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Through the Glass Darkly: What Oklahoma's Lethal Injection Regime Tells Us about Secrecy, Incompetence, Disregard, and Experimentation Nationwide

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The enterprise of lethal injection is dysfunctional across the country. The states that are performing or attempting to perform executions use flawed procedures and experimental drug protocols and operate with extraordinary secrecy. Other states are avoiding the complications and the risks by simply not carrying out executions. Much attention—by the states, the courts, and the press—has been focused on the difficulty states have in procuring execution drugs, and many judges and lawmakers are incensed by a perceived connection between drug unavailability and condemned prisoners challenging the constitutionality of execution procedures. That purported connection—often trumpeted by states—has led a number of courts to view the litigation as suspect (at best) and disingenuous (at worst).

To be sure, states face real challenges and obstacles to executions, including court-ordered stays in lethal injection litigation, high-profile botched executions, and difficulties

obtaining drugs. But under the law, drug availability and the factors affecting it have no bearing on condemned prisoners' legal and constitutional rights, particularly their protections under the Eighth Amendment. In their haste to keep executions on schedule, most states have declined to engage in a careful examination of execution procedures with the goal of identifying those that are humane and effective. Rather, state officials have responded to the challenges with ill-conceived, dangerous, and even illegal actions, and neither courts nor state governments have stepped in to stop them.

Oklahoma as a Lethal Injection Crisis Zone

The state of Oklahoma has experienced extraordinary complications with three recent executions, and the Supreme Court case *Glossip v. Gross* originated there. Therefore, Oklahoma provides an instructive snapshot of what is going wrong nationally with executions and why states' responses will not cure the problems.

Oklahoma's mechanism of death is badly broken. The Oklahoma Department of Corrections (ODOC) last carried out an execution in January 2015 and bungled the last three executions it performed or attempted to perform. Two state investigations have been conducted regarding these executions, and now a separate, independent commission is investigating Oklahoma's death penalty. Because of the investigations and ongoing lethal injection litigation, executions will remain on hold there into 2017.

Since its first lethal injection execution in 1990, Oklahoma has used a three-drug procedure. The second and third drugs, a paralytic and concentrated potassium chloride, have remained the same, but the first drug has changed. For 20 years (93 executions), ODOC administered thiopental, a barbiturate anesthetic, as the first drug. For the 17 executions it performed between December 2010 and January 2014, it used the barbiturate pentobarbital, instead of thiopental. Then, on April 29, 2014, Oklahoma first used midazolam, an anti-anxiety drug that is neither a barbiturate nor an anesthetic, in the execution of Clayton Lockett.

[His] execution did not go smoothly. Ten minutes after an intravenous (IV) line was set in Lockett's groin area and 100 milligrams of midazolam were administered, an attending physician declared Lockett unconscious. When the paralytic and potassium chloride were administered, however, Lockett awoke. Various

witnesses reported that Lockett began to writhe against his restraints, saying, "[t]his s*** is f***ing with my mind," "something is wrong," and "[t]he drugs aren't working." State officials ordered the blinds lowered, then halted the execution. But 10 minutes later— approximately 40 minutes after the execution began—Lockett was pronounced dead.

Glossip v. Gross, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting) (citations omitted).

Lockett's prolonged and gruesome execution garnered national and international attention. President Barack Obama described the execution as "deeply troubling" and said it highlighted problems with the death penalty. Under pressure to explain what went wrong and why, Governor Mary Fallin issued an executive order, appointing the commissioner of the Department of Public Safety (DPS) to lead the state's investigation, and executions were placed on hold.

On September 30, 2014, DPS issued an "Executive Summary" that catalogued the many errors and protocol violations committed during Lockett's execution and described ODOC's systemic problems of disorganization, carelessness, and ill-preparedness. Nonetheless, DPS concluded that Oklahoma's execution procedures were sound, and recommended that ODOC make only simple cosmetic changes. Shortly thereafter, ODOC announced a revised execution protocol that retained midazolam, despite its failure to keep Lockett unconscious and insensate throughout his execution, and continued the state's secretive practices. No external investigation of the events surrounding Lockett's botched execution was performed.

While the state's internal investigation was pending, four condemned prisoners—Charles Warner, Richard Glossip, John Grant, and Benjamin Cole—filed a federal lawsuit, *Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015), challenging Oklahoma's execution procedure under the Eighth Amendment, arguing that midazolam "is incapable of producing a state of unawareness that will be reliably maintained after" administration of the paralytic and the potassium chloride, the drugs that cause extraordinary pain and suffering. The plaintiffs sought a preliminary injunction to prevent implementation of the new protocol. Following an abbreviated hearing, at which the prisoners presented evidence that midazolam cannot function in a manner consistent with a humane and constitutional execution, the trial court declined to

enjoin the executions. The U.S. Court of Appeals for the Tenth Circuit affirmed, and the plaintiffs sought review in the U.S. Supreme Court.

The Supreme Court denied a stay of execution for plaintiff Warner, and he was executed in January 2015. Two weeks after his execution, the Court accepted the case, and stayed the executions of the remaining three plaintiffs. Ultimately, the Supreme Court affirmed the lower courts, ruling that the trial court did not commit clear error in finding that the plaintiffs "failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2731.

On September 30, 2015, nine months after Warner's execution, Oklahoma abruptly canceled Glossip's execution mere minutes before its scheduled start, admitting that it had obtained the wrong drug—potassium acetate instead of potassium chloride. It quickly became apparent that ODOC had used the same wrong drug for Warner's execution. What remains unclear is whether ODOC knew it used the wrong drug and hid that fact or did not know—a choice between incompetence or mendacity.

Following these revelations, Oklahoma's attorney general asked a grand jury to investigate how ODOC twice obtained the wrong drug. The grand jury found that ODOC and other state actors "failed to perform their duties with the precision and attention to detail the exercise of state authority in such cases demands." Interim Report Number 14, *In re Multicounty Grand Jury*, No. SCAD-2014-70, at 1 (Okla. May 19, 2016). Its report detailed failures at every level and recommended that ODOC again revise its execution procedures and follow the law and its protocol when performing executions. There have been no executions in Oklahoma since the grand jury report.

States' Responses to Changing Lethal Injection Landscape

Drug unavailability. The drug changes made by ODOC in and before 2014 closely track the shifting availability of execution drugs. Thiopental was the original lethal injection drug of choice, used by every state performing lethal injections. But in 2009, Hospira, the only pharmaceutical company that manufactured thiopental in the United States, stopped production of the drug due to manufacturing problems. The following year, the company announced that it would not resume sales of thiopental in the United States.

As described below, states scrambled to obtain thiopental, and later most replaced the drug with pentobarbital, which was first used in an execution in Ohio in December 2010. In July 2011, Lundbeck, the sole pharmaceutical company selling an injectable pentobarbital product approved by the U.S. Food and Drug Administration (FDA), restricted its distribution of the drug to prevent departments of corrections from buying it for executions. States next turned either to compounded pentobarbital or to midazolam.

Since 2011, several pharmaceutical companies that oppose the use of their products in executions have attempted to place their drugs out of reach for such use. Today, some departments of corrections claim it is difficult or impossible to obtain execution drugs, while others are able to routinely purchase the drugs they need. In response to the uncertainty surrounding drug availability, most states have prioritized expedience over due diligence and prompt executions over constitutional, legal, and humane practices. Moreover, states have loudly and persistently blamed condemned prisoners for the unavailability of execution drugs. In reality, the current state of affairs is the result of decisions by multinational pharmaceutical companies made in boardrooms and seats of power far from death row. While the states unquestionably face real challenges in obtaining manufactured drugs, the unavailability is the product of market forces and should not be used to justify abdication of the states' solemn responsibility to carry out humane, constitutional executions.

Importation. When thiopental became unavailable, states first responded by attempting to import the drug from overseas. Since 2010, at least a dozen states have imported or attempted to import thiopental from England and India. The first shipments came from Dream Pharma, an unregistered, one-man drug wholesaler in England. The FDA initially detained the shipments, because federal law prohibits admission into the United States of drugs that appear to be adulterated, misbranded, or unapproved. But after state officials explained that the thiopental would be used in executions, the FDA released the shipments, and thereafter several states imported thiopental from Dream Pharma. Condemned prisoners in Arizona, California, and Tennessee sued to challenge the agency's decision to allow the drugs into the country. The court ruled that the FDA erred and that federal law prohibited importation of the drugs, which were unapproved, misbranded, and the products of unregistered facili-

ties. *Beaty v. FDA*, 853 F. Supp. 2d 30 (D.D.C. 2012), *aff'd*, *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

In spite of the clear law forbidding importation, states again attempted to import thiopental in 2015, this time from India. In compliance with *Cook*, the FDA detained shipments slated for departments of corrections in Texas and Arizona. Journalists uncovered public records showing that Nebraska also attempted to purchase thiopental from the same company, but the drugs never left India. Ohio retained the same importation consultant as the other three states, but apparently did not actually attempt to purchase thiopental.

Compounding. After changing its protocol from thiopental to pentobarbital, Oklahoma initially was able to use Lundbeck's FDA-approved pentobarbital. But when that company made its drug unavailable for executions, ODOC began using what is known as "compounded" pentobarbital. Several other states followed suit.

Compounding pharmacies make drugs to order from the raw ingredients. Compounded drugs serve an important medical need for patients who require specific forms or formulations of their medications. However, compounded products are not FDA-approved, and it can be difficult for patients and governments to ensure their purity, potency, and effectiveness. For these reasons, use of compounded drugs in executions presents increased risks that the drugs will not function as necessary and will cause pain and suffering. Further complicating these inherent risk factors, states refuse to disclose relevant information about the provenance of their compounded drugs that would allow courts and the public to assess the quality of the drugs (see below), and both the American Pharmacists Association and the International Academy of Compounding Pharmacists have discouraged their members from providing execution drugs.

In January 2014, Oklahoma executed Michael Wilson using compounded pentobarbital. When the drug was administered, Wilson cried out, "I feel my whole body burning." These were his last words, and ODOC used compounded pentobarbital only once more before changing to midazolam.

Other states also have had problems with compounded drugs. In March 2015, the Georgia Department of Corrections canceled Kelly Gissendaner's execution at the last minute because its compounded pentobarbital had congealed. The state claimed the drugs became defective because they had been stored at the

incorrect temperature. However, when prison officials stored additional drugs at the same temperature, the problem did not recur. Georgia's Lethal Injection Secrecy Act conceals all information about its execution drugs, so the cause of the defective pentobarbital remains unexplained.

Novel drug formulas. While several states continue to use pentobarbital to execute their prisoners, others have changed to novel drugs and drug combinations. Several states have used midazolam in combination with various other drugs, and California's proposed execution procedure would introduce amobarbital and secobarbital, two barbiturates never before used in executions.

As noted above, Oklahoma opted to use midazolam in its three-drug procedure, despite previous executions that called into question its effectiveness. In January 2014 in Ohio, Dennis McGuire was the first man to be executed with a mixture of midazolam and hydromorphone. Ohio introduced the experimental procedure to unintended, disturbing results. A media witness reported, "McGuire started struggling and gasping loudly for air, making snorting and choking sounds which lasted for at least 10 minutes, with his chest heaving and his fist clinched. Deep, rattling sounds emanated from his mouth." McGuire took almost 30 minutes to die.

When Florida executed William Happ with midazolam in October 2013, a witness reported that "Happ remained conscious longer and made more body movements after losing consciousness than other people executed recently by lethal injection." Happ, like all prisoners executed in Florida (and Oklahoma), received a paralytic drug shortly after the midazolam, so it is not possible to know what he experienced.

Despite the well-documented problems with the executions of Happ, McGuire, and Lockett—all of whom received midazolam—Arizona nevertheless elected to use midazolam and hydromorphone to execute Joseph Wood in July 2014. His execution was also prolonged and gruesome. Over the course of almost two hours, the executioners administered 15 doses of the drugs to Wood, who gasped, snorted, and struggled for air.

A common thread between these botched executions is the failure of midazolam to maintain anesthesia and prevent suffering. The prisoners initially appeared to lose consciousness, but then started moving and demonstrating signs of struggle and suffering.

Secrecy. Over the last few years, while some states were seeking new execution drugs and experimenting with compounded and novel drug combinations, many states took steps to clamp down on information about their execution drugs and procedures. States have always shielded the identities of executioners, but in recent years they have responded to the increasing difficulty of procuring execution drugs by passing laws that broaden the secrecy to include information about the entities that provide execution drugs, including manufacturers, pharmacies, and distributors. These laws also make the information wholly inaccessible, preventing disclosure in court and even defining drug sources as a "confidential state secret," the highest level of state secrecy. *See, e.g.*, Ga. Code Ann. § 42-5-36(d)(2).

Laws in Arizona, Arkansas, Georgia, Louisiana, Missouri, Ohio, Oklahoma, Tennessee, Texas, Virginia, and other states now conceal not only how states obtain execution drugs, but also whether their purchases comply with the law, and whether the drugs themselves are legitimate and effective. By hiding this information, the new secrecy laws prevent courts from analyzing the legality and constitutionality of execution procedures and prevent the public from engaging in informed discourse. Nonetheless, courts across the country have rejected legal arguments from prisoners, the media, and the public that these laws infringe upon the First Amendment right of access to information.

States also have misrepresented the difficulty of obtaining execution drugs. In *Glossip*, Oklahoma submitted a heavily redacted letter that purported to show a pharmacy's refusal to sell pentobarbital to ODOC. It was later revealed, however, that the letter actually was sent from the pharmacy to Texas, a state that continues to use compounded pentobarbital in executions. Similarly, many states baldly claim that their drug purchases are legal, and only later is it revealed that the drug transactions violated the law—because the drugs were imported or purchased from a compounding pharmacy without a valid prescription or were traded with another state.

Conclusion

Oklahoma's recent execution history—a story full of errors, failures, and misrepresentations that culminated in three bungled executions—reflects broader national trends related to lethal injection practices. Like Oklahoma, many other states have

mishandled their responses to botched executions and the changing availability of execution drugs. At a time when states should be acting with due diligence and complete transparency to ensure effective execution procedures that comply with the Constitution and the law, they are instead selecting drug protocols based on what drugs they can get. Rather than accept the inconvenient reality that the pharmaceutical industry does not want to be associated with executions and work to find reasonable solutions, states have sought secrecy to avoid scrutiny of their drug purchases.

The states, the courts, and the press have largely focused on issues of drug availability when their attention and scrutiny should be focused on the behaviors of the state executive branches and legislatures, which hold the responsibility of ensuring executions are carried out in humane, constitutional, and lawful manners.