IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 06-3651

MICHAEL ANTHONY TAYLOR,
***Appellee*,**

v.

LARRY CRAWFORD, et al.,
Appellants.

On Appeal from the United States District Court
for the Western District of Missouri, Central Division
The Honorable Fernando J. Gaitan, District Judge

BRIEF OF APPELLANTS

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL PRITCHETT
Assistant Attorney General
Missouri Bar No. 33848

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P.O. Box 899
Jefferson City, MO 65102
(573) 75l-332l
ATTORNEYS FOR APPELLANTS

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee Michael Anthony Taylor, a murderer sentenced to death, challenges Missouri's three-chemical lethal injection procedure as violative of the Eighth Amendment's ban of cruel and unusual punishments. The crux of Taylor's argument is that the first chemical administered, thiopental, may not render him unconscious before and during the administration of the second two chemicals, pancuronium bromide and potassium chloride. Taylor asserts that, after the pancuronium bromide disables him from moving (its intended purpose), the administration of potassium chloride (intended to stop his heart) may cause him pain if the thiopental has not had its intended anesthetic effect.

Under Missouri's three-chemical procedure, however, the thiopental is administered in an amount large enough that even Taylor's expert witness agreed a condemned prisoner would be quickly rendered so deeply unconscious that he would not be aware of any pain from the succeeding chemicals and would remain at that level of unconsciousness for a length of time that is longer than required for the completion of the execution.

The defendant-appellee prison officials request twenty minutes for oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ISSUES PRESENTED FOR REVIEW

I.

Whether the district court erred in determining that Missouri's method of execution violates the cruel and unusual punishment clause of the Eighth Amendment when (1) lethal injection does not involve the unnecessary and wanton infliction of pain and (2) the state does not intend lethal injection to cause unnecessary and wanton infliction of pain.

Gregg v. Georgia, 428 U.S. 153 (1976);

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947);

Wilkerson v. Utah, 99 U.S. 130 (1878);

In re Kemmler, 136 U.S. 436 (1890)**.**

II.

Whether the district court erred by concluding that the Missouri lethal injection protocol creates an unnecessary risk of unconstitutional pain or suffering.

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005);

Evans v. Saar, 412 F. Supp. 2d 519 (D. Md. 2006);

Abdur'rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005).

III.

Whether the district court erred in ruling that the Eighth Amendment constitutionally requires that a doctor prepare and administer, or oversee the preparation and administration, of the chemicals used at executions and that a doctor monitor the anesthetic depth of the condemned prisoner when the anesthetic used, thiopental, is simple to prepare and can be appropriately administered by a nurse or emergency medical technician, and the five grams of thiopental administered will render the condemned deeply unconscious and unaware of the administration of the subsequent chemicals and their effects.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 91 S. Ct. 1267 (1971);

Evans v. Saar, 412 F. Supp. 2d 519 (D. Md. 2006);

Abdur'rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005);

Campbell v. Wood, 18 F 3d 662 (9th Cir. 1994).

IV.

Whether the district court erred in mandating that a doctor assist at executions when compliance with such a requirement could be impossible to fulfill, and thereby effectively bar implementation of the death penalty in Missouri, in that doctor participation in executions may be inconsistent with some interpretations of a doctor's ethical duties.

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005);

American Medical Association's Code of Ethics, E-2.06

STATEMENT OF THE CASE

Procedural History of Criminal Case. Taylor was charged by indictment in the Circuit Court of Jackson County, State of Missouri, with one count of murder in the first degree, in violation of §565.020, RSMo. 1994; one count of the felony of armed criminal action, in violation of §571.015, RSMo. 1994; one count of the Class B felony of kidnaping, in violation of §565.110, RSMo. 1994; and one count of the felony of forcible rape, in violation of §566.030, RSMo. Cum. Supp. 1993.

On February 8, 1991, Taylor appeared with his attorneys before the Honorable Alvin C. Randall and expressed his desire to enter a plea of guilty to these charges in open court and on the record pursuant to Missouri Supreme Court Rule 27.01(b). After a three day punishment phase hearing, Judge Randall sentenced Taylor to death. Taylor also received sentences of life imprisonment for rape, fifteen years imprisonment for kidnaping, and ten years imprisonment for armed criminal action, all terms to run consecutively.

Taylor brought a post-conviction action pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and sentence. After an extensive evidentiary hearing the circuit court denied Taylor's post-conviction motion.

Taylor filed an appeal challenging the guilty plea, the imposition of the death penalty and the denial of the Rule 24.035 motion for post-conviction relief, and

argued to the Missouri Supreme Court some fifteen claims of error. The Missouri Supreme Court issued the following order on June 29, 1993:

ORDER

Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

Taylor's second punishment phase hearing before Judge Michael Coburn began on May 2, 1994. Initially, Judge Coburn heard evidence for three days. The evidence was held open, and Taylor was allowed to present the testimony of additional witnesses on May 12, 1994 and June 6, 1994. The state adduced evidence concerning the abduction and murder of Ann Harrison, as well as evidence of Taylor's escape from custody. The defense called ten witnesses in purported mitigation of punishment.

On June 17, 1994, over three years after he had first received the penalty of death, Taylor appeared before Judge Coburn for formal sentencing. In oral and written findings, Judge Coburn found six statutory aggravating circumstances beyond a reasonable doubt, as well as three non-statutory aggravating circumstances. Judge Coburn found the existence of one mitigating circumstance, rejecting several others offered by Taylor, and concluded that the mitigating circumstance did not outweigh the aggravating circumstances of this case, making the sentence of death appropriate. Taylor also received fifty years for armed criminal action, fifteen years for kidnaping and life imprisonment for rape, all terms to run consecutively. Taylor filed an appeal.

He also sought post-conviction relief under Missouri Supreme Court Rule 24.035. This time, again on consolidated appeal, the Missouri Supreme Court affirmed. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996). The United States Supreme Court denied review. *Taylor v. Missouri*, 519 U.S. 1152 (1997).

Taylor initiated a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. The district court denied the petition, and on May 7, 2003, this Court affirmed. *Taylor v. Bowersox*, 329 F.3d 963 (8th Cir. 2003), *cert. denied*, 541 U.S. 947 (2004).

Facts of Criminal Case. The Supreme Court of Missouri described the circumstances surrounding Taylor's offenses in the direct appeal opinion.

> According to Taylor's testimony at his guilty plea, Taylor's videotaped statement and other evidence adduced in the sentencing hearing, Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire. Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor then had forcible intercourse with her. They untied her, and allowed her to dress. Ann tried to persuade them

to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte Carlo. Ann resisted getting into the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who would drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym clothes, books, and flute lying on the driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds were inflicted and could have remained

> conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

State v. Taylor, 929 S.W.2d 209, 214 (Mo. banc 1996) (footnote omitted).

Procedural History of this Case. Plaintiff-appellee Michael Anthony Taylor initiated this litigation on June 3, 2005, by filing a complaint requesting preliminary injunctive relief, declaratory relief, and a permanent injunction against his execution by means of Missouri's lethal injection procedure. App. 1.[7] He filed an amended complaint on September 12, 2005. App. 35-101. In his complaints, Taylor challenged the constitutionality of Missouri's execution process.

On January 3, 2006, the Missouri Supreme Court set February 1, 2006, as Taylor's execution date. App. 102. On January 19, 2006, the district court granted Taylor's application for an order prohibiting his execution. App. 124-25. The prison official defendants appealed that order. App. 126-27. On January 29, 2006, this Court vacated the stay in part and remanded the cause to the district court for further proceedings. App. 129-30.

---

[7]References to the Addendum are denoted "Add. ___." References to the Appendix are denoted "App. ___." References to the transcripts of the several days of trial are denoted "Jan. 30 Tr. ___," "Jan. 31 Tr. ___," or "June Tr. ___." (These various transcript references are used because the transcripts of the proceedings on January 30 and 31, 2006, are separately paginated from one another and also separately paginated from the transcript of the proceedings on June 12 and 13, 2006.

On January 30-31, 2006, the district court held an evidentiary hearing. App. 8. The court found Taylor's claims meritless, Add. 1-9; App. 131-39, and entered judgment in favor of the prison officials on January 31, 2006. App. 140. Taylor filed a Notice of Appeal on the same day. App. 141-42. On February 1, 2006, a panel of this Court denied Taylor's request for stay of execution, but the Court en banc issued a stay. App. 145-46. The United States Supreme Court declined to vacate that stay. App. 147.

On April 27, 2006, the court remanded the cause to the district court for further proceedings. *Taylor v. Crawford*, 445 F.3d 1045 (8th Cir. 2006); App. 148-54. After extensive discovery, the district court held a supplemental hearing on June 12-13, 2006. App. 19. The district court issued its order amending its January 31, 2006, order on June 26, 2006. App. 187-202; Add. 10-25. It required the defendant prison officials to submit a "written protocol for the implementation of lethal injections" by July 15, 2006. App. 199-201; Add. 22-24. The prison officials submitted a written protocol on July 14, 2006, App. 203-26; Add. 32-35, and then appealed the June 26 order as a precaution (in case it would be interpreted as an order final for purposes of appeal). App.227-28. The district court concluded it no longer had jurisdiction. App. 354-55. This Court remanded the case "to the district court for consideration of [the] newly propounded protocol and all other issues" on August 9, 2006. *Taylor v. Crawford*, 457 F.3d 902 (8th Cir. 2006); App. 356-59.

On September 12, 2006, the district court found the protocol insufficient and directed the prison official defendants to submit a revised protocol. App. 372-75; Add. 26-29. In response, the prison officials maintained that the protocol did comply with the Eighth Amendment and asked the court to reconsider its conclusion to the contrary. App. 377-79. On October 16, 2006, the district court declined to reconsider its order and entered judgment against the prison officials. App. 385-85; Add. 30-31. The prison officials appealed. App. 386-88.

Statement of Facts Regarding Lethal Injection Procedure. Missouri's lethal injection procedure, as established at the time Taylor filed this suit, was described in detail in interrogatory responses from defendant Crawford admitted into evidence at the hearing in this case. After the condemned prisoner is brought into the execution room, a doctor sets an IV catheter in the condemned prisoner's femoral vein. App. 813. Once the catheter is in place, the doctor injects flush solution through the tube into the vein to make sure the line flows freely. App. 813.

After the IV is in place and its flow checked, the Director of the Department of Corrections directs that the execution begin. App. 820. The Director does not give this order until he receives word that the governor has declined to exercise clemency and that the courts have declined to order a stay. App. 820.

When the order to proceed is given, prison officers inject five grams of thiopental prepared in a 60cc solution into the IV tubing leading to the femoral catheter set by the doctor. App. 820. Then 30cc of flush is injected to clear the line. App. 820. After the flush, 60cc of pancuronium bromide is injected. App. 820. Next, another 30cc of flush is injected to clear the line. App. 820. After this flush, 240 milliequivalents of potassium chloride is injected. App. 821. Finally, 60cc of flush is injected. App. 821. The entire process of injection of the chemicals and flush takes approximately 2 to 4 minutes. App. 821.

Once all the chemicals are administered the doctor monitors the electrocardiogram machine and determines death when all electrical activity of the heart ends. App. 814, 821. The time from injection of the first chemical to death, as shown by complete cessation of electrical activity in the heart, is from two to five minutes. Jan. 31 Tr. 72-73; App. 804.

The thiopental renders the condemned prisoner sufficiently unconscious to be unable to experience pain. App. 391 (¶ 5). Defendants' expert, Dr. Mark Dershwitz, testified that by the time five grams of this chemical are injected, over 99.99999999 % of the population would be unconscious. App. 392 (¶ 8). He also testified that there is only an approximately 0.000000006 % probability that a condemned prisoner given this amount would be conscious and able to experience pain after five minutes. App. 393 (¶ 9). Dr. Dershwitz calculated the same

probability of consciousness after ten minutes at approximately 0.0000015 %, after thirty minutes at 0.000021 %, and after sixty minutes at 0.00047 %. App. 393 (¶¶ 10-12). According to Dr. Dershwitz, most people receiving five grams of thiopental would be unconscious in excess of seven hours, assuming they were able to continue breathing. App. 393 (¶ 13).

The injection of pancuronium bromide will cause complete paralysis within a few minutes. Jan. 30 Tr. 27. The pancuronium bromide will prevent seizure activity during an execution and thereby result in a more peaceful and dignified death. App. 797. Administration of potassium chloride in the amount used in Missouri executions will quickly stop the heart. Jan. 30 Tr. 29.

In recent executions, the assisting doctor had difficulty mixing a 60cc solution containing five grams of thiopental because of a change of packaging. App. 643-47, 672-75. As a result, he prepared solutions that contained 2.5 grams of thiopental. App. 647-53, 664-65, 675. The doctor, based on his medical knowledge and experience, determined the lesser amount used to be more than sufficient to render the condemned prisoner deeply unconscious and unable to experience any pain. App. 627-28, 629, 676, 687. Plaintiff's expert, Dr. Thomas Henthorn, testified that as little as 1.67 grams of thiopental will result in a deep state of unconsciousness in almost everyone. June Tr. 233, 241-42. Dr. Henthorn also testified that

administration of the much larger than clinical amounts he was discussing will remain effective for 45 minutes to hours. June Tr. 245-46.

The doctor assisting at executions reduced the standard five gram amount of thiopental at his own discretion, believing that he had authority to do so based on his long experience assisting at executions. App. 626; June Tr. 341-42, 367-68. When the Director of the Department of Corrections learned that the doctor had not used the prescribed 2.5 grams, he was extremely concerned that the doctor had not reported the change in the amount of thiopental used, but he also was of the understanding that 2.5 grams was still six times the amount normally given for surgery. June Tr. 366-69. Because of the modification in the amount of thiopental used, which had occurred without his knowledge, the Director determined to prepare a directive to make the approved protocol explicit and to insure that changes in the amounts of chemicals used would occur only with his approval. June Tr. 369-74. The planned directive also included an auditing process. June Tr. 373-74. Once the directive was complete and before any further executions, the Director planned to meet with his staff, including the doctor, to explain it. June Tr. 374. Under the Director's plan, he would emphasize that changes in the amounts of chemicals used required his pre-approval. June Tr. 371-74.

After the hearing in this case, and the district court's direction to submit a protocol to it, the prison official defendants prepared a written protocol for the court's

review. App. 215-18; Add. 32-35. In summary, the protocol requires a physician, nurse or pharmacist to prepare the chemicals used during the lethal injection. App. 215-16; Add. 32-33 (§§A.2 & B). A physician, nurse, or EMT inserts the intravenous lines, monitors the condemned and supervises the injection of lethal chemicals by non-medical members of the execution team. App. 215-17; Add. 32-34 (§§A.3, C, D, & E.3 to E.4). The protocol requires administration of five grams of thiopental in 200cc of solution, a 30cc saline flush, 60 mg of pancuronium bromide in 60cc solution, a 30cc flush, 240 milliequivalent of potassium chloride followed by a 60cc flush. App. 215; Add. 32 (§B.1 to B.7).

Following administration of the thiopental, medical personnel examine the condemned to confirm that he is unconscious. App. 217; Add. 34 (§E.3). In the unlikely event the condemned is still conscious following the first injection of thiopental, then another five gram injection would occur. App. 217; Add. 34 (§E.4). The condemned would then be examined again for consciousness. App. 217; Add. 34 (§E.3 & 5). Once the condemned is unconscious and three minutes have lapsed from the effective injection of thiopental, App. 217; Add. 34 (§E.5), then the remaining chemicals are injected. App. 217; Add. 34 (§E.5 to E.9). If the condemned's heart does not cease activity within five minutes, then additional potassium chloride is injected to cause death. App. 217; Add. 34 (§E.10). When electrical activity of the heart ceases, then medical personnel pronounce death. App.

217; Add. 34 (§E.11). Finally, there are procedures to document the chemicals used during the execution process. App. 218; Add. 35 (§F).

SUMMARY OF THE ARGUMENT

Under United States Supreme Court precedent, a punishment is cruel and unusual, and thereby in violation of the Eighth Amendment, only if that punishment involves the unnecessary and wanton infliction of pain. There is no foundation in the text of the Eighth Amendment to reset the standard to prohibit punishments that create only *an unreasonable risk* of unnecessary and wanton infliction of pain. A "risk" standard is also unworkable in that all human activity entails risk. Such a standard could also tempt courts to become involved in decisions properly vested in the executive.

Some level of scienter is also required before a punishment may be found to violate the Eighth Amendment. Be it deliberate indifference, malicious and sadistic, or some other mental state, there must be some finding of intent to inflict cruel and unusual punishment before the Eighth Amendment applies. Missouri officials whose duty is to carry out executions are quite concerned that they carry out this duty as humanely as possible.

Regardless of whether the Supreme Court's standard or the "risk" standard applies, Missouri's lethal injection procedure is consistent with the Eighth Amendment. The initial injection of five grams of thiopental, many times the amount used during surgery, is more than sufficient to render the condemned prisoner deeply

unconscious and unable to experience any pain from the administration of the next two chemicals. Missouri's procedure is also expressly formulated, provides reasonable guidance as to its implementation, and is subject to appropriate oversight.

Although the district court firmly believes that the assistance of a doctor is necessary at an execution by lethal injection, the presence of a doctor is not mandated by the Eighth Amendment. Missouri's lethal injection procedure contains many safeguards that provide assurance that condemned prisoners will not experience unnecessary and wanton pain, or an unreasonable risk of such pain, regardless of whether a doctor takes part.

Moreover, it is difficult, if not impossible, to find a doctor to participate at an execution due largely to personal ethical concerns or concerns that licensing authorities will deem such participation a violation of professional ethical standards. Because it may be impossible to find a doctor to take part in one or more executions, a requirement of doctor participation could effectively prevent implementation of the death penalty.

STANDARD OF REVIEW

On review of a bench trial, as occurred here, the appellate court reviews the trial court's findings of fact for clear error and its conclusions of law *de novo*. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 710-11 (8th Cir. 2003).

ARGUMENT

I.

The district court erred in determining that Missouri's method of execution violates the cruel and unusual punishment clause of the Eighth Amendment because (1) lethal injection does not involve the unnecessary and wanton infliction of pain and (2) the state does not intend lethal injection to cause unnecessary and wanton infliction of pain.

In its October 16, 2006, order and judgment finding Missouri's lethal injection protocol unconstitutional, the district court applied an Eighth Amendment legal standard unsupported by Supreme Court precedent. The Supreme Court has concluded that the Eighth Amendment prohibits the states from purposefully inflicting unnecessary and wanton pain. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *Gregg v. Georgia*, 428 U.S. 153 (1976). In stark contrast to this settled law, the district court failed to find two elements of an Eighth Amendment claim: (1) unnecessary and wanton infliction of pain that (2) was purposefully inflicted. The district court only found that the Missouri protocol "subjects inmates to unreasonable *risk* of cruel and unusual punishment." App. 384; Add. 31 (emphasis added)). That "risk" standard has not been adopted by the United States Supreme Court as its interpretation of the Eighth Amendment. And there was no finding that

the prison official defendants acted purposefully or with any other mental state. When the proper Supreme Court's Eighth Amendment standard is applied to the facts adduced before the district court, it becomes readily apparent that prison officials were entitled to judgment.

Unnecessary and Wanton Infliction of Pain

The Supreme Court provided its guidance on the lawfulness of a method of execution under the Eighth Amendment in *Gregg v. Georgia*, 428 U.S. 153 (1976). After reviewing the history of the Eighth Amendment to the constitution, *id*. at 169-70, and its previous cases, *id*. at 170-71, the Supreme Court stated that "the punishment must not involve the unnecessary and wanton infliction of pain." *Id*. at 173. Conspicuously missing from this statement of the law is the word "risk," the lynchpin of the district court's judgment.

Nor does one find the word "risk" in the earlier decisions by the Supreme Court. The Supreme Court has addressed a constitutional challenge to a method of execution at least three times and in none of those decisions was "risk" a consideration. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), the court discussed whether Utah could execute by shooting without violating the Eighth Amendment. The court made clear it viewed the Eighth Amendment as prohibiting "punishments of torture," such as ones that involve "unnecessary cruelty." *Id*. at 136. The meaning of these

phrases is supplied by the preceding paragraphs in *Wilkerson* where there was discussion about when "terror, pain or disgrace [was] sometimes superadded" to sentences of capital punishment. *Id.* at 135. Examples given were "where the prisoner was drawn or dragged to the place of execution" for the crime of treason or where the prisoner "was embowelled alive, beheaded and quartered" as punishment for the crime of high-treason. *Id.* The court also mentioned public dissection for the offense of murder or the prisoner being burned alive for the offense of treason committed by a woman. *Id.* As *Wilkerson* makes clear, the method of execution, shooting, did not violate the cruel and unusual punishment clause, *id.* at 136, because it was not a punishment of "unnecessary cruelty." In contrast to the district court, the *Wilkerson* decision did not incorporate "risk" of cruel and unusual punishment as its Eighth Amendment analysis even though there is a "risk" of the volley's failure to kill. *See* http://historytogo. utah.gov/salt_lake_tribune/in_another_time/012896.html (last visited 11-27-06) (reviewing Utah's "botched execution" by firing squad).

In a second decision about a method of execution, the Supreme Court upheld New York's use of electrocution as a means of execution. *In re Kemmler*, 136 U.S. 436 (1890). In its analysis, the Court described the Eighth Amendment as prohibiting a state from having a punishment for an offense that was as "manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel or the like . . . ." *Id*. at 446. Speaking more generally, the court stated:

> Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, - - something more than the mere extinguishment of life.

Id. at 447.

Similarly, when the Supreme Court revisited the electric chair as a method of execution, the analysis of the Supreme Court did not change. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). It relied heavily on *In re Kemmler*, 136 U.S. at 436, and found use of the Louisiana electric chair to be constitutional. 329 U.S. at 464. The court examined the Louisiana fact pattern to determine if torture were involved. 329 U.S. at 463-64. Because there was no torture, Louisiana's use of the electric chair was constitutional. *Id.* at 464. The *Reseweber* decision did not incorporate "risk" of cruel and unusual punishment as its Eighth Amendment analysis even though there was a "risk" of the chair's failure to perform. *See generally* http://capitaldefenseweekly.com/chair.htm (last visited 11/27/06), at pages 2 & n.36-37, 12-13).

As this Supreme Court precedent makes clear, the issue before the district court was whether lethal injection as a means of execution constitutes torture such as burning at the stake, crucifixion, quartering and the like. And it is not. Lethal injection is not used as a means of execution that tortures the offender. The district

court did *not* conclude that Missouri's lethal injection was torture or involved the unnecessary and wanton infliction of pain.

The district court could not find lethal injection was torture; instead, it held that lethal injection created an "unreasonable risk of cruel and unusual punishment." App. 384; Add. 31. The district court did not cite legal authority for this legal proposition, risk, in its October 16 order. App. 384; Add.31. In a previous order, the district court cited another district court's decision, *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1039 (N.D. Cal. 2006) (subsequent history omitted). App. 196-97; Add. 19-20. And instead of citing precedent from the United States Supreme Court, the district court in *Morales* quoted a previous decision from the Ninth Circuit that has the phrase "unnecessary risk of unconstitutional pain." *Id.* (quoting *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004)). When the Court reads *Cooper*, however, the Ninth Circuit did not cite precedent from the Supreme Court or, for that matter, from any other court to support its "unnecessary risk" standard.

But an examination of the *Cooper* decision reveals the source of its "risk" standard. In *Cooper*, the offender was seeking a temporary restraining order and a preliminary injunction. 379 F.3d at 1030. Cooper's goal in the litigation was to obtain a stay of execution. *Id.* The question before the district court and then the Ninth Circuit was whether there was a risk of unconstitutional pain and suffering that would justify a stay of execution and a preliminary injunction. *Id.* at 1030, 1032.

This court uses similar risk analysis when it reviews a preliminary injunction situation. See *e.g.*, *Dataphase Systems v. C L Systems*, 640 F.2d 109, 113 (8th Cir. 1981) ("threat of irreparable harm to the movant").

And while that is appropriate for appellate review of a preliminary injunction, the district court here was not issuing a preliminary injunction in its eventual October 16, 2006 order and judgment. App. 383-85; Add. 30-31 Instead, the district court conflated the preliminary injunction standard with the Eighth Amendment standard to create a novel standard, a standard that inquired into the unreasonable "risk" of unconstitutional pain and suffering. App. 187-88; Add. 10-11.

This Court should reject a "risk" standard of Eighth Amendment analysis for a multitude of reasons. First, the "risk" standard has no foundation in the text of the Eighth Amendment. The Eighth Amendment prohibits "cruel and unusual punishments." It does not refer to either a risk of excessive bail nor the risk of an excessive fine nor the risk of cruel and unusual punishment.

Second, a "risk" standard is unworkable. All human activity entails risk. *See* http://www.time.com/time/health/article/0,8599,1564144,00.html?cnn=yes ("How We Confuse Real Risks With Exaggerated Ones") (emotions exaggerating risk analysis) (last visited 11/29/06). And with the introduction of the "risk" premise comes the inevitable claims that all bail and fines carry some risk of being excessive and that all forms of punishment, including incarceration, carry some risk of being

cruel and unusual. It is safe to say that going to prison is fraught with risks. Of course, such an outcome is unworkable. An example illustrates: in the complaint's prayer for relief, Taylor concedes that his execution by a single barbiturate (pentobarbitol) would satisfy him. App. 22 (¶ 54). But, in the *Morales* litigation, Taylor's expert, Dr. Heath, contends that administration of the single chemical is "not devoid of risks." http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales%20Dist%20Ct/November%20filing/Heath%20Post-Trial%20Decl.pdf (last visited 11/29/06) (Paragraph 59).[8] It seems that every human endeavor has risks.

The Supreme Court precedents have been recognized by other courts. In *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994), the court stated: "The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 464. And the dissent in *Campbell* was not to the contrary. It viewed death by

[8]The risk standard does not become more workable by adding an adjective to describe risk, *e.g.*, unreasonable or unnecessary. It is the word "risk," with or without an adjective, that gives rise to uncertainty, with its following litigation that makes that standard an unworkable constitutional standard. And the adjectives are uncertain as well. Do odds of 1 in 10 of an adverse event render a punishment an unreasonable risk or an unnecessary risk? 1 in 100? There was no quantification of risk by the district court, perhaps because there was no testimony about quantification.

hanging as comparable to the "rack and screw" that would violate the Eighth Amendment, as discussed by the Supreme Court in *Wilkerson* and *Kemmler*.

Similarly, the Oklahoma Court of Criminal Appeals and the Connecticut Supreme Court have noted that an execution process has the possibility of human error, but the risk of accident need not be eliminated in order for the method of execution to survive constitutional challenge. *Malicoat v. State*, 137 P.3d 1234, 1238 (Okla. Crim. App. 2006), *citing State v. Webb*, 750 A.2d 448, 456-57 (Conn. 2000).

Third, use of risk as the constitutional standard empowers the judiciary to assume the executive role of executioner in a Camelot-like quest to lower risks. That is precisely what the district court did here with regard to personnel qualifications. In the June order, the district court ordered the prison officials to use a board certified anesthesiologist, App. 200; Add. 23, even though none is available. When prison officials pointed this out, App. 206-07, the district court indicated it would be satisfied with "a physician with training in the application and administration of anesthesia," App. 373; Add. 27, but again without any showing of availability. The same can be said of the monitoring machine. App. 373; Add. 27.

A method of execution should pass or not pass constitutional scrutiny based on its own characteristics, not on the potential for "risk."

Mental State

Not only does the district court fail to find the "unnecessary and wanton infliction of pain," but also there is no finding of scienter by the prison officials. That omission is understandable given the testimony by the prison officials of the desire to have an effective, humane and speedy execution. June Tr. 367, 392-93. Defendant Crawford testified to this effect several times during his testimony at the hearing. June Tr. 368-69, 372-73, 376-79, 382-83). "So we're just going to make this process better and there will be a directive forthcoming on that." June Tr. 369. "I will say I have faith that we have done constitutional and humane executions, the ones that I have had experience with." June Tr. 378.

A finding of scienter is necessary before lethal injection as a means of execution is declared unconstitutional. The *Resweber* decision concluded that Louisiana did not have the "purpose" of adding an element of cruelty to the execution. 329 U.S. at 464. And in Missouri, there is no such purpose. In fact, Missouri's purpose is precisely the opposite. Not long ago, the federal courts were encouraging the states to use lethal injection as their means of execution. *See Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (dissent of Blackmun, J.) (describing peacefulness of lethal injection); *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing the writ of certiorari as improvidently granted because Florida would carry out

execution by lethal injection instead of electrocution); *Gomez v. United States District Court*, 503 U.S. 653, 656 (1992) (Stevens, J., dissenting) (describing alternative to gas chamber (lethal injection) as a "more humane and less violent method of execution"). Following the suggestions of these courts and the actions of other state legislatures, the Missouri legislature adopted lethal injection as the means of execution. §545.720, RSMo 2000. The motives of the state in adopting lethal injection were proper, the antithesis of the mental state necessary to show an Eighth Amendment violation.

Similarly, in the context of operating a correctional facility, Eighth Amendment review asks whether prison officials display "deliberate indifference" to the inmate's health and safety. *See Hope v. Pelzer*, 536 U.S. 730 (2002). The deliberate indifference standard subjects prison officials to liability only when they are subjectively aware of a substantial risk of serious harm to the inmate, and they failed to take reasonable measures to abate it. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991). In the prison context, only deliberate indifference to serious medical needs of prisoners constitutes a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). So if capital punishment were viewed as a "medical procedure" rather than a punishment, Taylor would have to show deliberate indifference, which he did not do.

Or perhaps lethal injection is better understood as an "excessive force" Eighth Amendment issue where liability of prison officials requires that they use force "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Cummings v. Malone*, 995 F.2d 817, 822 (8th Cir. 1993).

In contrast to these Supreme Court precedents is the district court decision. The district court made no finding of "purpose," "deliberate indifference," "maliciously or sadistically," or of any other mental state by the prison officials in any of its rulings. Nor was there a basis for such a finding. The record demonstrates that Missouri prison officials were and are conscientious in performing an execution. For example, Defendant Crawford, the Director of the Missouri Department of Corrections, became familiar with the execution process after becoming Director in early 2005. June Tr. 364. During the course of the litigation before the district court, it became apparent that half the prescribed five grams of thiopental, the initial chemical injected, had been used at the last executions. June Tr. 341-42.[4] Upon learning of this deviation, Defendant Crawford has directed that future executions begin with a five gram injection of thiopental. June Tr. 366-70.

---

[4]The average person loses unconsciousness after administration of 200 to 300 milligrams of thiopental (.2 to .3 grams). Tr. 267-68. Some states use as little as 2 grams of thiopental in executions. Tr. 264.

There is no culpable mental state by prison officials in this cause; thus, the district court's failure to find scienter is understandable and correct. But that omission also mandates reversal of the district court's judgment.

II.

The Missouri lethal injection protocol does not create an unnecessary risk of unconstitutional pain or suffering.

In Point I, prison officials discuss how the district court used an incorrect legal standard by which to measure the constitutionality of lethal injection in Missouri. In this and succeeding Points, they will assume the legal standard articulated by the district court is correct but demonstrate that the district court misapplied that standard.

Pre-Existing Lethal Injection Procedure Consistent with Eighth Amendment

The district court required Taylor to show there was "an unnecessary risk of unconstitutional pain or suffering. . . ." App. 196; Add. 19 (quoting *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1039 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1314 (2006)). The court then inquired whether there was "a reasonable possibility that Plaintiff will be conscious when he is injected with pancuronium bromide [Chemical #2] or potassium chloride [Chemical #3], and, if so, how the risk of such an occurrence may be avoided." App. 197; Add. 20 (quoting *Morales*, 415 F. Supp. 2d at 1040). When the evidence from the June 12-13, 2006, evidentiary hearing is reviewed, the inevitable legal conclusion is that there is no

"reasonable possibility that plaintiff will be conscious" at the time of the administration of chemicals two and three.

Testimony at the June 12-13 hearing revealed that Missouri would use three chemicals with its lethal injection protocol. The first chemical was five grams of thiopental administered in a 60cc syringe. June Tr. 370. A flush followed in order to clear the lines. June Tr. 370-71. After the flush came another 60cc solution containing 60 milligrams of pancuronium bromide. June Tr. 371. Following a second flush was the third chemical, 240 milliequivalents of potassium chloride in 120cc solution. June Tr. 371. Then there was a third flush that cleared the lines. June Tr. 371.

The first chemical, thiopental, renders the condemned unconscious so that the execution is humane. June Tr. 264. The five gram injection is a large multiple of the amount that the average person needs in order to lose consciousness (.2 to .3 grams). June Tr. 267. The five gram amount induces unconsciousness greater than that necessary for surgery. June Tr. 286.[5]

---

[5]Shortly after lethal injection became a common method of execution, death row offenders sued the Food and Drug Administration requesting, *inter alia*, the criminal prosecution of drug manufacturers because the drugs had not been certified as "safe and effective" for execution. *Chaney v. Heckler*, 718 F.2d 1174, 1178 (D.C. Cir. 1983). he Supreme Court eventually rejected the suit. *Heckler v. Chaney*, 470 U.S. 821 (1985). Opponents of capital punishment pressure companies not to supply the chemicals. *See Drug Companies and Their Role in Aiding Execution*, pp. 8-9 (2002) (available at http://www.ncadp.org/assets/applets/report.pdf (last visited 11-27-06).

The second chemical, pancuronium bromide, causes paralysis of the skeletal muscles, prevents a person from having voluntary muscle movement, and results in an inability to breathe. Jan. 30 Tr. 27. And the third chemical, potassium chloride ends electrical activity in the heart, causing it to stop. June Tr. 288-89. Because the condemned is unconscious from the first chemical, the condemned feels no adverse effects from the second or third chemical. June Tr. 285-89.

In three concise pages of the June 26 order, the district court disagrees and finds this procedure violates Taylor's Eighth Amendment rights. App. 197-99; Add. 20-22. The district court had four complaints.

First, the district court complains "there is no written protocol which describes which drugs will be administered, in what amounts and defines how they will be administered." App. 197; Add. 20. But the district court refers to no authority that states that the Eighth Amendment requires a written execution protocol. *See Abdur'rahman v. Bredesen*, 181 S.W.3d 292, 305 (Tenn. 2005) (rejecting Eighth Amendment challenge to Tennessee protocol, based in part on lack of written provisions). And both Larry Crawford, Director of the Department of Corrections and Terry Moore, Director of the Department's Division of Adult Institutions, testified about the chemicals that would be administered, in what amounts, and how they would be administered at a future execution. June Tr. 344-45, 369-71. The chemicals, their amounts, and the order of administration would be reduced to writing

before the next execution. June Tr. 369. And now, the Department has developed a written protocol, which establishes detailed guidelines as to the preparation and injection of the chemicals used. App. 215-18; Add. 32-35.[6] The district court's criticism of the Department's lack of a written protocol was not factually well-founded and, now that the Department has such a protocol, the concern is moot.

Second, the district court criticized prison officials because "Dr. Doe also testified that he felt that he had the authority to change or modify the formula as he saw fit." App. 197; Add. 20. The court noted that John Doe had changed the protocol by changing the amount of thiopental from five grams to 2.5 grams as well as the injection site. App. 197; Add. 20. The criticism by the district court misses the mark.

During the course of litigation, the record reflected that Dr. Doe had changed the amount of thiopental to inject from five grams to 2.5 grams for the execution of Gray and in preparation for the February 1, 2006 execution of Taylor. App. 193; Add. 16. Even administration of 2.5 grams is six times the surgical amount. June Tr. 368. This amount ensures unconsciousness. June Tr. 283-84. But the district court expressed concern that the protocol could "change at a moment's notice" due to the discretion maintained by Dr. Doe. App. 197; Add. 20. That concern by the district

[6]The Department considers this protocol a good policy instrument. It does not concede that the provisions of the protocol are constitutionally required.

court is not supported by the record because Director Crawford made clear that he had the discretion, not Dr. Doe. June Tr. 371.

The record developed at the June hearing reflects that Director Crawford is the person who "has the authority to set the method of execution within the dictates in Missouri statute." June Tr. 363. The Director's learning of Dr. Doe's previous change in the amount of thiopental administered led to the Director's intent to issue a defined protocol "so that this didn't happen again." June Tr. 369. "So we're just going to make this process better and there will be a directive forthcoming on that." June Tr. 369. The purpose was so that there would be "a clear understanding of the process, notification, and we will reach an agreement that that's what we will follow, absent any order of the court before then." June Tr. 370. At the hearing, the Director articulated that under the protocol, five grams of thiopental would be given along with 60 mg of pancuronium bromide and 240 milliequivalents of potassium chloride. June Tr. 370-71. Neither the chemicals themselves nor the order of the chemicals, nor the administration could be changed by anyone other than Director Crawford. June Tr. 371. While any change in the protocol could be made by Director Crawford, no change would occur without his consultation with others. June Tr. 372-73. Director Crawford intended that Dr. Doe be fully aware of the terms of the protocol. June Tr. 374. And this, too, was Dr. Doe's understanding. App. 731-33.

While the district court articulated concern that Dr. Doe had "total discretion for the execution protocol," App.197; Add.20, whatever validity those concerns may have had before the litigation, those concerns should have evaporated in light of Director Crawford's forceful testimony. Tr. 371-74. Additionally, that discretion by Dr. Doe does not exist under the written protocol. "The quantities of these chemicals may not be changed without prior approval of the department director." App. 215; Add. 32 (§B.1).

The third concern articulated by the district court involved Dr. Doe's ability to mix drugs. App. 198; App. Add. 21. Of course, Chemical 2, pancuronium bromide, and Chemical 3, potassium chloride, come as fully prepared chemicals. Jan. 30 Tr. 14 -15. The first chemical, thiopental, comes from the manufacturer as a powder. Jan. 30 Tr. 13. One mixes the powder that comes in a container with the supplied diluent. Jan. 30 Tr. 14. The district court refers to no episode where Dr. Doe accidently gave an incorrect amount of thiopental to the condemned due to improper mixing. The concerns by the district court are not well grounded in the record.

The recent difficulty experienced by Dr. Doe in mixing thiopental that resulted in less than five grams of this chemical being administered in recent executions was the result of attempting to mix it at a high concentration. App. 645-46, 672-75. The written protocol removes this difficulty because it provides that the five grams of thiopental will be administered in 200cc of solution, App. 215; Add. 32 (§B.2),

which is the standard 2 ½ % solution (25 mg per mL [equivalent to cc]) that can be prepared exactly as the manufacturer intended. App. 226, 1252. Thus, the preparation of the thiopental will no longer present the problems dealt with by Dr. Doe. It is also important to recognize that even the amounts of thiopental given in recent executions – at least 2.5 grams – were more than adequate to render the condemned prisoner unconscious and unaware of any pain from the succeeding chemicals. June Tr. 220-22, 241, 264-65.

The district court's fourth criticism of Missouri's protocol is that Dr. Doe was unable to monitor anesthetic depth. App. 198-99; Add. 21-22. To support this criticism, the court found that Dr. Doe could not see the facial expression of the condemned because the condemned is facing away from the operations room where Dr. Doe is located. App. 198; Add. 21. But Dr. Doe testified that the offender's facial expression could be seen from his position in the operations room, a room adjacent to the room where the condemned is on a gurney. App. 676-78. And this testimony can be confirmed by the court's review of Exhibit 47, the videotape of the execution room. The district court also found that it was dark in the operations room. App. 198-99; Add. 21-22. But the condemned is in the adjacent execution room where the fluorescent lights shine brightly. Exhibit 47 (videotape). The district court also noted there were blinds on the windows between the operation room and the execution room. App. 198-99; Add.21-22. These blinds are partially open during an

execution so that the offender can be observed from the operations room. App. 676-78; Exhibit 47 (videotape).

Finally, the Corrections defendants note that issues such as the positioning of the condemned prisoner in the execution room, the lighting in the operations room, and contingency plans have been addressed by the written protocol, App. 216-17; Add. 33-34 (§§ B.8 to B.9, C.1, D.2, E.4, E.10), to the district court's later satisfaction. App. 373; Add. 27.

Written Protocol Consistent with Eighth Amendment

As noted above, following the district court's June 26 order disapproving Missouri's execution procedures and directing the submission of a written protocol for the court's review, the Department of Corrections prepared a detailed protocol. But the court has also found this wanting in certain respects.

The district court's primary dissatisfaction with the new protocol appears to be its failure to require that a doctor trained in the use of anesthesia (1) prepare and administer, or oversee the preparation and administration, of the chemicals used and (2) monitor the anesthetic depth of the condemned prisoner. App. 200-01, 373-74; Add. 23-24, 27-28. These concerns are considered in Points III and IV.

The district court also seemed to criticize the auditing process in the proposed protocol. The court directed that the "Sequence of Chemicals" form, which is to

verify that the chemicals have been given in the proper order, be signed by the staff members taking part in an execution as soon as the inmate had been declared dead. App. 373; Add. 27. But that is already required by the protocol. "Before leaving ERDCC (the prison), all members of the execution team complete and sign the 'Sequence of Chemicals' form thereby verifying that the chemicals were given in the order specified in this protocol." App. 218; Add. 35 (§F.2). The only difference that defendants can perceive may be a matter of timing, with the district court wanting the form signed "as soon as the inmate has been declared dead," whereas the Department protocol specifies that it will be signed before the execution team leaves the prison. The district court does not articulate the constitutional significance for any difference it perceived. The court also ordered that the doctor sign the chemical log. App. 374; Add. 28. The protocol provides that "medical personnel" fulfill this function. App. 218; Add. 35 (§F.3). To the extent the court's disagreement is that a doctor is required, the issue is addressed in the following Points.

The district court also suggested that "the State may have to purchase additional equipment in order to adequately monitor anesthetic depth." App. 200, 373; Add. 23, 27. Although the verb used is discretionary – "the State *may* have to purchase" – the court offers no alternative option after rejecting the reasonable proposal of the defendant prison officials.

The monitoring provisions of the Department's protocol already require a medical person to assess the consciousness of the condemned prisoner by observation and by means of various clinical techniques, to inspect the catheter site, and to monitor an electrocardiograph machine . App. 216-17; Add. 33-34 (§§E.3 & D.2 to D.3). It is unclear if the district court is suggesting the purchase of "additional equipment" in lieu of these monitoring provisions or in addition to them.

The only equipment discussed in the June hearing was a machine called a "BIS Monitor." June Tr. 275-76. While North Carolina has used a BIS Monitor, June Tr. 279, it does not appear that it is under a court order to do so. The anecdotal evidence from North Carolina shows that its use of three grams of thiopental (60% of the amount used in Missouri) was sufficient to produce the "lowest measurable level of consciousness [as shown by the BIS Monitor] that one can achieve medically." June Tr. 280. While a BIS Monitor may be useful, it cannot be constitutionally required by the Eighth Amendment considering that North Carolina is the only state that defendants are aware of that uses one.[7] Taylor may reply that the district court did not

[7]There has been no finding by the district court that such a monitor is even available to Missouri. The maker of the BIS Monitor, Aspect Medical Systems, "is very much opposed to its use in executions for several reasons." App. 223. "Doctors at Aspect Medical Systems, which makes the device, have said they would not have sold one to the state if they had known its intended use." http://cftj.org/html/modules.php?name=News&file=article&sid=1354 (Last visited November 30, 2006).

mandate use of a BIS Monitor. That may be true, but it leaves the state to guess what "equipment" it may need to purchase.

The district court also required that "any deviations from this written protocol shall be a matter of written record submitted to the appropriate state officials." App. 374; Add. 28. The court did not articulate its meaning. Who are "the appropriate state officials?" And what is "a matter of written record?" And what if the deviation were deemed necessary by the Director, App. 215; Add. 32 (§B.1), at 11:30 p.m before the execution day opened, or at 11:55 p.m.?

No Risk of Any Pain under Current or Former Lethal Injection Procedures

Any deficiencies in the written protocol, or in the previously existing lethal injection process, are, in any event, all overcome by one overriding fact: the amount of the first chemical injected at an execution, five grams of thiopental, is so massive that there is no risk that the succeeding chemicals will cause any pain to a condemned prisoner. As defendants' expert, Dr. Dershwitz, testified:

> Q. If five grams of thiopental was administered at an execution, and let's assume that it's actually brought into the body, is there any need for a monitoring of the anesthetic depth of the condemned prisoner, in your view?
>
> A. I don't think it's necessary.
>
> Q. And can you tell us why not?

A. Because it is inconceivable that there's any human who could possibly remain awake after such a large dose of thiopental being properly administered into a working intravenous catheter.

Q. Would the same be true at a somewhat lower dose of thiopental, say 2.5 grams?

A. Yes. And in fact, I have testified elsewhere that even doses as low as 1.5 grams will provide a high enough probability of unconsciousness so that, in my opinion, an execution would be humane.

(June Tr. 284). Dr. Dershwitz explained the science underlying this conclusion.

A. Well, first of all, unconsciousness will be achieved once the first two to 300 milligrams circulate, and that will take, you know, typically 30 seconds to 45 seconds in the average person. And so as increasing amounts of thiopental are given, from the person's perspective who is receiving the drug nothing is different because once unconsciousness is achieved, the depth of unconsciousness, although perceptible to a clinician who is looking at an EEG, is not perceptible to a person receiving the drug. And so once the first few hundred milligrams circulate, which typically take 30 to 45 seconds, the person is unconscious and they will remain unconscious for quite a period of time after the rest of the dose is given.

June Tr. 286. Because of the massive amount of thiopental that is given the condemned, it is not possible that he will be conscious when the other two chemicals are administered. *See Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005); *Evans v. Saar*, 412 F. Supp. 2d 519, 521 (D. Md. 2006); *Abdur'rahman*, 181 S.W.3d at 307-08.

III.

The district court erred in ruling that the Eighth Amendment constitutionally requires that a doctor prepare and administer, or oversee the preparation and administration, of the chemicals used at executions and that a doctor monitor the anesthetic depth of the condemned prisoner because the anesthetic used, thiopental, is simple to prepare and can be appropriately administered by a nurse or emergency medical technician, and the five grams of thiopental administered will render the condemned deeply unconscious and unaware of the administration of the subsequent chemicals and their effects.

With or without the assistance of a doctor, executions in Missouri, both as previously conducted and as now formalized in a written protocol, are humane and consistent with the Eighth Amendment, even under the "unreasonable risk" standard applied by the district court. Five grams (in excess of 10 times the typical amount administered for surgical procedures, June Tr. 301 (typical amount of thiopental used in surgical procedures is a few hundred milligrams)) of thiopental are administered in the execution process. App. 215, 217; Add. 32, 34 (§§ B.2 & E.2); June Tr. 301. This amount will render the condemned deeply unconscious (a level of unconsciousness deeper than that used for surgical procedures) and unaware of the

administration of the subsequent chemicals and their effects. Jan. 30 Tr. 24-26; June Tr. 232-36, 256-57, 273-74; App. 389-414.

Initially, the district court ordered that a board certified anesthesiologist must assist in the execution process. App. 200; Add. 23. The court later modified its order to require the assistance of a doctor "trained in the administration and application of anesthetic drugs" to oversee the preparation and administration of the chemicals used in executions. App. 373; Add. 27. This directive that a doctor must monitor the execution process imposes a condition that is not required by the Constitution.

Eighth Amendment Does Not Demand Doctor at Execution

Even if it is possible for the Department of Corrections to find a doctor trained in the use of anesthesia to provide services during executions, the district court legally erred in imposing such a requirement. Assistance of a doctor at an execution has never been determined to be constitutionally required. Because the district court's order imposed a condition that is not constitutionally necessary, the court exceeded its remedial powers.

Although defendants have had difficulty in determining how many states conduct judicially approved executions without the assistance of a doctor, it appears from reported opinions that at least two states engage in lethal injection executions without the presence of a doctor of any kind. *Abdur'rahman v. Bredesen*, 181 S.W.3d 292, 301 (Tenn. 2005) (describing a process in which the prison warden prepares the

drugs and a non-physician prison official injects the drugs; a physician is on site only to perform a "cut down" procedure in the event the paramedics, two of whom are present at the execution, are unable to insert an IV in the condemned's arm), *cert. denied*, 126 S. Ct. 2288 (2006); *Ex parte Aguilar*, 2006 WL 1412666, at *4 (Tex. Ct. Crim. App., May 22, 2006) (Concurring Statement notes, but rejects, suggestion of plaintiff's expert witness that lethal injection procedure "should be performed by and reviewed by doctors"), *stay of execution denied sub nom. Aguilar v. Dretke*, 126 S. Ct. 2318 (2006). *See also Walker v. Johnson*, 448 F. Supp. 2d 719, 721 (E.D. Va. 2006) (physician present, but apparently only to pronounce death); *Evans v. Saar*, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (doctor present throughout execution, but without any apparent role in placing IV, monitoring it, or assessing anesthetic depth). *Blaze v. Rees*, 2006 WL 3386544 (Ky. Nov. 22, 2006) (phlebotomist or emergerncy technician inserts IV; doctor's role simply to verify cause of death); *Malicoat v. State*, 137 P.3d 1234, 1236 (Okla. Crim. App. 2006) (pharmacist mixing chemicals).

Evans v. Saar is the one case defendants have found that examines the issue of whether the assistance of a doctor is required during executions. In that case, the condemned prisoner plaintiff, expressing concern that the execution team members might not be adequately qualified, sought an injunction to stay his execution. 412 F. Supp. 2d at 524. The evidence established that at executions a certified nursing assistant establishes the IV and sees that fluids are flowing properly through the line.

Id. This person then monitors the execution procedure through a window. *Id.* The warden and a religious advisor stand near the condemned prisoner from where, although not medically trained, they can determine whether any major problems occur, such as a leak in the IV line. *Id.* The court found these qualifications adequate and denied the injunction. *Id.* at 525. *See also Bieghler v. State*, 839 N.E.2d 691, 695-96 (Ind. 2005) (denying habeas relief despite challenge that state had not developed its execution protocol with input from a person trained in anesthesiology), *cert. denied*, 126 S. Ct. 1190 (2006).

Neither Taylor nor the district court has identified a state in which a state or federal court constitutionally mandates the use of a doctor to prepare the chemicals or to oversee the mixing of the chemicals. And looking at execution more broadly, neither Taylor nor the district court has shown a decision where the Constitution has been found to require a doctor to have any role in any form of execution: gas, hanging, or electric chair. And looking at capital punishment even more broadly, neither Taylor nor the district court has shown an Eighth Amendment decision that requires any particular person or trade or guild have any particular role with an execution process. That is not to say that the use of such persons is or is not good policy, it only states that it is not a topic that the federal constitution regulates.[8]

---

[8]The district court also required the doctor selected by the state to be "in good standing" with the licensing board and "not have any disciplinary action taken against

Not even the decision in *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1314 (2006), which Taylor has relied on, requires use of a doctor at the execution. Although the court approved the three-drug execution protocol only if a doctor with formal training and experience in the field of general anesthesia took part, it also approved execution by means of a massive dose of thiopental alone or some other barbiturate or combination of barbiturates, without any direction that a doctor be present. 415 F. Supp. 2d at 1047.

Further, the evidence presented to the district court in this case establishes that an execution can occur without unnecessary and wanton pain without the presence of a doctor. The protocol developed by the Department of Corrections complies with this constitutional standard, as well as with the "unreasonable risk" standard used by the district court.

Taylor's own expert, Dr. Henthorn, testified that once a five gram dose of thiopental takes effect to the level of "burst suppression," which will likely occur in less than two minutes, "there is no chance that there would be any conscious

---

them." App. 374; Add. 28. While that may be good policy, it does not appear to be grounded in the Eighth Amendment. Perhaps another reading of this requirement is that the doctor selected shall not be subject to any disciplinary action by the licensing authority due to participation in an execution. But, if this is what is meant, the district court offers no authority to support its attempt to provide immunity from disciplinary action.

recognition of pain" by a condemned prisoner as the succeeding chemicals are administered.[9] June Tr. 195, 234. "Burst suppression" is complete unconsciousness. June Tr. 235. Once "burst suppression" is reached following administration of five grams of thiopental, a person will remain at that level of unconsciousness for a minimum of 45 minutes (and probably closer to the longer estimate of Dr. Dershwitz, defendants' expert).[10] June Tr. 233-35. And, when that level of unconsciousness is reached, there is no longer any need to monitor the level of unconsciousness. June Tr. 236-37.

Dr. Henthorn's concern with the lethal execution procedure was that the second two chemicals could be given before the first chemical had enough time to bring the condemned prisoner to the "burst suppression" level of unconsciousness.[11] June Tr. 200-01. His studies indicated that "burst suppression" would be reached within three minutes even for thiopental doses of two grams. App. 1324, 1327-28.

---

[9]Even administration of as little as 1.67 grams of thiopental will render almost everyone unconscious to a level of "burst suppression" within minutes. June Tr. 233.

[10]Of course, with a five gram dose of thiopental, death would result, instead of just unconsciousness, unless the recipient received life support assistance. Jan. 30 Tr. 21-22.

[11]Ironically, during the initial appeal, Taylor' theory of the case was that remand for further hearing would show that Missouri's protocol was too slow because it allowed "the rapid decline of levels of thiopental." Appellant's Brief in *Taylor v. Crawford*, No. 06-1397, at p. 50). Then before the district court, Dr. Henthorn's analysis was that the speed of injection was too quick. June Tr. 200-01.

Although defendants' expert disagrees that "burst suppression" must be reached before the second and third chemicals may be administered without painful effect, June Tr. 273-74,[12] defendants' protocol takes into account Dr. Henthorn's concern. The protocol provides that the second and third chemicals will not be administered until at least three minutes have elapsed since administration of the thiopental. App. 217; Add. 34 (§E.5). Thus, even under Taylor's evidence, once the five grams of thiopental called for by the protocol are administered and given time to take effect, there is no foreseeable risk that the condemned prisoner will experience unnecessary and wanton pain from the administration of the second or the third chemicals.[13]

---

[12]"Burst suppression is a much deeper level of unconsciousness than that targeted for surgical procedures. June Tr. 235-36, 273.

[13]It is also worth considering the old adage that one should not fail to see the forest for the trees. All the appropriate concern shown throughout this case that condemned prisoners be unconscious before the second and third chemicals are administered so that they not be aware of any pain, neglects consideration of whether the pain that might result, in the absence of anesthesia, rises to the level of cruel and unusual punishment. No one has testified that the second chemical, pancuronium bromide, causes pain. The defendants' expert, Dr. Dershwitz, testified without contradiction that the pain resulting from the third chemical, potassium chloride, entering the heart is comparable to the pain experienced by a person having a heart attack. June Tr. 288-90. The pain, from either the administration of potassium chloride or a heart attack, would last approximately ten seconds. June Tr. 289-90. It should be difficult to conclude that the level of pain experienced by persons having heart attacks, a leading cause of death, is a level of pain that, in the context of a judicially authorized execution, is cruel and unusual.

Doctor Not Necessary to Assure Proper Administration of Thiopental

Taylor has asserted that a doctor must participate in the lethal injection process to assure that some error in the setting of the IV, difficulty in the mixing of the thiopental, or other untoward event will not prevent the condemned prisoner from actually receiving the full amount of thiopental. Taylor's challenge, however, fails on several counts.

First, as noted above, "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." *Campbell v. Wood*, 18 F. 3d 662, 687 (9th Cir. 1994). "The Supreme Court has rejected Eighth Amendment challenges based on an 'unforeseeable accident.'" *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005) (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947)). Therefore Taylor's suggestion that, in the absence of a doctor's participation, mistakes are possible does not provide any constitutional basis for requiring modifications to the protocol.

Moreover, failure of the IV line to deliver the thiopental as expected is self-correcting. If a problem with the IV (such as a kink, a clog, or a leak) stops the thiopental from entering the body, the same problem would also prevent the other two chemicals from entering the body. And if the other two chemicals do not enter the body, they cannot cause any pain to the condemned.

Additionally, the written protocol developed by the Department of Corrections implements steps that provide assurance that the thiopental is prepared and administered appropriately. A doctor, nurse, or pharmacist is to prepare the thiopental. App. 215; Add. 32 (§A.2). This is a straight-forward matter of mixing a powder with a liquid found in a manufacturer's kit. *See Evans*, 412 F. Supp. 2d at 524-25; Jan. 30 Tr. 30-31. Two IV lines are set by either a doctor, a nurse, or an emergency medical technician (EMT-intermediate or EMT-paramedic).[14] App. 215-16; Add. 32-33 (§§A.3, C.1). The setting of IV lines is a procedure within the competence of nurses and EMTs.[15] *Reid v. Johnson*, 333 F. Supp. 2d 543, 546 n.6

---

[14]Taylor has expressed concern that medical personnel not trained and experienced in the setting of central lines will be setting central lines under the protocol. But the protocol does not mandate use of central lines. The protocol contemplates that the medical person present for the execution will set only the types of IV lines for which he or she is trained and has experience with. Not only does the protocol not provide for nurses or emergency medical technicians to set central lines beyond their experience and training, but it does not require a doctor to set such a line either. Doctors qualified to set either central or peripheral lines are to exercise their judgment to determine which type of line is most appropriate in the circumstances.

[15]The provision that permits an EMT to set IV lines and to check them for obstructions is not a step back from previous Department of Corrections practice of obtaining the presence of a doctor at executions. Permitting the medical roles to be filled by an EMT is only a foresighted recognition that there may be a time that the presence of a doctor cannot be obtained. In such a case Corrections will plan to go forward with the execution with the aid of an EMT, just as it would have had a doctor not been available in the past. Missouri's proceeding with an execution with an EMT, is comparable to Maryland's use of a certified nursing assistant. *Evans*, 412 F. Supp. 2d at 524. The intent of the Department of Corrections, however, is to obtain the presence of a doctor at executions if possible.

(E.D. Va. 2004); *State v. Webb*, 750 A.2d 448, 452 (Conn. 2000), *cert. denied*, 121 S. Ct. 93 (2000). At the time the IV lines are set, they are checked to make certain they are not obstructed. App. 216; Add. 33 (§C.2).

The written protocol also provides that, between the administration of the first chemical and the second two chemicals, the medical person who has set the IV line will return to the execution room and directly assess whether the condemned is conscious. App. 217; Add. 34 (§E.3). Although the Department of Corrections prefers to have the assistance of a doctor if possible, in the event that one is not available, a nurse or an emergency medical technician will be present. App. 215; Add. 32 (§A.3). Doctors, nurses, and emergency medical technicians have the ability to assess level of consciousness to the extent that they can be confident that a person is sufficiently unconscious to be unaware of any pain that would normally be the result of noxious stimuli, including the pain expected to accompany the administration of 240 milliequivalents of potassium chloride contained in 120 mL of solution. App. 371B (¶ 8). This is especially so when there is no concern that the level of unconsciousness may be too deep. App. 371B (¶ 8). The direct assessment of the condemned prisoner by the medical person present will provide reasonable assurance that the condemned prisoner will be unconscious when the second and third chemicals are administered and bring any risk of consciousness on the condemned's part below the level of foreseeable risk of unnecessary and wanton pain.

The protocol further provides that the medical person present is to examine the IV catheter site following the administration of the thiopental. App. 217; Add. 34 (§E.3). Doctors, nurses, and emergency medical technicians who have set IV lines are qualified to examine their lines and the line entry sites after administration of flush or chemicals to insure that the IV line is operating correctly and that the flush or chemicals have actually entered the blood stream. App. 371A-371B (¶¶ 3-6). By examination of the IV after administration of the thiopental, any risk that the thiopental has not entered the blood stream as expected is negligible.

Given the safeguards incorporated into the protocol, there is no foreseeable risk that the condemned will be subject to unnecessary and wanton pain through any failure to receive the full five grams of thiopental.

Mandating Use of a Doctor Exceeded District Court's Remedial Powers

As shown above, the written protocol developed by the Department of Corrections provides an ample level of confidence that condemned prisoners executed under its provisions will not be subjected to cruel and unusual punishment.

A court may exercise its equity power only on the basis of a constitutional violation. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 91 S. Ct. 1267, 1276 (1971). "The court's exercise of equitable discretion must heel close to the identified violation and respect 'the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'" *Gilmore v. California*, 220 F.3d 987,

1005 (9th Cir. 2000) (quoting *Milliken v. Bradley*, 97 S. Ct. 2749, 2757 (1977)). *See also Toussaint v. McCarthy*, 801 F.2d 1080, (9th Cir. 1986) ("Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation"), *cert. denied*, 107 S. Ct. 2462 (1987); 18 U.S.C. 3626(a)(1) ("Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiff").

The district court's order to the Corrections defendants to include assistance of a doctor at executions goes beyond its power under these standards. As discussed above, no court has ever found that assistance of a doctor is constitutionally required at an execution. Moreover, there is no necessity here, considering the evidence adduced and the protocol developed by the Department of Corrections, to require the assistance of a doctor at executions in Missouri. Conducting executions under the protocol, with or without a doctor, will result in no reasonably foreseeable risk that the condemned prisoner will experience unnecessary and wanton pain. Thus, the district court's imposition of a requirement that a doctor take part in executions, was broader than necessary to remedy any justified constitutional concerns. Therefore, the court's imposition of this requirement exceeded its authority.

IV.

The district court erred in mandating that a doctor assist at executions because compliance with such a requirement could be impossible to fulfill, and thereby effectively bar implementation of the death penalty in Missouri, in that doctor participation in executions is inconsistent with some interpretations of a doctor's ethical duties.

There is also a very practical reason why the district court's requirement that a doctor be involved in the execution process should be reversed: it may be impossible to find a doctor willing to assist, especially one trained in the administration of anesthesia.

Following the court's June 26 order that a board certified anesthesiologist be found to participate in executions, the reaction of the anesthesiologist community was swift and hostile. The June 30, 2006, message from the President of the American Society of Anesthesiologist to member anesthesiologist is perhaps best summarized by its last two words of advice: "[s]teer clear." App. 225. So they have. The Department of Corrections sent letters to 298 board certified anesthesiologists in this state and southern Illinois inquiring of their willingness to participate in executions, as outlined by the court's order. None accepted. App. 219.

Even assuming the modified order requiring only the participation of a doctor trained in the use of anesthesia widened the pool of candidates, there exists a real possibility that a doctor willing to take part cannot be found. As Taylor alleged in his amended complaint, a doctor's participation in an execution is a violation of professional ethical standards as interpreted by the American Medical Association. App. 65-66 (¶ 81), 100-01 (AMA's Code of Ethics, E-2.06). *See also Beardslee v. Woodford*, 395 F.3d 1064, 1074 (9th Cir. 2005) ("lethal injection executions are hampered by ethical restrictions on physicians, who are prohibited from participating in executions"). The ethical standards of the AMA are not necessarily binding on Missouri's medical licensing board, but could carry decisive weight with that board in the event charges were filed against a doctor who did participate in an execution. Thus, a requirement that a doctor participate at executions could effectively bar implementation of the death penalty in Missouri.

In response to the Department's concern that it may be impossible to obtain the services of a doctor at executions, Taylor has presented a journal article showing that a significant portion of doctors have indicated a willingness to take part in executions. App.347-53. But the article addresses only the willingness of doctors in general to take part, rather than of the narrower subset of doctors trained in the use of anesthesia. There is also quite a difference between responding positively to a survey as a general matter and actually agreeing to assist with executions, followed by

fulfillment of the agreement. Additionally, the article cited was written five years ago and so has questionable relevance to current attitudes of doctors.

Regardless of the difficulty in finding a doctor to participate in executions, the Department of Corrections prefers to have the assistance of a doctor, and continues its efforts to find one who will take part. But, in the event a doctor cannot be found, the written protocol permits the completion of an execution with the participation of a nurse, pharmacist, or emergency medical technician only. App. 215; Add. 32 (§A.2 & A.3). As discussed in Point III, the safeguards included in the protocol that assure the unconsciousness of the condemned prisoner before the administration of the second two chemicals render the services of a doctor unnecessary.

In particular, the examination of the IV line after administration of the thiopental will provide confidence that the thiopental has actually entered the condemned's blood stream. Then the three minute time lag time between the administration of the thiopental and the administration of the succeeding chemicals will provide confidence that the massive dose of thiopental has had time to take full effect before the succeeding chemicals are administered. These steps, mandated by the protocol, will provide appropriate assurance that the condemned prisoner is completely unconscious before the administration of the second two chemicals and, thereby, render an assessment of anesthetic depth by a doctor a needless redundancy. The protocol, as written, does not subject condemned prisoners to any foreseeable

risk of unnecessary and wanton pain. The substitution of a nurse, a pharmacist, or an emergency medical technician to carry out the steps committed to medical personnel by the protocol at an execution when a doctor is not available is reasonable and consistent with the Eighth Amendment.

CONCLUSION

As demonstrated above, Missouri's lethal injection procedure is consistent with the Eighth Amendment. The Corrections defendants urge this Court to reverse the district court's entry of judgment against them, to vacate the district court's orders imposing conditions on, and continuing oversight over, the implementation of their execution procedure against plaintiff Taylor and other condemned prisoners, and to remand this case to the district court with instructions to enter judgment in their favor. Executions in Missouri should be allowed to proceed as provided in its written protocol.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL PRITCHETT
Assistant Attorney General
Missouri Bar No. 33848

STEPHEN HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, Missouri 65102
Telephone No. (573) 751-3321
Fax No. (573) 751-9456

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of this brief, and a 3½ inch, labeled diskette containing this brief, were mailed, postage prepaid, this 4th day of December, 2006, to:

John W. Simon
Attorney at Law
2683 South Big Bend Blvd., # 12
St. Louis, MO 63143

C. John Pleban
Lynette M. Petruska
Attorneys at Law
2010 South Big Bend Blvd.
St. Louis, MO 63117

Donald B. Verrilli, Jr.
Matthew S. Hellman
Ginger Anders
Eric Berger
Attorneys at Law
601 13th Street, NW, Suite 1200
Washington, DC 20005

_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the foregoing document, excluding the Summary and Request for Oral Argument, the Table of Contents, the Table of Authorities, the Certificate of Service, the Certificate of Compliance, and the Addendum, contains 13,529 words of proportional spacing as determined by the automated word count of the WordPerfect 9 word processing system used and has 14-point print size, and that the diskette submitted with the instant brief has been scanned for viruses and is virus-free.

_____
Assistant Attorney General