NANCY SWEENEY
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BY Michelle Wray
DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RONALD ALLEN SMITH and WILLIAM GOLLEHON, Plaintiffs, v. STATE OF MONTANA, DEPARTMENT OF CORRECTIONS; DIRECTOR MIKE BATISTA; WARDEN LEROY KIRKEGARD; and JOHN DOES 1-20, Defendants.	Cause No. BDV-2008-303 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

INTRODUCTION

Before proceeding, it important to clarify the nature of this case. This Court has not been asked and will not make a determination as to whether lethal injection of the Plaintiffs constitutes cruel and unusual punishment. This case is not about the constitutionality or appropriateness of the death penalty in Montana. This case is not about whether the use of pentobarbital in a lethal injection setting is cruel and unusual or if pentobarbital in the doses contemplated by the State of Montana

would produce a painless death. Further, this case is not about the availability of pentobarbital or any other drug. This case is only about whether the drug selected by the Department of Corrections to effectuate the Plaintiffs' lethal injections, pentobarbital, meets the legislatively required classification of being an "ultra-fast acting barbiturate."

This Court rules that pentobarbital is not an ultra-fast-acting barbiturate. The State of Montana will either need to select a barbiturate that is ultra-fast acting to accomplish the execution of Plaintiffs or it will need to modify its statute as will be detailed below.

From the testimony and evidence presented, the Court enters the following:

FINDINGS OF FACT

Trial in this matter was held on September 2 and 3, 2015. Representing Plaintiffs were Ronald F. Waterman, James Park Taylor, and Gregory A. Jackson. Representing the State of Montana were C. Mark Fowler, Pamela P. Collins, Jonathan M. Krause, and Robert Stutz. The Court received numerous exhibits and heard from two witnesses, Dr. Mark Heath and Dr. R. Lee Evans.

Jurisdiction and venue are proper in this Court.

Plaintiff Ronald Allen Smith, an inmate at Montana State Prison, has been sentenced to death for the killing of two young men in 1982.

Plaintiff William J. Gollehon, an inmate at Montana State Prison, has been sentenced to death for the killing of another inmate at Montana State Prison in 1990.

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The Montana Supreme Court has upheld the death sentences of both Plaintiffs. *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (1996); *State v. Gollehon*, 262 Mont. 1, 864 P.2d 249 (1993).

Session law 1983 Montana Laws chapter 411 enacted lethal injection as an option for the execution of prisoners sentenced to death. That provision introduced the phrase "ultra-fast-acting barbiturate" into Montana Code Annotated § 46-19-103.

As of March 19, 1997, lethal injection became the sole method of execution of a sentence of death.

Montana Code Annotated § 46-19-103(3) provides: "[t]he punishment of death must be inflicted by administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent until a coroner or deputy coroner pronounces that the defendant is dead."

The current Execution Technical Manual (ETM) was adopted on January 16, 2013. (*See* Pl.'s Ex. 1.) The two-drug protocol is referenced on pages 41, and 50 through 53 of the current ETM. There it is indicated that sodium pentothal and pancuronium bromide will be used in the execution. At page 51, it is indicated that these drugs may be substituted by another drug based on availability. It is specifically provided that pentobarbital with a dosage of 5 gms may be substituted for sodium pentothal. Further, rocuronium bromide with a dosage of 1,000 mgs may be substituted for pancuronium bromide.

The State of Montana is the only state that specifies that the death penalty be accomplished by an "ultra-fast-acting barbiturate." The other states employing the death penalty either specify a particular drug to be used or merely state that execution is to take place by means of lethal injection.

The only issues remaining in this case are what the Montana legislature meant by using the words "ultra-fast-acting barbiturate" in Montana Code Annotated § 46-19-103, and whether pentobarbital is an ultra-fast-acting barbiturate within the meaning of Montana Code Annotated § 46-19-103.

Pentobarbital and thiopental are included in the class of drugs known as barbiturates.

At trial, the first witness was Dr. Mark Heath. His curriculum vitae was received as Plaintiff's Exhibit 8. Dr. Heath is a practicing anesthesiologist in New York at the Columbia Medical Center and also teaches medicine at the Columbia School of Medicine. Dr. Heath is a Board Certified Anesthesiologist and has written extensively on lethal injection. He has testified before various courts and legislatures, and has written articles and book chapters about lethal injection. Dr. Heath has also extensively studied various types of lethal injection, by reviewing witnesses descriptions, execution logs, publications, and electroencephalogram results of people who have been executed by means of lethal injection. All of Dr. Heath's opinions, which will be cited below, were given with a reasonable degree of medical certainty. The bottom line for Dr. Heath is that pentobarbital — the drug selected by the Montana Department of Corrections — is not an ultra-fast-acting barbiturate.

Barbiturates were first created in the 1930s and, as a class, share a certain common core ring of molecules. In general, barbiturates are weak acids that are absorbed and rapidly distributed to all tissues of the human body. Barbiturates are known by their lipid solubility. Barbiturates possessing more lipid solubility distribute more rapidly to the human brain. The basic core ring of barbiturate molecules has been modified over the years, and those modifications affect how certain barbiturates operate.

Experts speak of "vein-to-brain time," which is the amount of time it takes a barbiturate injected into the blood stream to transit to the human brain. In addition, there is a "blood-brain barrier." This is a grouping of cells and capillaries around the human brain that prevent toxins from entering the brain. Certain modifications to the basic barbiturate structure have allowed a rapid transfer through the blood-brain barrier. According to Dr. Heath, it is often important to have a very quick transition from consciousness to unconsciousness, quickly penetrating the blood-brain barrier, which allows physicians to take control of a patient's breathing to prevent negative consequences from occurring as a patient enters unconsciousness. According to Dr. Heath, this is the purpose of the development of ultra-fast-acting barbiturates.

Barbiturates are traditionally classified as long-acting (phenobarbital), medium-acting (such as pentobarbital), short-acting (secobarbital), and ultra-short-acting (thiopental). (*See* Test. Dr. Mark Heath; Pl.'s Ex. 4, Margaret Wood, Alistair J.J. Wood, DRUGS AND ANESTHESIA PHARMACOLOGY FOR ANESTHESIOLOGISTS (2d. ed.,Williams & Wilkins); *see also* Pl.'s Ex. 5, Ronald D. Miller, MILLER'S ANESTHESIA, 6th ed. (2005). According to Dr. Heath and MILLER'S ANESTHESIA, the ultra-short-acting drugs are thiopental, methohexital, and thiamylal. By using terms such as short-acting or ultra-short-acting, the classification system refers to the duration of action or how long the barbiturate exercises its control over the human body.

As noted by Dr. Heath, there is another classification of barbiturates which refers to the onset of action of the barbiturate or how soon the maximum effect is felt by the body. According to Dr. Heath, there is a correspondence between the two

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systems, and the terms ultra-fast and ultra-short refer to the same type of barbiturates, as do the terms fast and short, and as do the terms slow and long.

Putting this in a tabular form, we find the following:

1.	Ultrafast acting	Ultrashort acting	thiopental, thiamylal, methohexital
2.*	Fast acting	Short acting	secobarbital, pentobarbital
3.*	Intermediate acting	Intermediate acting	pentobarbital*
4.	Slow acting	Long acting	phenobarbital

(*Some systems combine #2 and #3 into one group of intermediate acting drugs) (Pl.'s Rebuttal Expert Disclosure, at 4 (June 25, 2013).) According to Dr. Heath, pentobarbital is either classified "fast," "short," or "intermediate."

Pentobarbital is not used as an anesthetic, according to Dr. Heath, because its effects last too long. Rather, pentobarbital is commonly used in pill form as a treatment for epilepsy and is also used to induce comas in already unconscious patients. Pentobarbital in the doses suggested in Montana's ETM would undoubtedly cause the death of the inmate.

Dr. Heath has used, in a clinical setting, both pentobarbital and thiopental. Dr. Heath has never heard, prior to this case, any reference to pentobarbital being classified as being ultra-fast acting. According to Dr. Heath, the operation of thiopental and pentobarbital is noticeably different. Dr. Heath testified that an administration of thiopental causes a "lights out" effect, where a patient is unable to complete the thought that was in their mind upon the administration of the drug. A patient receiving thiopental would take one or two breaths before the drug exerted its control over the patient. Heath also opined that an individual given pentobarbital would breathe longer, would have various body movements, and would slur words before the pentobarbital took effect. Heath testified that a patient given pentobarbital

would physically be able to appreciate the accrual of sleepiness or unconsciousness, while a patient given thiopental would not.

Of significant import to the Court is the manufacturer's insert provided for pentobarbital. (*See* Pl.'s Ex. 7, manufacturer's insert for Nembutal Sodium Solution (the manufacturer's name for pentobarbital).) At page one, the insert states "NEMBUTAL Sodium is a short-acting barbiturate." This comports with the classification stated by Dr. Heath.

Plaintiff's Exhibit 11 contains a compilation of a search engine results completed by Dr. Heath. His research shows that there were 28,600 results produced for a description of thiopental as an ultra-short-acting barbiturate. An additional 42 results were returned for the search phrase of thiopental being an ultra-fast-acting barbiturate. On the other hand, the search engine reported one finding for pentobarbital being an ultra-short-acting barbiturate, and a single finding of pentobarbital being an ultra-fast-acting barbiturate. (Pl.'s Ex. 11, at 3.)

The State produced the testimony of Dr. R. Lee Evans, a doctor of pharmacy and Dean of Pharmacy at Auburn University. In Dr. Evans' original declaration filed in March 2015 and received into evidence as Plaintiff's Exhibit 9, he is "not aware of the origin of the term "ultra-fast acting." (Pl.'s Ex. 9, at 6, ¶ 14.) According to Dr. Evans, pentobarbital could be considered short acting, and thiopental, ultra-short acting. (Id.) Dr. Evans opined that there is no meaningful difference between pentobarbital and thiopental in the time it takes to render a person comatose. (Id., at 7, ¶ 15.) However, Dr. Evans noted that onset of action for pentobarbital is under a minute, while for thiopental, the onset of action could be ten to forty seconds. (Id.)

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Until the trial of this action, Dr. Evans had not testified that pentobarbital was an ultra-fast-acting barbiturate. He did so testify at trial. However, the Court struck that conclusion because it did not comport with his prior discovery responses or declarations filed with the Court. (*See* Pl.'s Exs. 9, 10.) At the trial of this matter, Dr. Evans indicated that the onset of pentobarbital was under one minute. However, on December 10, 2012, Dr. Evans indicated "[t]hiopental is an onset of about a half to one minute, duration of a little less than 30 minutes. Pentobarbital is onset three to four minutes with a duration that is somewhat longer. That's the primary difference." (Pl.'s Ex. 14, *Pardo v. Palmer*, Case No. 3:12-cv-1328-J-32JBT (M.D. Fl. Dec. 10, 2012), Test. Roswell Lee Evans, Jr., at 68).) This testimony stands in stark contrast to what Dr. Evans stated at the trial this matter.

Dr. Evans pointed out that there is no question that pentobarbital is fast acting. For example, Plaintiff's Exhibit 7 — the package insert for pentobarbital — indicates that "the onset of action ranges from almost immediate. . . ." (Pl.'s Ex. 7, at 2.) See also Defendant's Exhibit L, a TOXNET reference which indicates that the onset of thiopental and pentobarbital is "almost immediate. (Def.'s Ex. L, at 16.) TOXNET is a collection of databases operated by the National Library of Medicine. See also Defendant's Exhibit N, a Drugs.com reference which indicates that the onset of pentobarbital is immediate. (Def.'s Ex. N, at 1.) Thus, there is no question that pentobarbital is fast acting. The question remains as to whether it is ultra-fast acting.

Dr. Evans did cite to references that indicate that if the onset of action of a drug is less than a minute, it can be considered ultra-fast acting. (*See*, e.g., Pl.'s Ex. Q, TOXNET reference, at 12; Pl.'s Ex. R, Micromedic reference, at 4 ("ultra-fast acting has an onset of one minute or less.).) The Court notes that at page 1 of Exhibit R, pentobarbital is listed as being "short acting," not ultra-short acting.

These references to pentobarbital being ultra-fast acting are consistent with Dr. Heath's finding some sources refer to pentobarbital as being ultra-fast acting. However, that must be compared with the greater weight of authority that indicates that pentobarbital is not in the class of drugs considered to be ultra-fast acting.

Dr. Evans did indicate that, in his opinion, pentobarbital and thiopental are almost identical. Both, in his current opinion, reach maximum effect in less than one minute's time. However, Dr. Evans did acknowledge that thiopental is a little quicker to get to the brain because pentobarbital is not as lipid soluble.

In making its decision, this Court has had to weigh the evidence presented by Dr. Evans versus Dr. Heath. Supporting Dr. Heath's testimony are standard pharmacology for anaesthesiologists text books (Pl.'s Exs. 4, 5) and Dr. Heath's own consistent testimony. Also supporting Dr. Heath's position is the significant research that classifies thiopental as being ultra-short acting (ultra-fast acting) and not so classifying pentobarbital, except for a few scattered references. (*See* Pl.'s Ex. 11.) Also of utmost import is the manufacturer's insert for pentobarbital (Pl.'s Ex. 7), which classifies pentobarbital as a short-acting barbiturate. Also crucial in this weighing the Court has undertaken is the fact that in the *Pardo v. Palmer* case, in testimony given not three years ago, Dr. Evans testified that pentobarbital's onset of action is three to four minutes as opposed to the less than one minute referred to in his testimony in this case. This is not to in any way insinuate that Dr. Evans is not a credible witness. However, it is a factor when weighing the evidence which shows by a relatively overwhelming nature that, while pentobarbital may operate in a fast nature, it is not ultra-fast as is required to comply with Montana's execution protocol. Thus, through this weighing process, this Court concludes that pentobarbital is not an ultra-fast-acting barbiturate.

From the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

1. Jurisdiction and venue are proper in this Court.

2. By using the limiting term "ultra" in the phrase "ultra-fast-acting barbiturate" in Montana Code Annotated § 46-19-103(3), the legislature limited the State of Montana to using only drugs in the fastest category of barbiturates, namely thiopental, methohexital, and thiamylal. Under the express terms of the statute, the State of Montana is not allowed to use the "fastest acting barbiturate available," or a "relatively fast-acting barbiturate," only an "ultra-fast-acting barbiturate," meaning drugs from the fastest class of barbiturates.

3. Had the legislature intended to give the State of Montana latitude in what drugs to use, it could have used much more general language in the statute authorizing execution, as many other states have now done. Pentobarbital cannot properly be classified as "ultra-fast-acting," since there is another class of drugs that is faster. Whether those drugs are currently available is not an issue the Court can resolve for the State. The State's remedy is to ask the Legislature to modify the statute to allow the use of pentobarbital or other slower acting drugs.

4. The State of Montana has modified the execution protocol several times during this litigation and has had many opportunities to return to the legislature to modify the language which limits the State of Montana to "ultra-fast-acting barbiturates," but has chosen not to.

5. Courts may not legislate through judicial interpretation of statutes. *Albinger v. Harris*, 2002 MT 118, ¶ 38, 310 Mont. 274, 8 P.3d 711 (It is not the province of this court or any other court to assume to legislate by judicial interpretation, and to create in favor of any individual or any class of people an

exception to the limitation set by the legislature.). A court cannot second-guess and substitute its judgment for that of the legislature or insert what has been omitted. *State Bar of Mont. v. Krivec*, 193 Mont. 477, 481, 632 P.2d 707, 710 (1981). Indeed, Montana law regarding statutory interpretation begins with Montana Code Annotated § 1-2-101, which states: [i]n 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 Montana Code Annotated § 46-19-103, the legislature mandates use of an "ultra-fast-acting barbiturate," and the Department of Corrections plan to use a drug which is, without dispute, not classified as an ultra-fast-acting barbiturate. Given these facts, the Court must find an impermissible inconsistency between the legislative mandate and the Department of Corrections' 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*, 840 F. Supp. 2d 1044 (S.D. Ohio 2012).

From the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER

The State of Montana is hereby ENJOINED from using the drug pentobarbital in its lethal injection protocol unless and until the statute authorizing lethal injection is modified in conformance with this decision.

DATED this 6 day of October 2015.

JEFFREY M. SHERLOCK
District Court Judge

pcs: Ronald F. Waterman
Jim Taylor
Gregory A. Jackson
Michael Donahoe
Timothy C. Fox/C. Mark Fowler/Pamela P. Collins/Jonathan M. Krauss, Robert Stutz

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