

Justices to Hear Challenge That Argues Lethal-Injection Drug Causes Agony

The use of a lethal-injection drug involved in prolonged, apparently agonizing executions last year will come under scrutiny in the Supreme Court on Wednesday as the justices hear a case brought by three condemned prisoners from Oklahoma.

The prisoners, convicted murderers, are challenging the use of the sedative midazolam as the first step in executions. Lawyers for the prisoners, with the support of many medical experts, say that even if properly administered, the drug cannot reliably cause deep unconsciousness before the injection of other extremely painful agents that cause death.

Oklahoma and several other states have turned to midazolam because manufacturers in Europe and the United States have refused to sell them the barbiturates traditionally used in executions. Officials from these states argue that when properly administered, midazolam does render prisoners insensate.

They also say that they have adopted new procedures to prevent mishaps like the gruesome execution in Oklahoma last April of Clayton D. Lockett, who moaned and writhed in a procedure involving midazolam that took 43 minutes after the intravenous line was improperly placed. The sedative was also used in executions in Arizona and Ohio in which prisoners gasped for prolonged periods — for nearly two hours in the Arizona case.

Clayton D. Lockett, who regained consciousness and writhed in apparent pain during his prolonged execution in Oklahoma last year. Credit Uncredited/Oklahoma Department of Corrections, via Associated Press

The Supreme Court has not examined lethal injections since 2008, when it held that what was then the standard three-drug combination did not violate the Eighth Amendment's ban on cruel and unusual punishment. But multiple opinions in that ruling revealed a splintered court and left uncertainty about crucial questions, said Deborah W. Denno, a law professor at Fordham University, including what standards states should apply as they adopted other drugs and combinations, and when the courts should grant stays of execution.

In one striking sign of continued divisions, the Supreme Court did not delay the Jan. 15 execution using midazolam of a fourth Oklahoma prisoner who was originally part of the current lawsuit, *Glossip v. Gross*, No. 14-7955. That would have taken five votes. Yet little more than a week later, it agreed

to hear the appeal of the other three men scheduled for executions, which required just four votes.

Lawyers for the prisoners say that there is a “scientific consensus” that midazolam “cannot reliably produce deep, comalike unconsciousness,” and that its use risks inflicting “agonizing pain and suffering” on prisoners.

The scarcity of time-tested anesthetics has led to turmoil in capital punishment as states have tried new drugs and combinations, sought drugs from secret sources and passed laws to conceal the identity of drug suppliers.

Some states have also revived plans for use of the electric chair, firing squads or, in the case of Oklahoma, nitrogen gas. But lethal injection remains the preferred option.

In the 2008 case, *Baze v. Rees*, condemned prisoners in Kentucky argued that the state’s three-drug regime violated the constitutional ban on cruel and unusual punishment because it risked causing severe suffering.

Kentucky was using the standard protocol: injection of the barbiturate sodium thiopental to render the prisoner unconscious and injection of two drugs that would otherwise cause excruciating pain. These are a paralyzing agent that prevents body movements and halts breathing, and potassium chloride, which induces cardiac arrest and has been called “liquid fire.”

The prisoners conceded that the execution would be constitutional if performed correctly, but said there was a significant risk that the barbiturate could be improperly administered, causing the prisoners to suffer agony that would then be masked by the paralytic.

The Supreme Court ruled that the chance of an injection mishap did not present a “substantial” or “objectively intolerable” risk. The legality of that three-drug regime, at least, was established.

But with the refusal of manufacturers to sell sodium thiopental as well as pentobarbital, another barbiturate that can reliably induce coma and death, these drugs have become scarce.

The 2008 case turned on the possible misadministration of drugs. In contrast, the new case argues that midazolam cannot reliably meet a constitutional standard even when it is properly used, said Megan McCracken, a legal expert with the Death Penalty Clinic at the University of California, Berkeley, School of Law.

“This is an opportunity for the court to prevent other states from adopting a drug that has been so problematic,” Ms. McCracken said.

But Florida officials, in a brief to the Supreme Court, said Florida's experience with midazolam in 11 "uneventful executions" showed that it can work well. They said barring its use would "threaten the ability of Florida and other states to carry out the punishments their citizens have selected."

Another question posed in Wednesday's case is whether those challenging a lethal injection protocol must show that alternative drugs are available.

A brief filed by Alabama, joined by 12 other states, charges that the Oklahoma prisoners' suit is part of a pattern of "thinly veiled attempts to prevent an offender's execution by *any* method." The solution, it says, is to require the plaintiffs "to present an acceptable, available alternative to the state's protocol."

Eric M. Freedman, a professor of law at Hofstra University, called this argument unfair.

"It is the government's obligation to conduct an execution that is not cruel and unusual," he said. "The government cannot shift that obligation to the prisoner."

By Erik Eckholm