



## Glossip et al. v. Gross et al.

576 U.S. \_\_ (2015)

**Country:** United States

**Region:** Americas

**Year:** 2015

**Court:** Supreme Court

**Health Topics:** Prisons

**Human Rights:** Freedom from torture and cruel, inhuman or degrading treatment, Right to due process/fair trial, Right to life

### Facts

The state of Oklahoma adopted lethal injection as its method of execution for inmates on death row. The injection consisted of a three-drug protocol of (1) sodium thiopental (a barbiturate) to induce unconsciousness, (2) a paralytic agent to inhibit all muscular-skeletal movements, and (3) potassium chloride to induce cardiac arrest. The Supreme Court had previously ruled that this method of injection did not violate the Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment.

Anti-death-penalty advocates then pressured pharmaceutical companies to prevent sodium thiopental (and, later, another barbiturate called pentobarbital). Unable to obtain either sodium thiopental or pentobarbital, Oklahoma decided to use a 500-milligram dose of midazolam, a sedative, as the first drug in its three-drug protocol.

Oklahoma death-row inmates challenged the procedure under 42 U. S. C. §1983, claiming that the use of midazolam violated the Eighth Amendment. They argued that midazolam would not render them unable to feel the pain associated with administration of the second and third drugs. The District Court denied the motion, holding that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the inmates failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain. The Tenth Circuit affirmed the ruling, and the inmates appealed to the U.S. Supreme Court.

### Decision and Reasoning

The Supreme Court denied the prisoners' request for a preliminary injunction, holding that they had failed to establish a likelihood of success on the merits of their claim that the use of midazolam violated the Eighth Amendment. The Court reasoned that a method of execution implemented by the state need not eliminate all pain in order to be constitutional. Describing a prior execution by Oklahoma in which the inmate had begun to speak and move after the injection of midazolam, the Court noted that, since that execution, Oklahoma had investigated the incident and implemented a new protocol that required administering a greater amount of midazolam (500 milligrams instead of the previously-used 100 milligrams), among other safeguards.

The Court also stated that the prisoners had failed to meet their burden of identifying an alternative method existed that was feasible, readily implemented, and significantly reduced the substantial risk of severe pain that midazolam posed.

A dissenting opinion by Justice Breyer stated that the death penalty is likely unconstitutional in any form given what is now known about wrongful convictions, the reliability of evidence in death penalty cases, and the number of exonerations that have been granted.

### Decision Excerpts

"Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Id.*, at 47. And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. *Ibid.* After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the

elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." Page 4.

"Our first ground for affirmance is based on petitioners' failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution. In their amended complaint, petitioners proffered that the State could use sodium thiopental as part of a single-drug protocol. They have since suggested that it might also be constitutional for Oklahoma to use pentobarbital. But the District Court found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma's Department of Corrections. The Court of Appeals affirmed that finding, and it is not clearly erroneous. On the contrary, the record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so." Pages 13-14.

"This research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care. But, at a minimum, they suggest a serious problem of reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime . . . Unlike 40 years ago, now have plausible evidence of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application." Pages 8-9 (dissent).

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