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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

RONALD ALLEN SMITH and)
WILLIAM GOLLEHON,)
)
Plaintiffs,)

-vs-

STATE OF MONTANA,)
DEPARTMENT OF CORRECTIONS;)
DIRECTOR MIKE BATISTA)
WARDEN LEROY KIRKEGARD; and)
JOHN DOES 1-20,)
)
Defendants.)

NANCY SWEENEY
CLERK DISTRICT COURT

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FILED
C. POBZICK
BY DEPUTY

No. BDV-2008-303

**BRIEF IN SUPPORT OF
MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs Ronald Allen Smith, and William J. Gollehon filed suit in this matter on April 3rd, 2008. Most recently, the District Court issued an Order on May 7, 2014 granting the Defendants summary judgment on every then remaining claim in the matter excepting the issue of whether pentobarbital is classified as an ultra-fast-acting barbiturate. Or. Granting Defs.' Mot. S.J. 22 (May 7, 2014). The Court relied on conflicting expert declarations to hold there was a dispute of material fact regarding whether pentobarbital is an ultra-fast-acting barbiturate. *Id.* at 15-16, 22. Because Defendants expert has withdrawn from the case, Plaintiffs now move for summary judgment on the issue of whether pentobarbital is classified as an ultra-fast-acting barbiturate. Def.'s Mot. to Continue, at 2 (August 13, 2014). As there are no longer conflicting expert declarations, there can no longer exist a dispute of material fact.

STATEMENT OF UNDISPUTED FACTS

The Department of Corrections' ("DOC") lethal injection protocol has a checkered legal history in Montana. The first protocol challenged in this litigation utilized a three-drug formula, including sodium thiopental (an ultra-fast acting barbiturate), pancronium bromide (a paralytic agent), and potassium chloride (to induce cardiac arrest). This Court found numerous deficiencies with the protocol in effect in 2012. Among those deficiencies were that the three drug protocol violated Montana law, and this Court ordered the Department of Corrections to revise its protocol. *See* Order on Cross Motions for Summary Judgment, decided September 6, 2012, at pages 21-22. The revised protocol eliminates the use of potassium chloride, previously the third drug used to stop the heart. The revised protocol, issued January 16, 2013, now lists only two drugs

to be used in lethal injections: sodium pentothal, and Pancuronium bromide. *See* Montana Department of Corrections Montana State Prison Execution Technical Manual, Ex. A, 01/16/13, p. 50-53. The revised protocol includes this footnote: “Drugs listed may be substituted with another equivalent type drug if drug listed becomes unavailable.” Ex. A, p. 41.

Despite listing sodium pentothal as the drug to be used, Defendants’ discovery responses regarding the revised protocol state: “Defendants do not propose to use Sodium Pentothal in the lethal injection protocol published by the Defendants, effective January 16, 2013, nor do Defendants have any Sodium Pentothal in stock.” Ex. B, Response to Interrogatory No. 11, p. 23. Defendants admit that sodium pentothal is no longer manufactured in the United States, is not available for purchase in the United States, is no longer manufactured in any of the European Union states for use in lethal injection executions, that no other state currently uses Sodium Pentothal as one of the drugs in any lethal injection protocol, and a federal court has required the FDA to block importation of Sodium Thiopental (another name for Sodium Pentothal) into the United States. Ex. B, Responses to Request for Admission 4, 5, 6, 7, 8, 9, pp. 23-27.

As a substitute for Sodium Pentothal, the Defendants propose to use Pentobarbital as the first drug in the two-drug formula. Ex. B, Responses to Interrogatory Nos. 12 and 13, pp. 27, 28. Plaintiffs do not believe that Defendants can locate a supply of legally manufactured pentobarbital, as that drug is no longer being commercially manufactured in the United States, and foreign suppliers refuse to sell the drug in the United States for the purpose of human execution. At this point, however, the Court need not explore that issue as pentobarbital is demonstrably not an “ultra-fact acting barbiturate.” Instead, it is

defined as either fast-acting, intermediate-acting or short-acting, depending on the classification system used. *See e.g.*, Plaintiffs' Rebuttal Expert Disclosure, attached as Exhibit C, p. 3-4. Defendants have not provided one example of a classification system describing pentobarbital as an ultra-fast-acting barbiturate, and Plaintiffs are not aware of any classification system describing it as "ultra-fast-acting." *See* Ex. C, p. 4.

As explained by Plaintiffs' expert, Dr. Mark Heath, "[p]entobarbital has a slower onset and a longer duration than thiopental." Plaintiffs' Expert Witness Disclosure ("Heath Aff."), Ex. H, ¶10. The Defendants do not have an expert to refute this fact, and therefore, there is no question of fact that pentobarbital has a slower onset than thiopental. Def.'s Mot. to Continue, at 2 (August 13, 2014). Indeed, as of August 13, 2014, the Defendants' expert has withdrawn from this case—and as a result, the only evidence in this matter regarding pentobarbital's classification and compliance with Mont. Code Ann. § 46-19-103, makes clear pentobarbital is not an ultra-fast-acting barbiturate. Def.'s Mot. to Continue, at 2 (August 13, 2014); Or. Granting Defs.' Mot. S.J. 15-16 (May 7, 2014). The revised protocol impermissibly conflicts with Mont. Code Ann. § 46-19-103.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M. R. Civ. P. 56(c). The purpose of Rule 56 is to promptly dispose of actions that have no genuine issues of fact, encouraging judicial economy through the elimination of unnecessary trial, delay, and expense. *Heiat v.*

Eastern Montana College, 275 Mont. 322, 343, 912 P.2d 787, 800 (1996). The party moving for summary judgment “has the burden of establishing the absence of any genuine issue of material fact, and the party opposing the motion must supply evidence supporting the existence of a genuine issue of material fact.” *Randolph v. Peterson, Inc. v. J.R. Simplot Co.*, 239 Mont. 1, 6, 778 P.2d 879, 882 (1989).

ARGUMENT

I. **Pentobarbital is not an ultra-fast-acting barbiturate and its use by Defendants contradicts Mont. Code Ann. § 46-19-103.**

Defendants have published a protocol that specifically calls for the administration of Sodium Pentothal, an “ultra-fast-acting” barbiturate, as the first of the two drugs used in lethal injections (Ex. A, p. 41). However, sodium pentothal is unavailable in this country, and Defendants admit they do not actually intend to use this drug. Ex. B, p. 23 (“defendants do not propose to use sodium pentothal in the lethal injection protocol . . . nor do Defendants have any sodium pentothal in stock”).

Defendants plan to substitute pentobarbital for sodium pentothal. Ex. A, p. 51 (“pentobarbital with a dosage of 5 gm may be substituted for sodium pentothal”), Ex. B, p. 27. Plaintiffs’ unopposed expert’s opinion makes clear that **pentobarbital**—the drug the DOC has stated it plans to use—is **not an ultra-fast-acting barbiturate**. Pl.’s Rebuttal Expert Disclosure, at 4 (June 25, 2013). At one point in the proceedings Defendants brought forth an expert to contradict the opinion of the Plaintiffs’ expert, but the Defendants’ expert has since withdrawn. Def.’s Mot. to Continue, at 2 (August 13, 2014). Further, the Defendants state they will not use any of their withdrawn expert’s opinions to refute the Plaintiffs’ expert’s opinion in a motion for summary judgment regarding whether pentobarbital is an ultra-fast-acting barbiturate. Def.’s Resp. to Pl.’s

Mot. To Strike, at 2 (November 12, 2014). Regardless of whether the Court grants Plaintiffs Motion to Strike of October 28, 2014, Dr. Dershwitz' previous opinions and declaration cannot now aid the State in responding to this Motion. There is no genuine issue of fact about whether the pentobarbital is an ultra-fast-acting barbiturate; it is not. As a matter of law, the revised protocol contradicts Mont. Code Ann. § 46-19-103.

Courts may not legislate through judicial interpretation of statutes. *Albinger v. Harris*, 48 P.3d 711, 720 (Mont. 2002) (“[i]t is not the province of this court or any other court to assume to legislate by judicial interpretation”). A court cannot second-guess and substitute its judgment for that of the legislature or insert what has been omitted. *State Bar of Montana v. Krivec*, 632 P.2d 707, 710 (1981). Indeed, Montana law regarding statutory interpretation begins with Mont. Code Ann. § 1-2-101 which states, "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." In Mont. Code Ann. § 46-19-103, the legislature mandates use of an “ultra-fast-acting barbiturate,” and the DOC plans to use a drug that is—without dispute—not classified as an ultra-fast-acting barbiturate. Given these facts, this Court must find an impermissible inconsistency between the legislative mandate and the DOC's exercise of that mandate. Scrupulous adherence to statutory mandates is especially important here given the gravity of the death penalty. *Accord In re Ohio Execution Protocol Litigation*, 2012 WL 84548 (S.D. Ohio 2012). This Court has previously invalidated the Department of Corrections lethal injection protocol for failing to comply with the expressed language of MCA §49-19-103. *See Order on Cross Motions for Summary Judgment*, decided September 6, 2012, at pages 21-22.


In summary, Mont. Code Ann. § 46-19-103 is clear and unambiguous in requiring an ultra-fast acting barbiturate. The plain meaning of "ultra-fast-acting barbiturate" is unambiguous, and does not include pentobarbital. It is an undisputed fact that pentobarbital is not an ultra-fast-acting barbiturate, but is at best an intermediate-acting barbiturate, sometimes also classified as a short-acting or fast-acting barbiturate. The necessary conclusion is that pentobarbital does not comply with the legislative mandate found in Mont. Code Ann. § 46-19-103.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court enter Summary Judgment in their favor on the issue of whether pentobarbital is an ultra-fast-acting barbiturate. It has now been almost seven years since this litigation began, and more than two and a half years since this Court ordered the State to revise its protocol to comply with Montana law. In that time the State has failed repeatedly to create a lethal injection protocol that complies with Mont. Code Ann. §46-19-103. There is no need for a trial in this matter, and the Court should grant summary judgment for the Plaintiffs and permanently enjoin the State of Montana from attempting to enforce the death penalty under Mont. Code Ann. §46-19-103.

Dated this 9th day of March, 2015.

Gough, Shanahan, Johnson & Waterman, PLLP

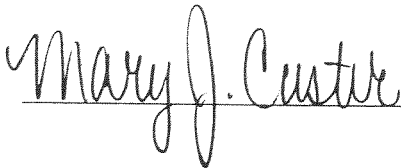
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within and foregoing was mailed, postage fully prepaid, on the 9th day of March, 2015, and directed to the following:

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MONTANA DEPARTMENT OF CORRECTIONS
Montana State Prison
Execution Technical Manual

Effective Date: 01/16/2013

Signed: _____


Leroy Kirkegard, Warden

Exhibit A

EXHIBIT

A

tabbles

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RONALD ALLEN SMITH and)	
WILLIAM J. GOLLEHON,)	Cause No. ADV 2008-303
)	
Plaintiffs,)	
v.)	NAMED DEFENDANTS'
)	RESPONSES TO PLAINTIFFS'
STATE OF MONTANA;)	SECOND DISCOVERY
DEPARTMENT OF CORRECTIONS;)	REQUESTS
DIRECTOR MIKE BATISTA; WARDEN)	
LEROY KIRKEGARD; JOHN DOES)	
1-20,)	
)	
Defendants.)	

RESERVATION OF RIGHTS

In responding to these discovery requests, the Named Defendants (Defendants) do not waive or intend to waive:

1. Any questions relating to competency, relevancy, materiality, privilege, and the admissibility as evidence for any purpose of these responses, or the subject matter thereof, in this action or any other action;

NAMED DEFENDANTS' RESPONSES TO SECOND DISCOVERY



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STATE OF MONTANA,)
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JOHN DOES 1-20,)
)
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No. BDV-2008-303

**PLAINTIFFS' REBUTTAL
EXPERT DISCLOSURE**

A. Dr. Mark Heath, hereby declares as follows:

