No. _____

IN THE

Supreme Court of the United States

ANNE L. PRECYTHE,
Director, Missouri Department of Corrections,
Petitioner,

v.

ERNEST JOHNSON,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals
For the Eighth Circuit

No. 17-2222

Ernest Lee Johnson,

Plaintiff - Appellant,

v.

Anne L. Precythe; Alana Boyles; Stanley Payne,*

Defendants - Appellees.

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: May 16, 2018
Filed: August 27, 2018

Before SMITH, Chief Judge, BEAM and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

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* Appellees Precythe, Boyles, and Payne are automatically substituted for their predecessors under Federal Rule of Appellate Procedure 43(c)(2).

Ernest Johnson, a prisoner sentenced to death in Missouri, appeals the dismissal of his action challenging the constitutionality of the State's method of execution as applied to him. The district court dismissed Johnson's second amended complaint for **[p. 2]** failure to state a claim. We conclude that Johnson pleaded a plausible claim for relief under the Eighth Amendment, so we reverse and remand for further proceedings.

I.

Johnson was convicted of three counts of first-degree murder in Missouri state court and sentenced to death. *See State v. Johnson,* 244 S.W.3d 144, 149 (Mo. 2008). He filed this action against Missouri officials in October 2015, approximately two weeks before a scheduled execution on November 3, 2015. Johnson alleged that the State's method of execution—lethal injection with pentobarbital—violates the Eighth Amendment's proscription on cruel and unusual punishment, because there is "a substantial and unjustifiable risk" that a pentobarbital injection will "trigger severe and uncontrollable seizures and convulsions due to his brain defect and unique medical condition."

The district court granted the State's motion to dismiss the complaint for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Applying the Eighth Amendment standard from *Glossip v. Gross,* 135 S. Ct. 2726, 2737 (2015), the court concluded that Johnson had not identified a feasible, readily implementable alternative method of execution that would significantly reduce a substantial risk of severe pain. The court dismissed the complaint without prejudice, stating that Johnson was free to

amend his complaint to remedy its deficiencies. Due to Johnson's imminent execution date, however, the court stated that it was certifying the dismissal order for interlocutory appeal under Federal Rule of Civil Procedure 54(b).

Johnson moved this court to stay his execution pending appeal. This court denied a stay after concluding that Johnson failed to demonstrate a significant possibility of success on either element of his Eighth Amendment claim. *Johnson v. Lombardi,* 809 F.3d 388 (8th Cir. 2015) (per curiam). The Supreme Court, however, granted a stay pending appeal in the Eighth Circuit. *Johnson v. Lombardi,* 136 S. Ct. **[p. 3]** 443 (2015) (per curiam). The Court observed that a supporting affidavit by a medical expert stated that, "[a]s a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that may be induced by [the] Pentobarbital injection." *Id.* at 443 (alterations in original).

As we observed in *Bucklew v. Lombardi,* 783 F.3d 1120 (8th Cir. 2015) (en banc), "[t]he Court's decision to grant a stay pending appeal reflected its determination that [the movant] had shown 'a significant possibility of success on the merits' of his appeal from the district court's dismissal of his complaint." *Id.* at 1123-24 (quoting *Hill v. McDonough,* 547 U.S. 573, 584 (2006)). In this case, however, we subsequently dismissed Johnson's appeal for lack of jurisdiction, and did not consider the merits of his complaint at that time. *Johnson v. Lombardi,* 815 F.3d 451 (8th Cir. 2016). We noted that the State had not established a new execution date, and that Johnson was thus "free to move for

leave to amend his complaint without the pressure of a scheduled execution." *Id.* at 452.

Back in the district court, Johnson amended his complaint, but the court again dismissed it without prejudice. This time, the court reasoned that Johnson's complaint failed to plead facts that established the likelihood that pentobarbital would cause him to have a mid-execution seizure. The court allowed that it would give Johnson one more opportunity to file an adequately pleaded complaint.

Johnson then filed a second amended complaint. As an exhibit, Johnson attached an affidavit from anesthesiologist Dr. Joel Zivot, who opined about the likelihood that Johnson would suffer a painful seizure if executed by means of pentobarbital. Johnson also attached an Oklahoma study concluding that nitrogen-induced hypoxia, an alternative to lethal injection, would be a humane method of execution.

[p. 4] The district court granted the State's motion to dismiss the latest complaint. The court reasoned that Johnson failed to plead adequately two elements of an Eighth Amendment claim—namely, that pentobarbital was sure or very likely to cause him to suffer severe pain, and that nitrogen-induced hypoxia was a feasible and readily implemented alternative method of execution that would significantly reduce that risk. Johnson appeals, and we review the district court's decision *de novo*. *Zink v. Lombardi,* 783 F.3d 1089, 1098 (8th Cir. 2015) (en banc) (per curiam).

II.

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is plausible on its face where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.,* and "raise[s] a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. A pleading must offer more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" to state a plausible claim for relief. *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 555).

At the same time, however, the rules of procedure continue to allow notice pleading through "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (per curiam) (quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (alteration in original) (quoting *Twombly,* 550 U.S. at 555). We assume in our analysis that the factual allegations in the complaint are true. *Twombly,* 550 U.S. at 556.

[p. 5] To prove a claim challenging a method of execution under the Eighth Amendment, a prisoner must first "establish that the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Glossip,* 135 S. Ct. at 2737 (quoting *Baze v. Rees,* 553 U.S. 35, 50 (2008)

(plurality opinion)). The risk must be "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Baze,* 553 U.S. at 50). Second, the prisoner must "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (alteration in original) (quoting *Baze,* 553 U.S. at 52). A plaintiff cannot satisfy this element "merely by showing a slightly or marginally safer alternative." *Id.* (quoting *Baze,* 553 U.S. at 51).

On the first element, Johnson alleged that he was diagnosed with an "atypical parasagittal meningioma brain tumor." A portion of the tumor was removed during a craniotomy procedure in August 2008, but another part remains in Johnson's brain. The surgery also resulted in "scarring tissue" in Johnson's brain and a "significant brain defect." Johnson pleaded that "[t]he brain defect and the scarring tissue that resulted from the craniotomy procedure were not known until an MRI procedure was conducted in April 2011." As a result of his "brain defect, scarring, and tumor," Johnson allegedly has a seizure disorder and has suffered seizures.

After detailing Missouri's lethal injection protocol, Johnson asserted that "there is a substantial and unjustifiable risk that the lethal injection drugs will trigger violent and uncontrollable seizures that are extremely painful and will lead to an ineffective and excruciating execution." Relying on the attached affidavit of Dr. Zivot, the complaint asserts that "a substantial risk of serious harm will occur during his execution as a

result of a violent seizure that is induced by pentobarbital."

[p. 6] Dr. Zivot's supporting affidavit states as follows: "As a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by Pentobarbital injection. Generalized seizures, such as the one that would occur in Mr. Johnson, are severely painful." This is essentially the same allegation that the Supreme Court cited in support of its decision in 2015 to stay Johnson's execution pending appeal. 136 S. Ct. at 443. The affidavit also explains that Methohexital, "a Barbiturate and close cousin of Pentobarbital," is known to induce seizures in persons *without* pre-existing seizure disorders, and avers that the introduction of barbiturates into the body of a person *with* a pre-existing seizure disorder is more likely to produce seizures.

We think these allegations are sufficient to meet the first element of an Eighth Amendment claim at the pleading stage. Dr. Zivot, as a medical expert, predicts "a violent seizure that is induced by Pentobarbital injection," opines that a seizure "would occur" during Johnson's execution, and states that such seizures are "severely painful." To be sure, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal,* 556 U.S. at 678. But Johnson's complaint and Zivot's attached affidavit include factual allegations that a seizure will occur when the State injects pentobarbital and that such a seizure causes severe pain. These allegations are not legal conclusions but statements of fact, and more detailed factual allegations are not required under

Rule 12. Insofar as Zivot reasoned by analogy from the effects of a "close cousin" in the barbiturate family, the reliability of his conclusion is a matter to be resolved after the presentation of evidence. For purposes of notice pleading, Johnson has included a plausible allegation that the State's method of execution will cause severe pain. *See Glossip,* 135 S. Ct. at 2737. Whether Johnson can *prove* the claim through Dr. Zivot's testimony or other evidence is a different matter to be addressed at a later stage of the proceedings.

[p. 7] To prove the second element of an Eighth Amendment claim, Johnson must show an alternative method of execution "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (alteration in original) (quoting *Baze,* 553 U.S. at 52). Johnson alleged that execution by lethal gas—specifically, "nitrogen-induced hypoxia"—is such an alternative.

Johnson pleaded at greater length as follows: (1) "execution by lethal gas is already authorized by Missouri statute," *see* Mo. Rev. Stat. § 546.720.1, (2) "the tools necessary to perform nitrogen-induced hypoxia are easily acquired in the open market," (3) nitrogen gas "is readily available through multiple sources in the United States" and "can be obtained without the need for a license," (4) nitrogen gas can be administered by "the use of a hood, a mask or some other type of medically enclosed device to be placed over the mouth or head of the inmate," and (5) "the use of a nitrogen gas method of execution would not require a gas chamber or the construction of [a] particular type of facility" and "could be administered in the same room or facility now

utilized by the Department of Corrections for lethal injection." Johnson further alleged that the use of lethal gas would "significantly reduce the substantial and unjustifiable risk of severe pain" resulting from a pentobarbital injection, because "the use of lethal gas would not trigger the uncontrollable seizures and convulsions." He attached to his complaint an Oklahoma study that found nitrogen-induced hypoxia to be "a humane method to carry out a death sentence."

In the recent case of *Bucklew v. Precythe,* 883 F.3d 1087 (8th Cir.), *cert. granted,* 138 S. Ct. 1706 (2018), the State did not dispute for purposes of that litigation that nitrogen-induced hypoxia is a feasible and readily implemented alternative method of execution. *Id.* at 1094; *see Bucklew v. Lombardi,* No. 14-8000-CV-W-BP, slip op. at 9 (W.D. Mo. June 15, 2017). But in this case, the State does contend that Johnson failed to plead that nitrogen-induced hypoxia is a readily implemented method of execution. According to the State, Johnson's complaint does not include required factual information "that explains how Missouri could take **[p. 8]** nitrogen gas from a tank and administer it to an inmate in a way that produces a rapid and painless death." As summarized above, however, Johnson alleged that nitrogen gas is readily available on the open market, could be introduced through a "medically enclosed device to be placed over the mouth or head of the inmate," and would not require construction of a new facility. Under the notice pleading regime of the federal rules, this is insufficient. Johnson need not set forth a detailed technical protocol for the administration of nitrogen gas to state a claim.

The district court concluded that the Oklahoma report attached to Johnson's complaint "actually indicates nitrogen induced hypoxia is not feasible or capable of being readily implemented for use in state executions," but we respectfully disagree. The report does state that "[f]urther study will be necessary to determine the best delivery system" for nitrogen gas. The report also raises the possibility that a gas mask delivery system could be less efficient than a gas bag delivery system. But the report's ultimate conclusion is that execution by nitrogen-induced hypoxia would be "simple to administer." That researchers have yet to decide which is the *best* among several feasible methods of implementation does not definitively refute Johnson's allegation that Missouri could feasibly implement this alternative without undue delay.

The district court also thought it fatal to Johnson's claim that he did not plead facts "indicating Missouri is willing to perform this type of execution, which suggests it may not be feasible." We cannot accept, however, that a State's unwillingness to employ a method that would significantly reduce a substantial risk of severe pain makes the method infeasible. Under the *Glossip/Baze* standard, a State may be obliged under the Constitution to implement an alternative method of execution. *See Baze,* 553 U.S. at 52. Whether Missouri is "willing" to implement an alternative method voluntarily does not determine whether the alternative is feasible.

The State also contends that Johnson did not adequately allege that nitrogen gas would significantly reduce a substantial risk of severe pain. The State suggests that **[p. 9]** *McGehee* v. *Hutchinson,* 854 F.3d 488 (8th Cir. 2017) (en banc)

(per curiam), forecloses Johnson's claim. *McGehee,* however, arose in a different procedural posture. Several Arkansas prisoners sought a stay of execution after an evidentiary proceeding on the ground that Arkansas's method of execution on its face violated the Eighth Amendment. *Id.* at 490-91. We concluded that the evidence was insufficient to justify a stay, because nitrogen hypoxia had "never been used to carry out an execution" and "[w]ith no track record of successful use," it was "not likely to emerge as more than a 'slightly or marginally safer alternative'" to the State's current method in the ordinary case. *Id.* at 493 (quoting *Glossip,* 135 S. Ct. at 2737).

Johnson is not bound by the pleadings or the evidentiary record in *McGehee.* He has pleaded an as-applied claim based on his medical condition, not a facial challenge to Missouri's ordinary method. He claims that nitrogen hypoxia would ameliorate the risk of severe pain allegedly caused by pentobarbital, because "the use of lethal gas would not trigger the uncontrollable seizures and convulsions." The pleading is sufficient to state a claim that the alternative method would significantly reduce a substantial risk of severe pain for Johnson in his particular circumstances. Again, whether Johnson can *prove* that claim is a different matter that will arise at a later stage of the proceedings.

III.

The State's last argument for affirmance is that Johnson's complaint is barred by the statute of limitations. A statute of limitations is an affirmative defense that the defendant must plead and prove. But "[a] defendant does not render a complaint

defective by pleading an affirmative defense," so the defense ordinarily must be apparent on the face of the complaint to justify dismissal for failure to state a claim. *Jessie* v. *Potter,* 516 F.3d 709, 713 n.2 (8th Cir. 2008). The district court rejected the State's position on the ground that the face of Johnson's complaint did not establish that his claim was barred by the statute of limitations.

[p. 10] In a § 1983 action like this one, the governing statute of limitations "is that which the State provides for personal-injury torts." *Wallace v. Kato,* 549 U.S. 384, 387 (2007). In Missouri, the period is five years. Mo. Rev. Stat. § 516.120(4). Although state law dictates the length of the limitations period, we look to federal common law to determine when a cause of action under § 1983 accrues. *Wallace,* 549 U.S. at 388. The standard rule is that accrual occurs "when the plaintiff has a complete and present cause of action, . . . that is, when the plaintiff can file suit and obtain relief." *Id.* (internal quotation marks omitted) (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997)). "[A] plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." *Union Pac. R.R. Co.* v. *Beckham,* 138 F.3d 325, 330 (8th Cir. 1998); *see also Cooey* v. *Strickland,* 479 F.3d 412, 416 (6th Cir. 2007) (applying the common law "discovery rule" to determine when a § 1983 method-of-execution cause of action accrued).

Johnson claims that his unique medical condition puts him at a substantial risk of suffering severe pain if he is executed by means of pentobarbital. Johnson's cause of action could not have accrued

until he discovered, or with due diligence should have discovered, that he suffers from the brain defects that make him vulnerable to seizures. His second amended complaint alleges that "the brain defect and the scarring tissue that resulted from the craniotomy procedure were not known until an MRI procedure was conducted in April 2011." The complaint was filed within five years of April 2011, so it would be timely if that is the accrual date.

The State argues that Johnson could have discovered his condition in 2008 after he underwent brain surgery. The State posits that "[t]he presence of scar tissue after a surgery is obvious and a natural and probable consequence of any surgery." The condition of which Johnson complains, however, is not only scar tissue. He alleges a seizure disorder that is caused by a confluence of factors in his brain. Giving Johnson all reasonable inferences at this stage in the litigation, it is not clear from **[p. 11]** Johnson's pleadings that he could have discovered this condition through the exercise of reasonable diligence before his MRI procedure in April 2011. Therefore, Johnson's complaint is not subject to dismissal under Rule 12(b)(6) based on the statute of limitations.

* * *

For the foregoing reasons, we reverse the district court's judgment dismissing Johnson's second amended complaint and remand for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ERNEST L. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:15-CV-4237-DGK
	)	
GEORGE A. LOMBARDI, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER DENYING A PRELIMINARY INJUNCTION AND DISMISSING THE COMPLAINT

Plaintiff Ernest L. Johnson ("Johnson") faces imminent execution by lethal injection. In this civil action, he challenges the constitutionality of the State of Missouri's proposed execution protocol as it applies to him. He alleges that, in light of his brain tumor and its resulting impairments, he will experience violent, uncontrollable seizures if the State executes him with the drug pentobarbital, as it intends to do.

Now before the Court are two motions. One is Johnson's motion for a temporary restraining order and a preliminary injunction (Doc. 5). The other is Defendants' motion to dismiss the Complaint for failing to state a claim (Doc. 7). For the reasons below, the motion for a restraining order and injunction is DENIED, and the motion to dismiss is

GRANTED.[1]

Background

Taking the factual allegations in the complaint as true and crediting Johnson with all reasonable inferences, the Court views the relevant facts as follows. *See Zink v. Lombardi*, 783 **[p. 2]** F.3d 1089, 1093 (8th Cir. 2015) (en banc) (Rule 12(b)(6) standard); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 744 (8th Cir. 2002) (Rule 65(a) standard).

Three times, a Missouri state court jury has sentenced Johnson to death for murdering three gas station employees in 1994. *State v. Johnson*, 244 S.W.3d 144, 149–50 (Mo. 2008). The Supreme Court of Missouri has set Johnson's execution for November 3, 2015.

The State plans to accomplish the lethal injection by using pentobarbital. A barbiturate, pentobarbital causes death by depressing the central nervous system, including portions of the brain. During the execution, medical personnel will monitor the prisoner from an adjoining room, but no medical personnel will be present next to Johnson as the pentobarbital enters his bloodstream. The State has no procedures dictating what happens if the pentobarbital fails to kill Johnson.

Johnson suffers from an atypical parasagittal meningioma brain tumor, which is a slow-growing

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[1] Because all of Johnson's allegations, taken as true, do not entitle him to a temporary restraining order or preliminary injunction under Rule 65, the Court denies his request for an evidentiary hearing. *See United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 744 (8th Cir. 2002).

tumor that develops on the meninges, the tissue surrounding the brain and spine. In August 2008, he underwent craniotomy surgery and had part of the tumor removed. The surgery significantly affected Johnson's brain; it scarred some tissue and destroyed other tissue in the area of the brain responsible for the movement and sensation of the legs. The tumor, brain scars, and lost parts of the brain collectively disrupt his electrical brain activity, causing violent and uncontrollable seizures. After Johnson began suffering from seizures, he started taking anti-seizure medications.

Using pentobarbital risks triggering violent and uncontrollable seizures in Johnson. Thus, an execution carried out with pentobarbital might cause him to seize and experience a significant muscle pain alternatively described as "severe," "extreme[]," and "excruciating." Compl. ¶¶ 21, 33 (Doc. 1). The seizure may be self-limiting, or it could last for a prolonged **[p. 3]** period of time. Because medical professionals will not be in the execution chamber when the pentobarbital is administered, if he experiences a seizure and severe pain, no one will be able to quickly soothe it.

Missouri law also permits execution by lethal gas. Mo. Rev. Stat. § 546.720.1. Johnson alleges that this method of execution "would significantly reduce the substantial and unjustifiable risk of severe pain" to him. Compl. ¶ 56.

On October 22, 2015—less than two weeks before the scheduled execution—Johnson commenced this action against Defendants George A. Lombardi, David Dormire, and Troy Steele, who are all employees of the Missouri Department of

Corrections. The sole count in Johnson's complaint charges that using a pentobarbital-based lethal injection on him will constitute cruel and unusual punishment, which is prohibited by the Eighth Amendment, as applied to the State of Missouri by the Fourteenth Amendment and enforceable through 42 U.S.C. § 1983. He seeks an injunction against the pending execution.

Discussion

The Court considers two motions in turn: Johnson's motion for a preliminary injunction, and Defendants' motion to dismiss the Complaint for failing to state a claim.

I. Because Johnson does not establish the likelihood of success on the merits, the Court denies his motion for a preliminary injunction.

Johnson moves for a preliminary injunction that prohibits Defendants from executing him with pentobarbital. *See* Fed. R. Civ. P. 65(a).[2] A preliminary injunction serves "to preserve the status quo until, upon final hearing, a court may grant full effective relief." *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 490 (8th Cir. 1993). Accordingly, in a ruling **[p. 4]** on a motion

[2] Johnson also moves for a temporary restraining order on the same grounds. A temporary restraining order is issued without notice to the opposing parties. Fed. R. Civ. P. 65(b)(1). Because Defendants have responded to the motion, the request for a temporary restraining order will be considered as a request for a preliminary injunction.

for a preliminary injunction, a court may consider "evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

In deciding whether to grant a preliminary injunction, the Court balances: (1) the likelihood that the moving party will prevail on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and any injury that granting the injunction will inflict on the non-moving party; and (4) the public interest. *Glossip v. Gross*, 135 S. Ct. 2726, 2736 (2015). These factors must be "balanced to determine whether they tilt toward or away" from granting the injunction. *W. Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986). An injunction is an extraordinary remedy and Johnson bears the burden of establishing the need for such relief. *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006).

A. Because Johnson has failed to identify a feasible, readily implementable execution procedure, the Court finds he will not likely succeed on the merits.

The Court first considers whether Johnson will likely succeed on the merits of his Eighth Amendment claim. The Eighth Amendment prohibits the State from inflicting "cruel and unusual punishments." U.S. Const. amend. VIII. To challenge an execution protocol as "cruel and unusual," a prisoner must establish two elements: (1) that the proposed method is "sure or very likely" to cause him serious, needless pain, and (2) a better, available

method of execution. *Glossip*, 135 S. Ct. at 2737.[3] A prisoner may challenge an execution protocol as applied to just him. *Bucklew v. Lombardi*, 783 F.3d 1120, 1127 (8th Cir. 2015) (en banc).

Assuming for the sake of argument that Johnson can establish the first element—that a pentobarbital-based lethal injection cocktail presents a substantial risk of serious harm—he is not likely to prove that there is a better, available method of execution. "A condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or **[p. 5]** marginally safer alternative." *Baze v. Rees*, 553 U.S. 35, 51 (2008). Rather, he must prove: [a] an alternative method of execution "[b] that is feasible, [c] readily implemented, and [d] in fact significantly reduces a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737 (alteration removed). Johnson has identified an alternative method of execution: execution by lethal gas. However, putting aside his bare assertion that "lethal gas is a feasible and available alternative method under Missouri law," Compl. ¶ 65, Johnson never explains how execution by lethal gas is feasible or could be readily implemented.

Feasibility asks whether the alternative method of execution is "capable of being done, executed, or effected." *Feasible*, *Webster's Third New International Dictionary* (2002). Yet Johnson does not indicate that the State has a working gas

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[3] In lieu of the second element, a prisoner may allege "a purposeful design by the State to inflict unnecessary pain." *In re Lombardi*, 741 F.3d 888, 896 (8th Cir. 2014) (en banc). Johnson has not advanced this theory.

chamber or all the supplies necessary to operate such a chamber. Readiness of implementation asks whether the alternative method of execution can be used promptly, efficiently, or without delay. *Readily*, *Webster's Third New International Dictionary*, *supra*. Yet Johnson does not assert that the State can put a gas chamber into operation in a prompt fashion.

Simply because Missouri law *authorizes* the use of lethal gas for executions does not mean that the State is anywhere near prepared to actually *use* lethal gas for executions. *See* Mo. Rev. Stat. § 546.720.1. Similarly, the Missouri Attorney General's public comment—recounted in Johnson's suggestions in opposition—that the gas chamber is an "option" does not tell the Court anything about the feasibility or readiness of that "option."

Perhaps Defendants can easily establish a gas chamber. Just as likely, their ability to execute with lethal gas may depend on several adverse variables outside of their control. In any event, the Court cannot conclude at this time that Johnson is likely to prove feasibility and **[p. 6]** readiness by a preponderance of the evidence. The Court thus finds that Johnson is not likely to prevail on the merits of his claim. *See Glossip*, 135 S. Ct. at 2737; *cf. Bucklew*, 783 F.3d at 1127 (reversing a district court's dismissal of an Eighth Amendment execution complaint, because the defendants had offered to tweak their lethal injection protocol to accommodate the plaintiff's disability, thereby conceding that alternative measures were feasible and readily implemented). This factor strongly weighs against a preliminary injunction.

B. Johnson will suffer irreparable harm if he is executed unconstitutionally.

Second, Johnson must establish that he will suffer irreparable harm if the State executes him with pentobarbital. Irreparable harm is present when legal remedies are inadequate. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959). A preliminary injunction may issue for future occurrences of irreparable harm. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Once the execution process begins, Johnson cannot pursue a remedy for any harm caused by the pentobarbital. If he is ultimately correct that the use of pentobarbital will cause him excruciating pain, then he will suffer irreparable harm if the Court denies a preliminary injunction and permits Defendants to proceed with Johnson's execution. This factor slightly favors a preliminary injunction.

C. The equities do not favor granting an injunction to Johnson.

The third injunctive consideration is the balance between the irreparable harm to Johnson and the injury to Defendants. On the one hand, if no injunction issues, Johnson faces a risk of an unconstitutionally painful death, taking his allegations as true.

On the other hand, "a State retains a significant interest in meting out a sentence of death in a timely fashion." *Bucklew*, 783 F.3d at 1128. Johnson claims that "temporary relief may **[p. 7]** cause a short, finite delay in the execution," Pl.'s Br. at 7 (Doc. 5), but as explained above, he provides no basis for his

assertion that Defendants can rapidly and cost-effectively adopt his preferred method of execution. And because Johnson appears to have sat on his rights for some time, any impending harm remediable by injunction is at least somewhat of his own creation. He has had all facts necessary to prosecute his claim for almost two years. He has known about his brain defects since 2008, and, according to him, the State has planned to use pentobarbital in executions since November 2013. Notwithstanding, he delayed filing this case until twelve days before his execution is set to occur.

The Court finds the parties' equities to be in balance, and so this factor does not favor an injunction.

D. A preliminary injunction would not serve the public interest.

Finally, the Court must balance whether an injunction would serve the public interest. The Court finds the public interest considerations to be the parties' individual considerations on a larger scale. Therefore, the public interest is neutral, and so does not favor an injunction.

E. Because the favors do not tilt toward granting a preliminary injunction, the Court will not issue one.

Only one factor favors issuing a preliminary injunction, while two are neutral and one—likelihood of success on the merits—strongly disfavors issuing one. On this basis, Johnson has failed to carry his heavy burden. *See W. Publ'g Co.*, 799 F.2d at 1222; *Lankford*, 451 F.3d at 503. The Court declines to

issue an injunction. Johnson's motion is denied.

II. The Complaint fails to state a claim upon which relief may be granted.

Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief can be granted. When reviewing a complaint under Rule 12(b)(6), the court takes all facts as true and draws all reasonable **[p. 8]** inferences in favor of the non-moving party. *Zink*, 783 F.3d at 1098. The court first assesses whether the complaint pleads sufficient facts to state a claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the complaint need not make detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration removed). Legal conclusions "are not entitled to a presumption of truth when considering the sufficiency of a complaint." *Zink*, 783 F.3d at 1098. If the complaint pleads sufficient facts, the court then determines whether the complaint states a claim for relief that is plausible. *Iqbal*, 556 U.S. at 678.

As discussed above, Johnson has failed to provide any facts establishing an essential element of his claim: that there is a feasible and readily implementable way to execute him. *See Glossip*, 135 S. Ct. at 2737. Instead, he makes a conclusory assertion that execution by lethal gas is a "feasible and available alternative method." Compl. ¶ 65; *see Zink*, 783 F.3d at 1083. Because Johnson failed to plead enough facts to state a claim to relief, the

Court grants Defendants' motion. *See Iqbal*, 556 U.S. at 678. Johnson's complaint is dismissed without prejudice.

III. The Court certifies this Order for interlocutory appeal.

Because Johnson's complaint is dismissed without prejudice, he is free to amend that complaint to remedy the deficiencies identified in this Order. *See* Fed. R. Civ. P. 15(a)(1). Thus, this is not a final order subject to appeal. *See Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) (Posner, J.). However, the Court appreciates that preparing and **[p. 9]** filing an amended complaint, followed by preparing and filing a new motion for a preliminary injunction, will consume some of the precious little time remaining before the execution date.

Rule 54(b) permits the district court to certify an order for interlocutory appeal if it "expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). Although the Court of Appeals "generally disfavor[s]" Rule 54(b) certification because of its "interest in preventing piecemeal appeals," *Clark v. Baka*, 593 F.3d 712, 714–15 (8th Cir. 2010), it may assume jurisdiction over a certified case if "there is some danger of hardship or injustice which an immediate appeal would alleviate." *Taco John's of Huron, Inc. v. Bix Produce Co.*, 569 F.3d 401, 402 (8th Cir. 2009).

The looming execution is a sufficiently compelling reason to permit Johnson to appeal, even though this Order does not finally adjudicate all of his claims. Moreover, if Johnson appeals, there will be no waste

of judicial resources, because there will be no other claims at the district court level and the Court will not entertain any new motions while the case is before the Court of Appeals. Therefore, the Court certifies this Order for interlocutory appeal under Rule 54(b). *See id.*

Conclusion

In view of the foregoing, Johnson's motion for a temporary restraining order and preliminary injunction (Doc. 5) is DENIED. Defendants' motion to dismiss the Complaint (Doc. 9) is GRANTED. Johnson's complaint is DISMISSED without prejudice. This Order is CERTIFIED for interlocutory appeal under Federal Rule of Civil Procedure 54(b).

IT IS SO ORDERED.

Date: October 27, 2015

/s/ Greg Kays
GREG KAYS,
CHIEF JUDGE
UNITED
STATES
DISTRICT
COURT

United States Court of Appeals
For the Eighth Circuit

No. 15-3420

Ernest Lee Johnson,

Plaintiff - Appellant

v.

George Lombardi; David Dormire; Terry Russell,

Defendants - Appellees

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: October 29, 2015
Filed: October 30, 2015

Before SMITH, COLLOTON, and GRUENDER,
Circuit Judges.

PER CURIAM.

Death row inmate Ernest L. Johnson moves for a stay of his execution scheduled for November 3,

2015, at 6:00 p.m., pending full briefing and argument of **[p. 2]** his appeal from the district court's[1] dismissal of his complaint filed under 42 U.S.C. § 1983. We deny his motion for a stay.

I.

Johnson underwent a craniotomy surgical procedure in 2008 to remove a brain tumor. After this surgery, a portion of the tumor remained. The surgery also resulted in a brain defect and scarring issue. Consequently, Johnson has suffered from several seizures in the last few years. After the State of Missouri scheduled his execution, Johnson filed a § 1983 complaint alleging that Missouri's lethal-injection protocol would be unconstitutional as applied to him because of his medical condition. Specifically, Johnson alleged that pentobarbitol, the drug Missouri uses to execute inmates, could trigger a seizure and cause him severe pain. In his complaint, Johnson identified lethal gas as an alternative method of execution permitted under Missouri law. *See* Mo. Rev. Stat. § 546.720.1.

The district court entered an order denying temporary injunctive relief and dismissing Johnson's complaint. The court determined that Johnson did not state a claim upon which relief could be granted because he failed plausibly to plead sufficient facts establishing the existence of a feasible and readily implementable method of execution. *See* Fed. R. Civ. Pro. 12(b)(6); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Johnson now moves for a stay pending

[1] The Honorable David Gregory Kays, Chief Judge, United States District Court for the Western District of Missouri.

appeal.

II.

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its **[p. 3]** criminal judgments without undue interference from the federal courts." *Hill v. McDonough,* 547 U.S. 573, 584 (2006). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* It is not enough merely to file an action that can proceed under § 1983. *Id.* at 583-84. A movant must present evidence to show a significant possibility of success on the merits of his claim. *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (per curiam).

To succeed on the merits of his claim, Johnson must show that Missouri's lethal-injection method of execution, as applied to him, violates the Eighth and Fourteenth Amendments. *See Clayton v. Lombardi,* 780 F.3d 900, 901 (8th Cir. 2015). Based on the record before us, we conclude that Johnson has not shown a significant possibility of success.

A prisoner may successfully challenge a method of execution under the Eighth Amendment only if he "establish[es] that the method presents a risk that is 'sure or very likely to cause serious illness and needless suffering, and give[s] rise to sufficiently imminent dangers.'" *Glossip v. Gross,* 576 U.S. ---, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees,* 553 U.S. 35, 50 (2008)). "To prevail on such a claim, 'there must be a substantial risk of serious harm, an

objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Baze,* 553 U.S. at 50). A prisoner "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Id.* (quoting *Baze,* 553 U.S. at 51). Instead, a prisoner must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* (quoting *Baze,* 553 U.S. at 52). **[p. 4]**

Under this standard, Johnson's arguments fall short. We conclude that Johnson has not shown a significant possibility of success on his claim that the method of execution used by Missouri "presents a risk that is sure or very likely to cause serious illness and needless suffering." *Id.* at 2737. The weakness of his contention is evidenced by the vagaries, hypotheticals, and speculation pled in his complaint. Johnson alleges that his condition raises a "significant *potential"* that pentobarbital will *"promot[e]"* a seizure and that such a seizure *"can* result in significant muscle pain." Such averments do not satisfy the demanding requirement that Johnson show that unnecessary suffering is *sure* or *very likely* to occur. *See id.* The attached affidavit of Dr. Joel Zivot fails to show a likelihood of success under the Eighth Amendment standard. Dr. Zivot notes that seizures *"may* be induced" as a result of the pentobarbital injection. And he notes that pentobarbital has the potential to promote a seizure. These equivocal statements do not sufficiently show a *"substantial* risk of serious harm." *Id.* at 2737 (emphasis added). Conspicuously absent from Dr. Zivot's affidavit is any clear statement that

significant pain is "sure or very likely" to occur if the state executes Johnson using pentobarbital. Although Dr. Zivot later uses stronger language in a concluding paragraph, the conclusion is based expressly on earlier findings that are insufficient.

In addition, Johnson has not shown a significant possibility of success because he has not identified another execution method that satisfies the Eighth Amendment standard. Johnson's threadbare assertion that lethal gas is *legally* available in Missouri is not the same as showing that the method is a feasible or readily implementable alternative method of execution. Indeed, nowhere in Johnson's complaint does he plead that Missouri could readily implement the lethal-gas method. Moreover, Johnson failed to offer any facts to support his conclusory allegation that lethal gas would reduce significantly the substantial and unjustifiable risk of pain. *See Glossip,* 135 S. Ct. at 2737 (noting that a plaintiff must "show that the risk is substantial *when compared to* the known and available alternatives") (emphasis added); *Zink v. Lombardi,* 783 F.3d 1089, 1098 (8th Cir. 2015) ("Legal conclusions **[p. 5]** and threadbare recitations of the elements of a cause of action supported by mere conclusory statements are not entitled to a presumption of truth when considering the sufficiency of a complaint.") (internal quotation omitted). Dr. Zivot's affidavit does not suggest that seizures would be any less likely to occur if Johnson were to be executed using lethal gas. We thus conclude that Johnson is unlikely to prevail on the merits because he does not sufficiently identify an alternative method of execution.

In reaching our conclusion, we are mindful that the Supreme Court granted a stay pending appeal in

Bucklew v. Lombardi, 572 U.S.---, 134 S. Ct. 2333 (2014), in light of allegations and evidence that lethal injection combined with a unique health condition created a substantial risk of severe pain. But Johnson's case is different. *Bucklew* involved a district court's *sua sponte* dismissal of a complaint despite the fact that Bucklew had presented stronger evidence that the lethal-injection protocol would create a risk of severe pain as a result of his medical condition. *See Bucklew v. Lombardi,* 783 F.3d 1120, 1128 (8th Cir. 2015). Indeed, the record in *Bucklew* included a concession from the state that the plaintiff had proposed an available alternative procedure that would have eliminated certain risks of unnecessary suffering. *See Bucklew v. Lombardi,* 783 F.3d 1120, 1128 (8th Cir. 2015). No such concession exists in this case. And, as stated above, Johnson has provided significantly weaker, speculative evidence regarding the risk of unnecessary harm.

III.

Given the record before us and the State's strong interest in enforcing its criminal judgment without undue interference, we deny the motion for stay of execution pending appeal.

(ORDER LIST: 577 U.S.)

TUESDAY, NOVEMBER 3, 2015

ORDER IN PENDING CASE

15A473 JOHNSON, ERNEST L. V. LOMBARDI, GEORGE A., ET AL.

The application for stay of execution of sentence of death presented to Justice Alito and by him referred to the Court is treated as an application for stay pending appeal in the Eighth Circuit. The application is granted pending the disposition of petitioner's appeal. Petitioner's complaint alleges that Missouri's method of execution violates the Eighth Amendment as applied to a person with his particular medical condition. A supporting affidavit by a medical expert states that "[a]s a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that may be induced by [the] Pentobarbital injection." Because petitioner's complaint was dismissed for failure to state a claim, the State was not required to submit any evidence refuting this allegation. In the currently pending appeal, the Court of Appeals will be required to decide whether petitioner's complaint was properly dismissed for failure to state a claim or whether the case should have been permitted to progress to the summary judgment stage.

United States Court of Appeals
For the Eighth Circuit

No. 15-3420

Ernest Lee Johnson,

Plaintiff - Appellant,

v.

George Lombardi; David Dormire; Terry Russell,

Defendants - Appellees.

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: January 13, 2016
Filed: March 21, 2016

Before SMITH, COLLOTON, and GRUENDER,
Circuit Judges.

COLLOTON, Circuit Judge.

Ernest Johnson, who is sentenced to death in Missouri, sued the director of the Missouri Department of Corrections and other state officials, alleging that the State's method of execution is unconstitutional under the Eighth Amendment. The

district court ruled that Johnson's complaint failed to state a claim upon which relief could be granted, because Johnson "failed to provide any facts establishing an essential element of this claim: that there is a feasible and readily implementable way to execute him." **[p. 2]** *Johnson v. Lombardi,* No. 2:15-cv-4237-DGK, 2015 WL 6501083, at *5 (W.D. Mo. Oct. 27, 2015). The court dismissed the complaint without prejudice and explained that Johnson was free to amend the complaint to remedy deficiencies identified in the court's order. The court observed that the order dismissing Johnson's complaint without prejudice was not a final order subject to appeal. *Id.* (citing *Coniston Corp. v. Vill. of Hoffman Estates,* 844 F.2d 461, 463 (7th Cir. 1988)).

The district court then reasoned, however, that Federal Rule of Civil Procedure 54(b) permits a district court "to certify an order for interlocutory appeal if it 'expressly determines that there is no just reason for delay.'" *Id.* (quoting Fed. R. Civ. P. 54(b)). Because Johnson's execution was scheduled for only seven days hence, and preparation of an amended complaint would "consume some of the precious little time remaining before the execution date," the district court thought there was "a sufficiently compelling reason to permit Johnson to appeal, even though this Order does not finally adjudicate all of his claims." *Id.* The court then provided that its order was "certified" for interlocutory appeal under Rule 54(b). *Id.*

Johnson was not executed on November 3, 2015. The Supreme Court granted a stay of execution pending the disposition of Johnson's appeal to this court. *Johnson v. Lombardi,* 136 S. Ct. 443 (2015) (per curiam). The parties then filed briefs concerning

whether Johnson's complaint was properly dismissed for failure to state a claim.

Before addressing the merits of Johnson's appeal, we must consider our jurisdiction. This court has jurisdiction over appeals from "final decisions" of the district court. 28 U.S.C. § 1291. The district court correctly observed that there is generally no final decision for purposes of appellate review when the court dismisses a complaint without prejudice, but does not dismiss the action. *Local 179, United Textile Workers of Am., AFL-CIO v. Fed. Paper Stock Co.,* 461 F.2d 849, 850 (8th Cir. 1972). **[p. 3]**

Here, the district court dismissed the complaint without prejudice, but made clear that it would permit Johnson to amend his complaint to remedy perceived deficiencies. But for the looming execution, the district court contemplated that Johnson would prepare and file an amended complaint alleging additional facts to support his constitutional claim. As there was no clear manifestation by the district court that its decision on the complaint was the end of the case, the order dismissing the complaint was not final. *See Hunt v. Hopkins,* 266 F.3d 934, 936 (8th Cir. 2001).

The district court sought to achieve finality through invocation of Rule 54(b), but the court's effort to "certify" its decision for appeal under that rule was unsuccessful. Rule 54(b) applies when an action presents more than one claim for relief, or when multiple parties are involved. The rule addresses the appealability of an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. Where the district court enters such an order, the rule

permits the court to enter final judgment "as to one or more, but fewer than all, claims or parties," if the court expressly determines that there is no just reason for delay. Fed. R. Civ. P. 54(b).

Rule 54(b) does not apply to a single-claim action. *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 742-43 (1976). Johnson's complaint brought only a single claim against state officials, alleging that the State's method of execution violated the Eighth Amendment. The district court resolved that single claim by dismissing the complaint without prejudice, but contemplated further proceedings on an amended complaint that the court invited Johnson to file. The district court could not invoke Rule 54(b) to enter a final judgment, or to "certify" its order for immediate appeal, because the court's order did not leave any claims, or the rights of any parties, unadjudicated in a case involving multiple claims or multiple parties.

For these reasons, the district court did not properly enter a final judgment, and we lack jurisdiction over Johnson's appeal. Whatever the validity of the district **[p. 4]** court's determination that there was no just reason for delaying an appeal, moreover, the reasons given by the court are inapplicable after the Supreme Court's order granting a stay of execution. Johnson has had ample time to prepare an amended complaint. The State has not established a new execution date, and Johnson is free to move for leave to amend his complaint without the pressure of a scheduled execution.

The appeal is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ERNEST L. JOHNSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:15-CV-4237-DGK
	)	
GEORGE LOMBARDI, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

A Missouri state court convicted Plaintiff Ernest L. Johnson ("Johnson") of first-degree murder and sentenced him to death. Johnson has exhausted all appeals challenging his conviction and the State of Missouri is now ready to execute him. In this civil action, he challenges the constitutionality of the State's proposed execution protocol as it applies to him. He alleges that, in light of his brain tumor and its resulting impairments, he will experience violent, uncontrollable seizures if the State executes him with the drug pentobarbital as intended.

Now before the Court is Defendants' motion to dismiss (Doc. 42). Because Johnson fails to state a plausible claim that pentobarbital presents a substantial risk of severe pain, and that his alternative method of execution is feasible and readily implemented, the motion is GRANTED and this case is DISMISSED WITHOUT PREJUDICE.

Background

On October 22, 2015, less than two weeks before his scheduled execution, Johnson commenced this action against Defendants George A. Lombardi, David Dormire, and Troy Steele, who are all employees of the Missouri Department of Corrections. On October 27, 2015, the Court denied a stay of execution and dismissed the complaint for failing to state a claim **[p. 2]** (Doc. 12). Johnson appealed and moved for a stay of execution. Without considering whether the Court had properly dismissed the complaint, the Court of Appeals denied the stay. *Johnson v. Lombardi,* 809 F.3d 388 (8th Cir. 2015). The Supreme Court of the United States granted the stay and ordered the Court of Appeals to consider the merits of Johnson's appeal. *Johnson v. Lombardi,* 136 S. Ct. 443 (2015). Because the propriety of dismissing the complaint was not yet appealable, the Court of Appeals dismissed the appeal and returned jurisdiction to this Court. *Johnson v. Lombardi,* 815 F.3d 451, 452 (8th Cir. 2016). On August 1, 2016, Johnson filed an amended complaint. The Court dismissed the amended complaint without prejudice for failing to state a claim and found the claim was not barred by the statute of limitations (Doc. 40). Johnson has now filed a second amended complaint attempting to cure his prior pleading deficiencies (Doc. 41).

Taking the factual allegations in the Second Amended Complaint as true and crediting Johnson with all reasonable inferences, the Court views the relevant facts as follows. *See Zink v. Lombardi,* 783 F.3d 1089, 1093 (8th Cir. 2015) (en banc).

A jury found Johnson guilty of murdering three gas station employees during a robbery in 1994.[1] *Johnson v. State,* 333 S.W.3d 459, 462 (Mo. 2011). Over the next seventeen years, Johnson's post-conviction challenges made their way through the state courts and he was sentenced to death three times. *Id.*

In 2008, Johnson was diagnosed with a slow-growing brain tumor called an atypical parasagittal meningioma. Johnson underwent craniotomy surgery in August 2008, during which doctors removed fifteen to twenty percent of his brain tissue but were unable to remove the entire **[p. 3]** tumor. After the surgery, Johnson started having violent, uncontrollable, and painful seizures of indefinite length. He takes anti-seizure medications, but they do not suppress all seizures.

For a few years after the surgery, Johnson knew only that part of the tumor was still in his brain. A magnetic resonance imaging ("MRI") scan in April 2011, showed the surgery caused some scarring of his brain tissue and left him with a brain defect. Doctors concluded the scar tissue and brain defect, together with the tumor remnants, were disrupting electrical activity in his brain and causing Johnson's seizures.

Johnson's brain health is relevant because he alleges his condition will expose him to a substantial and unjustifiable risk of severe pain if the State of

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[1] Johnson bludgeoned, stabbed, and shot the victims before fleeing with money from the store's safe. A complete account of the crime is set forth in *State v. Johnson,* 968 S.W.2d 686, 689-90 (Mo. 1998).

Missouri executes him as planned. The execution protocol dictates that non-medical personnel inject him with up to ten grams of pentobarbital, a barbiturate which depresses the central nervous system. Second Am. Cmpl. ¶¶ 24-25, 28. Johnson claims that because of his medical condition, administering pentobarbital risks inducing an unusually painful seizure. *Id.* ¶¶ 2, 34, 51. For example, the Second Amended Complaint alleges:

> Due to the unique and specific medical condition of Mr. Johnson, there is a substantial and unjustifiable risk that Missouri's lethal injection protocol currently utilized by the Missouri Department of Corrections will affect Mr. Johnson differently than an average healthy inmate and will cause severe pain and serious harm to Mr. Johnson. There is a substantial and unjustifiable risk that the lethal injection drugs will trigger uncontrollable and painful seizures and convulsions due to Mr. Johnson's unique brain defect and condition that were discovered in April 2011. There is a substantial and unjustifiable risk that the

> seizures and convulsions will be severely painful and cause needless suffering. The current method of execution is sure or very likely to cause serious and needless pain in light of Mr. Johnson's unique medical condition. **[p. 4]**

Id. ¶ 2. The phrase "substantial and unjustifiable risk" is repeated throughout the pleading. *Id.* ¶¶ 21,[2] 34,[3] 51,[4] 54.[5] The Second Amended Complaint also

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[2] "The administration of the lethal injection drug pentobarbital creates a substantial and unjustifiable risk that violent and uncontrollable seizures could be triggered during the execution due to the lethal injection drugs' interaction with the remaining meningioma, scarring tissue and brain defect. There is a substantial and unjustifiable risk that such violent and uncontrollable seizures will result in a severely painful and prolonged execution and serious harm. The use of the current lethal injection drugs is sure or very likely to cause serious and needless suffering and severe pain in light of Mr. Johnson's specific and unique medication condition." Second Am. Cmpl. ¶ 21.

[3] "The brain defects and pre-existing seizure disorder in Mr. Johnson create a substantial and unjustifiable risk that the execution will not proceed as intended in that there is a substantial and unjustifiable risk that the lethal injection drugs will trigger violent and uncontrollable seizures that are extremely painful and will lead to an ineffective and excruciating execution . . . . Mr. Johnson's seizure threshold is substantially lower than the general population. Any further lowering of that threshold by using a seizure promoting

alleges the current execution protocol is "sure or very likely to . . . trigger[ ] uncontrollable and violent seizures and convulsions." *Id.* ¶ 63; *see also* ¶¶ 2 (alleging "sure or very likely to cause serious and needless pain in light of Mr. Johnson's unique medical condition"), 21 (asserting "sure or very likely to cause . . . severe pain in light of Mr. Johnson's specific and unique medical condition").

Johnson contends that if he suffers a seizure it will not be quick, and it will prolong the execution. *Id.* ¶ 21. And because the State of Missouri does not station medical personnel inside the execution chamber and there is no plan for what to do if the pentobarbital triggers a seizure, no one will be able to do anything for Johnson if he suffers a seizure or if the pentobarbital fails to end his life. *Id.* ¶ 36. **[p. 5]**

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compound like pentobarbital will increase the likelihood of a seizure with a very high degree of probability." Second Am. Cmpl. ¶ 34.

[4] "Based on the condition of Mr. Johnson, which includes his brain tumor, brain defect and scarring, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by pentobarbital. The use of pentobarbital during the execution protocol significantly increases the likelihood that a seizure will occur in Mr. Johnson." Second Am. Cmpl. ¶ 51.

[5] "[T]he use of the lethal injection drugs used by the Department of Corrections under its current protocol create a substantial and unjustifiable risk that Mr. Johnson will suffer a severely painful execution by the triggering of violent and uncontrollable seizures and convulsions, which constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." Second Am. Cmpl. ¶ 54.

To support these assertions, Johnson attached an affidavit from a board-certified anesthesiologist, Dr. Joel Zivot, M.D. ("Dr. Zivot"). Dr. Zivot opines that pentobarbital, like another structurally similar barbiturate, methohexital, is a "seizure-promoting compound," and that because Johnson has an underlying seizure disorder, Missouri's "execution protocol will *increase the likelihood* of a seizure [during his execution] with *a very high degree of probability*." Aff. in Supp. ¶ 12, 15 (Doc. 41-2) (emphasis added). Further, since pentobarbital has an anti-algesic effect - that is, it exaggerates pain - a pentobarbital induced seizure would be more painful than any seizure Johnson would typically experience. *Id.* ¶ 14. Dr. Zivot concludes that Johnson "faces a *significant* medical risk for a serious seizure as the direct result" of Missouri's execution protocol and his neurologic disease. *Id.* ¶ 16 (emphasis added).

Finally, Johnson suggests there is a feasible, readily implemented alternative method of execution: the State could execute him by nitrogen-induced hypoxia. Second Am. Cmpl. ¶ 58. Missouri law already permits execution by lethal gas, Mo. Rev. Stat. § 546.720.1, and nitrogen, which is used commonly in welding and cooking, is easy to obtain. *Id.* ¶¶ 56, 58. The State could acquire nitrogen, fit a hood or mask over his head, and then administer the nitrogen to kill him painlessly. *Id.* ¶ 58.

The sole count in Johnson's Second Amended Complaint charges that by using pentobarbital to execute him, Defendants will inflict cruel and unusual punishment, which is prohibited by the Eighth Amendment as applied to the State of Missouri by the Fourteenth Amendment and

enforceable through 42 U.S.C. § 1983. He seeks a permanent injunction against his execution by lethal injection. *Id.* ¶ 70. **[p. 6]**

Standard

Defendants move to dismiss the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief can be granted. When reviewing a complaint under Rule 12(b)(6), a court takes all factual allegations as true. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). The court gives no deference to "formulaic recitation[s] of the elements of a cause of action" and "legal conclusion[s] couched as" facts. *Id.* Thus, a plaintiff cannot rely on mere "naked assertion[s]" of wrongdoing, but rather must support his claim with "further factual enhancement." *Id.* at 557.

The court must determine whether those facts state a "plausible" claim for relief. *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Twombly,* 550 U.S. at 556 (requiring "enough fact to raise a reasonable expectation that discovery will reveal evidence of [unlawful activity]").

In the plausibility evaluation, the court is limited to a review of the amended complaint and materials necessarily embraced by the amended complaint such as exhibits. *Meehan v. United Consumers Club Franchising Corp.,* 312 F.3d 909, 913 (8th Cir. 2002). This endeavor is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at

679. A court should bear in mind that "[t]here is no requirement for direct evidence; the factual allegations may be circumstantial." *McDonough v. Anoka Cty.,* 799 F.3d 931, 945 (8th Cir. 2015). "The complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.* at 946 (alteration removed). **[p. 7]**

Discussion

Defendants argue the Second Amended Complaint should be dismissed because it fails to state a claim and because it is barred by the statute of limitations.

The Eighth Amendment prohibits the State from inflicting "cruel and unusual punishments." U.S. Const. amend. VIII. A prisoner sentenced to death may challenge an execution protocol as applied to him. *Bucklew v. Lombardi,* 783 F.3d 1120, 1127 (8th Cir. 2015) (en banc).

To challenge an execution method as "cruel and unusual," a prisoner must plead facts supporting two essential elements: (1) the method is "sure or very likely to cause serious illness and needless suffering"; and (2) that a particular alternative method of execution is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross,* 135 S. Ct. 2726, 2737 (2015) (emphases and alteration removed).

I. The Second Amended Complaint fails to state a claim because it does not establish the plausibility that pentobarbital presents a substantial risk of inflicting severe pain on Johnson.

A prisoner challenging a method of execution must establish that "the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Glossip,* 135 S. Ct. at 2737 (internal quotation marks and citations omitted). To prevail on this claim "there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Id.* It is the prisoner's burden to establish "that the State's lethal injection protocol creates a demonstrated risk of severe pain." *Id.* (restated as "substantial risk of severe pain" at 2740). In the context of the present case, Johnson bears the burden of presenting facts in his complaint establishing that the use of **[p. 8]** pentobarbital is sure or very likely to cause him to have a seizure, and that this seizure will be severely painful, thus Missouri's execution protocol presents a substantial risk of inflicting severe pain on him.

In dismissing the First Amended Complaint for failing to state a claim, the Court found the complaint deficient because it contained conclusory allegations and recitations of the legal standard. It also found the remaining allegations did not establish: (1) the probability that pentobarbital will trigger seizures because of Johnson's brain defects; (2) a link between pentobarbital and the frequency of seizures; and (3) the possibility that a seizure during

Johnson's execution would be the result of his seizure disorder.

Johnson intersperses the Second Amended Complaint with conclusory statements that merely repeat the legal standard by asserting pentobarbital poses a "substantial and unjustifiable risk" of severe pain because it is "sure or very likely" to trigger a seizure. Second Am. Cmpl. ¶¶ 2, 21, 34, 51, 54; Aff. in Supp. ¶¶ 14, 16. These conclusory statements are not entitled to an assumption of truth. *McDonough,* 799 F.3d at 945. Neither has Johnson corrected the deficiencies in his previous complaint by providing a sufficient factual basis for the claim that using pentobarbital on him is "sure or very likely" to trigger a seizure, creating a "substantial risk" of causing severe pain.

Johnson relies on Dr. Zivot's affidavit to establish a factual basis that administering pentobarbital to him is "sure or very likely" to cause a seizure. The affidavit does not do this.

What the affidavit does do is provide plausible evidence that pentobarbital is a seizure- promoting compound, that Johnson has a lower threshold for seizures due to his epilepsy, and that any pentobarbital induced seizure would be more painful than usual. This outlines a theory **[p. 9]** explaining how pentobarbital could increase Johnson's risk of suffering a seizure, and that *if* Johnson suffered a pentobarbital induced seizure, it would be severely painful.

It does not establish - as *Glossip* requires - that using pentobarbital is "sure or very likely" to cause a seizure in him and so inflict unnecessary pain. Dr.

Zivot never uses the words "sure" or "very likely" or their equivalent in describing the probability that Johnson will actually suffer a seizure. The closest he comes is observing that in individuals with pre-existing epilepsy, exposure to seizure producing drugs is "more likely" to produce a seizure. *Id.* ¶12. Granted, he repeatedly claims there is a "substantial" risk here, asserting "Mr. Johnson's epilepsy creates a unique and substantially important risk when exposed to anything that promotes seizures," and there is "a substantial risk [that] serious harm will occur during his execution as a result of a violent seizure that is induced by Pentobarbital injection." Aff. in Supp. ¶¶ 12, 14. But it is unclear exactly what risk he is referring to, the risk of Johnson suffering a pentobarbital induced seizure, or the risk that if he suffers a seizure, it will be very painful? The clearest expression of Dr. Zivot's view is in the affidavit's conclusion when he states Johnson is at "significant medical risk for a serious seizure." Aff. in Supp. ¶¶ 12, 14, 16. While a "significant" risk is noteworthy, it does not mean the same thing as "sure or very likely." A "significant" risk is not an imminent risk or an objectively intolerable risk as set forth in *Glossip*. *See McGehee v. Hutchinson,* No. 17-1804, 2017 WL 1404693, at *2 (8th Cir. Apr. 17, 2017), *cert. denied,* No. 16-8770, 2017 WL 1414915 (Apr. 20, 2017) (finding that "a significant possibility that the prisoners could show an 'objectively intolerable risk' of severe pain" did not meet the "rigorous 'sure or very likely' standard of *Glossip").*

Accordingly, the Court finds the Second Amended Complaint does not meet the pleading requirements as set forth in *Glossip*. **[p. 10]**

II. The Second Amended Complaint fails to state a claim because it does not establish Johnson's alternative method of execution is feasible and capable of being readily implemented in Missouri.

Johnson pleads nitrogen-induced hypoxia is feasible and readily implemented because: (1) execution by lethal gas is authorized by Missouri statute; (2) the tools necessary to perform the execution, such as the nitrogen gas and a hood or mask, are easily acquired in the open market; (3) nitrogen can be acquired without the need of a license; and (4) it does not require a gas chamber or construction of a facility. Second Am. Cmpl. ¶ 58.

To plead a method of execution claim, a prisoner must identify an alternative execution protocol that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain."[6] *Glossip*, 135 S. Ct. at 2737. The Eighth Circuit explained this standard stating, "the State must have access to the alternative and be able to carry out the alternative relatively easily and reasonably quickly." *McGehee*, 2017 WL 1404693, at *3.

Attached to and embraced by Johnson's Second Amended Complaint is a report on nitrogen-induced hypoxia (Doc. 41-3). This report actually indicates nitrogen induced hypoxia is not feasible or capable of being readily implemented for use in state

[6] For purposes of this motion, the parties do not dispute Johnson's alternative method of execution will substantially reduce the risk of harm. The only issue in dispute is whether the alternative method is feasible and readily implemented.

executions. The report demonstrates the process used in a state execution would likely require a more elaborate mechanism than simply using a hood to deliver the nitrogen gas. Doc. 41-3 at 10. The report states using a mask to deliver nitrogen risks complications, such as the mask not sealing tightly around the prisoner's face. *Id.* at 7. If this occurs, "oxygen entering into the hood . . . can prolong [the] time to unconsciousness and death, as well as increase the possibility of involuntary movements by the subject." *Id.* at 11. **[p. 11]**

These allegations do not demonstrate nitrogen-induced hypoxia is capable of being readily implemented: the state would need to consider a protocol that is more elaborate than merely purchasing a hood or mask; Missouri would need time to develop a protocol to address risk of oxygen entering the hood; and Department of Corrections personnel would need to be trained on the process.

Equally fatal to this claim, Johnson has not pled facts indicating Missouri is willing to perform this type of execution, which suggests it may not be feasible. *C.f. Bucklew v. Lombardi,* No. 14-08000-CV-W-BP, 2016 WL 6917289, at *5 (W.D. Mo. Jan. 29, 2016) (holding Plaintiff adequately pled alternative method of execution by lethal gas because the complaint included comments by the Missouri Attorney General indicating a willingness to carry out a lethal gas execution).

Therefore, Johnson has failed to establish that nitrogen-induced hypoxia is a feasible and readily implemented alternative method of execution.

III. Johnson's claim is not barred by the statute of limitations.

Each time Defendants have moved to dismiss Johnson's complaint, including here, they have raised a statute of limitations argument. Although the Court could dismiss the amended complaint for the reasons stated above, the Court will address this argument because it will likely rise again.

"Bar by a statute of limitation is typically an affirmative defense, which the defendant must plead and prove." *Walker v. Barrett,* 650 F.3d 1198, 1203 (8th Cir. 2011). Thus, "the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense." *Id.*

"[T]he applicable statute of limitations governing method-of-execution Eighth Amendment claims" is a question the Eighth Circuit "has not addressed." *Bucklew,* 783 F.3d at **[p. 12]** 1128. While the Court does not have the benefit of Eighth Circuit guidance, it notes the limitations period for § 1983 lawsuits is generally the applicable state-law limitations period for personal-injury torts, *Wallace v. Kato,* 549 U.S. 384, 387 (2007), which in Missouri is five years, Mo. Rev. Stat.§ 516.120(4). *See also Wellons v. Comm'r, Ga. Dep't of Corr.,* 754 F.3d 1260, 1263 (11th Cir. 2014).

The limitations clock in § 1983 cases begins ticking "when the plaintiff has a complete and present cause of action," which is "when the plaintiff can file suit and obtain relief." *Wallace,* 549 U.S. at 388 (internal quotation marks omitted). Applied here, that time would be either when Johnson

became aware of his brain defect or when the State first selected a method of execution that presented Johnson a substantial risk of severe pain.

Defendants argue the State has used lethal injection since well before Johnson began having health issues in 2008, so his claim accrued no later than August 2013, five years after his surgery and two years before he filed this lawsuit. Defendants claim their argument is bolstered by Johnson's allegations that pentobarbital is a fast-acting barbiturate and Missouri's prior method of execution used a fast-acting barbiturate.

The Second Amended Complaint fails to establish a statute of limitations defense because: (1) the facts in the complaint establish Johnson's claim was not available to him until 2011; and (2) the amended complaint does not pinpoint a date the State began using pentobarbital in its protocol.

The facts giving rise to this *Glossip* claim rely on Johnson's knowledge of his specific brain scarring that was not known to him until at least 2011 when he underwent the MRI scan. This scan established that scarred brain tissue caused Johnson's violent and uncontrollable **[p. 13]** seizures. Because Johnson could not have been reasonably aware of these injuries, which form the basis of his complaint, before 2011, his complaint is not barred by the statute of limitations.

Conclusion

In view of the foregoing, Defendant's motion to dismiss (Doc. 42) is GRANTED. Johnson's complaint is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED

Date: May 1, 2017

/s/ Greg Kays
GREG KAYS, CHIEF
JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2222

Ernest Lee Johnson

Appellant

v.

Anne L. Precythe, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:15-cv-04237-DGK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Benton did not participate in the consideration or decision of this matter.

October 02, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

AFFIDAVIT OF JOEL ZIVOT, M.D., FRCP(C)

State of Georgia)
)
County of Guinnett **)**

I, Joel Zivot, being of sound mind and lawful age, hereby state under penalty of perjury as follows:

1. I am an associate professor and senior member of the Departments of Anesthesiology and Surgery, Emory University of Medicine, in Atlanta, Georgia. I am the fellowship director for training in Critical Care Medicine for the Department of Anesthesiology. I hold board certification in Anesthesiology from the Royal College of Physicians and Surgeons of Canada and the American Board of Anesthesiology. I am board certified in Critical Care Medicine from the American Board of Anesthesiology.

2. I have practiced anesthesiology and critical care medicine for 20 years and in that capacity, I have personally performed or supervised the care of over 40,000 patients.

3. I hold an active medical license from the states of Georgia, and have held unrestricted medical licenses in Ohio, the District of Columbia, Michigan, and the provinces of Ontario and Manitoba. I hold a license to prescribe narcotics and other controlled substances from the US Drug Enforcement Administration (DEA).

[p. 2] 4. I have been consulting with attorneys representing Mr. Ernest Johnson, a death row prisoner in the State of Missouri regarding Mr. Johnson's medical condition and the risks attendant to executing him by lethal injection.

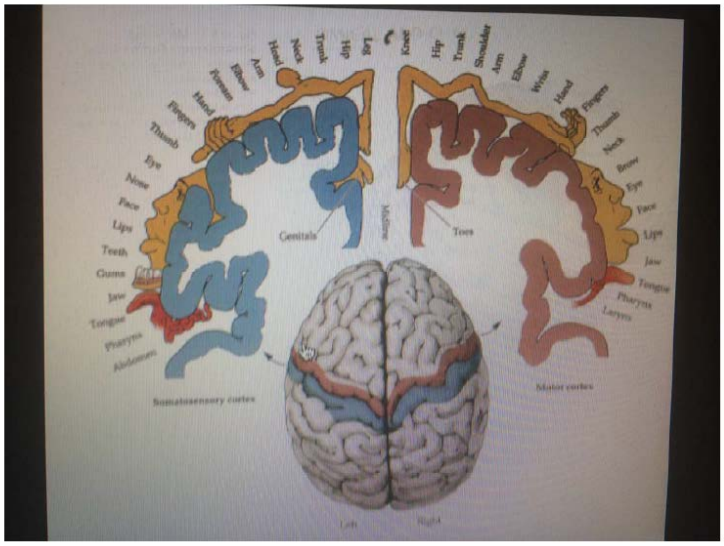
5. On August 14, 2015, I travelled to Potosi Correctional Center to examine Mr. Johnson. On examination, I found the following. He complains of recurring throbbing pain on the right side of his head that he rates as 7/10. This pain is worse when standing and better when lying down. He has balance problems and complains of weakness in the right leg. He suffers from intermittent chest pain that occurs weekly and lasts from 5–10 minutes at a time. He describes a heartburn sensation that occurs with regularity. Noteworthy on physical exam is a large scar on his head from prior cranial surgery in an attempt to remove a meningioma. Cranial nerves II-XII where intact and his blood pressure was 130/80 in the left arm and 140/80 in the right arm. His oxygen saturation was 98% on room air. His right leg was weaker than his left leg and he had hyper-reflexia of the deep tendon reflexes of the right leg.

6. I reviewed the records from Vista Imaging of Jefferson County dated 4/18/2011 and 7/9/2015. I reviewed the brain MRI images from those dates as well. I include 2 images with this report that require further explanation. The following image is a sagittal view (the plain that divides the body into left and right halves). This image shows 2 significant findings. The white line showing the edge of the skull at the top of

the image has a missing piece that appears black. This indicates that he has a hole in the top of his skull. Directly beneath the hole is **[p. 3]** a black region that represents missing brain tissue. I estimate the total quantity of missing brain tissue to be 15–20%.

As a comparison, I include a normal sagittal brain image. Note that the brain tissue is present and the skull defect is absent.
[p. 4]

7. Mr. Johnson is missing the region of the brain responsible for movement and sensation of the legs. Refer to the following picture that shows the marked area in question. The image represents a view from the top of the brain looking down. The blue area represents the sensory region for the legs and the red represents the motor region.
[p. 5]



8. The region of missing brain in Mr. Johnson corresponds to his findings of leg weakness, imbalance, and hyper-reflexia. This brain tissue will not grow back and this weakness and imbalance will not improve for the remainder of his life.

9. During the original operation performed on August 28th, 2008 to remove the brain tumor that was determined to be a meningioma according to a histology evaluation, it was noted that all of the brain tumor could not be removed. The first image in this report taken from the most recent evaluation from 7/9/2015 does not show significant change from 4/15/2011. This is an expected finding as a brain Meningioma is known to grow very slowly. Nevertheless, the brain tumor

[p. 6] remains in Mr. Johnson and would be detectable along the edges of the missing brain defect as seen on the first MRI image.

10. Mr. Johnson is known to have a seizure disorder and this is the direct result of the brain surgery. Scars in the brain and missing brain defects create disrupted areas of electrical brain activity that manifest as a seizure. Medication is required lifelong to suppress this electrical seizure propensity.

11. If Mr. Johnson should have a seizure, it would manifest as a violent shaking of the legs and then spread to the rest of the body and produce unconsciousness. Seizures may be self-limiting or last for a prolonged period of time. Outwardly, a seizure is a striking and alarming event that is seen as total body shaking and straining. During a seizure, it is not uncommon for the seizing individual to involuntarily urinate. Physically restraining a seizing individual is very difficult and will not result in a seizure resolution. After a seizure stops, the individual experiences generalized significant muscle pain and disorientation.

12. In the Missouri lethal injection protocol, Midazolam and Pentobarbital are the agents that will be used. Though benzodiazepines and barbiturates are used to treat seizures, both of these agents also have the real potential to promote a seizure when given. The extent and duration of these drug-provoked seizures are unknown.

13. In the setting of lethal injection, Mr. Johnson will be physically restrained on a gurney. If Mr. Johnson should have a seizure, and this is a **[p. 7]** significant possibility, it will be observed as a violent struggle against his restraints; he will likely urinate as well.

14. As a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that may be induced by Pentobarbital injection. Generalized seizures, such as the one that would occur in Mr. Johnson, are severely painful. Pentobarbital is a drug in the barbiturate class and it is important to note that all barbiturates lack the capacity to reduce pain and are never given to reduce pain. Pharmacologically, barbiturates like Pentobarbital are actually known to exaggerate pain. That is, they make pain worse.

15. Based on the above findings I am of the medical opinion that Mr. Johnson faces a significant medical risk for a serious seizure as the direct result of the combination of the Missouri lethal injection protocol and Mr. Johnson's permanent and disabling neurologic disease.

FURTHER AFFIANT SAYETH NOT.

I swear or affirm that the foregoing statements are true and accurate.

[seal]

/s/ *Joel Zivot*

Joel Zivot, MD, FRCP (C)

Subscribed and sworn to before me on this 22nd day of October, 2016.

/s/*Chanta Randall*
Notary Public

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

ERNEST L. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:15-CV-4237-DGK**
	)	
	)	
GEORGE A. LOMBARDI, DAVID DORMIRE, AND TROY STEELE,	)	**THIS IS A CAPITAL CASE**
	)	
	)	
	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

INTRODUCTION

1. Plaintiff Ernest Johnson is a Missouri inmate currently residing at the Potosi Correctional Center under a sentence of death. Mr. Johnson was diagnosed with an atypical parasagittal meningioma brain tumor. He had a craniotomy surgical procedure in August 2008 where a portion of the tumor was removed. Another portion of the tumor, however, could not be removed and remains in Mr. Johnson's brain. The craniotomy procedure resulted in scarring tissue and a brain defect that cause his current medical problems. The scarring tissue and

brain defect were not known until an MRI was conducted in April 2011.

2. Due to the unique and specific medical conditions of Mr. Johnson, there is a substantial and unjustifiable risk that Missouri's lethal injection protocol currently utilized by the Missouri Department of Corrections will affect Mr. Johnson differently **[p. 2]** than an average healthy inmate and will cause severe pain and serious harm to Mr. Johnson. There is a substantial and unjustifiable risk that the lethal injection drugs will trigger uncontrollable and painful seizures and convulsions due to Mr. Johnson's unique brain defect and condition that were discovered in April 2011. There is a substantial and unjustifiable risk that the seizures and convulsions will be severely painful and cause needless suffering. The current method of execution is sure or very likely to cause serious and needless pain in light of Mr. Johnson's unique medical condition. Mr. Johnson seeks this civil action for declaratory and injunctive relief against all Defendants for committing acts, under color of state law, that violate the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

JURISDICTION AND VENUE

3. Jurisdiction is conferred by 28 U.S.C. § 1331 which provides for original jurisdiction in the district courts of all civil actions arising under the Constitution, laws and treaties of the United States. Jurisdiction is also conferred by 28 U.S.C. § 1343 which provides for original jurisdiction in the district courts over any civil action authorized by law to redress the deprivation under color of any State law,

statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the United States Constitution. Jurisdiction is also conferred under 42 U.S.C. § 1983 which provides for a cause of action for the protection of the rights, privileges, or immunities secured by the United States Constitution. The declaratory and injunctive relief sought is also authorized by 28 U.S.C. §§ 2201 and 2202.

[p. 3] 4. Venue is proper in the Western District of Missouri under 28 U.S.C. § 1391(1)-(2), which provides that any civil action may be brought in a judicial district in which any defendant resides if all defendants are residents of the State in which the district is located, or in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. Upon information and belief, defendant Lombardi resides in the territorial jurisdiction of this district. Further, upon information and belief, decisions regarding Missouri's execution protocol were made within this Court's territorial jurisdiction.

PARTIES

5. Plaintiff Ernest Johnson is a resident of the State of Missouri and presently resides at Potosi Correctional Center in Mineral Point, Missouri. Mr. Johnson has been sentenced to death. No execution date is pending as of the date of this amended filing.

6. Defendant George Lombardi is the Director of the Missouri Department of Corrections. His office is located at 2729 Plaza Drive, Jefferson City, Missouri. Upon information and belief, Mr. Lombardi resides within the Western District of Missouri.

7. As Director for the DOC, Missouri law (Mo. Rev. Stat. § 546.720) specifically directs Defendant Lombardi to prescribe and direct the means by which executions are carried out within the statutorily prescribed methods of lethal gas or lethal injection.

[p. 4] 8. Defendant David R. Dormire is the Director of the Division of Adult Institutions for the Missouri Department of Corrections. His office is also located at 2729 Plaza Drive in Jefferson City, Missouri.

9. As Director of Adult Institutions, Defendant Dormire is the chief executive officer and has command-and-control authority over DOC officials, officers and employees who are involved directly or indirectly with carrying out executions and with respect to the implementation of the execution protocol.

10. Defendant Troy Steele is the Warden of the Eastern Reception and Diagnostic & Correctional Center (ERDCC) located at 2727 Highway K, Bonne Terre, Missouri. The State of Missouri currently conducts executions at the ERDCC.

11. Defendant Steele has authority over the staff at ERDCC and is responsible for the manner in which the execution is carried out by the staff and execution team at ERDCC.

12. All defendants are sued in their official capacities. At all times pertinent to the matters raised in this Complaint, all defendants acted and will act under color of state law.

FACTUAL BACKGROUND

Mr. Johnson's Medical Condition

13. Mr. Johnson suffers from an atypical parasagittal meningioma brain tumor. The tumor was discovered in or about 2008.

14. A meningioma is a tumor that arises from a layer of tissue called the meninges that covers the brain and the spine. A meningioma is typically slow growing.

[p. 5] 15. Mr. Johnson had a craniotomy surgical procedure on August 28, 2008, to remove a portion of the meningioma. The entire meningioma could not be removed during the craniotomy. A portion of the tumor remains in Mr. Johnson's brain.

16. The craniotomy procedure resulted in a hole in the skull of Mr. Johnson that is still present. The craniotomy procedure also resulted in scarring tissue in Mr. Johnson's brain. The craniotomy also resulted in a significant brain defect as a portion of Mr. Johnson's brain has been removed or compressed due to the existence of the tumor and the craniotomy procedure. This defect is depicted as a dark space or a hole in the brain.

17. The brain defect and the scarring tissue that resulted from the craniotomy procedure were not known until an MRI procedure was conducted in April 2011.

18. The brain defect is in an area of the brain responsible for the movement and sensation of the legs.

19. The remaining portion of the meningioma, the scarring tissue and the brain defect can create disrupted areas of the electrical brain activity that can manifest as a violent and uncontrollable seizure.

20. Since the surgical procedure, there are documented instances where Mr. Johnson has suffered from seizures. Mr. Johnson is known to have a seizure disorder (epilepsy) as s direct result of the presence and subsequent attempted resection of his brain tumor. The medical records reference that Mr. Johnson has been prescribed anti-seizure medications due to his condition. His brain defect, scarring and tumor cause these seizures.

[p. 6] 21. The administration of the lethal injection drug pentobarbital creates a substantial and unjustifiable risk that violent and uncontrollable seizures could be triggered during the execution due to the lethal injection drugs' interaction with the remaining meningioma, scarring tissue and brain defect. There is a substantial and unjustifiable risk that such violent and uncontrollable seizures will result in a severely painful and prolonged execution and serious harm. The use of the current lethal injection drugs is sure or very likely to cause serious and needless suffering and severe pain in light of Mr. Johnson's specific and unique medication condition.

22. Mr. Johnson's medical condition is documented in DOC records.

23. The legal issues surrounding the existence of Mr. Johnson's brain tumor have not been the subject of any litigation prior to the filing of the current lawsuit.

Missouri's Lethal Injection Protocol

24. Missouri's lethal injection protocol calls for the administration of 5 grams of pentobarbital,

divided into two syringes, and administered through an IV line into the execution chamber, where the prisoner is alone and strapped to a gurney. No medical personnel are close at hand, and the prisoner is monitored remotely from the execution support room. Although medical personnel insert the IV lines at the outset, the lethal drug itself is injected by non-medical personnel pushing syringes into the IV line at a pre-determined flow rate.

25. Pentobarbital is a drug within the barbiturate class and is the agent that will be used in the Missouri lethal injection protocol. All barbiturates are derived from the parent compound barbituric acid, which is an organic molecule. Relevant properties of **[p. 7]** barbiturates have a variety of effects on the central nervous system that include both excitatory and inhibitory states. A barbiturate acts by depressing the central nervous system, particularly on certain portions of the brain.

26. Methohexital is in the barbiturate class and is a close cousin to pentobarbital as it shares a common central molecular structure. Methohexital is commonly used in electroconvulsive therapy (ECT) which is a treatment for intractable depression. The ECT procedure requires the producing of a seizure of a brief and controlled duration. This procedure is repeated on at least 10 separate occasions. During the induced seizure, brief unconsciousness is necessary as the seizure is painful and disturbing. In extensive research, methohexital has been shown to intensify and prolong the seizures and is the drug of choice for ECT procedures. Methohexital and other barbiturates have been shown to produce seizures in individuals without an underlying seizure disorder or epilepsy. In individuals with pre-existing

epilepsy, the production of a seizure is even more certain and more likely to occur when the brain is exposed to the barbiturate which a seizure producing drug.

27. The procedure itself begins with the insertion of the IV lines—one in each arm (or a central line in the femoral, jugular, or subclavian vein if venous access in the arms is limited). About 15 to 30 minutes before the lethal drug is injected, a saline solution, which has historically been colored with methylene blue (or another dye) is injected into the prisoner to determine if the lines are clear. The gurney is positioned so medical personnel can remotely observe the prisoner's face, directly, "or with the aid of a mirror." Medical personnel monitor the prisoner remotely during the execution.

[p. 8] 28. Non-medical personnel administer the lethal drugs through syringes into the IV lines. After the administration of the initial 5 grams of pentobarbital, the non-medical personnel flush the IV lines with saline and methylene blue. Shortly thereafter, the execution chamber's curtains are closed and medical personnel check the prisoner to determine if he is deceased.

29. If the prisoner is not dead, then non-medical personnel inject an additional 5 grams of pentobarbital through two additional syringes.

30. During the administration of the lethal drug, no one is present in the execution chamber other than the prisoner and no medical personnel are at hand. The prisoner is monitored only remotely from the execution support room. The members of the execution team only enter the execution chamber

when the curtains are closed to determine if the prisoner has died. This check is performed after the administration of the first injection of pentobarbital, and then again if a second injection is needed.

31. If the prisoner does not die after the administration of 10 grams of pentobarbital, Missouri's protocol provides no further guidance. The protocol is completely silent as to what procedures should be followed in the event the lethal drugs trigger uncontrollable seizures.

32. If the prisoner is not killed by the execution, there is no protocol or equipment for resuscitating the prisoner.

33. If the execution is halted, and the prisoner remains alive, the State of Missouri must resume medical care of the prisoner, as it is obligated to do under the **[p. 9]** Eighth Amendment and Fourteenth Amendments to the United States Constitution. The protocol is silent as to this possible scenario.

34. Mr. Johnson has brain defects including scarring tissue, missing brain matter and a portion of brain tumor. These brain defects cause a seizure disorder or epilepsy. The brain defects and pre-existing seizure disorder in Mr. Johnson create a substantial and unjustifiable risk that the execution will not proceed as intended in that there is a substantial and unjustifiable risk that the lethal injection drugs will trigger violent and uncontrollable seizures that are extremely painful and will lead to an ineffective and excruciating execution. The use of pentobarbital is very likely to cause or trigger severely painful and prolonged seizures and convulsions. As noted above,

methohexital and other barbiturates, which are in the same class of drugs as pentobarbital and share a similar common central molecular structure to pentobarbital, have been shown in extensive research to produce, intensify and prolong seizures in ECT procedures involving patients with normal brain conditions. In individuals with pre-existing epilepsy or a seizure disorder, like Mr. Johnson, the production of such a seizure is even more certain and more likely to occur when the brain is exposed to drugs that have been shown to produce and promote seizures. Mr. Johnson's epilepsy and brain defect creates a unique and substantially important risk when exposed to anything that has been shown to promote seizures. Mr. Johnson's seizure threshold is substantially lower than the general population. Any further lowering of that threshold by using a seizure promoting compound like pentobarbital will increase the likelihood of a seizure with a very high degree of probability.

[p. 10]35. Missouri's protocol is grossly inadequate to address the significant risks to Mr. Johnson during an execution—risks that could cause an excruciating and severely painful procedure.

36. No medical assistance will be at hand—instead the personnel will be watching from the execution support room, unable to lend any medical aid to Mr. Johnson in the event it is constitutionally mandated.

Amended Affidavit of Dr. Joel Zivot

37. Dr. Joel Zivot is a highly trained, board-certified physician. He serves as an associate professor and senior member of the Department of

Anesthesiology and Surgery at Emory University of Medicine in Atlanta, Georgia. He holds board certifications in Anesthesiology and in Critical Care Medicine. A CV of Dr. Zivot is attached hereto as Exhibit 1. The amended affidavit of Dr. Zivot is attached hereto as Exhibit 2.

38. Dr. Zivot has practiced anesthesiology and critical care medicine for 20 years and has personally performed, or supervised, the care of over 40,000 patients. (Ex. 2 at ¶ 2).

39. Dr. Zivot has reviewed the medical records for Ernest Johnson.

40. On August 14, 2015, Dr. Zivot traveled to Potosi Correctional Center to examine Mr. Johnson in person.

41. Based on his personal examination of Mr. Johnson, Dr. Zivot found that Mr. Johnson complained of recurring throbbing pain on the right side of his head that is rated 7 out of 10. Mr. Johnson indicated this pain is worse when standing and better **[p. 11]** when lying down. Mr. Johnson complained of balance problems and weakness in the right leg. (Ex. 2 at ¶ 5).

42. Upon physical examination, Dr. Zivot observed a large scar on Mr. Johnson's head from a prior cranial surgery. Cranial nerves II through XII were observed to be intact. (Ex. 2 at ¶ 5).

43. Dr. Zivot observed that Mr. Johnson's right leg was weaker than his left leg and he had hyper-reflexia on the deep tendon reflexes of his right leg. (Ex. 2 at ¶ 5).

44. Upon his review of the medical records and MRI images for Mr. Johnson, Dr. Zivot observed a small hole in the top of Mr. Johnson's skull. He also observed a black region in the brain area that represents missing brain tissue. Dr. Zivot estimates that the total quantity of the brain defect is 15 to 20%. The brain defect is irreversible. (Ex. 2 at ¶ 6).

45. Mr. Johnson's brain defect is in the region of the brain responsible for movement and sensation of the legs. (Ex. 2 at ¶ 7). The region of the brain defect corresponds to Mr. Johnson's complaints and physical observations about leg weakness, imbalance and hyper-reflexia. (Ex. 2 at ¶ 8). The brain defect will not grow back or improve over time and the associated weakness and imbalance will not improve. (Ex. 2 at ¶ 8).

46. Dr. Zivot compared MRI images from April 15, 2011, to an image taken on July 9, 2015. The images and the reports indicate that there is no significant change in the meningioma. This is an expected finding as brain meningiomas tend to grow very slowly. (Ex. 2 at ¶ 9).

[p. 12]47. Dr. Zivot also observed that Mr. Johnson has a seizure disorder which is a direct result of the brain surgery. (Ex. 2 at ¶ 10).

48. According to Dr. Zivot, scar tissue in the brain and the brain defect create disrupted areas of electrical brain activity. (Ex. 2 at ¶ 10).

49. Based on his review of Missouri's execution protocol and Mr. Johnson's medical records and images, Dr. Zivot opines that the use of pentobarbital will increase the likelihood of seizure in Mr. Johnson

with a very high degree of probability. (Ex. 2 at ¶ 10).

50. A drug induced seizure would likely manifest as a violent shaking of the legs which can then spread to the rest of the body and then produce unconsciousness. The seizure may be self-limiting or could last for a prolonged period of time. Outwardly, the seizure is striking and an alarming event that is seen as a total body shaking and straining. During such a seizure, physically restraining a seizing individual is very difficult and will not result in a resolution of the seizure. Such seizures can result in significant muscle pain and disorientation. (Ex. 2 at ¶ 11).

51. Based on the condition of Mr. Johnson, which includes his brain tumor, brain defect and scarring, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by pentobarbital. (Ex. 2 at ¶ 14). The use of pentobarbital during the execution protocol significantly increases the likelihood that a seizure will occur in Mr. Johnson. Pentobarbital, a drug in the barbiturate class, produces a variety of effects on the central nervous system of the patient. A similar drug, Methohexital, a barbiturate and close cousin of pentobarbital, is **[p. 13]** used in electroconvulsive therapy to produce seizures in a patient. Methohexital is known to induce seizures in patients without pre-existing seizure disorders as seen in Mr. Johnson. In patients like Mr. Johnson, with a known pre-existing seizure disorder, the introduction of the barbiturate to the body is even more certain and more likely to produce a seizure in the patient. Mr. Johnson's seizure disorder creates a unique and substantially important risk that is significantly

increased when exposed to any drug that promotes seizures. Mr. Johnson's seizures threshold is substantially lower than the general population and any further lowering of that threshold will increase the likelihood of a seizure with a very high degree of probability. Further, pentobarbital lacks the capacity to reduce pain and is known to exaggerate pain or make it worse. Thus, the drugs used by the state of Missouri to execute prisoners has the unique capacity, in this case, to substantially increase the likelihood of a severely painful execution of Mr. Johnson. (Ex. 2 at ¶ 15).

52. Dr. Zivot also opines that risk of a pentobarbital seizure in the case of Mr. Johnson cannot be dismissed because Mr. Johnson has a pre-existing seizure disorder. Due to the unique medical condition of Mr. Johnson, the use of pentobarbital in a person with a pre-existing seizure disorder increases the likelihood of a resulting seizure to a very high degree of probability. (Ex. 2 at ¶ 10, 12, 14).

Mr. Johnson's Claims are Different from Prior Lethal Injection Litigation

52. Mr. Johnson brings this lawsuit as a single plaintiff based on his unique medical condition and the substantial and unjustifiable risks associated with the administration of lethal injection drugs.

[p. 14]53. Mr. Johnson's claims are different and distinct from those claims raised in the case of *Zink v. Lombardi*, Case No. 2:12-CV-4209 (W.D. Mo.).

54. Although the source of the drugs used in Missouri's lethal injection protocol are unknown

(whether manufactured in a controlled laboratory setting as authorized by the United States government or obtained through a compounding pharmacy), the use of the lethal injection drugs used by the Department of Corrections under its current protocol create a substantial and unjustifiable risk that Mr. Johnson will suffer a severely painful execution by the triggering of violent and uncontrollable seizures and convulsions, which constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Alternative Method of Execution that Alleviates Risks

55. The United States Supreme Court in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), requires that a feasible, alternative method of execution be alleged by an inmate who challenges an execution method. The prisoner must identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of pain.

56. The only other method of execution currently recognized as an alternative method by Missouri law is execution by lethal gas. Mo. Rev. Stat. § 546.720.1. The specific type of lethal gas is not further defined by the Missouri statute. The Missouri Department of Corrections thus has discretion to determine which method of lethal gas could be used under this statutorily-recognized alternative. Missouri law grants specific powers to the director of the Missouri Department of Corrections to provide a suitable **[p. 15]** and efficient room or place and "to obtain the necessary

appliances" for carrying out and an execution by lethal gas. Mo. Rev. Stat. § 546.720.1.

57. The administration of lethal gas can be performed in several different forms that would accommodate the existing Missouri statute. Recently, the State of Oklahoma passed legislation adopting the use of nitrogen gas which can induce hypoxia as a method of execution. According to the study commissioned by lawmakers in the State of Oklahoma, nitrogen-induced hypoxia would provide a safe, inexpensive and readily available alternative to controlled substance lethal injection. A copy of the Oklahoma study is attached hereto as Exhibit 3.

58. Nitrogen-induced hypoxia would be a feasible method of execution for the State of Missouri because execution by lethal gas is already authorized by Missouri statute. Nitrogen-induced hypoxia is also a feasible method of execution that can be readily implemented in that the tools necessary to perform nitrogen-induced hypoxia are easily acquired in the open market. The primary ingredient is nitrogen gas which is readily available through multiple sources in the United States. Nitrogen can be obtained without the need for a license. For example, nitrogen is used in welding, hospital and medical facilities and cooking. The nitrogen gas can be administered to the inmate through several different feasible and readily implementable methods, including the use of a hood, a mask or some other type of medically enclosed device to be placed over the mouth or head of the inmate. The use of a nitrogen gas method of execution would not require a gas chamber or the construction of particular type of facility. The nitrogen gas procedure could be administered in the

same room or facility now utilized by the **[p. 16]** Department of Corrections for lethal injection. Thus, the use of a nitrogen gas method of execution is feasible and readily implementable. The use of nitrogen gas is a known and available alternative method of execution.

59. An execution by lethal gas would significantly reduce the substantial and unjustifiable risk of severe pain that currently exists with Missouri's current lethal injection method, as applied to Mr. Johnson, in that the use of lethal gas would not trigger the uncontrollable seizures and convulsions that would likely be triggered by the administration of the current drugs used in Missouri's lethal injection protocol. The available literature regarding the nitrogen gas method of execution strongly suggests that the subject will have no allergic reaction to the gas, will experience a loss of consciousness, and will suffer no pain. The basis of this analysis is that nitrogen gas is a commonly occurring gas that is ingested by humans without medical complication.

CLAIM FOR RELIEF

Count I: Infliction of Cruel and Unusual Punishment

60. Plaintiff realleges and incorporates by reference the averments set forth in paragraphs 1 through 59 above as though fully stated herein.

61. Execution by lethal injection poses unique and specific risks to Mr. Johnson due to his medical condition.

62. There is a substantial and unjustifiable risk that the Defendants' use of lethal injection drugs to Mr. Johnson will trigger severe and uncontrollable seizures and convulsions due to his brain defect and unique medical condition that will be severely painful and will cause needless suffering.

[p. 17]63. There is a substantial and unjustifiable risk that executing Mr. Johnson by lethal injection will result in severe pain. The use of Missouri's current lethal injection protocol is sure or very likely to cause serious and needless pain and suffering by triggering uncontrollable and violent seizures and convulsions.

64. The Plaintiff has a life and liberty interest under the Due Process Clause of the Fourteenth Amendment in not being executed by the State in violation of the Cruel and Unusual Clause of the Eighth Amendment to the United States Constitution.

65. The Defendants' intended actions as set forth in this Complaint violate the Cruel and Unusual Clause of the Eighth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment and enforceable through 42 U.S.C. § 1983.

66. If not enjoined by the Court, the Defendants and their agents, representatives and employees will violate Plaintiff's right to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. This course of conduct will cause Plaintiff to suffer irreparable injury. Plaintiff does not have a plain, speedy, and adequate remedy

at law for such an injury. Accordingly, injunctive relief pursuant to 42 U.S.C. § 1983 and other authority is proper.

67. An actual and substantial controversy exists between Plaintiff and Defendants as to their respective legal rights and duties. Plaintiff contends that as applied to him, the lethal injection protocol violates his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. It is anticipated that **[p. 18]** Defendants will contend otherwise. Accordingly, declaratory relief pursuant to 28 U.S.C. § 2201 is proper.

68. In adherence to the pleading requirements set forth in *Glossip*, Mr. Johnson specifically alleges that lethal gas is a feasible and available alternative method under Missouri law that is readily implementable and will significantly reduce the risk of severe pain and a prolonged and ineffective execution.

Prayer for Relief

69. Plaintiff prays for this Court to issue appropriate declaratory relief regarding the unconstitutional acts and practices of Defendants as applied to Plaintiff.

70. Plaintiff also prays for appropriate permanent equitable relief against all Defendants that permanently enjoins them from conducting an execution by lethal injection with respect to this individual Plaintiff.

71. Mr. Johnson also seeks this Court's order under 42 U.S.C. § 1988 awarding him reasonable attorneys fees.

WHEREFORE, based on the foregoing, Plaintiff Ernest Johnson prays for this Court's orders and judgments as set for above.

[p. 19]

Respectfully submitted,
GADDY WEIS LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2016, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which sent notice of the filing to all counsel of record, including the following:

Gregory Goodwin
Missouri Attorney General's Office
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Jefferson City, MO 65102
Counsel for Defendants

/s/ Jeremy S. Weis
Counsel for Plaintiff Johnson

AMENDED AFFIDAVIDIT OF JOEL ZIVOT, M.D., FRCP (C)

State of Georgia)
)
County of Dekalb)

I, Joel Zivot, being of sound mind and lawful age, hereby state under penalty of perjury as follows:

1. I am an associate professor and senior member of the Departments of Anesthesiology and Surgery, Emory University of Medicine, in Atlanta, Georgia. I hold board certification in Anesthesiology from the Royal College of Physicians and Surgeons of Canada and the American Board of Anesthesiology. I am board certified in Critical Care Medicine from the American Board of Anesthesiology.

2. I have practiced anesthesiology and critical care medicine for 20 years and in that capacity, I have personally performed or supervised the care of over 40,000 patients.

3. I hold an active medical license from the states of Georgia, and have held unrestricted medical licenses in Ohio, the District of Columbia, Michigan, and the provinces of Ontario and Manitoba. I hold a license to prescribe narcotics and other controlled substances from the US Drug Enforcement Administration (DEA).

4. I have been consulting with attorneys representing Mr. Ernest Johnson, a death row prisoner in the State of Missouri regarding Mr. Johnson's medical condition and the risks attendant to executing him by lethal injection.

5. On August 14, 2015, I travelled to Potosi Correction Center to examine Mr. Johnson. On examination, I found the following. He complains of recurring throbbing pain on the right side of his head that he rates as a 7/10. This pain is worse when standing and better when lying down. He has balance problems and complains of weakness in the right **[p. 2]** leg. He suffers from intermittent chest pain that occurs weekly and lasts for 5-10 minutes at a time. He describes a heartburn sensation that occurs with regularity. Noteworthy on physical exam is a large scar on his head from prior cranial surgery in an attempt to remove a meningioma. Cranial nerves II-XII where intact and his blood pressure was 130/80 in the left arm and 140/80 in the right arm. His oxygen saturation was 98% on room air. His right leg was weaker than his left leg and he had hyper-reflexia of the deep tendon reflexes of the right leg.

6. I reviewed the records from Vista Imaging of Jefferson County dated 4/18/2011 and 7/9/2015. I reviewed the brain MRI images from those dates as well. I include 2 images with this report that require further explanation. The following image is a sagittal view (the plane that divides the body into left and right halves). This image shows 2 significant findings. The white line showing the edge of the skull at the top of the image has a missing piece that appears

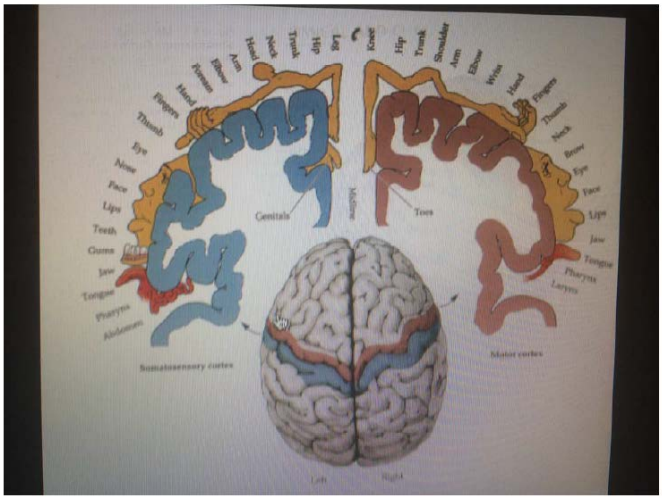
black. This indicates that he has a hole in the top of his skull. Directly beneath the hole is a black region that represents missing brain tissue. I estimate the total quantity of missing brain tissue to be 15–20%.

[p. 3]

As a comparison, I include a normal sagittal brain image. Note that the brain tissue is present and the skull defect is absent.
[p. 4]

7. Mr. Johnson is missing the region of the brain responsible for movement and sensation of the legs. Refer to the following picture that shows the marked area in question. The image represents a view from the top of the brain looking down. The blue area represents the sensory region for the legs and the red represents the motor region.

[p. 5]



8. The region of missing brain in Mr. Johnson corresponds to his findings of leg weakness, imbalance and hyper-reflexia. This brain tissue will not grow back and this weakness and imbalance will not improve for the remainder of his life.

9. During the original operation performed on August 28th, 2008 to remove the brain tumor that was determined to be a meningioma according to a histology evaluation, it was noted that all of the brain tumor could not be removed. The first image in this report taken form the most recent evaluation from 7/9/2015 does not show significant change from 4/15/2011. This is an expected finding as a brain Meningioma is known to grow very slowly. Nevertheless, the brain tumor remains in Mr. Johnson and would be detectable along the edges of the missing brain defect as seen on the first MRI image.

[p. 6] 10. Mr. Johnson is known to have a seizure disorder (epilepsy) and this is the direct

result of the presence and subsequent attempted resection of his brain tumor. Scars in the brain and missing brain defects create disrupted areas of electrical brain activity that manifest as a seizure. Medication is required lifelong to suppress this electrical seizure propensity. Brain tumor related epilepsy is known to be associated with three factors namely tumor pathology, tumor location, and sub-total resection. Tumor pathology refers to the nature of the tissue transformed to cancer. Cancer of the individual brain cells, (neurons), or cells covering and supporting neuron, (glia) are strongly associated with epilepsy. Cancer arising from the covering of the brain (meninges) produces epilepsy commonly before surgical removal and remains in a significant portion of those patients when the tumor is unable to be completely resected. Persistent epilepsy after meningioma resection can be resistant to antiepileptic drug treatment. Mr. Johnson will have lifelong epilepsy and control of his seizures will likely be challenging on an ongoing basis.

11. If Mr. Johnson should have a seizure, it would manifest as a violent shaking of the legs and then spread to the rest of the body and produce unconsciousness. Seizures may be self-limiting or last for a prolonged period of time. Outwardly, a seizure is a striking and alarming event that is seen as total body shaking and straining. During a seizure, it is not uncommon for the seizing individual to involuntarily urinate. Physically restraining a seizing individual is very difficult and will not result in a seizure resolution. After a seizure stops, the

individual experiences generalized significant muscle pain and disorientation.

12. Pentobarbital, a drug within the Barbiturate class, is the agent that will be used in the Missouri lethal injection protocol. Barbiturates are a large group of drugs with a wide spectrum of action. All Barbiturates are derived from the parent compound **[p. 7]** Barbituric Acid, an organic molecule. Relevant properties of Barbiturates include a variety of effects on the central nervous system that include both excitatory and inhibitory states. Barbiturates, as a class of drugs, have been in decline because of concerns over accidental overdose and other toxicities. Methohexital, a Barbiturate and a close cousin of Pentobarbital, is a notable exception. These two drugs share a common central molecular structure. Electroconvulsive therapy (ECT) remains as a treatment for intractable depression. This method requires the producing of a seizure of brief and controlled duration. This procedure is repeated on at least 10 separate occasions. Depression symptoms are seen to lessen after the completion of this series of seizure treatments. Brief unconsciousness is necessary as the seizure is painful and disturbing. Methohexital has been shown in extensive research to intensify and prolong a seizure and is the drug of choice for ECT procedures. Individuals that seek ECT treatment do not have a seizure disorder necessarily as a pre-existing condition. Methohexital, and other Barbiturates, have been shown to produce seizures in individuals without an underlying seizure disorder. In individuals with pre-existing

epilepsy, the production of a seizure is even more certain and more likely to occur when the brain is exposed to seizure producing drugs. Mr. Johnson's epilepsy creates a unique and substantially important risk when exposed to anything that promotes seizures. Mr. Johnson's seizure threshold is substantially lower than the general population and any further lowering of that threshold will increase the likelihood of a seizure with a very high degree of probability. Pentobarbital, structurally related to Methohexital, is such a seizure-producing compound.

[p. 8] 13. In the setting of lethal injection, Mr. Johnson will be physically restrained on a gurney. When Mr. Johnson has a seizure, it will be observed as a violent struggle against his restraints; he will likely urinate as well, and he will suffer extreme pain.

14. As a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by Pentobarbital injection. Generalized seizures, such as the one that would occur in Mr. Johnson, are severely painful. The Missouri lethal injection protocol as imagined, makes no direct claim on the subject of pain reduction as a consequence of Pentobarbital injection. Barbiturates produce differing effects on the central nervous system. Within medical practice, Barbiturates, including Pentobarbital, are never prescribed for the purpose of pain reduction (analgesia). It is a false claim to suggest that Pentobarbital would cause a painless death

based on outward appearances during execution. What is known is that when Barbiturates have been used in lower dosages, individuals suffering from concomitant pain report an ant-algesic effect. That is, the Barbiturate, instead of producing analgesia, actually exaggerates pain. As seizures are known to be painful and are observed as such by others, Pentobarbital induced seizures will be more painful than seizures from other causes including those that would otherwise occur in Mr. Johnson as a result of his underlying epilepsy.

15. It is erroneous to dismiss the risk of Pentobarbital induced seizures in the case of Ernest Johnson by claiming that Mr. Johnson may have a seizure at the time of his execution as a function of a baseline seizure disorder. The Missouri execution protocol will increase the likelihood of a seizure with a very high degree of probability.

16. Based on the above findings, I am of the opinion that Mr. Johnson faces a significant medical risk for a serious seizure as the direct result of the combination of the **[p. 9]** Missouri lethal injection protocol and Mr. Johnson's permanent and disabling neurologic disease.

FURTHER AFFIANT SAYETH NOT.

I swear or affirm that the foregoing statements are true and accurate.

/s/*Joel Zivot*
Joel Zivot, MD, FRCP(C)

Subscribed and sworn to before me on this 20 day of October 2016.

/s/ *Lesley Citizen*
Notary Public

[seal]