IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 06-3651

MICHAEL ANTHONY TAYLOR,
***Plaintiff-Appellee*,**

v.

LARRY CRAWFORD, et al.
***Defendants-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 PLAINTIFF-APPELLEE

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January 2, 2007

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Missouri Department of Corrections (DOC) officials appeal Judge Gaitan's determination that their lethal-injection procedures pose a significant and unreasonable risk that Appellee Michael Taylor will suffer an excruciating execution. That ruling should be upheld. The record shows that the DOC has abdicated authority over executions to an incompetent physician who has altered critical elements of the procedure, including the amount of anesthetic given to inmates. These arbitrary variations are so pervasive that DOC officials in this litigation cannot describe accurately even the most basic aspects of its procedures.

The State's appeal asks this Court to reweigh the evidence heard by Judge Gaitan, and substitute its judgment in crafting a remedy. No basis exists for doing so: the violation finding is amply supported by the record, and Judge Gaitan's remedy is carefully tailored to fix the systemic problems in Missouri's execution process in an unobtrusive manner. The DOC's proposed remedy, in contrast, undertakes no meaningful reforms and suggests that the DOC does not take seriously the grave flaws Judge Gaitan found. The State also asks this Court to adopt an Eighth Amendment standard that would restrict execution methods only when they are both guaranteed and intended to cause pain. That argument is waived as well as refuted by governing precedent.

This Court has set oral argument for 30 minutes per side.

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II. Whether the district court, given its finding of an Eighth Amendment violation, abused its discretion in issuing its injunction and in rejecting the Defendants' revised written protocol.

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STATEMENT OF FACTS

Michael Taylor filed the instant action on June 3, 2005, alleging that Missouri's execution procedure subjects him to a significant and unnecessary risk of excruciating pain, thereby violating the Eighth Amendment's ban on cruel and unusual punishment. In January 2006, the district court rejected Taylor's claims on the basis of an extremely limited record. After this Court, in April 2006, remanded this case for supplementation of the record, Mr. Taylor presented new compelling evidence of systemic failures plaguing the DOC's execution process. Judge Gaitan then reversed his earlier decision and concluded that the DOC's procedures subject condemned prisoners to cruel and unusual punishment.

I. PRE-REMAND PROCEEDINGS.

After Taylor filed this action, he obtained limited discovery over the DOC's objections. On January 3, 2006, six days after the court denied the DOC's motion to dismiss, the State set his execution for February 1, 2006. In late January 2006, the district court held an emergency hearing on the merits.

The evidence presented at the January hearing was necessarily limited in scope.[1] Virtually all Taylor knew about the procedure at the time was that, according to the testimony of DOC officials, the DOC accomplished executions by administering 5 grams of thiopental, 60 milligrams of pancuronium bromide, and

[1] That evidence is part of the record in this case. DOC_App_I:148-54.

240 milliequivalents of potassium chloride.[2] 1/31/06_Tr_67-69. These drugs are administered through an IV inserted in the femoral vein, which is located deep beneath the skin in the groin. Responsibility for the execution procedure is vested in Doe 1 ("Doe"), a surgeon, and Doe 2, a licensed practical nurse, as well as Does 3 and 5, nonmedical personnel. *Id*. 66-67, 80.

The first drug administered is thiopental, an ultra-short acting barbiturate anesthetic. 1/30/06_Tr_11, 14. If successfully administered in sufficient dose, thiopental will cause deep unconsciousness and, eventually, death. 1/31/06_Tr_18-19, 32. The second drug administered, pancuronium bromide, masks all visible suffering by paralyzing the inmate's voluntary muscles, including the diaphragm. 1/30/06_Tr_73; 1/31/06_Tr_22-23. If injected into a conscious person, pancuronium would cause the agonizing feeling of conscious paralysis and suffocation. 1/30/06_Tr_27. To observers, however, the person would *appear* tranquil. 1/30/06_Tr_73. The last drug injected, potassium chloride, is the actual agent of execution, as it induces cardiac arrest. 1/31/06_Tr_23; 1/30/06_Tr_29. It was uncontested that when administered in concentrations sufficient to stop the heart, potassium is extraordinarily painful, causing an excruciating burning sensation in the veins and lungs. 1/30/06_Tr_29; 1/31/06_Tr_23.

[2] That testimony turned out to be wrong, as discussed below.

Because both pancuronium and potassium cause extreme suffering if injected into a conscious individual, the induction of anesthesia is crucial to ensuring a humane execution. If the injection of the intended dose of thiopental is not completely successful, or does not result in deep anesthesia, the inmate will experience conscious suffocation and excruciating pain. 1/31/06_Tr_58. Without discovery into how the DOC actually accomplished executions, Taylor was unable to test whether the DOC's actual practices ensured adequate anesthesia. At the conclusion of the hearing, Judge Gaitan rejected Taylor's claims on the ground that Taylor had not established that inmates were at risk of inadequate anesthesia. DOC_Add_6.

This Court, sitting *en banc,* subsequently stayed Taylor's execution. After briefing and argument, this Court concluded that Taylor "was unable to make the record he felt necessary for the full and fair consideration of the merits of his case" at the January hearing. This Court therefore remanded the case to Judge Gaitan for "further discovery" and "a continuation of the hearing held on January 30-31, 2006." DOC_App_I:154. The district court was given 60 days in which to reconvene the evidentiary hearing and issue an opinion "amending, modifying or restating" its judgment on the merits.

II. REMAND PROCEEDINGS.

On remand, Taylor uncovered and presented evidence that the DOC has conducted executions in an arbitrary, dangerous manner, creating a significant risk of excruciating pain. Judge Gaitan's findings to this effect were made on the basis of a limited record, as he severely — and erroneously, in Taylor's view — restricted the scope of discovery on remand. Even the limited discovery, however, demonstrated the DOC's institutional failure to take even the most basic steps to ensure that executions were performed consistently and humanely.

A. The Discovery Allowed by the District Court.

After two teleconferences on the scope and timing of discovery, Judge Gaitan ordered that Taylor could receive only the following narrow discovery: execution records from the previous six executions; a limited deposition of Director Crawford; interrogatory responses from Crawford and Does 1 through 5; and an inspection of the DOC's execution facility. Taylor_App_31-33. Judge Gaitan repeatedly denied requests to depose Does 1 through 5, the members of the execution team, as well as other non-anonymous DOC employees.[3]

[3] The district court also denied all discovery regarding Doe's malpractice and licensing history, DOC_App_III:638, despite evidence that he had been reprimanded by a medical licensing authority, DOC_App_II:446. It is now apparent that the DOC opposed these efforts in the hopes of covering up extremely damaging details regarding Doe's background. *See* DOC_App_II:447-48. A July newspaper article eventually exposed Doe's problems, including his loss of privileges at two hospitals and a public reprimand authorized by the Missouri

The discovery ordered revealed that Doe, the doctor who oversees executions, had prepared only 2.5 grams of thiopental for Taylor's scheduled execution and for the execution of Marlin Gray. This evidence directly contradicted the DOC's representations to this Court and the district court that it always administered a dose of 5 grams of thiopental — including representations, made in court *24 hours* before Taylor's execution, that it would use 5 grams on Taylor. 1/31/06_Tr_67, 74-75; Taylor_App_20-30. After Doe offered several contradicting written explanations for lowering the thiopental dose, DOC_App_II:442-43; DOC_App_III:627, Judge Gaitan permitted Taylor to take, in the Court's presence and under its supervision, a limited two-hour anonymous deposition of Doe. Taylor_App_37-38; Taylor_App_39-41. No other discovery was permitted.

B. Evidence Regarding the DOC's Conduct of Executions.

Even this truncated discovery revealed that the DOC has treated the execution procedure with callous disregard, abdicating all responsibility to the manifestly incompetent Doe. He has performed the most important aspects of the procedure in a dangerous, unpredictable manner. This evidence shattered the DOC's previous representations regarding its procedures, and utterly belies the

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Attorney General's office. *See* Jeremy Kohler, *Behind the Mask of the Mo. Execution Doctor*, St. L. Post-Dispatch, July 29, 2006, available at http://www.stltoday.com/stltoday/news/special/srlinks.nsf/0/0903CBDA66BF5D22862571BC007C4F67?OpenDocument (last visited December 20, 2006).

DOC's description of a regularized and careful process in its brief to this Court, DOC_Br_18-21.

1. The DOC's Abdication of Responsibility for the Execution Procedure.

The DOC vested complete responsibility for designing and overseeing the execution procedure in Doe in the early 1990s, after "a very difficult execution … which caused a flurry in the press and embarrassment to the prison." DOC_App_III:654. The DOC did not provide Doe with any assistance, and in designing the current procedure, Doe did not consult with anyone, including persons knowledgeable about anesthesia. DOC_App_III:654; DOC_App_III:657. It was Doe who decided to use femoral catheterization in all executions; determined drug doses; and designed the drug delivery apparatus. DOC_App_III:646-67, 650, 655, 717; DOC_App_IV:826. The DOC acquiesced in all of these decisions without even discussing their merits with Doe. Instead, Doe communicated his intentions through non-medical execution personnel, and the DOC then implemented them. DOC_App_III:717; DOC_App_III:698, 718.

Doe also had unfettered discretion over how executions were carried out. In every execution, Doe inserts the femoral catheter; mixes the thiopental into solution; prepares the syringes of thiopental and the other drugs; and oversees the actual injection of the drugs. DOC_App_IV:812-14. Though Crawford has ultimate responsibility for each execution, neither he nor other DOC officials

observes Doe's conduct during executions, and Crawford testified that he simply defers to Doe on execution nights. DOC_App_IV:814; DOC_App_III:699, 740-41. Indeed, because the DOC has no source of medical expertise other than Doe, the DOC has no choice but to rely completely on Doe. DOC_App_III:698-99. As Doe summed up his role, the Director is "relying on me to keep him looking good, to use his terms directly." DOC_App_III:697.

2. Doe's Arbitrary and Dangerous Conduct of Executions.

Because the DOC allows Doe to exercise his authority over Missouri executions in an arbitrary, unpredictable manner, crucial elements of the procedure have varied from execution to execution. According to Doe, the DOC's primary objective in performing executions is to ensure that death occurs quickly, and that no observable incident occurs that would cause witnesses to ask Crawford what happened. DOC_App_III:730 ("[The DOC doesn't] want to wait 25 minutes with witnesses standing around wondering what happened."); DOC_App_III:656. Doe therefore believed, and the DOC never gave him reason to doubt, that he could alter any aspect of the execution process, even to make the procedure more dangerous, so long as the alteration was undetectable to witnesses. DOC_App_III:658, 664, 739-40.

a. Administration of Varying Doses of Thiopental.

Most crucially, Doe has varied the dose of thiopental from execution to execution, and there is no way of determining how much thiopental was actually administered in any execution. Contrary to the DOC's in-court representations, its execution records, read in conjunction with Doe's testimony, reveal that in five of the past six executions, Doe prepared substantially less than 5 grams of thiopental. DOC_App_V:1111-12; DOC_App_III:644-49. Because Doe has always operated without oversight, he assumed that changing the thiopental dose was within his authority, and he never informed the DOC. DOC_App_III:626.

Doe testified that at previous executions, he intended to administer less than 5 grams of thiopental. DOC_App_III:646. Although the DOC's records indicate that he could have prepared thiopental doses ranging between 2.5 and 4 grams, Doe admitted that may have actually mixed *substantially less* than that for injection at each execution. DOC_App_III:649 ("[W]e have no provision for showing that we disposed of three [grams] and gave two, or disposed of two and gave three, because this [record] has not been set up that way."); DOC_App_III:651-52. Doe found thiopental to be a "difficult drug" to prepare, DOC_App_III:656, and decided to use a lower dose after he had difficulty fully dissolving 5 grams, DOC_App_III:649. When pressed about the precise doses he prepared, Doe refused to estimate, and stated he that did not recall.

DOC_App_III:649-51. Doe also admitted that he was dyslexic and had considerable trouble making calculations and keeping track of numbers. DOC_App_III:659-60, 663. In sum, there is no way of knowing how much thiopental Doe prepared for any particular execution, and no guarantee that he always — or ever — prepared a minimally adequate dose.

When Doe first encountered problems mixing the thiopental, he did not bring the issue to the DOC's attention, apparently because he felt pressure to ensure that each execution went forward:

> I go to the execution chamber and we're on a time frame. I have minutes to get the drugs ready, minutes to ensure a perfect IV. There's no time to call the drug company at midnight, the Director or nursing staff to change. I am required to deal with what I am given and make it come out right and make this — make it happen I guess is best way to say it …. I was able to modify what I was given and [the Director] was totally unaware that there was any change in dosage.

DOC_App_III:664. Doe also did not investigate why the thiopental purchased by the DOC was not soluble, or request new thiopental, even though the manufacturer warns against using insoluble thiopental, DOC_App_V:1251. DOC_App_III:680.

In any event, Doe believed that the precise dose of thiopental used in executions was unimportant for two reasons. First, Doe stated that because lowering the dose of thiopental did not make a "visible difference" in the appearance or length of the execution, the "total dose [of thiopental] to me was insignificant." DOC_App_III:658. Of course, the paralytic effect of the

pancuronium would ensure that witnesses would be unable to tell even if *no* thiopental were administered, because the execution would still appear peaceful. Doe noted as much, stating that his goal in performing executions was to perform them "with no apparent suffering that the public can observe, which they will make the most of." DOC_App_III:658.

Second, Doe felt that it was not necessary to induce general anesthesia during executions. DOC_App_III:692, 710. He believed that even an overdose of thiopental would be *insufficient* to guard against extreme pain, DOC_App_III:689-90, but that this did not matter in an execution because he injected the potassium within inches of the heart, DOC_App_III:696,[4] and in any event inmates would be paralyzed, DOC_App_III:692.

Despite Doe's conviction that he had acted properly in reducing the thiopental dose without notifying the DOC, Doe initially denied that he had reduced the dose, and the DOC conveyed that denial to the court. Taylor_App_34-36; DOC_App_V:1325-26. After Doe recanted, his explanation for doing so evolved in response to Taylor's and the Court's inquiries. At first, Doe stated that he changed the dose "because … other jurisdictions considered a dose of … 5 grams to be larger than necessary." DOC_App_437. Later, Doe stated that he had reduced the dose because of difficulty dissolving the thiopental.

[4] This assertion is demonstrably incorrect given the equipment used. June_Tr_61.

DOC_App_III:627. Finally, in his testimony, Doe admitted for the first time that he had lowered the dose of thiopental in at least *five* of the six executions for which Taylor received discovery, and that he did not know how much he had given. DOC_App_III:646.

In sum, there is no way to know how much thiopental was prepared in any execution. Doe's understanding of the DOC's overriding objective of avoiding scrutiny, his inability to recall the doses, dyslexia, misapprehension about the need for anesthesia in executions, and misrepresentations to the district court, raise serious questions as to whether he *ever* prepared an adequate dose of anesthetic. And because all inmates were given pancuronium and no autopsies were performed, there was no way to discern at the time, and no means of reconstructing now, whether these inmates were adequately anesthetized.

b. Doe's Dangerous and Erratic Methods of Obtaining IV Access.

Doe testified that he uses a highly invasive form of IV access, femoral catheterization, rather than placing the standard peripheral IV in the elbow, because it "allow[s] rapid infusion of the drugs by nonmedical people," DOC_App_III:719, thereby facilitating quick executions. But because the femoral vein is buried deep within the upper thigh, femoral catheterization is much riskier than peripheral access, and accordingly is not the first-choice method of catheterization in any other state. June_Tr_109. Indeed, it is undisputed that a

number of extremely painful and life-threatening complications can immediately result from femoral catheterization. 1/30/06_Tr_63; June_Tr_141-42. The DOC acquiesced in Doe's decision to use femoral access, apparently without considering whether the procedure increased medical risks. DOC_App_III:716-18; June_Tr_354-55.

Doe botched the femoral catheterization in at least one of the last six executions.[5] Photographs revealed that Timothy Johnston, prior to his death, experienced significant bleeding and a hematoma, a painful and potentially severe condition that can arise when the femoral artery is pierced or lacerated. *Compare* Taylor_App_64-65 (Johnston: hematoma) *with* Taylor_App_66 (Smith: no apparent complications). As blood pools beneath the skin, it exerts pressure on the surrounding nerves and tissue, causing potentially severe pain. June_Tr_47, 50, 157. Doe, however, refused to acknowledge that this complication had arisen, in part because he believes (incorrectly) that such complications are impossible when he performs the procedure. DOC_App_III:712, 724. When asked what he would do if an inmate experienced severe bleeding and a hematoma during attempted catheterization, Doe replied that he would not treat it: "He's got two legs." DOC_App_III:713-14.

[5] Because Taylor was denied discovery into the additional executions in which Doe inserted a femoral catheter it is impossible to determine the true rate of complications caused by Doe.

Doe also revealed that in one execution, he had inserted the catheter in the subclavian vein, a procedure that involves a distinct set of potential immediate and agonizing complications, including suffocating as one's chest fills up with air and blood. DOC_App_III:740; June_Tr_54-55. Doe admitted that he performed the procedure even though he knew that to do so safely would require additional equipment that the DOC did not have, as well as "significant modification of the facility." DOC_App_III:735. In other words, Doe concededly chose to place an inmate in danger of an agonizing death.[6]

3. Other Members of the Execution Team

Although Taylor received virtually no discovery into the other execution team members, it is apparent that they have little or no medical training and operate at the direction of Doe. Doe 2 is a licensed practical nurse (LPN). 1/31/06_Tr_67. Under Missouri law, LPNs are non-professionals with minimal medical training who must work under the direct supervision of a physician or registered nurse. Mo. Ann. Stat. § 335.016(7), (9). All that is known about Doe 2's conduct is that despite his responsibility for helping Doe prepare the thiopental, DOC_App_IV:812, he did not realize that Doe prepared lower doses, DOC_App_II:465.

[6] Because this incident did not occur within the last six executions, Taylor does not know whether any complications occurred.

Does 3 and 5, who inject the drugs during executions by alternating syringes, have no medical training. DOC_App_IV:814; DOC_App_III:666. Because only Doe has significant medical training, he mixes the thiopental "because it's very difficult for someone who is not used to this to accomplish it," DOC_App_III:665, and he also directs the others' actions, DOC_App_III:667 ("That's the first time probably in their life they [Does 3 and 5] have picked up a syringe, and it's a Luralock twist connector and then they have a separate clamp where they have to clamp and unclamp the tubing, so it's a little stressful for them to be doing this.").

C. The Continuation of the Evidentiary Hearing.

In June 2006, Judge Gaitan reconvened the evidentiary hearing, which focused on medical-expert testimony as to whether the DOC's execution practices subject inmates to an unreasonable risk that they will not be successfully anesthetized.

1. Taylor's Case.

Taylor's expert testimony established that the DOC's careless and inconsistent execution procedures unreasonably fail to ensure adequate anesthesia, thereby subjecting inmates to a significant and needless risk of excruciating pain. Missouri's practices fail to ensure: reliable, consistent preparation of the full intended dose of non-defective thiopental; successful delivery of that thiopental

through patent IV tubing and a properly placed catheter into the inmate's circulation; and sufficient anesthesia prior to the injection of the pancuronium and potassium and throughout the execution.

Dr. Mark Heath, an anesthesiologist and expert in lethal-injection procedures nationwide, testified that inmates faced a substantial danger of inadequate anesthesia as a result of the DOC's abdication of responsibility to Doe and its failure to maintain a written protocol. June_Tr_17-19, 64-65, 82. Dr. Heath testified that Doe is "completely lacking in the credentials and qualifications and knowledge, skill set and experience to be entrusted with the delivery of general anesthesia, especially in an incredibly important thing like an execution." *Id.* 83; *id.* 21, 65. Dr. Heath's opinion was based on Doe's numerous factually incorrect statements about femoral catheterization, potassium, thiopental, and anesthesia in general. *Id*. 27-33, 39, 44, 59-64. In addition, Doe's dyslexia leaves him unable to deliver anesthesia because he cannot reliably calculate dosages, or keep track of how much thiopental he has mixed. *Id*. 34, 42.

Doe's lack of anesthesia training and incompetence directly increase inmates' risk of excruciating death because Doe prepares the thiopental in a manner that is "very sloppy and … reflects a lack of understanding of the importance of the quantity of drugs that are being given," *id*. 24-25; *id*. 21. Neither Dr. Heath nor Dr. Thomas Henthorn, Taylor's other expert anesthesiologist, could

discern from Doe's testimony how much thiopental he had administered in any execution, and both believed, based on the process that Doe described, that it may have been considerably less than 2.5 grams. *Id.* 23, 219, 222. In addition, the fact that Doe had trouble dissolving the thiopental suggested that the drug may have been defective and therefore devoid of anesthetic properties. *Id*. 36-38. Thus, several inmates may have been given defective thiopental and remained fully conscious during their executions. *Id.*

Moreover, Dr. Heath, Dr. Henthorn, and Dr. Stephen Johnson, an interventional radiologist who has performed thousands of femoral catheterizations, all concluded that Doe had demonstrated extremely poor medical judgment in numerous respects that each increased the likelihood of severe pain. These included deviating from standard medical practices in mixing the thiopental, *id*. 42; administering insoluble thiopental, *id*. 40-41; failing to record the doses of thiopental administered, *id*. 24-25; inserting a subclavian line without the proper equipment, *id*. 54-57; opting to use the more invasive, dangerous femoral catheterization even though it was medically unnecessary, *id*. 84-85, 144, 161, 228-29; and planning to treat a hematoma by letting it bleed out, a medically unaccepted and needlessly painful approach, *id.* 157-58. In sum, Taylor's three medical experts all concluded that Doe's behavior places inmates in significant danger of suffering excruciating pain. *Id*. 65, 161-68, 224.

Even if Doe were to prepare an adequate dose of non-defective thiopental, the manner in which the drugs are injected creates the risk that the full dose will not successfully be delivered. *Id*. 82. Doe may be unable to insert the femoral catheter properly because he performs the procedure only during executions. *Id.* 50, 53. Similarly, the catheter's efficacy could be hindered by a complication such as a hematoma like the one suffered by Timothy Johnston, *id*. 157, resulting in an infiltration that prevents an adequate dose of thiopental from reaching the vein, *id.* 196.[7] The fact that nonmedical personnel inject the drugs in the dark while holding flashlights, increases the risk of injecting the drugs in the wrong order or manipulating the syringes improperly, resulting in infiltration or tubing disconnection. *Id*. 81-82.

Moreover, the drug delivery apparatus is needlessly contorted, increasing the likelihood of IV failures and vitiating the team's ability to detect those failures. *Id*. 68, 196. The use of 8 to 9 feet of IV tubing, without an IV bag, compounds the likelihood of IV tubing problems, such as leaks and kinking. *Id*. 77-78. The inmate is alone in the execution chamber and the execution team has only an obstructed view, through partially closed blinds and one-way glass, of the top of the inmate's head. *Id*. 72-76. The team cannot observe any signs of IV problems or distress from this vantage point, because a sheet covers the IV tubing, the

[7] Infiltration occurs when the catheter is not fully within the vein, so that some of the drugs go into the surrounding tissue instead of into the vein. June_Tr_81.

catheter site, and the inmate himself, and an absorbent pad would conceal leaking drugs or blood. *Id.* 72-76, 98-101. Thus, if any IV problems prevented the full administration of the thiopental,[8] the team would not detect it, and the pancuronium would then prevent the inmate from indicating that he was still conscious.

Dr. Henthorn, one of the country's foremost experts on thiopental, testified that *even if* the full intended dose of thiopental were successfully administered, some inmates likely were not deeply anesthetized during their executions, because his analysis of the onset of drug effect demonstrated that the potassium was injected before the thiopental fully anesthetized them. *Id*. 199-222.

Both Dr. Heath and Dr. Henthorn testified that the only way to reasonably ensure that inmates were adequately anesthetized prior to the administration of

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[8] In this Court, the DOC attempts to assert a new theory, not presented at trial, that if IV problems prevent the inmate from receiving an adequate dose of thiopental, the other drugs necessarily will not reach the inmate either. DOC_Br_58. This is incorrect. An infiltration, leak, or other IV problem could result in, for instance, only 40% of each of the drugs reaching the inmate's circulation. The inmate would then receive a dose of thiopental insufficient to cause deep unconsciousness, but sufficient pancuronium and potassium to cause paralysis and excruciating pain (and death), respectively. That infiltration can cause an inhumane execution is definitively demonstrated by the recent Florida execution of Angel Diaz, who moved about, grimacing in pain, for 24 minutes following the injection of thiopental. Mr. Diaz's IVs were infiltrated, resulting in extensive chemical burns and requiring additional doses of the drugs. *See* Ron Word, *Official Says Florida Execution was Botched*, Yahoo! News, Dec. 15, 2006, available at http://news.yahoo.com/s/ap/20061215/ ap_on_re_us/florida_execution (last visited Dec. 18, 2006).

pancuronium and potassium was to have a trained person assess the inmates' anesthetic depth. *Id.* 70-71, 107-09, 196. This was particularly necessary in light of the problems plaguing the execution process, and the numerous points at which mistakes or irregularities committed by Doe or other team members could result in the failure to deliver adequate anesthetic. *Id.*

2. The DOC's Case.

a. Expert Testimony.

Dr. Mark Dershwitz, an anesthesiologist, testified that although Doe had "made some pharmacological mistakes," as long as he managed to prepare 1.5 to 2 grams of thiopental, the dose would be adequate. June_Tr_335. Dr. Dershwitz speculated that Doe might have had trouble dissolving the thiopental because he was attempting to use too high a concentration, although he conceded he could not be certain. *Id.* 339.

With respect to the need to monitor anesthetic depth, Dr. Dershwitz opined that *assuming* that five grams of thiopental were "properly administered into a working intravenous catheter," and the thiopental actually reached the inmate's circulation, there would be no need to monitor anesthetic depth because all persons given five grams would be deeply unconscious. *Id.* 284. He also described occasions where medical exigencies force anesthesiologists to induce anesthesia without monitoring anesthetic depth. *Id.* 269-70. When asked what "justifies

taking the increased risk of not monitoring anesthetic depth" in an execution setting, Dr. Dershwitz responded, "That's not for me to decide." *Id.* 313.

b. Testimony of DOC Officials.

Both Director Crawford and Terry Moore, the Director of Adult Institutions, testified that they were disappointed that Doe had changed the dose of thiopental without their knowledge. Crawford testified that the DOC would "firm … up" the procedure by specifying in writing the doses of each chemical (including a 5-gram dose of thiopental). The actual procedure — the personnel, drug preparation, administration, and method of IV access — would remain exactly the same, and would not be committed to writing. Both Crawford and Moore reaffirmed their confidence in Doe, and indicated their intent to retain him as the head of the execution team. *Id*. 377 ("I have known [Doe] to be bright, professional …"); *id*. 357. Crawford saw no need to consult with any medical personnel about the protocol, moreover, because he believed that executions are not "medical procedure[s] that require[] somebody to undergo anesthesia or to be rendered unconscious," and in any event, the DOC is not equipped to do procedures requiring anesthesia. *Id*. 381.

D. The District Court's Decision.

On June 26, Judge Gaitan ruled that Missouri's execution procedure created an unnecessary risk of inflicting extreme pain and suffering on inmates, and

therefore violated the Eighth Amendment. The court found that there were "numerous problems" plaguing the execution procedure, and these problems foreseeably placed inmates in danger of excruciating pain. DOC_Add_20-22.

In order to remedy the Eighth Amendment violation, Judge Gaitan ordered the State to adopt certain changes to its lethal-injection procedures. In principal part, the court ordered the State to promulgate a written execution protocol in consultation with an anesthesiologist; retain an anesthesiologist who would monitor anesthetic depth during executions, prepare the drugs, and determine the method of IV access; and develop a contingency plan and an auditing process. The DOC was to submit its new protocol to the court by July 15, 2006.

III. REMEDIAL PROCEEDINGS.

On July 14, 2006, the DOC submitted its proposed protocol, which it concedes does not comply with Judge Gaitan's June 26th order. Most importantly, the protocol does not provide for any effective monitoring of anesthetic depth and retains the same personnel, including Doe. Taylor opposed the proposed protocol because it did not meaningfully address the numerous problems afflicting the existing system.

On September 12, 2006, Judge Gaitan issued an order rejecting the proposed protocol in relevant part, on the ground that it did not remedy the Eighth Amendment violation because it did not provide for effective monitoring of

anesthetic depth. DOC_Add_27. The Court modified its previous order to allow the State to retain *either* an anesthesiologist *or* a physician with sufficient training in the administration of anesthesia to perform the monitoring function and oversee executions. Recognizing that the DOC planned to continue using Doe, the court also barred his participation in future executions. DOC_Add_27. Shortly thereafter, the DOC moved for reconsideration. Judge Gaitan denied the motion, noting that the State had indicated its "lack of willingness to even attempt to comply with the Court's order." DOC_Add_31. The DOC appealed.

SUMMARY OF ARGUMENT

Taylor established at trial that the execution procedures employed by the DOC violate the Eighth Amendment by creating an unreasonable risk of an excruciating execution. Judge Gaitan found that the DOC has abdicated its responsibility for the execution procedure to an incompetent physician who does not understand the chemicals used and who has arbitrarily varied crucial elements of the procedure. As the court concluded, the DOC's institutional failures are so extensive that it has been unable accurately to represent the nature of the procedure or even discern how much anesthetic it administers. Accordingly, Judge Gaitan imposed reasonable remedial measures, ordering the DOC to use a physician trained in anesthesia to monitor anesthetic depth.

Judge Gaitan's conclusions and injunction are in step with growing judicial and executive concerns over the implementation of lethal injection. In mid-December, following a bench trial that revealed evidence of incompetence and disregard similar to that demonstrated by Taylor, the district court in *Morales v. Tilton* concluded that California's lethal-injection procedures violated the Eighth Amendment. No. 06-219, __F.Supp.2d__, 2006 WL 3699493, at *8 (N.D.Cal. Dec. 15, 2006) ("*Morales III*"). Similarly, in Florida, a badly botched execution prompted Governor Bush to declare a moratorium pending investigation by a commission composed of medical and other experts. Fla. Exec. Order No. 06-260 (Dec. 15, 2006) (Taylor_Add_1-4).[9]

Despite this increasing recognition that lethal injection, if not implemented in a careful, professional manner, can be as torturous as barbaric methods long ago abandoned, as well as the overwhelming evidence that the DOC's procedures are systemically flawed, the DOC has continued to insist that a few cosmetic changes to its procedures can remedy the deficiencies. As the *Morales III* Court noted when faced with similar obduracy, however, the DOC's "unwillingness to see the situation for what it is and be proactive is self-defeating." 2006 WL 3699493, at *10 n.13. Judge Gaitan's conclusions are supported by extensive evidence, and his remedy provides a sensible, minimally intrusive solution to fundamental problems.

[9] Both California and Florida use the same three-drug sequence as Missouri.

Thus, as in *Morales*, the DOC's interests would be better served by complying with the injunction than by its present intransigence. *Id.* *8-*9.

Nevertheless, the DOC now challenges Judge Gaitan's ruling on three grounds. Mischaracterizing the record and ignoring the deferential clear-error standard of review that applies to all of Judge Gaitan's findings, the DOC asserts that Judge Gaitan erred in finding that the DOC's procedures created an unreasonable risk of excruciating pain. The DOC's contentions are meritless. Judge Gaitan's findings are amply supported by his evaluation of extensive fact- and expert-witness testimony.

The DOC next contends that Judge Gaitan abused his discretion in ordering the DOC to recruit a physician qualified to monitor inmates' anesthetic depth. Far from being an abuse of discretion, however, the court's remedy is the best solution to the DOC's systemic inability to ensure that inmates are adequately anesthetized: By monitoring anesthetic depth, the physician can prevent the procedures' numerous problems from resulting in excruciating pain. Nor was Judge Gaitan's refusal to approve the DOC's manifestly unacceptable proposed protocol — which does not provide for monitoring of anesthetic depth, retains Doe, and continues the numerous flaws in the existing procedure — an abuse of discretion.

Finally, the DOC argues, for the first time on appeal, that the Eighth Amendment is violated only upon a showing that an execution procedure is *certain*

to inflict pain on every inmate, and only where prison officials *intend* to cause pain. These arguments were not presented to the district court and are therefore waived. And even if they were properly presented here, the State's novel propositions are also refuted by Eighth Amendment jurisprudence and common sense. The standard applied by Judge Gaitan, that the Eighth Amendment prohibits execution procedures that create a significant and unreasonable risk of unconstitutional pain, regardless of intent, is supported by the case law. Under the DOC's standard, the theoretical possibility that a needlessly dangerous execution procedure could be carried out without causing pain would exempt it from constitutional review, no matter how many executions were actually painful. For all these reasons, Taylor respectfully requests this Court to affirm Judge Gaitan's rulings.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT MISSOURI'S EXECUTION PROCEDURES VIOLATE THE EIGHTH AMENDMENT.

Judge Gaitan's conclusion that the DOC's execution procedures create a significant and unreasonable risk of excruciating pain is compelled by overwhelming evidence in the record. The district court applied the correct legal standard — that execution procedures involving an unreasonable risk of

excruciating pain are unconstitutional,[10] DOC_Add_26, DOC_Add_22 — to its factfindings that the DOC's procedures are systemically flawed and create a substantial risk of excruciating pain.

In arguing that the court erred in finding a constitutional violation, the DOC pervasively mischaracterizes Judge Gaitan's factual findings. In actuality, the court resoundingly rejected both the DOC's factual assertions and its expert testimony regarding the risk of excruciating pain. Judge Gaitan's findings, which can be overturned only if clearly erroneous, are based on his evaluation of the credibility and demeanor of Doe, Crawford, and Moore; his review of the videotaped inspection of the execution chamber and other evidence; and his assessment of expert medical testimony regarding the risks created by the DOC's failures.

A. Standard of Review.

This Court reviews the district court's factfindings after a bench trial for clear error, and its conclusions of law *de novo*. *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1101 (8th Cir. 2006). Under the clear error standard, this Court must affirm if the district court's findings are "plausible," and may reverse only if after reviewing the record it "is left with the definite and firm conviction that a

[10] Perhaps realizing that it cannot prevail against the weight of the evidence, the DOC argues, for the first time on appeal, that Judge Gaitan applied an incorrect Eighth Amendment standard. This argument is both waived and incorrect. *See infra* Part III.

mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985) (quotation marks omitted). The district court's evaluation of witnesses' demeanor and credibility is entitled to great deference. *United States v. Hernandez*, 281 F.3d 746, 748 (8th Cir. 2002); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980, 986 n.3 (2006) (appellate courts should "be constantly alert to the trial judge's first-hand knowledge of witnesses, testimony, and issues").

The DOC attempts to obscure the application of clear-error review by mischaracterizing Judge Gaitan's review of the evidence as entirely a "legal" inquiry. DOC_Br_39-40. That effort fails. The court's findings of the "numerous problems" plaguing the execution procedure, DOC_Add_20, are plainly findings of fact, as is the court's finding that these problems create a significant risk of inadequate anesthesia. *See Morales v. Hickman*, 438 F.3d 926, 929 & n.6 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1314 (2006) ("*Morales II*"). The Court's ultimate characterization of the risk as unreasonable and unconstitutional, DOC_Add_22, 26, is a mixed question of law and fact subject to *de novo* review. *See Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996), *vacated as moot on other grounds*, 519 U.S. 918 (1996).

B. The District Court's Factual Findings Were Not Clearly Erroneous.

Judge Gaitan correctly held that the DOC's execution procedure violates the Eighth Amendment on the basis of the following factfindings, all of which have ample support in the record and none of which is clearly erroneous.

1. Potassium Causes Excruciating Pain.

Relying on the January testimony of both Taylor's experts and the DOC's expert, Dr. Dershwitz, Judge Gaitan correctly found that potassium "will cause excruciating pain as it is administered through the inmate's veins." DOC_Add_15; 1/30/06_Tr_29, 56 (Dershwitz: potassium would be "extremely painful" "between the time it's injected and the time the heart stops"); 1/31/06_Tr_23; June_Tr_58, 190. The DOC apparently takes issue with the Court's finding, DOC_Br_57 n.13, pointing to Dershwitz's June testimony that potassium might not be very painful. June_Tr_288-90. Judge Gaitan's decision to credit Taylor's experts and Dershwitz's January testimony is entitled to great deference, however, *see In re Central Arkansas Broadcasting Co.*, 68 F.3d 213, 215 (8th Cir. 1995), and is buttressed by Dershwitz's inability to support his change in testimony with any scientific evidence, June_Tr_322-24. *See Cooey v. Taft*, 430 F.Supp.2d 702 (S.D. Ohio 2006) (noting growing evidence calling many of Dershwitz's assertions "into question").

Judge Gaitan also correctly found, on the basis of unanimous medical testimony, that pancuronium would paralyze the inmate, rendering him unable "to show that he was experiencing discomfort [from the potassium]." DOC_Add_15.

2. The DOC's Procedures are Fraught with Systemic Problems.

Having found that conscious inmates would be subjected to "torturous" suffering, DOC_App_II:354, the court correctly identified the key factual issue in the case as whether the DOC's procedures reliably ensure that general anesthesia is successfully induced.[11] DOC_Add_15, 20; *see Beardslee v. Woodford*, 395 F.3d 1064, 1074 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005); *Morales III*, 2006 WL 3699493, at *5. The evidence unequivocally demonstrates, and Judge Gaitan correctly found, that the execution procedures are systemically flawed, rendering the DOC incapable of ensuring adequate anesthesia.

a. The DOC Has Abdicated Authority to Doe.

Judge Gaitan first found that the DOC had delegated "total discretion for the execution protocol" to Doe, and that there "are no checks and balances or oversight." DOC_Add_20-21. The DOC contends that these findings are clearly erroneous because Crawford testified at trial that he had "the authority to set the

[11] Thus, the DOC's repeated assertion, *see* DOC_Br_49-50; 55-57, that a 5-gram dose of thiopental is more than sufficient to cause unconsciousness — which is undisputed — simply begs the question whether the DOC can ensure that the 5-gram dose (or some adequate dose) is actually prepared correctly, administered successfully into the inmate's circulation, and given time to take effect.

method of execution." DOC_Br_43; June_Tr_363. The record demonstrated, however, that Crawford's authority is merely nominal: he, like previous directors, has rubber-stamped Doe's conduct of executions, unfailingly deferring to Doe's decisions regarding fundamental elements of the procedure. DOC_Add_18-21; DOC_App_III:717-19. Indeed, by the DOC's own admission, it has always been "dependent" on Doe as the *only* authority on the procedure. June_Tr_342 (Moore); *id.* 367-68 (Crawford); DOC_Add_20-21; DOC_App_III:697-99. Moreover, Doe clearly operated with no meaningful supervision, as he repeatedly altered the procedure without the DOC's approval. DOC_Add_20.

The DOC also asserts that it established that Doe would not have unbridled authority in the future because Crawford testified that he would clarify that only he had the authority to approve changes to the procedure. DOC_Br_43. Crawford and Moore also testified, however, that they intended to continue to defer to Doe's judgment and that they had "confidence" in his "capabilities." DOC_Add_19; June_Tr_387-89 (Crawford); *id.* 353, 356, 360 (Moore); DOC_App_III:731-32.

Moreover, the DOC did not present any evidence that it intended to meaningfully limit Doe's total control over the procedure on execution nights. *See* DOC_Add_20; June_Tr_351-53, 381-82. Indeed, DOC officials conceded that, with no medical background of their own, they would not be able to assess Doe's exercise of medical judgment with respect to drug preparation or any other

execution-night decision. *See* DOC_Add_20; June_Tr_346-47, 351-53. Thus, Doe would continue to control the procedure in the only way that matters here: his decisions and errors would determine whether or not executions were performed humanely. Judge Gaitan's findings to this effect are overwhelmingly supported in the record as a whole.

b. Doe Is Not Competent to Oversee or Perform the Procedure.

Judge Gaitan next found that Doe, whose deposition testimony the court heard first-hand, is not capable of ensuring that inmates will be properly anesthetized. DOC_Add_21 (court was "gravely concerned" about Doe's competence). Because the process of preparing the drugs for administration "involves precise measurements and the ability to use, decipher, and not confuse numbers," DOC_Add_21, Doe's dyslexia and admittedly frequent calculation errors render him unable to prepare and administer anesthesia reliably. DOC_Add_21; DOC_App_III:659-60, 663, 685. These findings are not clearly erroneous. To the contrary, they are supported by extensive expert testimony regarding Doe's numerous material errors and inability to prepare thiopental. *See supra* at 15-17.

The DOC complains that the Court "refers to no episode where Dr. Doe accidentally gave an incorrect amount of thiopental." DOC_Br_44. In fact, Doe admittedly gave an incorrect amount of thiopental in five of the last six executions.

Indeed, Doe was unable even to state what dose he administered in any of these executions. Having heard first-hand Doe's testimony regarding his difficulties and uncertainty about how much thiopental he prepared,[12] as well as Taylor's experts' concerns, Judge Gaitan's finding that Doe is incompetent and unable to reliably prepare adequate thiopental cannot possibly be clearly erroneous.

c. The DOC Has No Consistent Procedure.

The Court found that the execution procedure "as it currently exists is not carried out consistently and is subject to change at a moment's notice." DOC_Add_20. That finding is indisputable, as Doe had repeatedly altered the procedure at his whim; his dyslexia creates unpredictability by preventing him from reliably preparing the doses; and he testified that he was "still improvising" with respect to the execution procedure. DOC_Add_18, 20-21. Moreover, the DOC had never attempted to regularize its procedures by creating a written protocol. DOC_Add_20.[13]

[12] The DOC mischaracterizes Doe's testimony when it asserts that the "record reflected" that Doe had administered at least 2.5 grams at all executions. DOC_Br_42. Doe's testimony reveals that, as Taylor's experts testified, it is impossible to determine how much thiopental Doe gave, and it may have been less than 2.5 grams. June_Tr_21, 222.

[13] The DOC urges that the Eighth Amendment does not require a written protocol. DOC_Br_41. Whether or not that is the case, the record supports the court's factual determination that the DOC's failure to institute a written protocol contributed to the arbitrariness of its procedures. DOC_Add_16-17, 20; DOC_App_III:704-5.

The DOC argues that Crawford testified that he would remedy this failure by memorializing "[t]he chemicals, their amounts, and the order of administration." DOC_Br_41. The DOC does not provide any basis, however, for finding clearly erroneous the court's conclusion that the variability in the procedure was the result of the DOC's grant of unchecked authority to Doe and his incompetence. DOC_Add_18, 20. Simply writing down the doses would not address the arbitrariness of the procedure, because Doe's awareness of the doses he was required to administer had not prevented him from making alterations in the past. DOC_Add_18, DOC_App_644-45.

d. The Drug Delivery Mechanism Risks Improper Administration.

Judge Gaitan found that the DOC's system of remote drug administration creates the danger of erroneous administration. He noted Doe's testimony that "the people who do the injections are nonmedical and they're in the dark so they have a small flashlight," as well as the impossibility of observing the inmate from the execution support room. DOC_Add_18, 21-22 (quoting Doe 31). The court also heard expert testimony that the lack of "visibility of what they're doing [is] a completely needless set-up for a problem," as it risks syringe errors and prevents any observation of IV problems or inmate distress. June_Tr_82. In ordering that execution personnel must be able to "see which drugs are being administered," and

that observation must be improved, then, the court found that the drug delivery system created a danger of erroneous administration. DOC_Add_23.

The DOC apparently does not challenge this finding. DOC_Br_46.

e. The DOC Does Not Monitor Anesthetic Depth.

Finally, Judge Gaitan found that the DOC does not monitor inmates' anesthetic depth in order to "ensure that [they have] received an adequate dose of anesthesia before the other two chemicals are administered." DOC_Add_21-22. Although Doe testified that he could monitor anesthetic depth by viewing the inmate's face through a window, Judge Gaitan rejected that testimony based on his review of videotaped simulations of each team member's view into the execution chamber. DOC_Add_21-22 (it would be "almost impossible" for Doe to observe facial expression).

The DOC challenges Judge Gaitan's assessment of the videotaped demonstration based on its own opinion of that evidence. DOC_Br_45. Judge Gaitan's rejection of testimony is "virtually unreviewable on appeal," however, *United States v. Gomez-Perez*, 452 F.3d 739, 743 (8th Cir. 2006) (quotation marks omitted), and his evaluation of tangible evidence cannot be rejected simply because the DOC disagrees. Moreover, the court's conclusion is also supported by expert testimony that Doe is unqualified to monitor anesthesia and that facial

expression is in any event not a reliable means of monitoring. June_Tr_72-76, 83, 197-98, 239.

f. The Procedure as a Whole Subjects Inmates to a Significant Danger of Inadequate Anesthesia.

The court found that taken together, these "numerous problems" in the execution procedure create a risk of inflicting excruciating pain, because there is significant potential for inmates to be inadequately anesthetized. DOC_Add_20. The court found that the risk present here was of sufficient magnitude to leave the court "gravely concerned" about the likelihood of error. DOC_Add_21-22. Far from being clearly erroneous, these findings are compelled by the record.

The problems described above materially impede the DOC's ability to induce general anesthesia successfully. The anesthetic Doe manages to prepare is delivered by nonmedical personnel through a convoluted, cumbersome drug-delivery apparatus allowing no visual observation, much less anesthetic monitoring. The DOC's use of this dangerous system, combined with substantial doubts as to whether inmates have been adequately anesthetized in the past, compels the conclusion that inmates face a significant risk of inadequate anesthesia. June_Tr_71, 196; *see Morales III*, 2006 WL 3699493, at *7-*8. Though the danger of botched executions resulting from the DOC's system is facially evident, the court's conclusions are buttressed by medical expert testimony that these systemic problems create a significant risk that inmates will be

inadequately anesthetized or subjected to painful complications of central access. June_Tr_65, 81-83, 142, 168, 190.

C. The Court Correctly Concluded That the Procedure Is Unconstitutional.

Judge Gaitan correctly found that the significant risk of excruciating pain created by the DOC's execution procedures is undue and unconstitutional. DOC_Add_22. The substantial danger is the direct, foreseeable result of the DOC's conscious choices and failure to take available steps to reasonably minimize that risk. *See Morales III*, 2006 WL 3699493, at *7.

The DOC has chosen to use an excruciatingly painful execution method — potassium — despite the existence of painless alternative lethal-injection methods. See 1/31/06_Tr_18-19, 23. The only way to avoid the certain infliction of pain using this method is to ensure that inmates are adequately anesthetized. This standard is achievable; potassium executions need not risk excruciating pain if performed with adequate safeguards.

The DOC's multiple failures, however, have resulted in an unjustifiably high risk of excruciating pain. Instead of acknowledging and minimizing the foreseeable danger of inhumane executions, the DOC has instituted a needlessly dangerous system, while displaying a shocking lack of interest, much less diligence, as to whether its procedures reasonably ensure adequate anesthesia. June_Tr_374-75, 381. This is an unreasonable way to run any state function, much

less one as grave and solemn as carrying out executions. In light of the extreme pain that will result from inadequate anesthesia and its manifest preventability, the significant risk the DOC's procedures create is unreasonable and "incompatible with … evolving standards of decency." DOC_Add_13-14 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

II. THE DISTRICT COURT DID NOT ABUSE ITS REMEDIAL DISCRETION.

A. Standard of Review.

In a court-tried case where equitable relief is sought, this Court reviews the district court's grant of an injunction for abuse of discretion.[14] *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The district court's discretion is exceeded only where it "rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Smith v. Arkansas Dep't of Correction*, 103 F.3d 637, 644 (8th Cir. 1996) (internal quotation marks omitted). The district court's exercise of remedial discretion is thus closely intertwined with the district court's factual findings

[14] The DOC neglects to mention this applicable standard of review. *See* DOC_Br_26.

regarding the violation. *See Hutto v. Finney*, 437 U.S. 678, 686-87 (1978) (emphasizing district court's "ample authority" to fashion remedies based on "severity" of established violations); *Smith*, 103 F.3d at 646. "[A]ppellate review is correspondingly narrow." *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co*., 845 F.2d 773, 780 (8th Cir. 1988).

B. The District Court Did Not Abuse Its Discretion When, Having Found a Constitutional Violation, It Required the DOC To Include a Physician with Training in Anesthesiology To Participate in and Oversee Its Lethal-Injection Procedure.

Judge Gaitan's decision to require, as a remedial matter, that the DOC obtain the services of a physician trained in anesthesiology to assess anesthetic depth is grounded in, and justified by, the same record that required him to amend his January ruling and find a violation.[15] Taylor presented extensive evidence that the procedure's systemic problems foreclose any assurance that inmates will be adequately anesthetized. *See supra* Part I. Remedying these problems is hardly simple, because the DOC's longstanding abdication of responsibility for the safety of the execution procedure leaves it unequipped to respond effectively now. Neither Doe nor any other DOC employee understands the risks of the procedure,

[15] Judge Gaitan's June 26 order required that the DOC employ a board-certified anesthesiologist, DOC_Add_23, but on September 12 he modified that requirement, broadening it to include "physician[s] with training in the application and administration of anesthesia." DOC_Add_27. Both requirements were well within the court's remedial discretion. This discussion addresses the latter requirement. *See infra* Part II.D.

the nature and dangers of the drugs, or the need to ensure adequate anesthesia. That situation persists despite the DOC's opportunity to learn, through this litigation, about these issues, as is evident from Crawford's and Moore's testimony and the DOC's belief that merely specifying the drug doses would remedy all problems. June_Tr_351-52, 356-57, 372, 381; DOC_App_III:659-60, 692, 710.

Based on the record established at trial, Judge Gaitan reasonably determined that neither the DOC's supervisory personnel nor Doe and other execution personnel could reasonably be entrusted to fix the pervasive problems in the execution procedures or perform executions constitutionally. Indeed, even were the DOC to attempt to design such a protocol, Judge Gaitan recognized that DOC employees' past conduct and present recalcitrance provided ample reason to conclude that they would ignore or be unable to follow the new instructions.[16] DOC_Add_20-21; June_Tr_19. Judge Gaitan therefore reasonably found that effective monitoring of anesthetic depth by a qualified professional is the best way to ensure that any errors, deviations from the protocol, misconduct, or drug delivery failures will not result in inadequate anesthesia. This conclusion was

[16] Astoundingly, the DOC stated after the trial that if the full dose of thiopental could not be mixed in the future, it would once again deviate from its stated procedures without warning and administer an indeterminate lower dose of insoluble thiopental. DOC_App_II:369. The DOC's disregard of the evidence that this precise conduct creates a serious risk of inadequate anesthesia indicates the need for anesthetic monitoring to guard against pain caused by such arbitrariness.

supported by the testimony of Taylor's expert anesthesiologists.[17] June_Tr_71, 107, 196-198. Taylor also presented extensive evidence that only persons who have advanced training in anesthesiology can perform anesthetic monitoring, particularly on paralyzed patients.[18] *See, e.g.,* Doc_App_II:249-50; June_Tr_at 26, 196. By providing effective monitoring, the DOC would ensure that whatever goes wrong during the procedure, the inmate will not receive the painful drugs until he is sufficiently anesthetized.[19]

Thus, the court's injunction was an eminently reasonable, effective remedy for an intractable problem, and as such clearly not an abuse of discretion. *See French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985); *Smith*, 103 F.3d at 645. Indeed, when medical expertise must inform an institution's conduct, as Crawford concedes is true of lethal-injection executions, June_Tr_382-83, 390, it is certainly reasonable for courts to require that decisions be made by a "professional," "competent" decision maker. *Youngberg v. Romeo*, 457 U.S. 307, 323 & n.30 (1982) (institution would be liable if decision about involuntarily committed

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[17] The DOC's expert's testimony is not to the contrary; Dershwitz testified that monitoring is not necessary *assuming* that 5 grams of thiopental reaches the circulation – which is precisely what Judge Gaitan found the DOC is unable to ensure. June_Tr_284.

[18] In contrast, EMTs, nurses, and physicians without training in anesthesia are not qualified to monitor anesthetic depth. *See* DOC_App_II:251.

[19] Indeed, Missouri veterinarians cannot euthanize animals using potassium without monitoring anesthetic depth. *See* Mo. Ann. Stat. § 578.005(7), -007(7),-012.

ward's care was not "made by persons with degrees in medicine or nursing, or with appropriate training"); *Morgan v. Rabun*, 128 F.3d 694, 697-98 (8th Cir. 1997).

Nor is Judge Gaitan's remedy unduly burdensome. The court recognized that the DOC needed either to monitor the inmate's anesthetic depth to ensure against pain, or dramatically change the procedure to ensure that the anesthetic was delivered properly. DOC_Add_27. Had the court opted not to require monitoring, it would have had two options for changing the procedure to minimize the risk of pain. One approach would have been to impose detailed instructions about how to fix each step of the procedure. *See supra*. But this option would likely have been a futile exercise, and would require extensive judicial supervision. *See Morales III*, 2006 WL 3699493, at *9 (detailing systemic changes in consultation with independent experts and suggesting Governor oversee revision process in light of DOC's incompetence and recalcitrance). A second course would have been to order the DOC to stop using pancuronium and potassium and instead execute using only a massive dose of thiopental. *See* Taylor_App_51; DOC_Br_56 n.10; *see also Morales v. Hickman*, 415 F.Supp.2d 1037, 1047 (N.D. Cal. 2006) ("*Morales I*") (same), *aff'd*, 438 F.3d 926 (9th Cir.), *cert. denied*, 126 S. Ct. 1314 (2006); *Morales III*, 2006 WL 3699493, at *10. But the Court deferred to the DOC's desire to continue using the three-drug protocol. DOC_Add_26. Thus, the Court's chosen remedy — ordering that one qualified individual ensure that none of the

procedure's problems results in inadequate anesthesia — is, compared to its other options, both unintrusive and eminently reasonable.[20]

Nor is this remedy anomalous. In *Morales II*, the Ninth Circuit refused to find it an abuse of discretion for the district court to have ordered that an anesthesiologist "take all medically appropriate steps necessary to ensure" unconsciousness. *Morales II*, 438 F.3d at 931. As here, the *Morales* district court recognized that such a step was needed to ensure sufficient anesthesia and, hence, the constitutionality of this same three-drug sequence.[21]

The DOC contends that the Eighth Amendment does not require that a trained professional monitor anesthetic depth. DOC_Br_52. This misses the point. Anesthesiologists are not constitutionally required to participate in all lethal-injection executions, as Judge Gaitan recognized. DOC_Add_27. But that does not mean that it is an abuse of discretion for the district court to require one as an exercise of remedial discretion where, as here, it has found a constitutional violation based on findings that the current procedure fails to ensure sufficient

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[20] *Morales III* recognized that California had these same three options. 2006 WL 3699493, at *9-10.

[21] It is true, as the DOC points out, that the *Morales* court presented the DOC with a choice of employing an anesthesiologist or eliminating pancuronium and potassium. *See Morales I*, 415 F.Supp.2d at 1047-48. But this merely confirms that Judge Gaitan's remedy was among the appropriate options. That California chose the anesthesiologist option over using the one-drug procedure further demonstrates that Judge Gaitan's remedy was not only permissible but may be preferable to a department of corrections.

anesthetization and the DOC intends to continue using drugs which indisputably cause pain and suffering upon administration to a conscious person.[22] This Court observed this distinction in *Smith*. There, the district court found that the prison had breached its constitutional obligation to take reasonable steps to protect inmates from brutal violence. *Smith*, 103 F.3d at 644-45. Having found a violation, the court then granted injunctive relief requiring the defendants to station additional guards in the prison's open barracks. *Id.* 642. Reviewing for an abuse of discretion, this Circuit held that this remedy would not be constitutionally required in every case, but was "reasonable" in light of the evidence of the constitutional violation. *Id.* 646; *see also Jensen v. Clarke*, 94 F.3d 1191, 1200-01 (8th Cir. 1996); *French*, 777 F.2d at 1252.

[22] For this reason, the cases cited by the DOC in support of its argument, DOC_Br_52-53, are inapposite. In those cases, courts found, usually without the benefit of any discovery, that the lethal-injection procedures at issue did not create an unreasonable risk of pain. It was therefore unnecessary to consider whether anesthetic monitoring was necessary. The case on which the DOC most heavily relies, *Evans v. Saar*, 412 F.Supp.2d 519, 524 (D. Md. 2006), demonstrates the invalidity of the DOC's argument. There, the court refused to grant a preliminary injunction on Evans' lethal-injection claim. Subsequently, however, the court conducted a bench trial, at which Evans presented extensive evidence that the procedures are unreasonably dangerous. The court is now considering whether to remedy the violation by ordering that an anesthesiologist monitor executions. *See* Brian Witte, *Maryland Told to Explore Using Doctors for Executions*, *Baltimore Sun*, Dec. 6, 2006, available at http://www.baltimoresun.com/news/local/bal-deathpenalty1206,0,5637317.story?coll=bal-local-headlines (last visited Dec. 19, 2006).

Just as remedy in *Smith* could not be reversed as an abuse, so too must the district court's anesthesia-monitoring requirement stand. Indeed, the remedy in *Smith* was far more intrusive than the district court's: it commandeered trained correctional officers for a particular purpose, thus taxing a limited prison resource and interfering directly in prison administration and security. Given that the DOC has already brought in an outsider (Doe) to participate in dozens of executions, Judge Gaitan's requirement that the DOC recruit another professional of its choosing surely does not so impose on these interests.

In light of the procedure's "numerous" flaws, the deference that must be afforded that factual finding, and the court's broad equitable discretion, this remedy cannot possibly be an abuse of discretion.[23]

C. The District Court Did Not Abuse Its Discretion When It Denied the DOC's Request to Modify the Injunction.

Instead of trying to comply with the court's injunction, the DOC submitted a protocol that sought to redefine the remedy — a thinly veiled request for the district court to modify its injunction. The standard for reviewing an order

[23] The DOC also misses the point when it contends that the Eighth Amendment does not require the doctor selected to be in good standing. *See* DOC_Br_54-55 & n.8. Once again, this requirement emerges from the scope of the violation. The DOC's last doctor, Doe, performed the procedure so dangerously that Judge Gaitan felt compelled to bar his participation in executions. *See* DOC_Add_27. Given the DOC's poor record in selecting execution personnel, Judge Gaitan's requirement that the doctor be in good standing is entirely appropriate and manifestly not beyond the scope of the violation. *See Smith*, 103 F.3d at 646. *See also supra* note 3.

refusing to modify an injunction is the same abuse of discretion standard used to review decisions to grant an injunction in the first place. *See* 16 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3924.2, at 212 (2d ed. 1996); *see also Surgidev Corp. v. Eye Tech., Inc.*, 828 F.2d 452, 458 (8th Cir. 1987). The court's rejection of the written protocol cannot be deemed such an abuse.

The DOC's written protocol neither complies with the court's injunction nor rescues the procedure from its manifest flaws. As noted above, the district court required the DOC to monitor the inmate's anesthetic depth using a qualified professional. The DOC's protocol does not do so. Instead, it proposes monitoring inmates with "medical personnel" — that is, a doctor, nurse, or EMT. Taylor presented extensive evidence, however, that personnel without formal training in anesthesiology are unable to monitor anesthetic depth, particularly in paralyzed inmates.[24] June_Tr_69, 85; DOC_App_II:252-53. In rejecting the DOC's monitoring plan, Judge Gaitan also rejected the DOC's assertions that personnel without anesthesia training can effectively monitor anesthetic depth.[25] DOC_Add_27. Moreover, the proposed protocol allows the existing personnel, including Doe, to perform the monitoring function, *see* Protocol at 1, despite their

[24] The written protocol lists some clinical techniques for monitoring anesthetic depth, Protocol at 3, but those techniques cannot be competently applied by someone without training in anesthesiology. *See* DOC_App_II:252.

[25] The DOC fails to acknowledge this point. DOC_Br_60.

track record of incompetence.[26] Far from constituting an abuse of discretion, the district court was well within its authority to reject the DOC's monitoring plan.[27]

Nor does the proposed protocol attempt to remedy the procedure's other "numerous problems," DOC_Add_20-21, instead affixing a few cosmetic changes onto an irreparably broken system. To understand the proposed protocol's deficiencies, one must understand the nature of Judge Gaitan's remedy. Aside from requiring the DOC to have a qualified physician undertake anesthetic monitoring, Judge Gaitan sensibly entrusted many important specifics of the new procedure to the discretion of the physician in consultation with the DOC. DOC_App_I:200-01. That approach makes eminent sense, as the overriding flaw in the DOC's current system is that it is run by personnel — from the Director to the execution team members — who do not understand the procedure and its risks.

Thus, even aside from the lack of anesthetic monitoring, the DOC's proposal undermines Judge Gaitan's carefully calibrated remedy. The written protocol

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[26] Tellingly, the DOC has never disavowed its intent to continue using existing personnel, including Doe, to perform executions. *See* June_Tr_387-89 (Crawford intends to continue using same personnel, including Doe); *see generally* DOC_App_II:360-71.

[27] The DOC argues that its monitoring was adequate because Doe, who is untrained in anesthesiology, could see the inmate's facial expression through a window from another room. *See* DOC_Br_45. The DOC's continued intention to rely on an unqualified person to monitor anesthetic depth through a window, despite the court's findings, demonstrates that the DOC cannot be trusted to perform this procedure without the addition of a qualified professional.

cannot be evaluated in isolation as an abstract document, because it must always be given effect by the personnel who carry it out. That is particularly the case here, as the protocol, like the injunction itself, leaves much to the discretion of the execution personnel, including, *inter alia*, IV access, thiopental preparation, drug administration, and inmate observation. DOC_Add_32-34. Instead of having that discretion exercised by a physician with the anesthesia training necessary to understand the risks of the procedure, as Judge Gaitan contemplated, the DOC envisions vesting discretion in Doe and the same unqualified, untrained personnel who have always deferred to him.

The DOC's proposed protocol thus perpetuates the grave flaws that prevent the DOC from even being able to ensure compliance with its own procedures. Indeed, Judge Gaitan made extensive findings that the DOC's personnel were both unwilling and unable to perform their tasks properly.[28] The DOC also intends to use the same convoluted drug delivery apparatus that simultaneously creates a risk of problems and hinders detection of those problems. June_Tr_77-78. Far from obviating the need for the court's injunction, the written protocol thus demonstrates that the DOC will not change unless forced to do so. *See Jensen*, 94

[28] For example, the new protocol, extraordinarily, permits Doe to prepare the drugs, even though the court found that the procedure is complicated and Doe is incompetent to perform it. This problem cannot be cured merely by delegating the preparation to another member of the team, because no one on that team possesses the necessary skills and qualifications. DOC_App_III:665; *see also Morales III*, 2006 WL 3699493, at *6-*7 (registered nurse unable to mix thiopental).

F.3d at 1200-01 (citing defendants' inadequate remedial plan as evidence that violation would continue); *French*, 777 F.2d at 1254.

The district court therefore correctly found that this new protocol created significant risk of suffering. *See* DOC_Add_27. This factfinding is reviewed for clear error and cannot be reversed so long as Judge Gaitan's view of the evidence is plausible. *See Anderson*, 470 U.S. at 573. The court's view is unquestionably "plausible." Accordingly, its rejection of the new protocol and refusal to modify the injunction cannot be an abuse of discretion.

D. The DOC Has Not Taken Adequate Steps To Locate A Physician With Training In Anesthesiology, So Its Objection To That Requirement Is Premature.

The DOC argues that the district court erred in mandating that a physician with training in anesthesiology assist during executions, because it could be impossible to comply with such a requirement, thus effectively barring implementation of the death penalty in Missouri. The DOC, however, has made only the most minimal effort to comply, sending out 298 "cold-call" letters to local anesthesiologists by regular mail just *eight days* before it announced that it was unable to retain anyone. There are tens of thousands of anesthesiologists in the United States; a cursory letter to 298 does not remotely demonstrate that it is "impossible" to procure one. *See* DOC_App_II:258. Furthermore, after the DOC sent its letters, the district court amended its order to encompass other physicians

with training in anesthesiology, *see* DOC_Add_27, thereby broadening the field of candidates. Notwithstanding the DOC's unelaborated claim that it continues to search for a doctor, *see* DOC_Br_65, nothing in the record suggests that it has attempted to take advantage of this broader universe of eligible physicians.

The DOC's suggestion that no doctor will be willing to participate is simply wrong. Studies demonstrate that 25% of physicians would personally perform five or more actions intrinsic to lethal injection, and 19% would be willing to administer the lethal drugs themselves.[29] DOC_App_II:257-58. There are, to be sure, ethical issues involved, but these studies make clear both that there is no monolithic ethical position in the medical community, and that many doctors *would* be willing to participate. Additionally, *no* professional-association rules or Missouri laws impose sanctions for doctors' participation.[30] *See* DOC_App_342, 347.

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[29] There is no reason to believe that the attitudes of anesthesiologists would be any different. *See* DOC_App_II:257-58. Indeed, at a recent panel of the American Society of Anesthesiologists (ASA), one anesthesiologist stated that he considered it an ethical *duty* to assist with lethal injection because prisoners "are suffering and I have the ability to help them." *See Clinical Forum: Medicalizing executions places anesthesiologists on slippery slope, ASA Daily News 2006*, Oct. 15, 2006, available at http://www.asadailynews.com/Sunday.html (last visited Dec. 31, 2006).

[30] Indeed, earlier in this litigation, the DOC itself confirmed that neither the AMA Code of Ethics nor any Missouri ethical rule or law would prohibit or penalize physician participation in executions. Taylor_App_16-17. Moreover, while the

Having barely begun the process of locating someone, the DOC's objection to this requirement is premature and frivolous. *See United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 736 (8th Cir. 2001) (litigants bear burden of showing in detail that compliance with court order is impossible).

Finally, were the DOC ultimately unable to find someone after further genuine efforts, it would still have ways to implement the death penalty. It could, for instance, adopt a one-drug procedure or ask the district court to modify its injunction based on a more rigorous showing of impossibility. Accordingly, the injunction in no event bars implementation of the death penalty.

III. THE DISTRICT COURT APPLIED THE CORRECT EIGHTH AMENDMENT STANDARD.

For the reasons stated above, the DOC's challenges to Judge Gaitan's rulings are entirely meritless. The DOC's alternative tack on appeal is to assert an eviscerated Eighth Amendment standard that restricts only execution procedures that are *guaranteed* and *intended* to cause pain. The DOC never raised these arguments to the district court, and they are waived. *Wiser v. Wayne Farms*, 411 F.3d 923, 927 (8th Cir. 2005); *Becker v. University of Nebraska*, 191 F.3d 904, 909 n.4 (8th Cir. 1999) ("A party may not stand idly by … and allow[] the [district court] to commit error of which [the party] subsequently complains."). Moreover,

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outgoing ASA president advised anesthesiologists to "steer clear," his words have no binding effect. *See* DOC_App_II:262.

the arguments are indefensible. No precedent supports the DOC's standard, which tolerates even the most unnecessary and unreasonable risks of pain, and which excuses even the cruelest execution methods so long as the officials do not explicitly intend to inflict pain. In contrast, the standard adopted by the district court — that the Eighth Amendment bars methods of execution that impose unreasonable risks of pain — is the law of the land.

A. Standard of Review.

This Court reviews questions of law *de novo*. *Antolik v. Saks, Inc*., 463 F.3d 796, 798 (8th Cir. 2006).

B. The Eighth Amendment Forbids Execution Procedures That Create An Unreasonable Risk Of Pain.

The Eighth Amendment bars the imposition of "cruel and unusual punishment." U.S. Const. amend. VIII. The Supreme Court has long interpreted this phrase to bar punishments "incompatible with the 'evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Judge Gaitan found that although the unforeseeable "risk of accident," DOC_Add_26, does not violate the Eighth Amendment, the DOC may not use execution methods that create an "unnecessary" or "unreasonable risk" of pain, DOC_Add_26. That conclusion is plainly correct. The DOC acknowledges that the Eighth Amendment prohibits the "unnecessary" infliction of pain.

DOC_Br_28 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Thus, the DOC is constitutionally obligated to reasonably minimize the pain that it inflicts on condemned inmates. But maintaining a procedure that creates an unnecessary risk of pain does not reasonably minimize pain, because that procedure will inevitably cause unnecessary pain in real executions. It is entirely proper to require the DOC to correct that unnecessary risk now, rather than after Taylor's execution when it will be too late to safeguard his constitutional rights. Moreover, such unreasonable risks are by definition "totally without penological justification," *Jorden v. Farrier*, 788 F.2d 1347, 1348 (8th Cir. 1986) (quoting *Gregg*, 428 U.S. at 183), and inconsistent "with the evolving standards of decency," *Estelle*, 429 U.S. at 102 (internal quotation marks omitted), because they needlessly subject inmates to a painful execution. Even Justices who have taken a narrower view of the Eighth Amendment's protections have recognized such punishments are impermissible. *See Furman v. Georgia*, 408 U.S. 238, 430 (1972) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.") (Powell, J., dissenting, joined by Burger, C.J., Blackmun, J., and Rehnquist, J.).

The correctness of Judge Gaitan's ruling is confirmed by the many cases that have adopted the same standard. *See Evans v. Saar*, 412 F.Supp.2d 519, 524 (D. Md. 2006) (asking "whether an inmate facing execution has shown that he

is subject to an unnecessary *risk* of unconstitutional pain or suffering") (emphasis added; internal quotation marks omitted); *Morales III*, 2006 WL 3699493, at *1 ("[T]he Eighth Amendment prohibits … procedures that create an 'unnecessary *risk*' [of pain.]") (emphasis added); *Cooey*, 430 F.Supp.2d at 708 (finding that "Ohio's lethal injection protocol giv[es] rise to the unacceptable *risk* of violating the Eighth Amendment[]") (emphasis added); *Baze v. Rees*, No. 2005-SC-0543-MR, __S.W.3d__, 2006 WL 3386544, at *2 (Ky. Nov. 22, 2006) ("[The test is whether the] procedure for execution creates a substantial *risk* of wanton and unnecessary infliction of pain.") (emphasis added); *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004) (Cooper must show "he is subject to *unnecessary risk* of unconstitutional pain") (emphasis added). Although these courts use slight differences in phraseology, they are crystal clear that risk of pain is central to the Eighth Amendment analysis.

Despite this precedent supporting the district court's standard, the DOC now argues that no risk, no matter how unreasonable and foreseeable, can give rise to a constitutional violation. But that argument is waived, as the DOC never presented it to the district court. Indeed, although the DOC challenged many other aspects of the district court's decision, it repeatedly *embraced* a risk standard in defending its revised protocol: "The protocol proposed by the Department of Corrections complies with the Eighth Amendment *in that it … does not subject condemned*

prisoners to a foreseeable and undue risk of unnecessary and wanton pain." DOC_App_II:360 (emphasis added); *see also* DOC_App_II:361, 362, 364, 366, 370. Likewise, although Taylor's amended complaint alleges an Eighth Amendment violation on the basis of the "foreseeable risk" of pain, DOC_App_II:87-88, the DOC did not claim this was the wrong standard in its motion to dismiss. Nor did the DOC articulate the argument in its June pre-trial brief. It is entirely improper for the DOC to argue for a new standard on appeal. *Wiser*, 411 F.3d at 927.

Even if the argument were preserved, it should still be rejected as erroneous. The DOC calls the risk standard "novel," DOC_Br_32, yet its brief ignores nearly all of the cases cited above that apply the standard.[31] Nor does the DOC's standard make any sense given that it permits even the most dangerous means of execution so long as they are not guaranteed to be cruel and unusual. The DOC's standard would insulate haphazard execution practices from constitutional review because of the impossibility of demonstrating that those practices were absolutely certain to cause pain. No decision from any court ignores risk in the manner the DOC urges.

[31] The DOC claims that the risk standard articulated in *Cooper* is the product of a preliminary injunction analysis. DOC_Br_31-32. Yet preliminary relief for Cooper depended not on showing that it was likely that the execution method was *guaranteed* to cause pain, but that it was likely the execution method presented an *unreasonable risk* of causing pain. *Cooper*, 379 F.3d at 1033.

Certainly the cases that the DOC cites do not support its extreme position. Noting that "all human activity entails risk," DOC_Br_32, the DOC cites the plurality opinion in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947),[32] for the proposition that the "risk of accident" does not create an Eighth Amendment violation. DOC_Br_33. That citation is doubly inapt. First, *Resweber* did not even involve a claim that death by electrocution created an unreasonable risk of pain; the prisoner's claim was only that it would be psychologically cruel and unusual to subject him to electrocution a *second* time after the first attempt was unsuccessful. *Resweber*, 329 U.S. at 464. Thus, *Resweber* simply has nothing to do with the issue before this Court.

Second, even indulging the DOC's misreading of *Resweber*, Judge Gaitan, as noted above, explicitly *rejected* the notion that the unavoidable "risk of accident" inherent in all human activity could give rise to an Eighth Amendment violation. DOC_Br_33. Judge Gaitan found instead that the constitution bars only foreseeable and unreasonable risks of excruciating pain, a standard fully consistent with *Resweber*. *Compare* DOC_Add_22 (finding a violation in light of "undue risk" of pain) *with Resweber*, 329 U.S at 464 (declining to find a violation on the basis of an "unforeseeable accident") (plurality opinion). Indeed, Judge Gaitan's

[32] Although the DOC does not mention it, the Eighth Amendment ruling in *Resweber* secured the votes of only four Justices; Justice Frankfurter concurred in the judgment on different grounds. 329 U.S. at 466-72 (Frankfurter, J., concurring in the judgment).

formulation is suggested by *Resweber* itself, which reached only the limited conclusion that "[*a*]*s nothing has been brought to our attention to suggest the contrary*, we must and do assume that the state officials carried out their duties … in a careful and humane manner," *Resweber*, 329 U.S. at 462 (emphasis added). The other cases that the DOC cites as purportedly abandoning the risk standard impose these same restrictions. *See, e.g.*, *Malicoat v. State*, 137 P.3d 1234, 1237 (Okla. Crim. App. 2006) (finding that the mere risk of accident does not violate the Eighth Amendment, so long as the State takes "appropriate precautions and rel[ies] upon adequate training, skill, and care in doing the job"). In short, while the Eighth Amendment does not require the DOC to prevent the unforeseeable, it is required to remedy the foreseeable likelihood of excruciating pain.

The pair of nineteenth-century cases that the DOC cites are also unavailing. In *Wilkerson v. Utah*, 99 U.S. 130 (1878) and *In re Kemmler*, 136 U.S. 436 (1890), the Supreme Court considered challenges to execution by firing squad and electrocution, respectively. But both cases involved entirely different types of Eighth Amendment challenges than the one at issue here. The prisoners did not allege that the method of execution contained some foreseeable risk that would cause unconstitutional pain; their claim was that death by firing squad and electrocution were inherently unconstitutional, *even if carried out without error*. As such, those cases had no reason to address the relevance of unreasonable risk,

let alone to hold it irrelevant. Moreover, just because executions no longer take place using the facially unconstitutional methods discussed in those opinions, such as the rack and screw, the DOC cannot avoid Eighth Amendment scrutiny by adopting a potentially proper method of execution like lethal injection but carrying it out in an unreasonable manner.[33] *See Weems v. United States*, 217 U.S. 349, 373 (1910) ("[W]e cannot think that [the Eighth Amendment] was intended to … prevent only an exact repetition of history.").

The DOC is left to argue that a reasonableness standard is untenable. DOC_Br_32-34. That canard is rebutted by courts every day as they assess reasonableness in countless contexts in order to apply legal standards. What would be wholly untenable is to exempt from constitutional review all execution methods not guaranteed to cause pain. That legal standard would make a procedure's mere *potential* to be carried out painlessly a complete defense to the all too real risks the DOC's actions create.

Because the DOC has waived its "certain pain" argument, and because the argument is an incorrect interpretation of the Eighth Amendment, this Court should reject it.

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[33] Indeed, the DOC's "guaranteed pain" requirement would permit even the cruelest methods of punishment because no method of execution is strictly guaranteed *ex ante* to cause pain in all cases. Any number of contingencies might arise, such as the prisoner who dies or loses consciousness instantly.

C. Cruel and Unusual Execution Methods Do Not Become Constitutional When They Are Unintended.

The DOC's second argument is that whatever pain and suffering its execution procedures create, there can be no Eighth Amendment violation unless prison officials intend to cause that pain and suffering. Again, the DOC creates a precedentless standard inconsistent with Eighth Amendment jurisprudence.

As an initial matter, the DOC never argued the necessity of scienter to the district court. The claim is waived and not properly before this Court. *Wiser*, 411 F.3d at 927.

But even if it had been validly raised, the argument would still be incorrect. *Mens rea* has no place in an Eighth Amendment review of the means by which a state carries out its punishment of death. The intent of the executioner plainly does not lessen the pain he causes. *See Campbell v. Wood*, 18 F.3d 662, 682 & n.12 (9th Cir. 1994) (review of the "methodology" of an execution is concerned only with "*objective* evidence of the pain involved" and a "deliberate indifference standard is not directly applicable" to it) (emphasis added)).

In response, the DOC relies almost exclusively on cases involving prison conditions and the like. DOC_Br_36-37. To be sure, *mens rea* may be relevant to actions taken *incident* to punishment, such as with cell overcrowding or medical care, lest every error in the prison context "become a constitutional violation merely because the victim is a prisoner." *Estelle*, 429 U.S. at 106. But the state

action at issue here is not "incident" to punishment; the method by which the DOC chooses to perform the lethal injection *is* the punishment — indeed it is the most profound punishment that the DOC may impose. No case has ever held *mens rea* relevant to those actions; on the contrary, case after case has considered challenges to execution methods without ever inquiring into subjective state of the officers who carry it out. *E.g., LaGrand v. Stewart*, 173 F.3d 1144, 1148-49 (9th Cir. 1999) (finding execution by cyanide gas unconstitutional based on "substantial risk" of severe pain, without considering scienter); *Cooey*, 430 F.Supp.2d at 708 (same for lethal injection); *Morales I*, 415 F.Supp.2d at 1039.

Indeed, the *only* execution case that the DOC cites for its intent standard is the *Resweber* plurality. But while that opinion noted that Louisiana lacked a "purpose to inflict unnecessary pain," it is clear from context that the plurality meant only that the "unforeseen accident" that led to a failing of the electric chair was in fact truly an accident. *Resweber*, 329 U.S. at 464 ("The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot ... add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain ...."). Thus, while a showing of malicious purpose could be relevant to an inquiry into whether mistakes by the DOC were truly

unforeseeable, *Resweber*'s plurality imposed no general rule that purpose is a necessary component of unconstitutional pain.[34]

In sum, the DOC has waived any argument about scienter, and its arguments are flawed in any case. Its claim of error must therefore be rejected.

[34] Even if this Court were to conclude that intent were necessary, a standard no higher than deliberate indifference is justified. Higher *mens rea* is reserved only for situations, such as prison riots, where officials are "in haste [and] under pressure." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Judge Gaitan's ruling amply supports a finding of deliberate indifference, *i.e.*, "recklessness." *Id.* 836. The district court found that Crawford was, and intends to remain, "totally dependent" on Doe regarding medical procedures, and that Doe, despite knowing that he had significant trouble with dosages, continued to administer executions. DOC_Add_18-20; *supra* note 16. That is tantamount to a finding of deliberate indifference. *Farmer*, 511 U.S. at 842, 846 & n.9 (recklessness can be inferred where "risk is obvious" and court has found a risk exists); *Jensen v. Clarke*, 94 F.3d 1191, 1200 (8th Cir. 1996) (defendants' post-trial conduct indicated deliberate indifference). In all events, imposing a *mens rea* requirement at most would require remanding the case to Judge Gaitan to enter findings on the point.

CONCLUSION

Judge Gaitan's decision should be affirmed, and this Court should remand to the district court so that the DOC may comply with the court's rulings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations of Federal Rule of Appellate Procedure 32(a). This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,993 words, according to the word count function of Microsoft Word (2002).

Respectfully submitted,

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Ginger D. Anders

CERTIFICATION OF COMPLIANCE WITH CIRCUIT RULE 28A(D)

A PDF digital version of Appellee's brief, excluding the addendum and unpublished opinions, has been furnished on a CD-ROM and produced to this Court. Duplicate CD-ROMs have been produced to the Appellants' counsel. The CD-ROMs have been scanned for viruses using the McAfee 8.0 program and are virus free.

Respectfully submitted,

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Ginger D. Anders

CERTIFICATE OF SERVICE

I certify that on January 2, 2007, I caused to be served two copies of the brief and one copy of the appendix of Plaintiff-Appellee Michael Anthony Taylor on counsel of record for the Defendants-Appellants herein by mailing said copies via UPS, addressed to the following:

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I also served him with electronic copies of the brief on CD-ROMs enclosed in the same mailing.

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