ALAN WILSON
ATTORNEY GENERAL

July 27, 2015

Bryan P. Stirling, Director
South Carolina Department of Corrections
4444 Broad River Rd.
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Dear Director Stirling:

We are in receipt of your opinion request concerning the interpretation of Section 24-3-580 of the South Carolina Code. Specifically, you ask if Section 24-3-580's definition of the phrase "member of an execution team" includes "an individual or company that provides, or an individual who participates in preparation of, chemical compounds intended for use by the Department of Corrections . . . in carrying out an order of execution by lethal injection." Our response follows.

I. Background

In 2009, "anti-death penalty advocates" successfully persuaded "[t]he sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug [lethal injection] protocol, to cease production of the drug." Glossip v. Gross, --- S.Ct. --- 2015 WL 2473454 (June 29, 2015). Subsequently, after it was announced "the company planned to resume production in Italy" activists again "pressured both the company and Italian Government to stop the sale of sodium thiopental for use in lethal injections in this country." Id. These efforts "proved successful" and resulted in the company announcing "it would exit the sodium thiopental market entirely." Id.

In response, some states, after unsuccessfully pursuing other methods of procuring sodium thiopental,[1] replaced the drug with another barbiturate, pentobarbital. Id. According to the Supreme Court of the United States, "[a]nti-death penalty advocates lobbied the Danish manufacturer of [pentobarbital]" which in turn, resulted in the manufacturer taking actions to block its export for use in executions in the United States. Id.

[1] See e.g., Beaty v. Food and Drug Admin., 853 F. Supp.2d 30, 34-35 (D.D.C. 2012) (detailing that from June of 2010 to January of 2011, the FDA intercepted shipments of sodium thiopental to the Georgia, Arkansas, Arizona, Tennessee, California and South Carolina Departments of Corrections and adding that although the initial shipments were released, the FDA was enjoined from releasing any further shipments).

As a consequence of these actions, "states have struggled to find a sustainable supply [of lethal injection drugs]." Blythe, Harrison, Laboratories of Democracy or Machinery of Death? The Story of Lethal Injection Secrecy and a Call to the Supreme Court for Intervention, 65 Case W. L. Rev. 1269, 1278 (2015). Critics suggest it is this struggle which has created the rise in what anti-death penalty advocates have called "Lethal Injection Secrecy Laws." Id. at 1279.

According to one critic, Lethal Injection Secrecy Laws ("LISL") consist of three major parts. First, they "prohibit[] disclosure of identifying information of all parties who participate in the process of manufacturing, distributing, and administering lethal injection drugs." Id. at 1280. Second, they "create[] a civil cause of action against anyone who violates this prohibition." Id. And third, they "forbid[] licensing boards from taking disciplinary action against physicians who oversee the lethal injection process." Id. It has been suggested that Sections 24-3-580 and 24-3-590 of the South Carolina Code, both passed in 2010 via Act 203 of the Legislature, amount to LISL. See Blythe, 65 Case W. L. Rev., at 1273, n. 22 (highlighting that nine states, including South Carolina, have laws making "confidential certain information concerning the process involved in creating, distributing, and administering . . . lethal injection drugs.").

II. Law

As noted above, Section 24-3-580 of the South Carolina Code was passed by the Legislature and subsequently signed into law on June 7, 2010 as part of Act 203. According to the Act's legislative title Section 24-3-580 was added "so as to prohibit the disclosure under certain circumstances of the identity of members of an execution team and to allow for civil penalties for a violation of the section." 2010, S.C. Acts No. 203 Legis. Title (June 7, 2010). To that end, Section 24-3-580 states as follows:

> *A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team.* However, this information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a willful [sp] violation of this section, punitive damages.

S.C. Code Ann. § 24-3-580 (2014 Supp.) (emphasis added).

In addition to Section 24-3-580, Act 203 also included Section 24-3-590 of the Code. Similar to Section 24-3-580, Section 24-3-590's legislative title explains it was added "so as to prohibit licensing agencies from taking any action to revoke, suspend, or deny a license to any person solely for his participation on an execution team." 2010, S.C. Acts No. 203 Legis. Title (June 7, 2010). Thus, Section 24-3-590 of the Code states:

> No licensing agency, board, commission, or association may file, attempt to file, initiate a proceeding, or take any action to revoke, suspend, or deny a license to any person solely because that person participated in the execution of a sentence of death on a person convicted of a capital crime as authorized by law or the director.

S.C. Code Ann. § 24-3-590 (2014 Supp.).

III. Analysis

With this background in mind, we now return to your question, whether Section 24-3-580's use of the phrase "member of an execution team" should be broadly construed to include "an individual or company" providing or participating in the preparation of chemical compounds intended for use by the Department of Corrections for "carrying out an order of execution by lethal injection." Because Section 24-3-580, like other so-called LISLs, is a remedial measure intended to protect current and former execution team members from the negative consequences stemming from the disclosure of their involvement in a state-sanctioned execution, we believe, consistent with South Carolina law, that the phrase must be broadly construed to extend such a remedy to individuals and companies involved in any phase of the execution process—especially the preparation of lethal injection drugs.

In order to determine whether Section 24-3-580's "member of an execution team" language includes individuals or companies providing or participating in the preparation of chemical compounds for purposes of "carrying out an order of execution by lethal injection," we must first look to the intent of the legislature. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible."). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). When determining the effect of words utilized in a statute, a court typically looks to the "plain meaning" of the words. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). However, courts will reject the plain and ordinary meaning of the words used in a statute when doing so would defeat the intent of the legislature. Greenville Baseball v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 815 (1942).

Additionally, where a statute is remedial in nature it must be broadly construed in order to accomplish the object sought. S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978). This is so because a narrow interpretation of a statute creating a right of action leaves the entity or individuals potentially covered by the statute without remedy or

protection from the wrongs the statute was designed to right. Hanna, 270 S.C. at 213, 241 S.E.2d at 564; Trammell v. Victor Mfg.Co., 102 S.C. 483, ---, 86 S.E. 1057, 1057 (1915).

For instance, in Trammell, our Supreme Court, interpreting a statute requiring employers to immediately pay discharged laborers for work done prior to discharge and assessing penalties for failing to do so, stated that despite statutory language indicating the statute's provisions only applied to "weekly" and "monthly" laborers, the statute's remedial purpose—penalizing an employer's failure to pay discharged workers for the money they had earned and could have used towards finding new employment—meant the statute's penalty provisions should apply not only to laborers who are paid weekly or monthly, but also to laborers who are also paid every two weeks, three weeks, or four weeks. 102 S.C. at ---, 86 S.E. at 1057. In so finding, the Court explained "to hold that, because plaintiff's case does not come within a strict verbal construction of the statute, he must be denied the remedy which clearly appears to have been intended for his benefit, would be to sacrifice the legislative will to the mere form and phraseology of its expression." Id.

Similarly, in Hanna, our Supreme Court, construing a statute mandating that the legal representative of a mentally ill person subject to the custody of the Department of Mental Health be removed for failing to make an annual accounting to the probate court, held that although the individual was no longer in the custody of the Department, the statute should not be construed "so narrowly as to deny the Department capacity to sue." 270 S.C. at 213, 241 S.E.2d at 564-65. In so concluding the Court found that while the statute at issue dealt only with those subject to the custody of the Department, because the statute was generally aimed at protecting mentally ill wards from a self-serving legal representative, the mere fact that the ward was no longer in Department custody was not a bar to the Department seeking removal of the ward's legal representative in probate court.

This Office has also explained that the mandate of broad construction extends to confidentiality statutes. See Op. S.C. Att'y Gen., 1975 WL 29638 (March 31, 1975) (stating that a statute intended to remedy "a gap in the common law by providing for the protection of [a] . . . patient[']s [mental health records]" must be "broadly construed in favor of the patient's confidentiality[.]" The rationale supporting broad construction of confidentiality statutes is the same rationale used to support broad construction of remedial statutes—to ensure that those who are potentially covered by the statute's protections are not stripped of such protections via a narrow construction. See e.g., McGee v. Bruce Hosp. System, 312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993) (detailing that a confidentiality statute aimed at preventing disclosure of internal materials related to the competency of hospital staff members should be broadly construed as the statute is designed to encourage health care professionals to freely engage in peer-review to improve patient care and narrow interpretation of statute's protections would run contrary to that purpose). Thus, it stands to reason that a statute providing a legal remedy for disclosure of confidential information must be broadly construed as both a remedial and confidentiality statute.

Applying these principles of statutory interpretation to Section 24-3-580, we believe the phrase "member of an execution team" must be broadly construed to include an individual or company providing or participating in the preparation of chemical compounds intended for use by the Department of Corrections for "carrying out an order of execution by lethal injection." Indeed, there is absolutely no doubt that Section 24-3-580 is a remedial statute designed to prohibit the disclosure of an execution team member's identifying information by providing a civil right of action against those who release such information. See S.C. Code Ann. § 24-3-580 ("A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team . . . [a]ny person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section."). Specifically, the express language of the statute prohibits disclosure of an execution team member's identity or identifying information, creates "a civil cause of action" for a violation of this prohibition, discusses the type of damages recoverable under the action (actual and punitive) and details the showing needed for the assessment of punitive damages (willful). S.C. Code Ann. § 24-3-580. Thus, there can be no question that Section 24-3-580 is a remedial statute designed to protect execution team members from the negative consequences stemming from the release of their identity or identifying information and is therefore subject to a broad interpretation under the liberal construction requirement tied to remedial and confidentiality statutes.

Moreover, we believe that because the rule of liberal construction applies, it would be incorrect to limit the remedy from Section 24-3-580 to only prison personnel who serve on an execution team. This is especially true where the statute makes no attempt to define the phrase "member of an execution team" and where Section 24-3-590, which was also passed as part of Act 203, prohibits licensing agencies, boards, commissions and associations from imposing sanctions on an individual based on their participation "in the execution of a sentence of death" both of which suggest an intent to apply Section 24-3-580's remedy outside the prison walls.[2] S.C. Code Ann. § 24-3-590.

Further, a broad interpretation of Section 24-3-580 is also consistent with the rationale justifying LISL which is to ensure confidentiality "for the protection of *all* involved parties." Blythe, 65 Case W. L. Rev., at 1280 (emphasis added); see also, Berger, Eric, Lethal Injection Secrecy and Eighth Amendment Due Process, 55 B.C. L. Rev. 1367, 1416 (2014) ("States' interest in the anonymity of their execution teams is understandable, especially given that

[2] Specifically, because the American Medical Association, American Nurses' Association, American Society of Anesthesiologists, and National Commission on Correctional Health Care "all have ethics guidelines that oppose participation in lethal injections," Section 24-3-590's protection from revocation, suspension or denial of a license on the basis of participation in the execution of a sentence, supports the proposition that Section 24-3-580's "member of an execution team" phrase is not limited to prison personnel. Roko, Executioner Identities: Toward Recognizing a Right to Know who is Hiding Beneath the Hood, 75 Fordham L. Rev. 2791, 2799-2800 (2007).

members of the execution team or providing pharmacies can be subject to harassment."). This need for protection and confidentiality stems from the corresponding need to protect the identities of suppliers, as well as those who administer lethal injection drugs, in light of the negative consequences often associated with the recent actions of anti-death penalty advocates. See e.g., Gross, --- S.Ct. at ---, 2015 WL 2473454 (June 29, 2015) (detailing the negative economic consequences for pharmaceutical companies stemming from "anti-death penalty advocates" efforts' to prohibit state departments of corrections from procuring drugs utilized in lethal injection protocols); Berger, 55 B.C. L. Rev., at 1380 (explaining that Hospira's decision to exit the sodium thiopental market was based, at least in part, on liability concerns); Id. at 1416, n. 357 (noting that a Texas compounding pharmacy that provided execution drugs received hate mail, intimidation and harassment from anti-death penalty advocates after the pharmacy's role in the process became public); Roko, 75 Fordham L.Rev., at 2799-2800 (explaining that because a variety of medical groups and associations are opposed to capital punishment and have adopted ethical guidelines against it, members of such organizations who participate in executions are often subject to professional discipline). Indeed, even critics of LISL acknowledge that such laws are intended to grant broader protections than typical statutes protecting against the disclosure of an executioner's identity and therefore, unlike executioner identity statutes, extend "to all involved parties," especially those parties supplying lethal injection drugs to state authorities.[3] See Blythe, 65 Case W. L. Rev., at 1280 (explaining the legislative policy justifying LISL is based on the rationale that "confidentiality is imperative for the protection of all involved parties" and are intended to provide greater protections than traditional laws prohibiting disclosure of "the particulars of executions."); see also, Berger, 55 B.C. L. Rev., at 1416 (explaining the state interest in execution team anonymity, which extends to "pharmacists or providers who compound or supply drugs for the state" are based on concerns of harassment of such individuals). As a result, we believe that if one were to construe the phrase "member of an execution team" to exclude companies and individuals creating and supplying lethal injection drugs, doing so would result in the absurd situation where a state law designed to enable the State to confidentially secure lethal injection drugs would provide the

[3] We believe it is clear that Act 203 is properly classified as an LISL. As mentioned above in Section I, LISL "can be broken into three major parts" with the first portion prohibiting "disclosure of identifying information of all parties who participate in the process of manufacturing, distributing and administering lethal injection drugs;" the second part creating "a civil cause of action against anyone who violates [the] prohibition;" and the third part forbidding "licensing boards from taking disciplinary action against physicians who oversee the lethal injection process." Blythe, 65 Case W. L. Rev., at 1280. Not only does Act 203 mirror this structure, but it was also passed after the domestic sale of sodium thiopental was cut off by "anti-death penalty advocates" which suggests it was not designed to merely protect the identity of the executioner, but was instead drafted to protect each member of the execution team, including drug producers, from the negative consequences associated with selling or compounding a drug utilized for purposes of lethal injection. See e.g., Gross, --- S.Ct. ---, 2015 WL 2473454 (June 29, 2015) (explaining that in 2009, "anti-death penalty advocates" successfully persuaded "[t]he sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug [lethal injection] protocol, to cease production of the drug."). Further, and as mentioned above, Sections 24-3-580 and 24-3-590 have been referred to as an LISL. See Blythe, 65 Case W. L. Rev., at 1273, n. 22 (highlighting that nine states, including South Carolina, have laws making "confidential certain information concerning the process involved in creating, distributing, and administering . . . lethal injection drugs.").

companies and individuals doing business with the State no corresponding confidentiality and no means of remedying potential harms incurred as a result of their conducting such business. C.f. Trammell, 102 S.C. at ---, 86 S.E. at 1057 (concluding that the words "weekly" and "monthly" must be "taken as used to denote the extremes" as "[a]ny other construction would . . . lead to absurd consequences."); Op. S.C. Att'y Gen., 1975 WL 29638 (March 31, 1975) (finding that a statute designed to ensure confidentiality must be broadly construed so as to avoid the absurd result where a statute intended to provide for confidentiality is instead interpreted in favor of disclosure). Thus, because courts "must avoid construing [a] statute so as to lead to an absurd result," it follows that when liberally construing Section 24-3-580's "member of an execution team" language, we must conclude that such language extends to both individuals and companies involved in the preparation of chemical compounds intended for use by the Department of Corrections in carrying out an order of execution via lethal injection. Stone v. City of Spartanburg, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994). Accordingly, it is the opinion of this Office that Section 24-3-580's "member of an execution team" language must be broadly construed so as to protect the identities of individuals and companies involved in the process of preparing chemical compounds for purposes of carrying out an execution via lethal injection and to give such individuals and entities a means of remedying potential violations of Section 24-3-580's prohibitions by seeking relief in the form of a civil action.

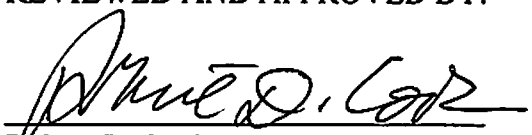
IV. Conclusion

In conclusion, we believe Section 24-3-580, like other so-called LISL, is a remedial measure intended to prevent the disclosure of the identity of current and former execution team members so as to protect them from the negative consequences stemming from their involvement in a state-sanctioned execution. As a result, the phrase "member of an execution team" must be broadly construed and, in light of the facts and circumstances surrounding the enactment of Section 24-3-580—namely the struggle to obtain lethal injection drugs—its' protections must be extended to the identities of individuals and companies involved in the process of preparing chemical compounds for use in an execution via lethal injection. To find otherwise would be inconsistent with the statute's legislative intent and would lead to an absurd result where the object and purpose of the legislation is sacrificed because of the mere form and phraseology used in its expression. Therefore, it is the opinion of this Office that Section 24-3-580 prohibits the disclosure of both the identity and identifying information of individuals and companies involved in the process of preparing chemical compounds for the purpose of carrying out an execution via lethal injection and permits such individuals and entities to seek remuneration should an individual violate Section 24-3-580's prohibitions.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:



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