition, the term opens the first Monday of October. In addition to hearing the first oral arguments in the cases accepted for appeal, the Supreme Court has also begun to issue decisions on which appeals will be rejected. The majority of appeals to the Supreme Court—called petitions for writ of certiorari—are rejected, and each rejection for all practical purposes affirms the decision of the lower court. The Supreme Court typically does not give reasons for appeals it declines to hear in this way.

Major issues in the October 2015 term, based on the cases that have been accepted so far, include voting rights, immigration, and access to abortion and contraception.

The Supreme Court also indicated that it will hear a case on the constitutionality of an affirmative action policy at the University of Texas, following subsequent proceedings in a case that was already the subject of a 2013 Supreme Court decision called *Fisher v. University of Texas.* Also this week, the Supreme Court on Monday rejected a certiorari petition in a controversial insider trading case. The case involves an appeals court decision that, according to prosecutors, makes it more difficult to prosecute financial criminals. By declining to hear the appeal, the Supreme Court left the lower court decision undisturbed.

The Supreme Court's rejection of the appeal in *U.S. vs. Newman* was no doubt followed by the sound of innumerable champagne corks popping on Wall Street. The case involves Anthony Chiasson and Todd Newman, who were convicted in 2012 of using illegal insider tips to make millions for their hedge funds. The Second Circuit Court of Appeals subsequently ruled that since Chiasson and Newman did not have "direct communications" with the tippers—the illegal tips were relayed by their staff—they were not guilty of insider trading.

"We think there is a category of conduct that will go unpunished going forward," Preet Bharara, the United States attorney in Manhattan, told reporters. This result may also jeopardize the convictions of a number of prominent financial criminals who have already been sentenced, raising the possibility that their convictions will be overturned.

The coddling of financial criminals, alongside the brutal sentences handed down to the lower strata of society, is a reflection of class justice.

On Friday of last week, the Supreme Court entered a decision in the death penalty case of Alfredo Prieto. Prieto had been executed the day before. The Supreme Court denied Prieto's final petition as "moot" because Prieto was already dead.