

kleptomania falls within this exclusion. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), however, classifies kleptomania as an impulse-control disorder, distinguishing it from antisocial personality disorder. This distinction suggests that kleptomania may be considered as not falling within the exclusion to the volitional test used in some states.

Perhaps a larger question is whether courts should examine symptom severity, rather than ruling out entire diagnoses. The current diagnostic trend, as reflected in DSM-5, is to move away from categorical diagnosis toward recognizing illness on a continuum, with various levels of symptom severity and dysfunction. For example, substance use disorders include severity specifiers (i.e., mild, moderate, and severe) based on the number of criteria met. Proponents of the dimensional approach point out that it allows for more precise diagnoses and the identification of individuals who would benefit from more targeted treatment strategies (Andrews G, et al: Dimensionality and . . . . *Int J Methods Psychiatr Res* 16: S41–S51, 2007; see also, Frances A: DSM-5 and dimensional diagnosis. *Psychiatric Times* March 22, 2010). The understanding that individuals with a diagnosis of the same disorder may experience widely disparate levels of impairment leads us to the question of whether courts should also consider a dimensional approach, as opposed to strict diagnoses, when evaluating whether insanity defense criteria are met. In regard to the questions posed in *Giroux*, is there a level of severity in kleptomania at which an individual cannot control himself in the eyes of the law?

Disclosures of financial or other potential conflicts of interest: None.

## Capital Punishment and Eighth Amendment Rights

**Scott Walmer, DO**

*Fellow in Forensic Psychiatry*

**Maya Prabhu, MD, LLB**

*Assistant Professor of Psychiatry*

*Law and Psychiatry Division*

*Department of Psychiatry*

*Yale University School of Medicine*

*New Haven, CT*

## Oklahoma's Lethal Injection Protocol Does Not Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the U.S. Supreme Court denied the 42 U.S.C. § 1983 action of three Oklahoma state death row inmates, which alleged that the use of the sedative drug midazolam was a violation of the Eighth Amendment because it creates an unacceptable risk of severe pain. While citing precedent holdings as the basis for its opinion, the Court moved beyond the narrow question of method of execution to focus much of its energy on the constitutionality of the death penalty.

### *Facts of the Case*

The State of Oklahoma has historically used three specific drugs for its lethal injection protocol: sodium thiopental, pancuronium bromide, and potassium chloride, a combination that was found to be constitutional by the U.S. Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). In response to pressure from anti-death penalty advocates, the manufacturers of sodium thiopental and its closest substitute, pentobarbital, made them unavailable in the United States. Lacking a viable means of obtaining either drug, Oklahoma modified its lethal injection protocol to incorporate the long-acting benzodiazepine midazolam instead.

In April 2014, Oklahoma executed its first inmate, Clayton Lockett, using the new three-drug protocol. Mr. Lockett died shortly after the medication was administered, but he did not remain sedated during the entirety of the execution. After a public outcry, an investigation concluded that the primary reason for the failure of the medication to keep Mr. Lockett sedated was infiltration of the intravenous line. Consequently, Oklahoma instituted several procedural changes and amended its protocol to use a higher dose (500 mg) of midazolam.

In response, 21 Oklahoma death row inmates filed an action under 42 U.S.C. § 1983 (2012) alleging that the "use of midazolam violates the Eighth Amendment's prohibition of cruel and unusual punishment" (*Glossip*, p 2735). Four of the plaintiffs, having exhausted legal channels for challenging their convictions and sentences, then filed a motion for preliminary injunction against the drug protocol, arguing that the use of 500 mg of midazolam did not render an individual insensate to pain once the second and third drugs in the protocol are administered.

An evidentiary hearing was held in which the state's expert testified that it is "a virtual certainty" that an inmate will not feel pain when the second and third drugs are administered after a 500-mg dose of midazolam is given (*Glossip*, p 2736). He testified that this dose is sufficient to put individuals into a coma, as it is several times higher than the normal therapeutic dose. One of the petitioners' experts agreed that, as the dose of midazolam increases, it can produce a lack of response to pain, but argued that there is a "ceiling effect" of the drug. The district court found the state's expert's testimony to be reliable. It then held that the petitioners were unlikely to be successful for two reasons: they "failed to identify a known and available method of execution that presented a substantially less severe risk of pain than the method that the State proposed to use" (*Glossip*, p 2736), and they failed to prove that the lethal injection protocol amounted to an "objectively intolerable risk of harm" (*Glossip*, p 2736).

The inmates appealed to the Tenth Circuit Court of Appeals, which affirmed the district court's finding of fact regarding the efficacy of midazolam. The Tenth Circuit held that the petitioners did not identify an alternative agent but noted that since they "failed to establish that the use of midazolam creates a demonstrated risk of severe pain," this holding did not determine the outcome of the appeal anyway (*Glossip*, p 2736). The Tenth Circuit also held that testimony from the state's expert, which contained alleged errors, was reliable and did not render the district court's findings clearly erroneous.

In January 2015, Oklahoma executed one of the four petitioning inmates. The three remaining inmates appealed to the U.S. Supreme Court, which agreed to hear the case and ordered temporary stays of execution.

#### *Ruling and Reasoning*

Justice Alito (joined by Justices Roberts, Scalia, Kennedy, and Thomas) delivered the opinion of the Court, which affirmed the Tenth Circuit's decision. The Court based its ruling on its previous holding in *Baze*. In that case, the Supreme Court held that the three-drug protocol previously used by Oklahoma and other states did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. The Court emphasized that it has "never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and un-

usual punishment" (*Glossip*, p 2732). The majority then provided two reasons behind its decision to affirm.

First, they held that the burden is on prisoners, not the state, to prove that a known and available alternative method of execution carries substantially less risk of pain, which the prisoners (and their experts) were unable to do. The petitioners argued for either sodium thiopental or pentobarbital in lieu of midazolam, but the Court held that the district court was not clearly erroneous in finding that those agents were no longer available to Oklahoma.

The Supreme Court then turned its attention to the matter of whether the district court clearly erred regarding midazolam's ability to render a person insensate to pain. The Court reasoned that "speculative evidence" about the ceiling effect of midazolam did not establish that the district court's findings were erroneous (*Glossip*, p 2743). Further, the Supreme Court underscored that it would not "lightly overturn" the Tenth Circuit's findings, particularly as "multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings" (*Glossip*, p 2740). Finally, the Court emphasized that the central issue in this case revolves around a scientific controversy that may be beyond any court's reach.

The majority acknowledged arguments raised by the two dissents about the constitutionality of the death penalty. Justice Alito defended the majority's position and wrote: "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" (*Glossip*, p 2733). In two concurring opinions, Justices Scalia and Thomas (each joined by the other) objected to the case's becoming one about the constitutionality of the death penalty when the question before the court was much narrower.

#### *Dissent*

In a dissent, Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan) took issue with factual findings from the district court's evidentiary hearing. Namely, she opined that the district court erred in crediting "the scientifically unsupported and implausible testimony of a single expert witness" (*Glossip*, p 2781) and in placing the burden on petitioners to prove that an alternative means for their own executions must be available. In a second dissent, Justice

Breyer (joined by Justice Ginsburg) agreed with Justice Sotomayor's reasoning. However, he surprised many with his suggestion that, if it did not abolish the death penalty outright, the Court should, at a minimum, hold a full briefing to evaluate its constitutionality.

**Discussion**

The district court's findings of fact regarding the safety and efficacy of midazolam in this case are germane to the testimony of forensic psychiatrists. In this case, there was no factual evidenced-based literature that any expert witness could reasonably rely on, short of extrapolations and inferences, because randomized controlled trials of medications in extremely high-dose ranges are unethical. Similarly, a reasonable forensic psychiatrist testifying on a matter related to capital punishment might opine within the scope of his or her expertise, but in so doing may be asked questions outside the scope of current scientific knowledge. This case serves as a useful reminder that in death penalty cases, any expert testimony is carefully scrutinized.

The death penalty remains a highly contentious topic that presents an ethics-related dilemma for participating forensic experts. Forensic psychiatrists are often asked to testify on a variety of matters related to capital punishment, including competence to proceed, criminal responsibility, sentencing mitigation, and competence to waive further appeals for execution. Forensic psychiatrists are most helpful to the court when their role is well defined. However, there are current professional ethics guidelines stating that physicians should not participate in a "legally authorized execution" unless the physician's involvement falls within permissible exceptions (American Medical Association Code of Medical Ethics: Opinion 2.06, 2000). Offering a reasonable statement for the court that does not violate those guidelines requires thoughtfulness before accepting the referral and prior to testimony about how a professional opinion can be ethically articulated. A prudent expert should be clear about what it means to "participate" in death penalty cases and consider obtaining consultation in complex cases.

The ethics-based dilemmas facing forensic psychiatrists in capital cases may evolve. The American Psychiatric Association currently endorses a moratorium on capital punishment and the American Academy

of Psychiatry and the Law has no current position statement regarding capital punishment.

Disclosures of financial or other potential conflicts of interest: None.

## **Federal Sentencing Guidelines in an Exceptional Domestic Violence Case**

**Lucas P. Bachmann, MD**

*Fellow in Forensic Psychiatry*

**Charles C. Dike, MD, MPH**

*Assistant Professor of Psychiatry and Co-Associate  
Training Director, Law and Psychiatry Fellowship  
Program*

*Law and Psychiatry Division*

*Department of Psychiatry*

*Yale University School of Medicine*

*New Haven, CT*

### **A Pattern of Activity Involving Threatening and Harassing E-Mails Enhances Sentence**

In *United States v. Lee*, 790 F.3d 12 (1st Cir. 2015), the court of appeals affirmed a decision from the District Court of Maine that convicted Benjamin Lee for charges of threatening and stalking his ex-wife and her boyfriend. Mr. Lee argued that his previous threats toward his victims were in the context of an altered mental status that was influenced by his health concerns.

#### *Facts of the Case*

Mr. Lee met his ex-wife, Tawny, when she was eight years old and started dating her when she was in her late teens. She had just ended a relationship with Timothy Mann when she began dating Mr. Lee. Soon thereafter, she and Mr. Lee married and had two children. They later divorced twice, the first time in 1993.

Mr. Lee was described as being verbally and physically abusive toward Ms. Lee throughout their marriage. The abuse had been documented to span over three decades. Ms. Lee relayed several incidents of Mr. Lee's controlling and threatening behavior, including incidents of physically restraining her and subjecting her to "nearly daily verbal abuse" during their marriage. Ms. Lee later testified that Mr. Lee told her in 1979 "if he couldn't have her, no one could" (*Lee*, p 14), causing her to stay with him for fear of her safety.