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Supreme Court of the United States
One First Street, N.E.
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Re: *Ernest Johnson* v. *Anne L. Precythe, et al.*, No. 20-287

Dear Mr. Harris:

At the Court's request, petitioner Ernest Johnson submits this supplemental letter brief addressing the following question: "Given that the District Court dismissed without prejudice, would petitioner be barred from filing a new complaint that proposes the firing squad as the alternative method of execution?" 20-287 Order (Mar. 29, 2021). Petitioner understands the Court to be asking whether, if the Court were to deny certiorari, petitioner would be barred from filing a new civil action in which he would assert an Eighth Amendment claim that proposes the firing squad as an alternative method of execution. For the reasons stated below, there is a significant possibility that the district court would conclude that any new complaint is indeed barred on procedural grounds.

I. Introduction

Petitioner respectfully submits that this Court should not deny certiorari on the expectation that petitioner would be permitted to file a new civil action alleging the firing squad as an alternative method of execution. If this Court were to deny certiorari and petitioner were to attempt to file a new complaint, the State would undoubtedly argue in the district court that the

complaint should be immediately dismissed on various procedural grounds, including res judicata and timeliness. Petitioner would of course contest those arguments. But the district court could be receptive to the State's arguments, and the court could also view a new complaint as inconsistent with the Eighth Circuit's and the district court's own prior decisions in this case—which a denial of certiorari would leave in place. To ensure that petitioner has the opportunity to allege the firing squad—a "traditionally accepted" execution method that Missouri itself argued would be a feasible alternative in *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1125 (2019); *id*. at 1136 (Kavanaugh, J.)—the Court should summarily reverse the Eighth Circuit's refusal to permit petitioner to amend his complaint.[1] Pet. 25-30. The Court could also accomplish the same result by summarily vacating the decision below and ordering that petitioner be permitted to amend his complaint in this action. See, *e.g*., *Allison* v. *United States*, 386 U.S. 13 (1967) (summarily vacating with instructions); R. Stern & E. Gressman, *Supreme Court Practice* 344 (9th ed. 2007).

II. Relevant Procedural History

Petitioner filed the operative second amended complaint in October 2016. *Johnson* v. *Precythe*, No. 2:15-CV-4237-DGK (W.D. Mo.), Dkt. 41, 42. In May 2017, the district court dismissed the complaint for failure to state a claim. Pet. App. 22a. The district court's order stated that the dismissal was "without prejudice," but the court did not state that petitioner could amend his complaint.[2] *Id*. at 37a. The court also issued a judgment stating that "this *case* is dismissed for failure to state a claim." Dkt. 52 (emphasis added). Petitioner sought clarification, asking the court to grant leave to amend or, in the alternative, clarify that the order represented a final, appealable judgment despite the "without prejudice" language. Dkt. 53. The State argued that because the district court had already issued a judgment with respect to the entire "case," no amendments should be permitted, and the court should clarify the dismissal order accordingly. Dkt. 54. The district court did not issue any clarification by the deadline to appeal, and after petitioner filed a notice of appeal, the court denied petitioner's "motion for leave to file an amended complaint" as moot. Dkt. 63. As a result of that procedural history, the parties have treated the district court's May 2017 dismissal as effectively denying leave to amend, and as entering a final judgment for purposes of appellate jurisdiction.

As the petition for certiorari recounts, Pet. 6-11, the Eighth Circuit initially reversed the district court's May 2017 dismissal of the second amended complaint. After this Court GVRed in light of *Bucklew*, the Eighth Circuit held, in the decision that is the subject of the petition, that *Bucklew* foreclosed petitioner's allegation that nitrogen hypoxia was an available alternative method of execution. The Eighth Circuit also denied petitioner's request for a remand to permit

[1] Petitioner also urges this Court to grant plenary review for the reasons stated in the petition. Pet. 11-25; Pet. Reply 1-9.

[2] By contrast, the court's earlier order dismissing the first amended complaint without prejudice had granted leave to amend, while cautioning that a subsequent dismissal might be with prejudice. Dkt. No. 40.

him to amend the complaint to allege a different alternative method of execution. Pet. App. 7a-8a. The Eighth Circuit reasoned that "[w]e are not convinced that *Bucklew* constitutes an intervening change in law that warrants granting" leave to amend. *Id*. at 7a. Therefore, the court held, "we conclude that the case should be closed." *Id*. at 8a.

III. The District Court Likely Would Dismiss Any New Complaint

If this Court were to deny certiorari, and if petitioner were to file a new complaint alleging the firing squad as an alternative, there is a significant possibility that the district court would dismiss the new complaint on procedural grounds. The State is highly likely to seek immediate dismissal on procedural grounds, and although petitioner would resist that outcome, the district court may be receptive to the State's arguments—particularly with the Eighth Circuit's decision still operative after a denial of certiorari. That risk renders a new complaint an unsuitable vehicle for obtaining a ruling on the merits of the firing squad as a proposed alternative.

Res Judicata. As the Court's question reflects, the general rule, including in the Eighth Circuit, is that a dismissal without prejudice does not give rise to a res judicata bar precluding a second suit. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim."); *Smith* v. *Missouri Dep't of Corrections*, 207 F. App'x 736, 737 (8th Cir. 2006) (citing cases) (where the first action "was dismissed without prejudice," "the conditions of res judicata are not met"); see *Pohlmann* v. *Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999).

In the unusual circumstances of this case, however, the State may argue that res judicata bars a new action. The Eighth Circuit has stated that "a Rule 12(b)(6) dismissal is a 'judgment on the merits' for res judicata purposes unless the plaintiff is granted leave to amend or the dismissal is reversed on appeal." *United States* v. *Maull*, 855 F.2d 514, 516 n.3 (8th Cir. 1988). The State therefore might contend that the district court's decision should be understood as a final judgment on the merits, particularly because the district court did not grant petitioner's post-dismissal request to amend. In addition, because a denial of certiorari would render the Eighth Circuit's decision the final judgment in this action, the State might argue that it is that final appellate judgment—not the district court's dismissal—that is the relevant judgment for res judicata purposes. See, *e.g.*, *Griffin* v. *Focus Brands Inc.*, 685 F. App'x 758, 760 (11th Cir. 2017). Petitioner would argue, at minimum, that the district court's designation of its dismissal as "without prejudice" is dispositive for res judicata purposes under *Semtek*. But it is possible that the district court would not agree.

Statute of Limitations. The State will likely argue that any new action is untimely. The Eighth Circuit's initial decision in 2018 rejected the State's argument that the current action should be dismissed on statute of limitations grounds. The court applied Missouri's five-year

limitations period for personal-injury torts[3] and held that petitioner's suit, filed in 2016, should not be dismissed as untimely because petitioner had adequately pleaded that he could not reasonably have discovered the brain injury that serves as the basis for his suit before 2011. Pet. App. 19a-21a. A new complaint filed in 2021, however, would not be filed within five years of the 2011 date on which the Eighth Circuit has held that petitioner's cause of action accrued. Petitioner might attempt to invoke Missouri's savings statute, which permits a plaintiff to commence a new action within a year of "suffer[ing]" a "nonsuit"—i.e., a dismissal that does not constitute an adjudication on the merits. Mo. Ann. Stat. § 516.230; *Molder* v. *Trammell Crow Servs., Inc*., 309 S.W.3d 837, 841 (Mo. Ct. App. 2010). But although a "nonsuit" generally includes a dismissal without prejudice, *Molder*, 309 S.W.3d at 841, the State might argue that the dismissal in this case should be treated as an adjudication on the merits because the case was dismissed and petitioner was not granted leave to amend. See *Kansas City* v. *S. Sur. Co*., 51 S.W.2d 221, 224 (Mo. App. 1932) (contrasting "nonsuit" and final adjudication of the merits). Although petitioner believes that argument would be incorrect, it is difficult to predict how the district court would interpret Missouri law—or how the court would interpret the effect of its own 2017 dismissal order.[4] There is thus a significant possibility that any new action would be dismissed as untimely.

Precedential Effect of the Eighth Circuit's Decision. Denying certiorari would render the Eighth Circuit's decision the final judgment in this action. The Eighth Circuit held that petitioner should not be permitted to amend his complaint in part because of "*Bucklew*'s emphasis that" method-of-execution challenges should be resolved "expeditiously." Pet. App. 7a-8a. The State may argue that a new action alleging the firing squad is an end run around the Eighth Circuit's decision. Petitioner would contend, at minimum, that the Eighth Circuit's discussion of whether petitioner should be permitted to amend in this action is not relevant to petitioner's entitlement to institute a new action, and that petitioner has acted diligently throughout this litigation. Without any further direction from this Court, however, the district court might conclude that it would be most consistent with the Eighth Circuit's decision to dismiss any further complaint.

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[3] In federal Section 1983 actions, the state-law analog supplies the pertinent statute of limitations and any tolling rules. *Wallace* v. *Kato*, 549 U.S. 384, 387 (2007); *Bd. of Regents of Univ. of State of N.Y.* v. *Tomanio*, 446 U.S. 478, 484-485 (1980).

[4] Petitioner might also argue that the limitations period should be equitably tolled, but the district court might conclude that the Eighth Circuit's decision suggests that no extraordinary circumstances outside petitioner's control are present. See *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250, 256-257 (2016); *Carrier* v. *Skepticon, Inc*., No. 4:19-CV-1059-JCH, 2019 WL 4750269, at *3 (E.D. Mo. Sept. 30, 2019).

IV. Denying Certiorari Will Leave Petitioner Without an Adequate Vehicle to Obtain a Ruling on the Merits of Firing Squad as an Alternative Method

For the reasons stated above, a new civil action would face a significant risk of being dismissed on procedural grounds, and therefore would not provide a realistic avenue for obtaining an adjudication of an Eighth Amendment claim relying on the firing squad as a feasible alternative method of execution. And even if a procedural dismissal were later reversed on appeal, petitioner would obtain a ruling on the merits only after additional time has elapsed, which would unnecessarily consume judicial and party resources and further extend the litigation.

Permitting petitioner to amend his complaint in this action is therefore the only—and the most expeditious—way to ensure that petitioner is able to propose, and obtain an adjudication of, firing squad as an alternative method of execution. The procedural obstacles discussed above would not be present if petitioner is permitted to continue this action. And this Court's reversal or vacatur of the Eighth Circuit's decision would deprive that decision of any precedential effect that would otherwise constrain the district court. Petitioner respectfully submits that the only disposition that adequately preserves petitioner's ability to obtain an adjudication on the merits of allegations concerning the firing squad is a summary reversal or vacatur with instructions to permit amendment.

Bucklew emphasized that a plaintiff facing a serious risk of severe pain—as petitioner has adequately alleged here, Pet. App. 3a-4a—should generally be able to identify an available alternative of execution. 139 S. Ct. at 1128-1129; *id.* at 1136 (Kavanaugh, J., concurring). The State itself has suggested that firing squad "would be such an available alternative." *Id.* at 1136 (Kavanaugh, J., concurring) (citing *Bucklew* Tr. Oral Arg. 63-64). Members of this Court also have stated that firing squad may be a readily available and humane method of execution. *Ibid.*; *Arthur* v. *Dunn*, 137 S. Ct. 725, 733-734 (2017) (Sotomayor, J., dissenting from denial of certiorari). As petitioner has explained, if *Bucklew* established that nitrogen hypoxia is categorically unavailable, the unique circumstances of this case warrant permitting petitioner to amend his complaint to allege the firing squad in light of *Bucklew*'s clarification that such allegations could state a claim. Pet. 25-30; Pet. Reply 9-12. Accordingly, petitioner respectfully requests that the Court summarily reverse or vacate the decision below and direct that petitioner be permitted to amend his complaint. Should the Court opt for that course, petitioner stands ready to prosecute this action as expeditiously as possible.

Respectfully submitted,

Ginger D. Anders

cc: D. John Sauer (counsel of record for respondent)