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Professor Emily Sack's Post

More Death Penalty Puzzles Highlighted by New Supreme Court Case

Posted by Emily Sack on 02/24/2015 at 09:00 AM



On the evening of January 15, 2015, Oklahoma prisoner Charles Warner died by lethal injection, shortly after the Supreme Court denied his application for a stay of execution. Warner had also filed a petition for certiorari, in which he argued that the lethal injection protocol used by Oklahoma violated the Eighth Amendment's prohibition on cruel and unusual punishment. Eight days after Warner was executed, the Court granted the petition for certiorari in his case.

How could the Court refuse to stay a man's execution and then, just a few days later, agree to hear the merits of his case? The technical answer is that the procedures of the Court permit such a Kafkaesque result – it takes a majority of the Court, five Justices, to grant a stay, but only four to grant a petition for certiorari. Justice Sotomayor, joined by Justices Ginsburg, Breyer and Kagan, had vigorously dissented from the denial of the stay. Presumably these four dissenters voted to grant the petition and hear the merits of the case (which was still pending despite Warner's death because three other Oklahoma death row prisoners remained as petitioners). We cannot know if there were additional votes in favor of hearing the case, because the Court does not release votes on the granting of cert. petitions.

However, there are deeper unresolved questions. Though the four Justices had the power to grant the petition on their own, it seems unlikely they would have done so unless they believed there was some chance of getting a fifth vote when the Court considered the merits of the case. Did at least one other Justice indicate that he might consider such a case favorably? If so wouldn't that Justice have voted to grant the stay of Warner's execution a week earlier?



The procedural riddles do not end there. The three remaining petitioners were scheduled to be executed before April 2015, when the Court is due to hear arguments in the case. Again, despite the grant of certiorari, the Court was not required to grant stays of their executions. However, circumstances had now changed – the Court had agreed to hear the merits of the case, and the Oklahoma Attorney General had actually applied for a stay until the case was decided, or at least until the state could obtain a “viable alternative” to use of midazolam, the drug at issue in the Oklahoma injection protocol. On January 28, 2015, just a day before the now-lead petitioner, Richard Glossip, was scheduled to die, the Court granted the stays. The order was unsigned, and so we do not know which Justice(s) joined the four who had dissented from the previous denial, to reach the five required.

The substantive issues raised by the case are no less important than the procedural conundrum it has highlighted. The Court has never found a particular method of execution to be unconstitutional, and in 2008 in *Baze v. Rees*, the Court specifically considered and upheld the three drug lethal injection protocol used by Kentucky. However, since *Baze*, the only U.S. manufacturer of the barbiturate used as part of the Kentucky protocol stopped its production. European manufacturers began to refuse to export the drug to the U.S. for use in executions, and in 2011 the European Union issued strict export restrictions for a range of related drugs used for this purpose. Unable to obtain this drug, corrections officials in several states have turned in recent years to new and untested drugs and drug combinations for their executions, often without revealing their source.

In April 2014, for the execution of Clayton Lockett, Oklahoma experimented with a different drug as part of its three drug protocol -- midazolam, a benzodiazepine which is designed to render the inmate unconscious, so that he would not feel severe pain from the effects of the subsequent drugs that would kill him. The Lockett execution was macabre – he was awake and writhing on the execution table after the drugs were injected and began to speak, saying that the drugs weren’t working. Though the execution process was terminated, more than 40 minutes after the drugs were administered he finally died. Midazolam also was used in what the New York Times called “problematic executions” in other states in

the past year, where the prisoners appeared to gasp for several minutes before dying. Yet, after review, Oklahoma decided to continue use of midazolam in executions, though at a higher dosage and with some revised procedures.

In *Glossip v. Gross*, the Court will consider whether executions using midazolam are unconstitutional. It also likely will revisit the legal standard for determining the constitutionality of a particular method of execution, an issue on which the *Baze* Court was badly splintered.

In the past several decades, the Court has shown little appetite for considering whether the death penalty is unconstitutional *per se*. However, in recent years, it has narrowed its use, largely focusing on the types of offenses or offenders that may be death penalty eligible. A decision granting relief to the petitioners in *Glossip* will not invalidate the death penalty. But given the unavailability of more accepted drugs, it would make the death penalty difficult, if not impossible, to implement in practice. As Justice Sotomayor stated in her dissent from the denial of Warner's stay: "Petitioners have committed horrific crimes, and should be punished. But the Eighth Amendment guarantees that no one should be subjected to an execution that causes searing, unnecessary pain before death." The outcome of *Glossip* may provide us with more clues to this divided Court's understanding of the meaning of the Eighth Amendment. Perhaps the events of this case also will lead the Court to reconsider its procedures in death penalty cases, to prevent the grisly and unseemly prospect of failing to stay the execution of a man whose case it deems worthy of substantive review.