ATTORNEY GENERAL OF MISSOURI

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April 26, 2021

The Honorable Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street, NE
Washington, D.C. 20543

Re: *Ernest Johnson* v. *Anne L. Precythe, et al.*, No. 20-287 – Respondent's Supplemental Letter Brief

Dear Clerk Harris:

On March 29, 2021, the Court ordered the parties to file a supplemental letter briefs 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?" The answer to that question is yes, and remanding for a third amended complaint would also be futile. The Court should deny the petition for writ of certiorari, and it should not allow Johnson to interpose yet more needless delay before his execution.

A. Because Missouri Law Does Not Currently Authorize Execution by Firing Squad, Johnson's New Firing-Squad Claim Would Have to Be Raised in a Habeas Petition, Not a Section 1983 Action.

First, regardless of whether the prior dismissal was with or without prejudice, Johnson cannot propose firing squad as an alternative method of execution in a lawsuit brought under 28 U.S.C. § 1983. A habeas corpus petition—not a § 1983 lawsuit—is the proper vehicle to challenge a method of execution when "a grant of relief to the inmate would necessarily bar the execution." *Hill v. McDonough*, 547 U.S. 573, 583 (2006); *see also Nelson* v. *Campbell*, 541 U.S. 637, 644 (2004). This Court acknowledged in *Bucklew* that, if an inmate proposes an alternative method of execution that state law does not authorize, "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1128 (2019). In such circumstances, "recharacterizing the complaint as an action for habeas corpus might be proper." *Id.* (quoting *Hill*, 547 U.S. at 582–83). Here, for the reasons stated in *Hill*, "recharacterizing [Johnson's] complaint as an action for habeas corpus" would be proper. *Id.*

As *Hill* and *Nelson* observed, "in a State where the legislature has established lethal injection as the method of execution, 'a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself.'" *Hill*, 547 U.S. at 579 (quoting *Nelson*, 541 U.S. at 644). For this reason, *Hill* reasoned that, where the petitioner's method-of-execution challenge "would leave the State without any other practicable, *legal*

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method" of executing the convicted murderer, the challenge should be asserted in a habeas corpus petition. *Id.* at 580 (emphasis added). Because "Florida law" did not "require the department of corrections to use the challenged procedure," Hill's claim could be asserted in a § 1983 action. *Id.* But *Hill* suggested that a method-of-execution challenge must be asserted through a habeas corpus petition where the petitioner's success would "necessarily foreclose the State from implementing the lethal injection sentence *under present law*." *Hill*, 547 U.S. at 583 (emphasis added).

Here, "under present law," *id.*, Missouri authorizes only two methods of execution: lethal injection or lethal gas. Mo. Rev. Stat. § 546.720. Johnson challenges lethal injection as unconstitutional as applied to him, and lethal gas is not practically available. No Missouri statute currently authorizes execution by firing squad. Absent a statutory amendment authorizing execution by firing squad,[1] an order requiring Missouri to execute Johnson by firing squad instead of lethal injection would "necessarily foreclose the State from implementing the lethal injection sentence under present law." *Hill*, 547 U.S. at 583. Accordingly, Johnson's claim that he should be executed by firing squad instead of lethal injection can only be raised in a habeas petition. *Id.*

Any such habeas petition would face insuperable barriers at this late stage. The Antiterrorism and Effective Death Penalty Act would apply to it. 28 U.S.C. § 2254. AEDPA imposes strict procedural requirements, including a one-year statute of limitations, an exhaustion requirement, and limits on second or successive petitions. *See* 28 U.S.C. § 2244(d); § 2254(b)–(f). All these barriers would foreclose habeas relief here. Johnson admits he discovered the factual predicate of his claim more than one year ago. Pet. Sup. Br. 4; 28 U.S.C. § 2244(d)(1)(D). The Eighth Circuit has rejected the argument that such claims ripen when an execution warrant is issued. *Jones* v. *Kelly*, 854 F.3d 1009, 1013–14 (8th Cir. 2017). The petition would be unexhausted because Johnson has never raised the claim in state court. 28 U.S.C. § 2254(b). And it would be second or successive because he litigated a federal habeas petition after he could have discovered the factual predicate of this claim. *Johnson* v. *Steele*, 2013 WL 625318 No.11-08001-CV-W-DGK (W.D. Mo. Feb. 20, 2013); 28 U.S.C. § 2244(b).

B. Any Attempt to Raise a Firing-Squad Claim at This Late Stage Would Be Barred on Numerous Grounds, Regardless of Whether It Is Filed As a New Case or an Amended Petition in the Preexisting Case.

Even if Johnson could assert his firing-squad claim under § 1983, Johnson is barred from raising firing squad either in a new or in an amended complaint. Missouri agrees with Johnson that it would assert procedural defenses to such a claim, and Missouri agrees that the courts very likely would find those defenses dispositive. Pet. Sup. Br. 3–4.

If Johnson were to file a new § 1983 complaint raising a claim that asserted firing squad as an alternative method of execution, that new complaint would be barred on multiple grounds. Johnson concedes as much—the caption of his discussion of this point states that "The District

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[1] If the federal courts were to decide that Missouri's current method of lethal injection is unconstitutional as applied to Johnson, Missouri could undoubtedly enact a new statute authorizing his execution by firing squad, or by any method deemed constitutionally necessary. But *Hill* properly focuses on "present law," not on possible laws that a State might enact in the future.

Court Likely Would Dismiss Any New Complaint." *Id.* at 3. As Johnson notes, controlling Eighth Circuit precedent would treat the district court's dismissal of this case without leave to amend as res judicata barring his attempt to raise similar claims in a subsequent case. *Id.* (citing *United States* v. *Maull*, 855 F.2d 514, 517 n.3 (8th Cir. 1988) (holding that "it is well-established 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")). As Johnson also notes, a new complaint would be barred by Missouri's five-year statute of limitations for tort actions, because Johnson's alleged injury was discoverable no later than 2011, and the pendency of his current lawsuit from 2016 to 2021 would not toll that statute of limitations under Missouri law. Pet. Supp. Br. 4 (citing Mo. Rev. Stat. § 516.230 and *Kansas City* v. *S. Sur. Co.*, 51 S.W.3d 221, 224 (Mo. App. 1932)). And, as Johnson notes, permitting a new lawsuit to go forward would contradict the Eighth Circuit's decision not to allow yet another amendment in this case. Pet. App. 7a–8a. As the Eighth Circuit stated: "We are not convinced that *Bucklew* constitutes an intervening change in law that warrants granting Johnson a third opportunity to amend. Neither the Supreme Court nor this court ever said that the universe of available alternatives was limited by state law." Pet. App. 7a. "Johnson filed three complaints in the district court and had ample opportunity to allege any alternative method he wished to pursue." *Id.* "Especially given *Bucklew*'s emphasis that 'the proper role of the courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously,' we conclude that the case should be closed." Pet. App. 7a–8a (quoting *Bucklew*, 139 S. Ct. at 1134) (alteration and citation omitted). In light of this holding, a federal district court likely would (and certainly should) dismiss any attempt by Johnson to raise a firing-squad claim in a new complaint, and that decision would likely be affirmed.

Moreover, any attempt by Johnson to amend his complaint in *this* case would fare no better. Johnson may not request a firing squad execution in an amended complaint because that new claim would not relate back under Rule 15, and thus it would still be barred by statute of limitations. Johnson's years-long delay precludes amendment under Rule 15(a) to request a firing squad—especially as he has already amended his complaint twice. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *see also* § 1487, 6 FED. PRAC. & PROC. CIV. § 1487 (3d ed.) (Wright & Miller). *Foman* holds that reasons to refuse a belated amendment include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman*, 371 U.S. at 182. Every single one of those reasons applies here.

In addition, Johnson's firing-squad theory constitutes a new claim that does not relate back to the original complaint under Rule 15(c), and thus the new complaint would be barred by statute of limitations. Instead of claiming that Missouri must select one of two *authorized* methods of execution, any amended complaint must allege that a firing squad is a known and available alternative and that Missouri's failure to authorize firing squad executions is unconstitutional. Further, *Glossip's* substantive requirement that "a prisoner ... plead and prove a known and available alternative" entails that those allegations are part of the core operative facts of an Eighth Amendment method-of-execution claim. 576 U.S. at 880. Given that the new claim entails an entirely new substantive element that was not alleged in any prior complaint, the proposed amendment would not merely "restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct, transaction or occurrence in the preceding pleading." *Bensel* v. *Allied Pilots Ass'n*, 387 F.3d 298, 310 (3d Cir. 2004). The original

complaint did not "involve[] … a common core of operative facts" or give Missouri "fair notice of the general fact situation and legal theory" that Johnson now proposes. *Id.*; *see also Mayle* v. *Felix*, 545 U.S. 644, 656–57 (2005) (rejecting the view that, in the habeas context, Rule 15(c) allows relation back to any new claim challenging the same "trial, conviction, or sentence"). The new firing-squad theory would not satisfy Rule 15(c)'s "same core of operative facts" requirement, and thus it would be barred by statute of limitations. *Mayle*, 545 U.S. at 656–57; *see also Taylor* v. *United States*, 792 F.3d 865, 870 (8th Cir. 2015).

C. Johnson Has No Absolute Entitlement to an Adjudication on the Merits of His Proposed Firing-Squad Claim.

In its conclusion, Petitioner's Supplemental Brief argues that this Court should vacate or summarily reverse the Eighth Circuit's decision refusing to remand to permit amendment, because that is "the only—and most expeditious—way to ensure that petitioner is able to propose, and obtain an adjudication of, firing squad as an alternative method of execution." Pet. Supp. Br. 5. Petitioner argues that "the unique circumstances of this case warrant permitting petitioner to amend his complaint to allege the firing squad" in light of *Bucklew*. *Id.*

On the contrary, the "unique circumstances of this case" cut entirely in the opposite direction. Eighth Circuit precedent did not foreclose Johnson from pleading firing squad prior to *Bucklew*. Nothing prevented Johnson from requesting a firing squad as an alternative in his initial complaint, his first amended complaint, or his second amended complaint. *See* Pet. App. 7a (noting that, when Johnson filed his original three complaints, "[n]either the Supreme Court nor this court ever said that the universe of available alternatives was limited by state law").

Moreover, Johnson's allegation that lethal injection is sure or very likely to cause him needless suffering—the first prong of *Glossip*—is highly implausible. *See Foman*, 371 U.S. at 182 (holding that "futility of amendment" justifies denying leave to amend). Johnson's theory that pentobarbital will likely induce "a mid-execution seizure" rests on the "Affidavit of Joel Zivot." Pet. 5–6. Dr. Joel Zivot, of course, is the same expert who predicted catastrophic consequences during Russell Bucklew's execution. *See Bucklew*, 139 S. Ct. 1131–33. Yet even Bucklew's counsel admitted that Dr. Zivot had "crossed up the numbers" in the sole study on which that opinion was based, and his remaining testimony failed to create a triable issue of fact. *Id.* at 1132. Dr. Zivot had predicted intolerable suffering in multiple prior executions, and none of those predictions came true. *See Bucklew* v. *Precythe*, 883 F.3d 1087, 1099 (8th Cir. 2018) (Colloton, J., dissenting) (noting Dr. Zivot's "inaccurate predictions of calamities at prior executions"). After this court's decision, Bucklew's execution proceeded uneventfully, with no traces of the suffering that Dr. Zivot had confidently predicted.[2] The Court should give no credence to yet another dubious prediction of unconstitutional suffering from Dr. Zivot. This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce* v. *New York*, 139 S.

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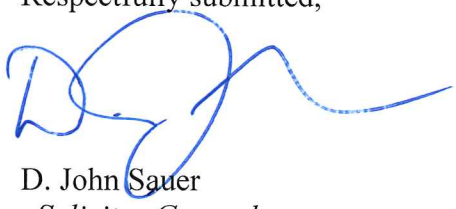
[2] *See, e.g.*, Associated Press, *Missouri Executes Killer With Rare Medical Condition That Some Feared Would Make Death Painful*, NBCNEWS.COM (Oct. 2, 2019), *at* https://www.nbcnews.com/news/us-news/missouri-executes-killer-rare-medical-condition-some-feared-would-make-n1061056 (reporting that "[t]here were no outward signs of distress as the state used lethal injection on convicted killer Russell Bucklew").

Ct. 2551, 2575 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

It has been 27 years since Ernest Johnson brutally murdered three gas-station clerks in the course of an armed robbery. Br. in Opp. 5. Permitting Johnson to delay his execution *again* by pursuing a yet another meritless method-of-execution claim—based on the testimony of the discredited Dr. Joel Zivot—would be the antithesis of justice. Like Bucklew, Johnson "committed his crimes more than two decades ago," and "since then he has managed to secure delay through lawsuit after lawsuit." *Bucklew*, 139 S. Ct. at 1133–34. "The people of Missouri, the surviving victims of [Mr. Johnson's] crimes, and others like them deserve better" than a futile remand order directing the district court to entertain Johnson's meritless claims, only to deny them again after still more years of litigation. *Id.* at 1134. As in *Bucklew*, the Court should "carefully police against attempts to use such [method-of-execution] challenges as tools to interpose unjustified delay." *Id.* The Court should deny certiorari and permit Missouri to proceed with Johnson's execution.

Respectfully submitted,



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