



**NEWS** Local News

# Supreme Court to review drugs used in lethal injections

At issue: Do drugs inflict excessive pain?

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The Supreme Court has agreed to review whether the current three-drug cocktail used in most lethal injections in the U.S. violates the constitutional ban on cruel and unusual punishment.



**DAVID LEESON/DMN**  
A lethal injection table in Texas shows where inmates set to be executed are strapped down before receiving a three-drug cocktail. Claims that the anesthesia can wear off before death have prompted a Supreme Court review.

But that didn't stop Texas from executing a Houston-area man Tuesday night after the high court rejected his last-minute request for a reprieve pending the review.

The court's decision to examine lethal injection could still effectively lead to a temporary nationwide moratorium on the death penalty if lower courts decide to wait for a definitive ruling.

"In one sense, the case has extraordinary significance because it could create a de facto moratorium on executions in the short term," said Jordan Steiker, co-director of the Capital Punishment Center at the University of Texas law school.

If the challenge to lethal injection prevails, the high court's review would probably only change which chemicals are used in injections or establish a consistent legal standard for lower courts to apply in appeals concerning cruel and unusual punishment, the experts said.

In Texas, which leads the nation in executions and has allowed lethal injections since 1977, Gov. Rick Perry said the state will continue to use lethal injection until the court rules on its constitutionality.

"We'll go forward with our interpretation until the Supreme Court decides otherwise," he said.

Texas has executed 26 death row inmates this year.

'Unnecessary pain'

Tuesday's high court decision marks the first time in more than 100 years the court has taken up the issue of whether a particular method of execution causes excruciating pain.

Pressure for the Supreme Court to act has been mounting since early 2005, when a British medical journal published a research article that concluded that the anesthetic used in executions could wear off before death, subjecting inmates to several minutes of pain.

Since then, there have been several problems with the administration of the drugs, including executions in Florida and Ohio in which it took as long as two hours for the condemned men to die.

The case that the Supreme Court accepted involves two inmates on death row in Kentucky – Ralph Baze and Thomas Clyde Bowling Jr. – who sued the state in 2004.

Mr. Baze was convicted of killing a sheriff and deputy in 1992, while Mr. Bowling was sentenced to death for shooting a 2-year-old and killing the toddler's parents outside their dry-cleaning business in 1990.

Their attorneys argued that chemicals other than the ones currently used in executions would be just as effective with less risk of pain.

They also argued that the flurry of legal cases in recent years has led to various legal standards requiring "wanton infliction of pain," "excessive pain," "unnecessary pain," "substantial risk," "unnecessary risk" and "substantial risk of wanton and unnecessary pain."

"The court is eager to set a national standard," Mr. Steiker said. "The lower courts are all over the map in terms of their resolution. I think that fact has caused the courts to hear the issue."

Kentucky – like Texas and every other state other than New Jersey that carries out lethal injections – uses a three-drug cocktail, with each drug administered sequentially.

The process begins with the tranquilizer sodium thiopental, which sedates the person. A muscle relaxer, pancuronium bromide, is then injected to shut down breathing, followed by potassium chloride, which overloads the heart and causes it to stop.

The Kentucky lawyers argued that pancuronium bromide could be eliminated, sodium thiopental could be replaced by the anesthetic propofol, and potassium chloride could be replaced by the seizure medication Dilantin.

Others have suggested pure nitrogen gas or a single overdose of barbiturates. While the electric chair is still an option – a Tennessee inmate chose to be executed by one this month – even death penalty advocates doubt it will become standard again.

After the death penalty was reinstated in Texas in 1974, lethal injection was widely regarded as the more humane alternative to the chair, hanging, the gas chamber and the firing squad.

"There's probably not a humane way to take a human life, but it's a lot better than to get the death penalty in the electric chair," said former state Rep. Ben Z. Grant, who authored the first law on lethal injection in Texas in 1977.

"There may be an improvement on this, but I think if it's administered right, I don't think it's any more painful except maybe than a shot in the arm," he said.

Since the first person was executed by lethal injection in 1982, nearly 1,100 people have been put to death, including 928 by lethal injection.

#### Torture not allowed

According to the Texas Department of Criminal Justice, the execution process causes the inmate to appear to fall asleep and takes about seven to 10 minutes.

But opponents argue that despite the tranquil appearance, the inmates actually suffer excruciating pain as one drug suffocates them while another has been found to cause a burning sensation in the veins of people who are conscious.

"As much as society would like to cause some murderers to feel great pain in light of some of the heinous crimes they commit, the Eighth Amendment allows the state to execute prisoners, but it does not allow it to commit torture," said David Dow, a University of Houston law professor who specializes in capital cases.

Mr. Dow was one of the lawyers for Michael Wayne Richard, 49, and helped prepare the first petition asking the Supreme Court to stay an execution in the wake of its plan to review lethal injection.

Mr. Richard's execution for raping and killing a nurse in her home in 1986 was delayed for more than two hours as his appeal made its way to the high court.

Mr. Dow, who works on behalf of the Texas Defender Service, said he and other lawyers plan to challenge the constitutionality of lethal injection in two more cases in the next week.

Carlton Akee Turner is scheduled for execution Thursday for the 1998 murder of his adoptive parents in Irving. In another local case, Heliberto Chi is set to die next Wednesday for a fatal shooting during the robbery of a men's clothing store in Arlington.

But those efforts could stall because of procedural issues dictating how and when someone can challenge the constitutionality of lethal injection. Mr. Dow said lawyers have raised such claims on behalf of 20 to 25 Texas inmates in the last three years – all unsuccessfully.

"The state rule says you cannot bring a challenge until you have an execution date," he said. "The federal rule is that if you wait until you have execution date, you've waited too long."

#### Method of appeal

While defense lawyers expect a flurry of challenges in almost every case set for execution in the near future, a Collin County case will probably set the standard for how claims of cruel and unusual punishment will be handled in Texas.

The case involves John Alba, who was convicted of capital murder after breaking into an apartment and killing his wife in 1991.

The Texas Court of Criminal Appeals is expected to decide any day now which legal method, such as a civil rights lawsuit or a writ of habeas corpus, defendants must use to file such claims, said John Rolater, who oversees the appellate division of the Collin County district attorney's office.

But he said it is unlikely that the Texas court will make any decisions about lethal injection before the Supreme Court decides the Kentucky case.

While no one expects the high court to issue a blanket moratorium in the meantime, several death penalty experts predicted that lower courts would take Tuesday's decision as a directive.

"To me, it's almost automatic that it will have the same effect as a moratorium, but it will have to be case by case," said Rolando del Carmen, a Sam Houston State University criminologist, who wrote a textbook on the death penalty.

But his colleague, Dennis Longmire, wasn't so sure.

"I don't think it's going to slow Texas down at all," he said. "The issue has been raised before. Texas has reviewed its protocol, and Texas will not hesitate until its protocol has been ruled unconstitutional."

In May 2006, the Texas Court of Criminal Appeals stayed an execution on this very issue, but the court lifted the stay two days later after reviewing the state's procedures.

Still, Texas increased the dosage of sodium thiopental this year to ensure that the offender would lose consciousness before the other two drugs were delivered, said Michelle Lyons, spokeswoman for the Texas Department of Criminal Justice.

The change came on the advice of a medical expert who said that while the ingredients did not cause unnecessary pain, the increase would add a level of certainty that the inmate is unconscious.

*Staff writers Christy Hoppe, Jennifer Emily and Ian McCann contributed to this report.*