

# **BREAKING: STMT FROM LETHAL INJECTION ATTY RE: OKLA GJ REPORT**

May 19, 2016

*Today, the Attorney General of Oklahoma released the findings of a grand jury convened to examine the state's attempted and completed executions by lethal injection, which have had multiple errors and problems. Below is a statement from attorney Dale Baich, who is co-counsel for a group of Oklahoma death row prisoners currently litigating to ensure the state brings its execution procedures into accordance with the constitution and is able to perform executions humanely and reliably.*

"While we are still reviewing today's report, the state-sponsored investigation confirms things we already knew and fails to address bigger questions for which we still do not have answers. What we do know is that secrecy, along with the use of an experimental drug combination, led to at least one botched execution in Oklahoma and a drug mix-up in another. As the state continues to alter its execution protocol, more scrutiny is needed before experimental procedures are carried out in execution chambers.

More transparency is needed as well as accountability for a pattern of serious mistakes in the administration of the death penalty in the state.

An independent, bipartisan commission is beginning its work to examine the death penalty in Oklahoma and the litigation brought by prisoners is about to move forward. The moratorium on executions should continue in order to allow the commission to complete its study and for the federal litigation to be resolved."

*-Dale Baich, Assistant Federal Public Defender, District of Arizona, and one of the attorneys for the Oklahoma death row litigants*

*-May 19, 2016*

## **Background on Lethal Injection Issues in Oklahoma**

Lethal injection in Oklahoma has been marked by extreme secrecy resulting in experimental, problematic executions. Following the profoundly troubling execution of Clayton Lockett in 2014, a group of death row prisoners litigated the state's use of the controversial sedative midazolam in place of an anesthetic drug in the state's three-drug lethal injection protocol. The U.S. Supreme Court agreed to hear the case but did not stay the scheduled execution of one of the petitioners, Charles Warner, who was later executed using the wrong drug. A divided U.S. Supreme Court ruled 5-4 that the use of midazolam is permissible in June 2015, but left room for further litigation on the use of the drug.

Twenty death row prisoners are currently seeking increased transparency and an improved lethal injection process before any executions proceed. A November 2015 poll by The Oklahoman showed that over half of Oklahomans support the state's moratorium on carrying out executions: <http://newsok.com/article/5461486>

In late March, a bipartisan group of prominent Oklahomans formed the Oklahoma Death Penalty Review Commission. According to the Oklahoma City-based newspaper the *City Sentinel*, "[t]he Commission will conduct what a press statement called 'the first-ever independent, objective and thorough review of the state's entire capital punishment system.'" The paper also endorsed a continued moratorium on executions until the Commission concludes its study:<http://city-sentinel.com/2016/03/bipartisan-death-penalty-review-commission-formed-supported-in-oklahoma/>

### **Current Litigation:**

Twenty Oklahoma death row prisoners have filed a lawsuit seeking increased transparency and an improved lethal injection process before the state resumes executions. The link to the most recent filing in the case, a joint stipulation filed by both the state and the death row prisoners, is here:

[https://drive.google.com/file/d/0B1LFfr8Iqz\\_7TkltcUJqczd6Nkk/view](https://drive.google.com/file/d/0B1LFfr8Iqz_7TkltcUJqczd6Nkk/view)

In the joint stipulation, the death row prisoners seek to be provided with the following before any execution takes place:

- That any ongoing investigations into the state's lethal injection practices known to the AG have been conducted;
- The results of those investigations should be disclosed;
- Prisoners should be provided with notice of any changes to the June 30, 2015 lethal injection protocol;
- Prisoners should be provided with notice that the Oklahoma DOC can comply with the state's lethal injection protocol.

In the joint stipulation, the state agrees not to seek an execution date until 150 days after the above information is provided.

### **Oklahoma's Problematic Executions and Attempted Execution:**

- **Clayton Lockett** - On April 29, 2014, Clayton Lockett took over forty minutes during which he writhed, gasped, and attempted to speak, according to media witnesses. A state-commissioned report later concluded that a catheter failure caused the lethal drugs, at some point, to infiltrate Mr. Lockett's tissue instead of directly entering his bloodstream. As a result, the second drug failed to effectively paralyze Mr. Lockett, allowing witnesses to see his return to consciousness and suffering.
- **Charles Warner** - On January 15, 2015, Oklahoma executed Charles Warner with what was purported or have been midazolam (a sedative), rocuronium bromide (a paralytic) and potassium chloride to stop the heart. However, the state disclosed in October 2015

that the wrong drug was used in that execution, in contravention of the state's lethal injection protocol. The logs from the execution stated that potassium chloride was used, but after the attempted execution of Richard Glossip, the state revealed that potassium acetate had actually been used on Mr. Warner. More information here: <http://bigstory.ap.org/article/f7fe7d5b76cd4a12a2e00e8f929520fb/report-oklahoma-used-wrong-drug-january-execution>

- **Richard Glossip** (execution not completed) - On September 30, 2015, with moments to spare before the scheduled execution of Richard Glossip, the state announced it had the wrong drugs and cancelled the execution. Documents from the Oklahoma Attorney General's Office sent to attorneys for Richard Glossip indicate the Oklahoma Department of Corrections said it would use potassium chloride in the three-drug protocol. Attorneys received no further information regarding a change. And, on the morning of Mr. Glossip's last scheduled execution (9/16/15) the department again confirmed that no changes would be made, although later that day, the state did not have the drugs. Letter re: Motion for Summary Judgment: <http://bit.ly/1iMgljJ>; Letter from AG office to Glossip attorney: <http://bit.ly/1MHdc4y>

### **Glossip v. Gross:**

On June 29, 2015, in a 5-4 decision, the U.S. Supreme Court issued its opinion in *Glossip v. Gross*, ruling that the anti-anxiety medication midazolam may be used as the first drug in a three-drug lethal injection formula. The case was brought by death row prisoners in Oklahoma, who argued that the state's use of midazolam in this manner creates an "objectively intolerable risk of harm."

Justice Alito wrote for the majority, joined by Justices Roberts, Scalia, Thomas and Kennedy. Justice Breyer, joined by Justices Ginsburg and Sotomayor, wrote a dissent. Justice Sotomayor also wrote a dissent, joined by Justices Breyer, Ginsburg and Kagan. As Justice Sotomayor notes in her dissent:

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U. S. 551, 560 (2005). Today, however, the Court absolves the State of Oklahoma of this duty. It does so by misconstruing and ignoring the record evidence regarding the constitutional insufficiency of midazolam as a sedative in a three-drug lethal injection cocktail, and by imposing a wholly unprecedented obligation on the condemned inmate to identify an available means for his or her own execution. The contortions necessary to save this particular lethal injection protocol are not worth the price."

Oral argument in *Glossip v. Gross* was heard at the Court on April 29, 2015. During argument, Justice Sotomayor commented she was "substantially disturbed" by statements in the state's brief which were either "not supported" or "directly contradicted" by the facts. (p. 35 of transcript: [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-7955\\_1b72.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-7955_1b72.pdf)). It was later uncovered that the Attorney General's office provided a heavily-redacted letter, included in the state's exhibits, which purportedly showed the refusal of a

pharmacy to sell pentobarbital to Oklahoma; in fact, the letter was actually sent to Texas. More on that here: <http://www.buzzfeed.com/chrisdaniel/oklahomas-attorney-general-misled-supreme-court-about-letter#.bu3BVZBJZ>

In *Baze v. Rees* (2008), the Court found that the three-drug protocol for lethal injection, which was widely used, was constitutional. However, for the first drug administered, Oklahoma substitutes midazolam for sodium thiopental, creating risk of “severe pain, needless suffering and a lingering death.” The second and third drugs in Oklahoma’s protocol are the same as the *Baze* protocol: a paralytic and potassium chloride, which stops the heart.

The Petitioner’s brief states:

“In *Baze*, there was consensus that sodium thiopental, if properly administered, would produce deep comalike unconsciousness. With midazolam, the opposite is true. Midazolam is not approved for use as the sole anesthetic for painful surgery. Clinical studies showed that midazolam does not reliably induce deep unconsciousness; when used in surgery, patients felt pain. The medical consensus is that midazolam cannot generate deep, comalike unconsciousness. There is also no substantial practice among the states of using midazolam for lethal injections. Although sodium thiopental was widely used in lethal injections for years, only four states have used midazolam in an execution, and only two have tried to use it as anesthesia. On these undisputed facts, the use of midazolam to create deep comalike unconsciousness presents an “objectively intolerable risk of harm” (*Baze*, 553 U.S. at 50).” (p. 26)

Midazolam is not a barbiturate, but a benzodiazepine commonly used in pre-operative settings to alleviate anxiety. It is the shortest-acting drug in the same class of anti-anxiety drugs as Xanax, Atavan and Valium. All of the experts who testified in a three-day hearing in Oklahoma in December 2014, including the state’s expert, agree that midazolam has a ceiling effect, above which additional dosing has no additional effect, and no analgesic (pain-relieving) qualities ([Joint Appendix to Brief for Petitioner](#), medical testimony from three-day hearing at pp. 199, 256, 274).

The four states that have used midazolam in lethal injection executions are Arizona, Florida, Ohio and Oklahoma. Three executions that used midazolam triggered [formal state investigations](#) into why they did not go as planned (Petitioner’s Brief at p. 31). **In all of these botched executions, the prisoners initially appeared to lose consciousness, but then started moving and demonstrating signs of struggle and suffering, including:**

- [William Happ, Florida](#): Mr. Happ was executed on October 15, 2013, which was the first time midazolam was used in lethal injection. Media witnesses reported, “It appeared [William] Happ remained conscious longer and made more body movements after losing consciousness than other people executed recently by lethal injection.” All 11 men executed with midazolam in Florida received paralytic drugs, so it is impossible to say what these men experienced once they were prevented from moving and speaking.
- [Dennis McGuire, Ohio](#): Mr. McGuire was executed on January 16, 2014. Media eyewitness reports of Mr. McGuire’s execution, which took more than 20 minutes,

observed, “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 was executed using a new, untested two-drug combination: midazolam and hydromorphone, a morphine derivative.

- [Joseph Wood, Arizona](#): Lasting almost two hours on July 23, 2014, Mr. Wood’s execution was the longest in recent history. Mr. Wood received 750 mg of midazolam, demonstrating that even extremely high doses of midazolam are not effective. Oklahoma has raised its midazolam dose from 100 to 500 mg, claiming that a larger dose of midazolam will ensure that the drug will work as intended, but, as Mr. Wood’s execution demonstrates, midazolam has a “ceiling effect” and does not exert more effect above a certain dose.

*Glossip v. Gross* originated in federal court in Oklahoma as a response to the botched execution of Clayton Lockett on April 29, 2014. Charles Warner was originally one of the Petitioners, but the Court denied a stay of execution in his case, and he was executed using midazolam in a three-drug formula on January 15, 2015, just eight days before the Court accepted this case for review. On January 28, 2015, the Court stayed the executions of the three Petitioners, Richard Glossip, John Grant and Benjamin Cole, who are Oklahoma death row prisoners. In their Petition for *Certiorari*, Petitioners asked the Court to “provide urgently needed guidance” to prisoners and courts addressing new, experimental lethal injection protocols.

On March 16, 2015, *amicus curiae* briefs detailing the scientific limitations of the drug midazolam, which cannot reliably protect against pain and suffering during an execution, and the flawed process used by Oklahoma when adopting midazolam for lethal injection executions, were filed with the U.S. Supreme Court in *Glossip v. Gross*.

For additional background about the case, including amicus briefs, please visit [www.glossipvgross.com](http://www.glossipvgross.com).

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