No. 20-287

In The Supreme Court of the United States

ERNEST JOHNSON,

Petitioner,

v.

ANNE L. PRECYTHE, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
Questions Presented

The questions presented are:

1. Should this Court overrule its decision in *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019), and hold that the Eighth Amendment requires a State to adopt an untried and untested method of execution?

2. Should the Court restore the Eighth Amendment's original meaning and evaluate method-of-execution claims on whether the State's method deliberately inflicts pain?

3. Must an inmate who demands an alternative method of execution must plead facts detailing a procedure to administer his proposed alternative method of execution?

4. Should this Court allow Johnson to amend his complaint for the third time in more than five years to include a claim that he could have raised twelve years ago?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Nearly twenty-seven years ago, Ernest Johnson robbed a gas station and brutally murdered three clerks. He bludgeoned their heads with a claw hammer, shot one clerk in the face, and stabbed another at least ten times with a screw driver. He then hid their bodies.

A Missouri jury sentenced Johnson to death on each count of murder. But, even after the lengthy review process over the legality of this sentence ended, for more than five years, Johnson has delayed his punishment further by challenging Missouri's method of execution. Three times, the district court dismissed Johnson's complaints for failing to state a claim. But twice he has appealed and sought to delay his sentence again, arguing that he should be executed by nitrogen hypoxia rather than pentobarbital.

After this Court's decision in *Bucklew v. Precythe* holding that the Eighth Amendment does not require a State to try novel methods of execution and rejecting nitrogen hypoxia as a ready implemented alterative execution method, this Court granted certiorari and remanded the case to the Eighth Circuit for consideration of Johnson's complaint in light of *Bucklew*. On remand, the Eighth Circuit affirmed the district court's dismissal of the complaint, holding that *Bucklew* makes clear that the Eighth Amendment does not require the State of Missouri to try nitrogen hypoxia as a new execution method.

Still, Johnson asks this Court to intervene so that he can proceed to discovery on his claim that Missouri should execute him by nitrogen hypoxia, and so that he can amend his complaint to allege a new alternative execution method: firing squad.

Consistent with this Court's role to ensure that method-of-execution challenges are resolved fairly and expeditiously, this Court should decline review. After *Bucklew*, the law is clear on the requirements of as-applied Eighth Amendment challenges involving nitrogen hypoxia, and so there is no need to revisit this area of law again so soon. The Eighth Circuit correctly understood this Court's clear instructions in *Bucklew*. This case thus presents no conflict among appellate courts, let alone a conflict worthy of review. The decision below, like this Court's decision in *Bucklew*, is correct, and so neither decision should be disturbed. Missouri's method of execution does not intentionally inflict pain, and so, under the original meaning of the Eighth Amendment, it is constitutional. Johnson's petition also suffers from procedural and factual complications that make it a poor vehicle to examine any of these questions.

Recognizing that *Bucklew* forecloses any relief, Johnson also seeks summary reversal so he can amend his complaint to present a new theory. But he does not show any intervening change in law to allow him to re-plead his case, and so his attempt to amend his complaint now comes too late.

The petition should be denied.

STATEMENT

This case addresses whether the Eighth Amendment forbids the State of Missouri from using a proven humane method of execution—pentobarbital—and instead requires the State to adopt other new and untried methods of execution, such as nitrogen hypoxia.

A. Factual Background

Petitioner Ernest Johnson seeks to have a federal court require the State of Missouri to execute his death sentence using a method other than the State's established speedy and painless method of lethal injection of pentobarbital. He claims that this method would inflict an unconstitutional level of pain on him, due to his epilepsy. While incarcerated, Johnson developed and was eventually diagnosed with a slow-growing brain tumor. Pet. App. 24a. In 2008, the State provided surgical treatment to remove Johnson's tumor. Pet. App. 24a. That surgery succeeded; a majority of the tumor was removed, although a portion of the tumor remained and scar tissue developed. Pet. App. 24a. Johnson has contended that, as a result of the surgery's side effects, he has developed epilepsy, and that execution by pentobarbital could trigger a painful seizure. Pet. App. 25a.

B. Procedural History

Johnson sued the State of Missouri, seeking an alternate method of execution and proposing nitrogen hypoxia, and his as-applied Eighth Amendment claim has since lingered in federal appellate and district courts for many years.

Johnson pleaded that he was unware of the "brain defect" or the scar tissue until 2011. Pet. App. 25a. Four years later, the Missouri Supreme Court issued a warrant of execution for November 3, 2015. Less than two weeks before his sentence was to be carried out, Johnson challenged Missouri's method of execution as it would be applied to him. Pet. App. 10a. He contended that Missouri should use nitrogen gas, and not pentobarbital, to carry out his execution. Pet. App. 10a. He did not propose using a firing squad to execute him.

The district court granted the State's motion to dismiss. Pet. App. 10a. Johnson filed an appeal and requested a stay of execution, which the Eighth Circuit denied. Pet. App. 10a–11a. But this Court issued a stay of execution directing that, as the appeal proceeded below, the Eighth Circuit would 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." *Johnson v. Lombardi*, 136 S.Ct. 443 (2015). When the case returned to the Eighth Circuit, that Court determined that it did not have jurisdiction over the appeal. Pet. App. 11a. Back in the district court, Johnson filed an amended complaint, but again did not propose using a firing squad to execute him, and the district court again dismissed the complaint under Rule 12(b)(6). Pet. App. 11a.

The district court then warned that Johnson would only have one more chance to amend his complaint. Pet. App. 12a. Johnson then filed a second amended complaint after obtaining an amended affidavit from his expert, Dr. Zivot, who also provided the inmate's expert testimony in *Bucklew*. Pet. App. 12a. Johnson

still did not propose using a firing squad to execute him.

The district court then likewise dismissed Johnson's second amended complaint under Rule 12(b)(6). Pet. App. 12a. This time, Johnson sought review, and the case returned to the Eighth Circuit. Pet. App. 12a. After briefing and argument, the Eighth Circuit concluded that Johnson had satisfied Rule 12(b)(6)'s requirements. Pet. App. 3a.

This Court then intervened. *Precythe v. Johnson*, 139 S.Ct. 1546 (2019). This Court granted the State's petition for writ of certiorari granted, vacated the Eighth Circuit's judgment reinstating Johnson's complaint, and remanded the case to the Eighth Circuit "for further consideration in light of *Bucklew v. Precythe*, 587 U.S. ——, 139 S.Ct. 1112, —— L.Ed.2d —— (2019)." *Id*. Under *Bucklew,* an "independent" reason why an as-applied Eighth Amendment claim failed was that the inmate "sought the adoption of an entirely new method," namely, nitrogen hypoxia. 139 S.Ct. at 1129–30. The Court held that "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it," because the Eighth Amendment "does not compel a State to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution." *Id*. at 1130 (citation omitted).

The Eighth Circuit on remand received briefing and heard argument about the proper disposition of Johnson's complaint in light of *Bucklew*. The Eighth Circuit determined that Johnson had not stated a claim upon which relief could be granted because *Bucklew* teaches that "the Eighth Amendment" does not require a state to adopt an "untried and untested" method of execution. Pet. App. 6a (quoting *Baze v. Rees*, 553 U.S. 35, 41 (2008)).

The Eighth Circuit also rejected Johnson's argument that he should receive leave to file a *third* amended complaint, so that, now that his nitrogen hypoxia proposal was insufficient he could propose a firing squad as a new alternate method of execution. Pet. App. 7a. No further leave to amend his complaint was warranted because, according to the Eighth Circuit, Johnson already "had ample opportunity to allege any alternative method that he wished to pursue." Pet. App. 7a. Nor had *Bucklew* changed the law on the Eighth Amendment requirements for the identification of an alternate method of execution, because the Eighth Circuit had held the same as *Bucklew* held during the earlier iterations of Johnson's case when he was given several chances to amend his complaint. Pet. App. 7a-8a. Allowing Johnson a third amended complaint now thus would not allow for "fair[] and expeditiou[s]" resolution of the case. Pet. App. 8a.

No Eighth Circuit judge dissented or called for en banc review.

REASONS FOR DENYING THE PETITION

This Court should deny review. *Bucklew* made clear that the Eighth Amendment does not require the novel use of nitrogen hypoxia, and so there is no need to revisit this area of law again so soon. The Eighth Circuit's decision rejecting Johnson's claims on this basis is thus correct, and no split exists on this question. And, even were this Court to grant review, it would have to conclude that the original public meaning of the Eighth Amendment supports this holding.

Nor is there any reason to reverse the Eighth Circuit summarily to allow Johnson to amend his complaint at this late stage in the case. He has

already had several chances to amend his complaint, and the governing standards for Eighth Amendment claims remained the same during his case in the Eighth Circuit both before and after *Bucklew*. He claims that *Bucklew* announced a new categorical rule that a plaintiff may not propose a previously unused method. But nothing then or now required Johnson to limit his alternate proposed method of execution to be authorized by state law, so he could have proposed using a firing squad at any time in his previous amended complaints. He thus failed to raise this theory expeditiously in any of his three earlier complaints, and the Eighth Circuit properly rejected his last-minute attempt to do so now.

I. There is no conflict of authority.

No appellate courts have divided on the questions presented. That there is no conflict among the courts of appeals is apparent by the short shrift—a mere two sentences—that Johnson gives the argument. Pet. 19.

Indeed, just last month this Court rejected a nearly identical argument involving the decision below and the same Eleventh Circuit case that Johnson relies on. *Henness v. DeWine*, 592 U.S. —— (No. 20-5243) (2020). Johnson, as in this recent Sixth Circuit petition, alleges that the Eleventh Circuit has chosen to ignore this Court's holding in *Bucklew* that "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." 139 S.Ct. at 1130. He alleges that, in *Price v. Comm'r*, 920 F.3d 1317, 1327 (11th Cir. 2019), the Eleventh Circuit rejected the State's contention that it could refuse to adopt nitrogen as "new," in view of state legislature's recent enactment of nitrogen as an available method. But even though Alabama, like Missouri, authorized nitrogen hypoxia as a method of execution, the

Eleventh Circuit in *Price* addressed this issue in dicta because it ultimately upheld Alabama's execution protocol. Johnson thus seeks to manufacture a conflict where none exists, and where the appeals courts came to similar conclusions on similar facts. Pet. 13, 19.

Without a circuit split, Johnson falls back to claiming that the Eighth Circuit decision conflicts with this Court's own decisions, including *Bucklew*. Johnson thus asserts that the Eighth Circuit "misapprehends" this Court's holding in *Bucklew*. Pet. 13–20. This "misapprehension" is no more than an argument that the Eighth Circuit misapplied *Bucklew*. But even if Johnson were correct, mere misapplication of this Court's cases does not merit certiorari review. Rule 10(a).

Johnson next tries to argue for a conflict between the decision below and this Court's decisions in *Baze*, *Bucklew*, and other Eighth Amendment cases. Pet. 11. His theory is that the Eighth Circuit gave the "legitimate penological justification" standard a different meaning in the method-of-execution context than it has in every other context. *Id.* He complains that, under this approach, States may foreclose any method-of-execution claim by proffering any facially legitimate reason for rejecting a proposed alternative method of execution. *Id.* And so he claims that the State may not advance its legitimate penological justification at the motion-to-dismiss stage. *Id.*

But Johnson's efforts begin with a critical concession: that the "legitimate penological justification" requirement comes from *Baze*, not *Bucklew*. Pet. 14. This admission alone defeats Johnson's later argument for summary reversal, in which he claims that he could not have anticipated the Court's holding in *Bucklew* that the Eighth Circuit does not require States to implement a previously

unused method. Point IV, *infra*.

Johnson also cites other prison cases that do not involve method-of-execution claims. But it cannot be an Eighth Amendment violation for the state to refuse to adopt an untried and untested method of execution because the Eighth Amendment does not require states to experiment. *Baze*, 553 U.S. at 41; *Bucklew*, 139 S.Ct. at 1130. There is, therefore, no need to consider whether this Court has adopted a "categorical" or a "fact-specific" approach, or both, in other contexts. Pet. 14. The same is true for Johnson's claims that this Court has rejected a State's proffered penological reason as "pre-textual" in other contexts. Pet. 15. Categorically or in particular cases, the Eighth Amendment does not make a State adopt any new and untried methods. Alleging an untried method is thus grounds to dismiss the complaint.

Johnson has no other basis to show that the Eighth Circuit holding conflicts with this Court's precedents. Johnson tries to find fault with the Eighth Circuit's holding that the State was free to reject nitrogen because it was untried and untested. Pet. 16. But *Bucklew* mandated the Eighth Circuit's holding below. *Bucklew*, 139 S.Ct. at 1130 ("The Eighth Amendment . . . does not compel a State to adopt 'untried and untested' . . . methods of execution"). Johnson argues that the court below should have understood *Bucklew* "in light of the prison-conditions jurisprudence that undergirds *Baze*'s Eighth Amendment framework." Pet. 16. If this "undergird[ing] framework" modified *Bucklew*'s holding that "[t]he Eighth Amendment . . . does not compel a State to adopt 'untried and untested' . . . methods of execution" then this Court would have said so.

Johnson's "categorical" versus "as-applied"

argument does not appear in *Bucklew*'s text. Realizing this, Johnson admits that the Court did not hold so "expressly" but claims that is because "it did not need to do so." Pet. 16–17. A supposed conflict resulting from an implicit holding does not merit this Court's review, not when the Court in *Bucklew* made clear that its standards applied in all as-applied challenges.

II. The decision below was correct.

Johnson advances a separate, but likewise flawed argument: the decision below was wrong. Pet. 20–24. This Court is not a court of error correction. *See, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 611 (2005); *see also* E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007). Even so, the Eighth Circuit's decision—that Johnson's complaint should be dismissed—was correct.

Johnson charges the court below with two errors: first that the State may not advance a legitimate penological justification at the motion-to-dismiss stage, and second that the untried and untested nature of nitrogen hypoxia is not a "legitimate" penological justification Pet. 20–24. Johnson is wrong on both counts.

Johnson's first point—that the State may not advance its legitimate penological justification at the motion-to-dismiss stage—recycles his argument that the court below should have looked to cases adjacent to method-of-execution cases. Pet. 20–21. Not so. This Court was clear in *Glossip* that a condemned murderer must "plead *and prove*" an alternative method of execution that is available, feasible, and readily implemented. *Glossip v. Gross*, 576 U.S. 863, 880 (2015) (emphasis added). Johnson tries to avoid this bar by contending that he has satisfied the

pleading requirements of Rule 7. Pet. 22. The Eighth Circuit found that he did not. Pet. App. 6a. The district court found that he failed to plead *both* prongs of the *Glossip* test. Pet. App. 33a, 35a. And Johnson failed to provide his second amended complaint to this Court. Pet. App. 1a–37a. In other words, Johnson cannot show the Eighth Circuit's decision was wrong.

Johnson next argues that—when adding information not included in his complaint—the State does not have a legitimate penological justification in refusing to adopt the untried and untested method of nitrogen hypoxia.[1] Pet. 22–23. But *Bucklew* holds the opposite: the Eighth Amendment does not require a State to adopt an untried and untested method. Pet. App. 6a; *accord Bucklew*, 139 S.Ct. at 1130 (quoting *Baze*, 553 U.S. at 41).

Johnson also contends that the State has another interest countering its interest in using pentabarbital: protecting witnesses from witnessing a potential seizure. Pet. 22. But, even if that point were relevant to the Eighth Amendment analysis, Missouri does not agree that five grams of pentobarbital is sure or very likely to produce a painful seizure.[2] And the district court agreed that Johnson failed to make that

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[1] The Eighth Circuit apparently found the nitrogen study unpersuasive. Pet. App. 5a–7a. Plus, Johnson cannot amend his complaint with a study produced—for the first time—to the appellate court.

[2] If pentobarbital was sure or very likely to cause a painful seizure, then Johnson would have produced an affidavit to that effect in the last five years. Instead, Johnson has produced an affidavit saying that a different drug—methohexital—is likely to produce a seizure. Missouri does not and has not used methohexital.

showing, although the court below disagreed. Pet. App. 32a. Nor does Missouri agree that nitrogen hypoxia would reduce a substantial risk of severe pain. Given this record, Johnson's contention that nitrogen would serve a legitimate interest in protecting witnesses must fail. Pet. 22. But even so, Johnson has undercounted the State's interests. Johnson forgets the State's strong interest in the timely enforcement of its judgments. *Baze*, 553 U.S. at 61; *Barr v. Lee*, 140 S.Ct. 2590, 2591 (2020) (quoting *Bucklew*, 139 S.Ct. at 1134). Johnson must admit that adopting nitrogen hypoxia will significantly delay his execution. Worse still, Johnson has all but admitted that he no longer desires an execution by nitrogen hypoxia, and instead desires execution by firing squad. Pet. 29–30. Because of all of this, the Eighth Circuit correctly found the State has ample legitimate penological justification for refusing to adopt nitrogen hypoxia.

Missouri's method of execution, which it has used to carry out twenty-one rapid and painless executions since 2013, is not designed to add pain. Under the Eighth Amendment's original meaning and this Court's precedents, Johnson's claim is meritless and the court of appeals' decision should be affirmed.

III. Johnson's complaint is a procedurally and factually infirm vehicle for review.

This case is also a poor vehicle for review of any issues. Johnson's complaint, filed eight years after his surgery, is very likely time-barred because it was filed outside Missouri's generous five-year statute of limitations. And even if the complaint were timely, it is factually deficient because it does not plead procedures for the administration of nitrogen hypoxia. These two infirmities make it a poor, not "ideal" vehicle for reviewing Johnson's proposed question.

Pet. 24.

First, the suit is time-barred. This Court has cautioned that method-of-execution challenges should not, in the ordinary course, delay lawful executions. *Hill v. McDonough*, 547 U.S 573, 584 (2006). But the Court has not yet fashioned an explicit rule to enforce this policy. Instead, States must rely on the statute of limitations for § 1983 claims. *See Nelson v. Campbell*, 541 U.S. 637, 644–45 (2004). Missouri has a five-year residual statute—one of the most generous provisions of any death penalty state. *Compare* MO. REV. STAT. § 516.110(4), *with* MISS. CODE ANN. § 15-1-49 (three years); GA. CODE ANN. § 9-3-33 (two years); TENN. CODE ANN. § 28-3-104(a)(3) (one year). Because Johnson knew or should have known about his scar tissue in 2008, and because Missouri has always used an ultra-fast acting barbiturate, Johnson could have brought his method-of-execution claim years ago. *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007). Instead, he waited until less than two weeks before his scheduled execution. Pet. App. 23a. Although that maneuver led to a stay, it means his suit is likely outside the five-year statute of limitations. So even if Johnson prevails on merits review, it is likely that the statute of limitations—after more years of delay—will ultimately resolve his suit. The Court should deny the petition and wait for a case in which the petitioner has brought his challenge timely.

Second, Johnson's complaint failed to plead procedures for the administration of nitrogen hypoxia. Although Johnson notes the Eighth Circuit at first disagreed, Pet. 25, Johnson fails to note the district court's ruling, Pet. App. 33a–35a, or that the State presented this as the sole ground for certiorari review just last year. Pet. for Writ of Cert. at ii, *Precythe*, 139 S.Ct. 1112 (No. 18-852). This thorny issue was also the

basis for the fourth question in *Bucklew*—a question that this Court added. Merits review would force the Court to confront this question directly, despite Johnson's implication to the contrary. Pet. 25. And the State is likely to prevail. Johnson's complaint lacks necessary details such as the quality and quantity of nitrogen required, the delivery method and rate of flow, or procedures to ensure the safety of witnesses and staff. Pet. App. 34a. To be sure, the Eighth Circuit believed Johnson met the pleading requirements. Pet. App. 17a. But this Court cannot reach Johnson's argument about *Bucklew*'s "independent" requirement without first considering whether Johnson has included adequately pleaded details. This antecedent legal issue means the Court would be well served by waiting for a better vehicle.

IV. Summary reversal is not warranted because *Bucklew* did not create a new rule.

Recognizing that there is no basis for certiorari review, Johnson also asks this Court to summarily reverse the court of appeals so that he can file a third amended complaint and allege firing squad—for the first time—as an alternative method. Pet. 25–31. As grounds for amending his complaint at this late hour, Johnson claims that *Bucklew* announced a new and surprising categorical rule that a plaintiff may not propose a previously unused method, rather than an older method unauthorized by state law, and so he should get a chance to proposed death by a firing squad.

But no reason exists to reverse the Eighth Circuit summarily or to allow Johnson to amend his complaint at this late stage in the case. Pet. App. 7a. Over the last several years, Johnson has had several chances to amend his complaint to add any other

theories under the Eighth Amendment standards identified by the Eighth Circuit and reaffirmed in *Bucklew*. He could have alleged an older method at any time, whether or not authorized under state law, and no precedent stopped him from doing so.

Johnson claims that *Bucklew* announced a "new rule." Pet. 25, 27, 28, 29. But *Bucklew* did no such thing. The controlling opinion in *Baze* repeatedly emphasized that an untried and untested method of execution does not constitute a feasible, readily implemented alternative. *See Baze*, 553 U.S. at 41, 54, 57, 62 (holding that a method of execution that "has never been tried by a single State" does not satisfy the second element of *Baze*); *Henness*, 592 U.S. —— (Statement of Sotomayor, J.). Nothing limited Johnson to methods identified in state law or that were new. The law has not changed.

Johnson's claim that the "weight of authority" required him to identify a method authorized under Missouri law is incorrect. Pet. 29. Johnson identifies authority from 2016 and 2017, but neglects to admit to the Court that he filed his complaint in 2015. Pet. App. 23a. Johnson twice amended his complaint in 2016. The only authority Johnson produces that preceded his amended complaints is a district court decision holding the question was not presented: "Bucklew's response raises what could be an interesting question about whether an execution method that is factually available but not legally permitted is 'available' . . . but the Fourth Amended Complaint does not present the issue." *Bucklew v. Lombardi*, No. 14-8000, 2016 WL 6917289, at *4 (W.D. Mo. Jan. 29, 2016). In other words, Johnson's cited authority was a roadmap, not a roadblock, to raising this claim.

Johnson's last argument is that refusal to allow him to file a third amended complaint contravenes the Court's pronouncement that there is "little likelihood" that an inmate "will be unable to identify an available alternative—assuming, of course, that the inmate is more interested in avoiding unnecessary pain than in delaying his execution." *Bucklew*, 139 S.Ct. at 1128–29. Of course, Johnson has advanced no real argument that he could not identify the firing squad when he filed his complaint in 2015. Instead, Johnson has essentially conceded that he made a strategic choice.

At bottom, Johnson's request is designed to permit him a fourth opportunity to amend his complaint. Johnson did not suggest the use of a firing squad in his complaint in 2015, or in his first amended complaint in 2016, or in his second amended complaint in 2016. This Court should not countenance his unexcused delay.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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