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2015 APR 10 PM 2:48
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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.)

No. BDV-2008-303

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

The Court has framed the remaining question to be answered in this case; whether pentobarbital is an ultra-fast acting barbiturate. The Plaintiffs have offered a sworn declaration

that it is not, and the Defendants do not offer any real evidence or cogent argument that it is. Rather they choose to suggest that the specific language of the statute should be ignored because perhaps the legislative history suggests that the Legislature simply wanted a means to execute individuals in a fast and humane manner, or perhaps because the administration of pentobarbital will cause death fairly quickly, although not as fast as other drugs which satisfy the legislative definition. This argument, carried to its ultimate conclusion, would allow the Defendants to proceed any way they wanted, so long as they achieved a fast and humane death of an inmate.

Two and a half years ago, this Court ruled on the constitutionality of the execution protocol then in effect. One of the most critical points of the Court's decision was:

“It must be made clear that this is not a case where the legislature has given guidance to the Department of Corrections and told the Department to adopt the most humane execution method possible. The legislature, instead, has given a specific direction on how execution is to take place, and the Department of Corrections, in its own policy statement, reiterates that the punishment must be administered pursuant to the two-drug policy set forth by the legislature... Despite the fact of this clear inconsistency between the statute and the ...protocol adopted by the Department of Corrections, the State has done nothing to address this issue, even though it has known ... that this is a major contention of the Plaintiffs... The Court notes that, theoretically, the legislature and the Department of Corrections can easily make changes to the protocol as are found wanting in this decision.” Order of the District Court on Cross Motions for Summary Judgment, September 6, 2012, at pages 21, 26.

Despite this admonition, although they have revised the execution protocol, the Department and other Defendants have not sought legislative amendment of the statute requiring an “ultra-fast barbiturate.” Instead, they respond to the Motion for Summary Judgment asking the Court to allow the Defendants to ignore the explicit provisions of the applicable statute.

Montana law requires the Department to utilize an "ultra-fast acting barbiturate" which, while not prescribing a specific drug, prescribes a category of drugs which does not include pentobarbital. Defendants have known for at least two Legislative sessions that the problem they confront was the language in the statute, and the fact that they could not comply with that

language. Instead of seeking a legislative revision, they come to the District Court to excuse their inability to comply with the statute. Defendants ask this Court to allow them to use pentobarbital, an intermediate acting barbiturate and a drug that does not comply with the language of the governing statute. A District Court is not empowered to modify the language of a statute or excuse its compliance merely because a party finds compliance either difficult or impossible. If the statute is impossible to comply with, the remedy is to seek legislative amendment of the statute through the Legislature, which created the statute. This Court cannot act as a super legislature and develop exceptions to compliance with the language of the statute.

Defendants nevertheless maintain that the District Court should allow the Defendants to proceed with their published lethal injection protocol for several reasons, none of which justify the proposed action of Defendants.

First, Defendants argue that the legislative history of the statute gives meaning to the term "ultra-fast acting barbiturate." Defendants contend that the Legislature meant only to prescribe a drug which brought about a fast and humane death of the inmate subjected to the lethal injection. While the Defendants want to avoid the specific language of the statute and ask to be governed by a broader and more general language, this is not what the legislation provides. Regardless of how tempting it may be to revert to the broader general language, the fact remains that the language of the existing language requires the use of a specific class of drugs, "ultra-fast barbiturates."

Defendants cannot resort to Legislative history unless the language of the statute is vague, or otherwise lacks specificity to provide direction of how an agency should act. The Montana Supreme Court has been clear that to ascertain legislative intent, the first step is to consider "the plain meaning of the words used in the statute." *Mont. Vending Inc. v. Coca-Cola*

Bottling Co., 2003 MT 282, P21, 318 Mont. 1, 78 P3d 499. The Court avoids a statutory construction “which renders any section of the statute superfluous or fails to give effect to all of the words used.” *Mont. Trout Unlimited v. Mont. Dept. of Nat. Res. & Conserv.*, 2006 MT 72, P23, 331 Mont. 483, 133 P3d 224. Here no vagueness exists. The Legislature provided specific direction to the agency to use drugs only within a specific category of available drugs, those within the "ultra-fast acting" category of barbiturates. Defendants cannot refer to the legislative history to avoid the specific and clear direction of the statute.

Moreover, the Legislative history does not provide the clear directive suggested by the Defendants. If anything, confronted with a variety of options, including specifying specific drugs, providing general directions to proceed in a humane direction,¹ or specifying categories of drugs, the Legislature chose to adopt a direction to the Department to use drugs in a specific category, those within the definition of "ultra-fast acting barbiturates" to carry out the execution of an individual.

The Defendants ask this Court to consider that Montana’s execution statute was patterned on the laws of other states, Oklahoma, Texas, Idaho, New Mexico, Washington, Massachusetts, and Utah, noting that none of those states ever adopted a law requiring an ultra-fast barbiturate (although Washington and Utah did specifically mention sodium thiopental²). Of those states

¹ As Oklahoma has now done, because of the unavailability of both thiopental and pentobarbital. Okla. Laws 2011, c. 70, §1, eff. Nov. 1, 2011.

² Originally Washington required the use of thiopental. In 1996, Washington did away with the requirement when it was apparent that there would be problems with obtaining that drug, by amending its lethal injection language to require that it take place “by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead.” WA Legis, Chapter 251 (1996). Utah has never required that only thiopental be used. As the Defendants point out, the original lethal injection language from Utah was that there be “intravenous injections... one of which shall be of a lethal quantity of sodium thiopental **or other equally or more effective substance sufficient to cause death.**” (emphasis added). Because of continued concerns about the legality of Utah’s death penalty statute, Utah has now added the option of death by firing squad. 2015 Utah Laws H.B. 11. “(4) The method of execution for the defendant is the firing squad if the sentencing court determines the state

referenced, only two had language that was in any way similar to that of Montana, Oklahoma and New Mexico (both requiring an “ultra-short acting barbiturate”). Neither state still has that language in their statutes. New Mexico repealed the death penalty in 2009. N.M.S.A. §§31-14-1 to 31-14-16. Repealed by L.2009, Ch. 11, §5, eff. July 1, 2009. Oklahoma amended its lethal injection statute in 2001 to remove the “ultra-short acting barbiturate” language, and now only requires, “The punishment of death shall be carried out by the administration of a lethal quantify of a drug or drugs until death is pronounced by a licensed physician according to accepted standards of medical practice.” Okla. Laws 2011, c. 70, §1, eff. Nov. 1, 2011.

No state, other than Montana, requires that execution be carried out by an “ultra-fast barbiturate.” It is uncontested that at the time Montana enacted its lethal injection procedures, sodium thiopental was the execution drug used as an “ultra-fast acting barbiturate.” It is uncontested that thiopental can act as much as six times faster than pentobarbital.³ The fact that the Defendants are no longer able to obtain thiopental does not justify their failure to comply with the statute. As the Court noted in its Order of September 6, 2012, if the Defendants cannot proceed in a manner consistent with the language of the statute, their option is to seek Legislative (and not judicial) modification of the statute.

To address this issue and in an obvious attempt to avoid the language of the statute, the Defendants offer the testimony of Dr. Evans, a pharmacist who is willing to act as an expert for

is unable to lawfully obtain the substance or substances necessary to conduct an execution by lethal intravenous injection 30 or more days prior to the date specified in the warrant issued upon a judgment of death under Section 77-19-6.”

³ In any event, they may all be for naught, as Plaintiffs do not believe that Defendants can even acquire pentobarbital. See *Warner v. Gross*, 776 F.3d 721, 725 (10th Cir. 2015) “Since approximately 2010, the State of Oklahoma has been unable to obtain sodium thiopental, either commercially manufactured or compounded, for use in executions. **Although the State of Oklahoma was able, for a short time, to obtain and utilize an alternative barbiturate, pentobarbital, during executions, that drug has also become unavailable to the State of Oklahoma for use in its executions.** See *Pavatt v. Jones*, 627 F.3d 1336, 1337 (10th Cir.2010) (addressing challenge to State of Oklahoma's planned use of pentobarbital).” (emphasis added)

the Defendants. Dr. Evans is quite cautious in his testimony as demonstrated in his declaration. At no point in his declaration does he state that pentobarbital is an ultra-fast acting barbiturate. This is because it is not and he will not commit perjury to provide support for the Defendants position in this case. Although Dr. Evans thinks barbiturates should be classified differently, he acknowledges that pentobarbital and thiopental have not been classified in the same category, and he further acknowledges that pentobarbital has been classified as “short acting,” and thiopental as “ultrashort acting.”⁴ He is not familiar with the origin or legal definition of “ultra-fast acting.”⁵ He concedes that thiopental can act as much as six times faster than pentobarbital.⁶ He opines that pentobarbital would nevertheless eventually achieve the same result as thiopental, albeit in a slower rate than thiopental.

None of these excuses justify ignoring the specific prescription of what drugs are permitted by Montana statute in carrying out an execution. The Defendants offer up only excuses for not complying with the specifics of the statute but those excuses do not justify non-compliance with the statute.

The statute at issue does not require a barbiturate that is “kind of fast,” “pretty fast,” “fast enough to be more or less humane,” or even “fast.” The statute requires the barbiturate be “ultra-fast,” and pentobarbital does not meet that definition. As this Court held its Order of September 6, 2012, the Legislature gave specific directions on how executions are to occur. If conditions have changed and because of the unavailability of particular drugs the Defendants can longer comply with the statute, their remedy is with the Legislature, not with this Court. If Defendants wish to use pentobarbital or other drugs that are not “ultra-fast” acting barbiturates, they must do

⁴ Defendant’s Expert Witness Disclosure, paragraph 14, at page 6.

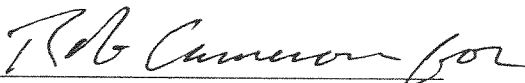
⁵ Id.

⁶ Id at paragraph 15, page 7.

as Oklahoma and Washington have done and seek a legislative remedy. In the meantime, Defendants must be enjoined from proceeding further.

Dated this 10th day of April, 2015.

Gough, Shanahan, Johnson & Waterman, PLLP

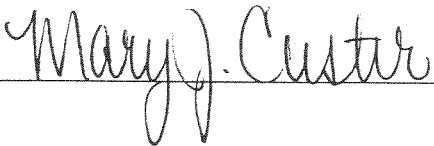
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within and foregoing was mailed, postage fully prepaid, on the 10th day of April 2015, and directed to the following:

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