

# Analysis: Will Billy Ray Irick receive a stay of his Aug. 9 execution?

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After more than 30 years on death row, Billy Ray Irick is less than two weeks from becoming the first person executed in Tennessee in nearly a decade.

The 59-year-old Knox County man, convicted in the 1985 rape and murder of a 7-year-old girl, has no remaining legal options on his own case. His execution is scheduled for Aug. 9.

But, David Raybin, a Nashville attorney who helped write Tennessee's death penalty statute in 1976, said he would be "astounded" if the state actually executed Irick anytime soon.

"In my view, I think the state Supreme Court will most certainly grant a stay here," said Raybin, who has represented clients on death row before.

The state's high court only steps in to delay an execution when there is ample legal reason to do so. Despite Irick exhausting his own appeals, Raybin said his participation in a challenge to the state's lethal injection method will likely provide the rationale needed to delay an execution.

## 'I don't think they're going to rush this'

Nashville Chancellor Ellen Hobbs Lyle resoundingly rebuked the lawsuit filed by Irick and 32 other death offenders Thursday, issuing a ruling that allowed the state to proceed with its controversial three-drug lethal injection protocol.

But the lawsuit is "postured perfectly" for a stay of execution, Raybin said. That's because the state's high court has never taken a stance on this specific lethal injection methodology, and an appeal of Lyle's decision would take at least three months.



David Raybin (Photo: Submitted)

"He's been pending execution years and years, I don't think they're going to rush this along when you have a definitive issue here," Raybin said.

It would be highly irregular to not issue a stay while an appeal is pending. If this unlikely scenario were to happen, Gov. Bill Haslam could step in and issue a stay.

Haslam, who has the authority to grant clemency at any time, is reviewing Irick's case.

"My role, again, is not to be the 13th juror, it's not to decide is capital punishment right or wrong — it's the law of the state. My role is to say, did the process break down anywhere along the way?" Haslam said this week, discussing his approach to death penalty cases

## **State Supreme Court can take case**

Although typically the case would be appealed to the Tennessee Court of Appeals, Raybin expects the state Supreme Court may scoop up the case. Tennessee has a "reach-down" statute, or a law that allows the Supreme Court to take on a case outside of routine legal channels under extreme circumstances.

Raybin said this case is perfect for such a move: it would speed up the overall appeal and allow the high court to issue a stay at the same time.

Immediately after Lyle's ruling, attorneys for the death row offenders said they would appeal. The "sloppy" ruling provides more than enough fodder for them to potentially prevail, said Deborah Denno, a law professor at Fordham University in New York City and a death penalty expert.

"I think they have a strong case for appeal," Denno said. "This is not a well-argued opinion, and I think there are many ways they can poke large holes in it."

Lyle said the offenders failed to meet standards established in U.S. Supreme Court precedents in order to prove the state is violating the U.S. Constitution.

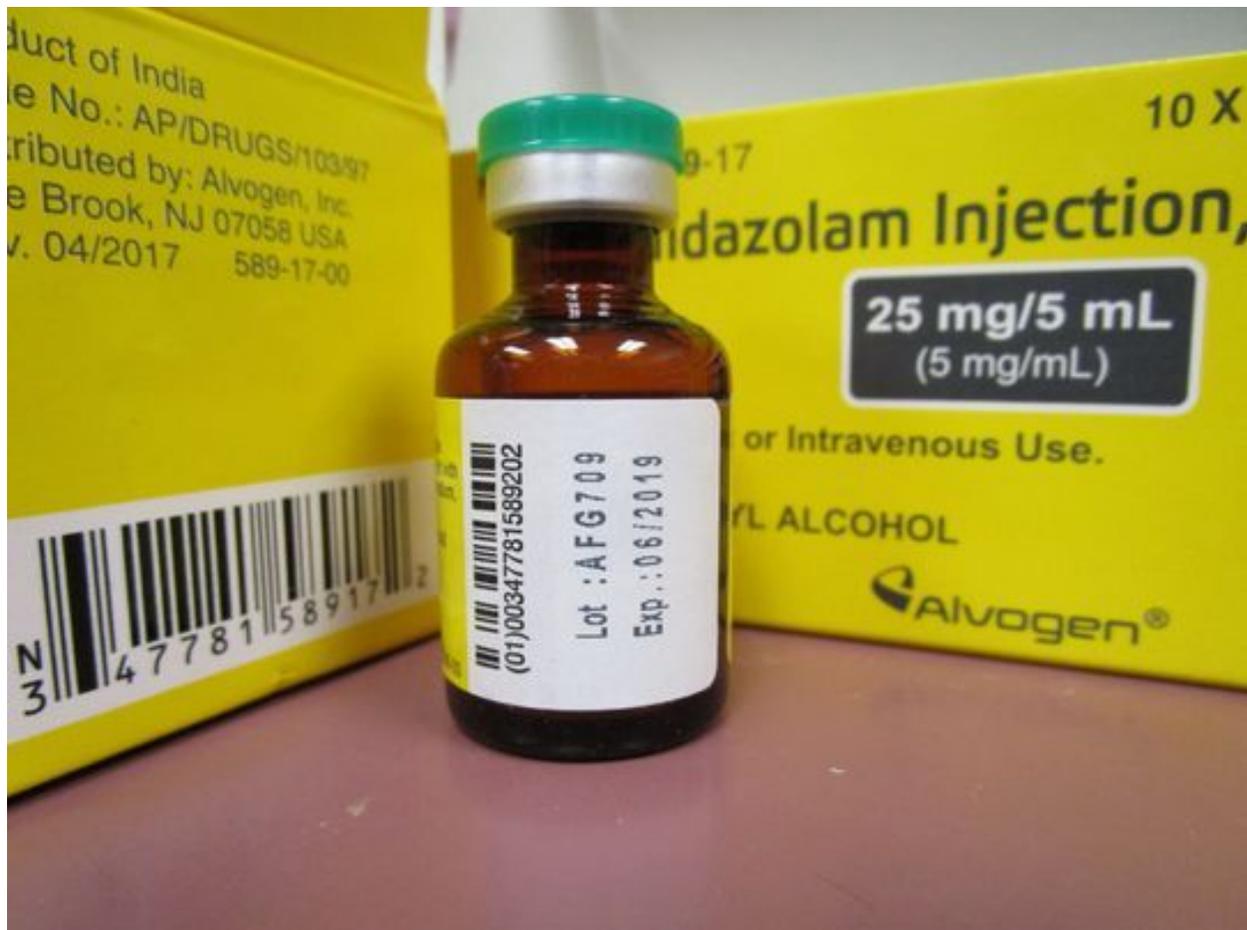
Those standards are:

- There is a different means to carry out the execution that is readily available and substantially less painful; and
- The drugs the state plans to use would cause the inmate to be tortured to death.

But Denno thought Lyle put far too much trust in the word of the Tennessee Department of Correction when officials said they could not find other lethal injection drugs. And she questioned Lyle's process in determining the drugs did not amount to torture.

## Fewer executions, more litigation

Lyle determined the inmates' attorneys presented compelling evidence that the first of the three drugs to be used, midazolam, did not guarantee inmates would not feel pain from the second and third drugs used. Kelley Henry, a federal public defender who led the inmates' case, indicated attorneys would likely focus on this aspect in the appeal.



But the chancellor ruled inmates did not prove this pain amounted to torture.

She relied specifically on the amount of time an execution could take. Evidence in trial found executions could last anywhere from 10 to 18 minutes. That isn't objectively long enough to be considered torturous, Lyle ruled.

"Any of us know you can experience great torture in far less time than that. Time has always been one element of assessing torture, but for the court to hold that, there's really not a basis for it," Denno said.

"Nobody has said 10 to 18 minutes is too short of time to be considered torturous."  
Raybin was less critical of the ruling. He likened the ruling to a "fact-finding proceeding" that establishes the framework of the appeal.

Regardless of the appellate strategy, both experts agree the continued use of lethal injections means fewer actual executions and much more litigation.

"Looking way down the road on this, I think ultimately the states are going to have to come up with some alternative to this other than lethal injection, because it constantly creates prolonged litigation," Raybin said.