Case No. SC99873

In the Supreme Court of Missouri

STATE OF MISSOURI
Plaintiff,

v.

KEVIN JOHNSON,
Defendant.

SPECIAL PROSECUTOR'S MOTION FOR STAY OF EXECUTION AND SUGGESTIONS IN SUPPORT

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INTRODUCTION

This Court issued an execution warrant for defendant Kevin Johnson for November 29, 2022. The Special Prosecutor has determined that racist prosecution techniques infected Mr. Johnson's conviction and death sentence. Unless this Court stays the execution, the result in this case will forever have this cloud over it. This Court should stay the execution so that the Special Prosecutor may pursue the Legislatively-conferred right to appeal the Circuit Court's summary denial of the motion to vacate.

At the time it appointed a Special Prosecutor, the Circuit Court knew of the pending November 29, 2022 execution date. The Special Prosecutor faced a high task: review a case file spanning some 31,744 pages, reach out to witnesses, conduct legal research, and make follow-up document requests that led to 12 more boxes of files. The Special Prosecutor reviewed all this evidence. Having determined that the facts compelled action, the Special Prosecutor filed an extensive motion to vacate on November 15, 2022.

The Circuit Court - in direct contravention of RSMo § 547.031's language - denied it summarily the next morning.

Section 547.031 grants prosecutors a clear mandate: to file a motion to vacate an illegal judgment, to see that motion through an evidentiary hearing, and to appeal if the Circuit Court denies relief. *See* RSMo § 547.031. This mandate will prove pointless if the execution moves forward.

I. SUMMARY

This Court has issued an execution warrant for defendant Kevin Johnson for November 29, 2022. The Special Prosecutor has determined that purposeful racial discrimination infected Mr. Johnson's conviction and death sentence, and filed a motion to vacate the judgment. But the Circuit Court has determined there was insufficient time to conduct the required hearing, and to issue findings of fact and conclusions of law, and denied the motion. Unless this Court stays the execution, the claims of racial discrimination will never be heard, and the result will forever have this cloud over it. This Court should stay the execution.

At the time it appointed a Special Prosecutor, the Circuit Court knew of the pending November 29, 2022 execution date. The Special Prosecutor faced a high task: review a case file spanning some 31,744 pages, reach out to witnesses, conduct legal research, and make follow-up document requests that led to 12 more boxes of files, all in a month. Having determined that the facts compelled action, the Special Prosecutor filed an extensive motion to vacate on November 15, 2022.

The Circuit Court - citing RSMo § 547.031's requirement for a hearing, and findings of fact and conclusion of law – has recognized that, short of a stay, it is impossible to comply with the Legislature's dictates. Order and Judgement, November 19, 2022, at 4.

Section 547.031 grants prosecutors a clear mandate: to file a motion to vacate an illegal judgment, to see that motion through an evidentiary hearing, and to appeal if the Circuit Court denies relief. *See* RSMo § 547.031.

The Special Prosecutor has acted with lightning speed in pursuing this case. But, as the Circuit Court recognized, the scant time left is both a physically and legally impossible timeframe in which to do this legal duty.

Preparing for the hearing will, at the very least, require noticing and taking the depositions of two of the trial prosecutors, Robert McCulloch and Patrick Monahan, because both have outright refused to talk with the Special Prosecutor. (Ex. 3, Bradford Aff.) The Special Prosecutor even asked Mr. McCulloch if he could spare *five minutes* for a phone call. (Ex. 4, McCulloch Corr.) Under RSMo § 547.031, the Attorney General has the right to intervene and prepare for the hearing; due process would likewise require that Mr. Johnson have time to prepare, as his rights are at stake. And if the Circuit Court does not grant the motion to vacate, the Legislature has conferred on the Prosecutor an absolute right to appeal. *See id.* To put it mildly, it is not realistic for this all to happen in the remaining time available.

The State meets the standards for a stay. The State has a strong likelihood of success on the merits. Procedurally, as the Circuit Court recognized, there is insufficient time to conduct the required hearing, as an expedited hearing would be unfair to the Attorney General. Order and

Judgement, November 19, 2022, at 4. Substantively, the evidence proves that racial considerations motivated the decision-making in Mr. Johnson's case.

The balance of equities overwhelmingly favors a stay. Executing Kevin Johnson on November 29, 2022 will effectively decide the merits of the Section 547.031 motion and its appeal without the due process that the state legislature and the Constitution guarantee. Section 547.031 - passed by the current Legislature and signed by the current Governor - provides for a hearing, findings of fact and conclusions of law, and a right to appeal. *See* RSMo § 547.031.

The State would suffer irreparable injury because it will not be able to vindicate its right to seek review of the judgment under Section 547.031, a process that includes a hearing and a right to appeal.

A stay serves the public interest. Our constitutional systems depends on democratic processes and separation of powers. Section 547.031 is a duly-enacted law. Its procedural mandates are not options, they are obligations. Executing Mr. Johnson on the current schedule effectively repeals a statute the Legislature passed and the Governor signed without the attendant democratic processes. Enforcement of a democratically-passed law always serves the public interest. Further, the public interest is served by vindication of constitutional rights, as well as the State's and the Prosecutor's sovereign and individual interest in ensuring that justice be done. *See* MO. R. P. C. 4-3.8.

This motion is not the sort of Hail Mary pass that courts often see in death penalty cases. For one, it comes from the State. Further, the timing of this motion is not a matter of the State's choosing. The statute at issue only came into being last year. The undersigned Special Prosecutor was only appointed to this case last month, and had an ethical duty to investigate the facts before filing a motion to vacate and seeking a stay. The Special Prosecutor could not have responsibly moved for a stay any sooner than now. Finally, the process here is a process specifically authorized by the law, and the failure of the Circuit Court to follow it is plain and obvious: the court held no hearing and issued no factual findings.

A stay will respect the separation of powers, permit a Court to assess the newly-discovered facts on the merits, and ensure public confidence in the outcome of this case, whatever it may be. The Court should grant the stay.

II. FACTUAL AND PROCEDURAL BACKGROUND

The police were looking for Mr. Johnson at a family residence to serve an outstanding warrant for a probation violation resulting from a misdemeanor assault.[1] While the police were present, Mr. Johnson's twelve-year old brother suffered a seizure and was dying of heart failure. Mr. Johnson was observing

[1] These facts come generally from *State v. Johnson*, 284 S.W.3d 561, 567-68 (Mo. banc 2009), as well as the case record here and in the Circuit Court.

unseen from next door. Mr. Johnson would later be heard saying that the police, including Sgt. William McEntee, were consumed with arresting him, and blaming the death of his younger brother on police indifference to the medical emergency.

Two hours after the seizure, Sgt. McEntee responded to a report of fireworks in the neighborhood. Mr. Johnson approached Sgt. McEntee's patrol car and was heard to accuse him of killing his brother before firing several times. Sgt. McEntee's patrol car rolled down the street, coming to rest at a tree. Mr. Johnson returned and fired additional shots, killing Sgt. McEntee.

After an initial trial resulted in a hung jury split 10-2 in favor of conviction on the lower charge of second-degree murder, a new trial jury found Mr. Johnson guilty of one count of first-degree murder, and sentenced him to death.

On August 28, 2021, RSMo § 547.031 went into effect. Mr. Johnson timely requested review under the statute. (*See* Motion for App't of Special Prosecutor, filed Oct. 12, 2022, available on Case.net in underlying case.) On December 1, 2021, the St. Louis County Prosecuting Attorney's Office received an application from Mr. Johnson pursuant to RSMo § 547.031, asserting that he was a victim of pervasive racial discrimination practiced by that office and requesting investigation of his allegations. (*Id.*)

That office conducted an initial investigation into Mr. Johnson's application. The investigation remained incomplete because the office determined that a conflict of interest precluded further participation, and sought to identify a special prosecutor to handle Mr. Johnson's case. (*Id.*) The office engaged in a lengthy search for a qualified, disinterested, and available candidate.

The State and Mr. Johnson were at all times diligent. RSMo § 547.031 authorizes the Prosecuting Attorney of the county of conviction to seek to set aside a judgment if it finds clear and convincing evidence of a wrongful conviction. Mr. Johnson made his initial application in December, 2021, and amended it an April 2022, before the current execution warrant issued, citing *inter alia* an ongoing but a yet to be completed study of Mr. McCulloch's capital decision-making and intervening law relevant to discrimination at jury selection. Only after it determined the St. Louis County Prosecuting Attorney could not, within the bounds of its professional and ethical responsibilities, continue to consider Mr. Johnson's application, did it begin the process of seeking a Special Prosecutor. The Conviction Incident and Review Unit has represented to the Special Prosecutor that the fact an execution warrant had issued, and the requirement that any special prosecutor candidate not only be competent and willing but also itself be free of any potential conflicts (including the active representation of any client where the St Louis County Prosecuting

Attorney), made the task exponentially more difficult, with numerous otherwise qualified candidates ultimately having to decline.

By October 12, 2022, the Prosecutor's Office identified a qualified, disinterested, and available candidate for Special Prosecutor, who was appointed by the Circuit Court on that date. (*Id.*) Upon appointment the State moved diligently in investigating Mr. Johnson's allegations.

Given the scant few weeks since the appointment, the Special Prosecutor (mindful of the execution warrant) has filed the Section 547.031 Motion as soon as it was clear the standard was met and the allegations capable of proof. The Special Prosecutor has attempted to ensure that not only Mr. Johnson's allegations were adequately investigated but also that the State's interest in the preservation of a fairly earned judgment—if indeed that had proved to be the case—were respected. In the end, the evidence was so clear that the Special Prosecutor had no ethical option but to move to vacate the judgment. The Special Prosecutor filed this motion yesterday last Tuesday evening.

Concurrently with the filing of the Motion, but prior to its disposition, the Special Prosecutor sought a stay in this Court so that the required hearing could be conducted. This Court found the stay request by the State to be premature, as no matter to which Special Prosecutor was party was yet pending. Now that that there is a final Order and Judgment, and the State has appealed, the Special Prosecutor has standing to be heard as to a stay request.

RSMo § 547.031 (4) ("The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion.") The stay request is properly ancillary to the right to "maintain" an appeal as conferred by the statute. Without such a stay, the Special Prosecutor's appeal will become moot.

The Circuit Court denied it Wednesday morning in a summary order. The Special Prosecutor then sought a stay in this Court. On Thursday, this Court denied a stay "on the ground that there are no matters pending before this Court at the present time to which [the special prosecutor] is a proper party or representative." (Order, Nov. 17. 2022, Case No. SC89168, on Casenet.)

On Friday, the Special Prosecutor, Attorney General, and Mr. Johnson's counsel held a teleconference with the Circuit Court. The Circuit Court explained its reasons for the summary denial. Both the Special Prosecutor and Mr. Johnson filed motions to amend the judgment or for a new trial later that day, and the Special Prosecutor filed a notice of appeal. On Saturday morning, the Circuit Court issued an amended judgment, denying the motions for new trial or to amend.

The Circuit Court, Presiding Judge Mary Elizabeth Ott, who carefully reviewed the pleadings below, concurs that a hearing is necessary, and thus, at least implicitly, that a stay is warranted:

> This Court recognizes that §547.031 RsMo. (2021) requires a hearing, and is also aware of the requirement that sufficient time for all parties to prepare and present evidence at such hearing is essential to its proper function
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> ***
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> Of course, the Court will, in light of the exigent circumstances present in this case, continue to give it the highest priority that must always be given to cases involving the penalty of death. However, the question is not simply can a hearing be conducted but rather can the date of the hearing afford the parties adequate time to prepare and present the evidence, and the Court adequate time to thoughtfully consider the evidence admitted at hearing, keeping in mind the important public interests at issue.

Order and Judgment, November 19, 2022, at 3, 4.

The Special Prosecutor is now a proper party in a pending appeal. See RSMo 547.031 ("The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion.")

III. DISCUSSION

This Court should stay the November 29th execution date because the State demonstrates that it is likely to succeed on the appeal of the Motion to Vacate. Irreparable harm would result absent a stay. These factors outweigh any prospect of harm caused to others if a reasonable amount of time is granted to afford a full and fair adjudication of the § 547.031 motion. As shown further below, the public interest cannot be served by proceeding with the scheduled execution date.

A. Standards Governing Stays of Execution.

The Supreme Court of Missouri has adopted the federal four-factor test for considering whether to issue a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. banc 1996) (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm.*, 812 F.2d 288, 290 (6th Cir. 1987)).

A motion to stay should be granted when the moving party has shown "that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued." *Id.* at 840 (citing *Celebrezze*, 812 F.2d at 290). The balance of these four factors "cannot be accomplished with mathematical precision," so "the equitable nature of the proceedings mandates that the court's approach be flexible." *Id.* (internal citations omitted).

B. The State has Demonstrated the Likelihood of Success on the Merits.

The Special Prosecutor's investigation and review of available evidence has revealed key facts showing that racial bias infects Mr. Johnson's conviction and death sentence. (*See* Motion to Vacate and Exhibits), attached here.)

1. Procedural Error.

The State shows a strong probability of success on the merits of its appeal based on procedural error alone. Section 547.031 is crystal clear. Due to the importance of the statutory language, the Special Prosecutor quotes it in full here, with key phrases bolded:

> 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.
>
> 2. Upon the filing of a motion to vacate or set aside the judgment, the **court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented.** The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion.
>
> 3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.

> 4. **The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion.** The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

RSMo § 547.031.

The Circuit Court felt itself in a difficult position with an execution date pending. As it recognized, it cannot on its own stay a mandate of this Court. But this Court can always stay its own orders. That is now possible because this matter is before this Court.

The Circuit Court was mistaken in denying the motion due to timing. The statute expressly states "A prosecuting or circuit attorney . . . may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted." RSMo § 547.031.1 (emphasis added). The Special Prosecutor had an ethical duty to investigate the allegations at issue before filing a motion to vacate. He did so as soon as humanly possible once he had "information that the convicted person" had been "erroneously convicted." *See id*. The Legislature could have set time limits on when a motion can be filed, but it did not.

"Statutory analysis requires ascertaining the intent of the legislature, as expressed in the words of the statute." *Utility Service Co. v. Dep't of Lab. & Indus. Rels.*, 331 S.W.3d 654, 658 (Mo. banc 2011). "Statutory language is given its plain and ordinary meaning." *Id.*

The Legislature said "at any time." That language is plain and unambiguous. But even if a court were to graft in an exception for what looked like strategic delay, that is not this case. The undersigned prosecutor commenced an investigation immediately once receiving an appointment, and after reviewing troves of evidence, got a comprehensive motion on file in one month. To the extent the circuit court attempted to cast blame on the St. Louis County Prosecutor's Office, that lacks basis in fact: as the Court itself recognized in the order of appointment, that office determined it lacked the power to act due to a conflict of interest. The actions of a conflicted office cannot be counted against the motion once an unconflicted prosecutor timely filed it.

The statute says the Circuit Court "shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented." RSMo § 547.031.2 (emphasis added). "The word 'shall' generally prescribes a mandatory duty." *Gross v. Parson*, 624 S.W.3d 877, 889 (Mo. banc 2021).

The Circuit Court did not do any of these things. It did not order a hearing: it summarily denied the motion. It did not issue findings of fact or conclusions of law. And it did not address "all issues presented."

"The failure to follow [a] mandatory procedure and make the required determinations is reversible error." *Crumbaker v. Zadow*, 151 S.W.3d 94, 98 (Mo. App. E.D. 2004) (citing similar "shall" language requiring a hearing and determination on joinder issues).

2. Substantive Error.

The question before the Court is whether this appeal is likely to succeed. On procedural error alone, it is. And this suffices for the likelihood of success prong of stay analysis. But if the Court were to look beyond that to the underlying merits of the motion to vacate, these also demonstrate a likelihood of ultimate success if this Court were to reverse and remand for the required hearing and findings.

The Special Prosecutor found clear and convincing evidence of racial bias by the trial prosecutor. Contrary to the Circuit Court's comment in its recent order, these are not claims that have been rejected by prior courts. The claims here rely on previously-unavailable evidence and changes in the law. These changed circumstances now enable the prosecutor to prove a constitutional violation. And regardless, the entire point of Section 547.031 is to allow a prosecutor to reopen previously adjudicated cases where justice requires it.

As this Court has held, proof of discrimination "often depend[s] on inferences rather than on direct evidence," because those who discriminate are "shrewd enough not to leave a trail of direct evidence." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 116 (Mo. banc 2015) (citation omitted). Analysis "generally must rely on circumstantial evidence." *Id.* "There will seldom be eyewitness testimony as to the [decisionmaker]'s mental processes." *Id.* The key facts showing discrimination and the need for a full hearing include:

- The-Prosecuting Attorney Robert P. ("Bob") prosecuted five police-officer killings during his tenure. Mr. McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. Forster's conduct was more aggravated. He had bragged on social media about wanting to kill police officers ("I want fuck the police carved into my grave"), and stated that he planned "to go pull my .9 on a cop." *State v. Forster*, 616 S.W.3d 436, 440 (Mo. App. E.D. 2020).

- In the White-defendant police-killing case, Mr. McCulloch's office issued a written invitation to defense counsel to submit mitigating evidence that might convince the prosecutor's office not to seek death. (Ex. 6.) His office granted the defense nearly a year to provide arguments against death, and Mr. McCulloch ultimately decided not to seek death against this White defendant, without giving any specific explanation why. (Ex. 6, Corr. with Forster

Counsel.)

- By contrast, Mr. McCulloch never issued a mitigation-invitation to Mr. Johnson or any of the other three Black defendants accused of killing police officers. (Ex. 3, Bradford Aff.)

- Work product from the prosecution team shows the prosecutors' strategy to evade *Batson* by exercising fewer than their allotted nine peremptory challenges, in the hope that the trial court might eliminate Black jurors ranked high in the strike pool without those strikes counting against the prosecution. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)

- A stay is further required to permit compulsory process through depositions or at a hearing because the entire trial prosecution team has declined to cooperate with the Special Prosecutor. Mr. McCulloch has refused to even acknowledge correspondence from the Special Prosecutor asking him about the case, despite his extensive statements to the news media about this and other cases. (Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)

- Former Assistant Prosecutor Sheila Whirley, who participated in Mr. Johnson's trial, when questioned about why the State pursued death, would only state that she is reluctant to reveal **"family secrets,"** and said the death decision was Robert McCulloch's. (Ex. 3, Bradford Aff.)

- Mr. McCulloch's office maintained *no record* of guidelines,

practices, or procedures on whether to seek the death penalty. (Ex. 2, Alton Aff.) This contradicts Mr. McCulloch's own statements that he "disputes claims of bias" in the death penalty because of "the process and procedure that is employed by prosecutors in making the determination of whether or not to seek death." (Ex. 8, McCulloch Death Penalty Statements.)

- A comprehensive and rigorous statistical study of 408 St. Louis County death-eligible homicide prosecutions during Mr. McCulloch's tenure as prosecuting attorney, shows that he largely reserved the death penalty for defendants whose victims were White when deciding whether to charge first degree murder and to seek the death. (Ex. 10, Baumgartner Report.)

- Later statements by Mr. McCulloch to other prosecutors show a particular animosity towards young Black males like Mr. Johnson, viewing them as a population that "we had to deal with," and portraying them as stereotypical criminals. (Ex. 1, Hummel Aff.)

i. The State is Likely to Succeed on the Equal Protection Claim.

Mr. McCulloch's race-consciousness is inescapably evident. Of five such cases he sought death only against the four Black defendants, finding death was "not appropriate" for the sole White defendant. Following an exhaustive review of the facts of the five cases, and a comprehensive search for internal standards, guidelines, and contemporaneous memoranda reflecting the

decisions, there is simply no discernable legitimate case characteristics that can plausibly explain the disparate treatment.

Missouri courts have consistently looked to the treatment of other similarly-situated parties to infer racial animus or other illicit bias. *See*, *e.g.*, *McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 667-68 (Mo. App. W.D. 2016) ("[I]nstances of disparate treatment, that is, when the employee has been treated differently from other employees, can support a claim of discrimination[.]") Comparators "[n]eed not be identical in every conceivable way. . . . So long as the distinctions between the [defendant] and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied.")

The appended motion demonstrates, at length, that the five defendants are similarly situated: they committed similarly aggravated crimes, and they have similarly mitigating backgrounds and psychological impairments. Despite those similarities, it was only the White defendant whose attorneys were invited to dissuade the prosecution from seeking death, and it was only the White defendant for whom Mr. McCulloch decided that the death penalty would be inappropriate.

The evidence shows that race was a pervasive factor throughout Mr. McCulloch's capital decision-making; he reserved the most severe penalty

largely for defendants whose victims were White. In Dr. Frank Baumgartner's comprehensive study, he found:

> Black victim cases have a 4.0 percent chance of leading to a death sentence; White-victim cases see a 14.1 percent chance. The ratio of these two rates is 3.5. White-victim cases are 3.5 times as likely to lead to a death sentence than Black victim cases.

Ex. 10, Baumgartner, Frank, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990-2021, Report* (Sept. 20, 2022) at 8-9. He further concluded, "The effects are particularly pronounced at two decision-points attributable solely to the prosecutor, the decision to charge the case as a first-degree murder and the decision to give notice of intention to seek death." *Id.* at 23-24. "These effects persist after the introduction of controls for aggravating and mitigating factors, meaning that these disparities cannot be explained by legitimate case characteristics." *Id.* Dr. Baumgartner's thorough analysis supports an inference of discrimination. Statistical evidence is "relevant in conjunction with all other evidence in determining intentional discrimination." *Cox v. First Nat. Bank*, 792 F.3d 936, 941 (8th Cir. 2015) (citation omitted).

In a Section 547.031 proceeding, the Prosecutor is the voice of the State. The State confesses error: race was a substantial factor in Mr. McCulloch's exercise of discretion in the capital prosecution of Kevin Johnson. Notwithstanding the prodigious and unassailable evidence that discrimination

was operative in this case, this confession alone makes success on the merits likely.

ii. The State is Likely to Succeed on the *Batson* claim.

At jury selection, the primary panel of 30 comprised 24 Whites and six Blacks. Thus, the prosecution had an opportunity to strike 24 Whites and struck one for a strike rate of 4%. The prosecution had the opportunity to strike six Blacks and struck three for a strike rate of 50%. Including the eight additional venirepersons comprising the alternate pool, the prosecution had the opportunity to strike 30 Whites and struck two (7%). It had the opportunity to strike eight Blacks and struck four (50%).

Based on these disparities, a prima facie case of discrimination was found, thus the burden shifted to the state to justify its strikes on non-racial grounds. The focus was principally on the strike of Debra Cottman, a Black woman. Cottman testified that she was a "visiting foster parent" at the Annie Malone children's home. Trial Tr. 1010. Cottman did not know anyone from Annie Malone that was associated with the case, including Kevin Johnson. Trial Tr. 1011. Similarly, Mr. Johnson himself had little contact with that agency. The record shows he had stayed there for one week as a child, through placement by the DFS. Trial Tr. 1003-04, 1051, 2112-13, 2270.

Nevertheless, Mr. McCulloch said, "I don't want anyone associated with Annie Malone." This Court found this explanation was not pretextual to be sufficient to satisfy *Batson*, notwithstanding that Mr. McCulloch had accepted a White juror with comparable experience at a similar agency. It further declined to consider as one factor multiple other instances of discrimination at jury selection practiced by Mr. McCulloch.

Two intervening factors compel the Special Prosecutor to revisit the *Batson* claim, notwithstanding that this Court has previously addressed racial discrimination at jury selection.[2] First is a memorandum discovered in the last few weeks composed after the racially-balanced first jury failed to reach a verdict. (Ex. 7, Memorandum re: Johnson Jury Selection.) It sets forth procedures for exploiting certain idiosyncrasies in the trial judge's jury selection procedures that would result in the elimination of Blacks from the remaining prospective jury panel without overt State strikes.

The very existence and timing of the memo allows for the inference of purposeful intent to subvert the rule of law in *Batson* in the upcoming retrial.

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[2] The Circuit Court, apparently referring to the *Batson* claim, noted "the Motion at issue herein renew[s] arguments and claims previously raised on behalf of Kevin Johnson," Order and Judgment, at 4. But, as demonstrated herein and in the Motion, the State based its conclusions not only on the trial record, but on new factual revelations from which discriminatory intent can be inferred, and intervening case law.

Second is the recent case *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019), a case which this Court did not have the benefit of when it first decided the *Batson* claim. Under *Flowers*, courts must take into account the background history of a prosecutor's office in assessing racial discrimination claims around jury selection. *See id.*

On direct appeal, Mr. Johnson called the Court's attention to previous *Batson* violations from St. Louis County during the few years before his trial, specifically, *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. banc 2005); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). This Court declined to consider the evidence as relevant, stating that "A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009).

Intervening authority from the United States Supreme Court is directly to the contrary: A defendant may rely on, and a court must consider, "relevant history of the State's peremptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243.

Previously unavailable law, and previously hidden facts, now make clear that Mr. McCulloch's proffered explanations at trial were pretextual; a Court must reexamine Mr. McCulloch's specious decision to strike a Black juror.

D. Irreparable Harm is Certain if the Court Denies a Stay.

Absent a stay, the State's right to pursue the § 547.031 motion would be nullified. The State answers to the people; it has an obligation to be conscientious and thorough. As this Court has stated:

> The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other; that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate.

State on inf. McKittrick v. Wallach, 182 S.W.2d 313, 318–19 (Mo. 1944).

And prosecutors, when performing their duties, are authorized "to exercise a sound discretion." *State, on Inf. McKittrick v. Wymore*, 132 S.W.2d 979, 986 (Mo. 1939).

The serious time constraint imposed by the November 29th execution date undermines the State's performance of its duties. And the integrity of the proceedings in the Circuit Court. Mr. Johnson's execution is scheduled to occur November 29, 2022. An appeal cannot be briefed, argued, and decided on that timeframe. And if a remand occurs, the Circuit Court could not hear the motion in time.

The state and Mr. Johnson will also suffer irreparable injury if Mr. Johnson's execution goes forward before the courts can consider whether racial bias tainted his conviction and sentence. *See e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) ("The third requirement – that irreparable harm will result if a stay is not granted – is necessarily present in capital cases."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J.) (granting stay of execution in light of the "obviously irreversible nature of the death penalty"); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) ("There can be no doubt that a defendant facing the death penalty at the hands of the state faces irreparable injury.")

The Circuit Court has indicated its willingness to act expeditiously, while respecting the need to review the evidence with care:

> There is no question that "Death is Different" [;] it is different from all other punishments and in fact qualitatively different and requires particular care in its application in every case. *See Furman v. Georgia*, 408 US 238(1972), *Lockett v. Ohio*, 438 US 586 ((1978). The procedural and temporal posture of the instant motion places the court in an untenable position. To comply strictly with the plain language of § 547.031 is in conflict with current Missouri law analyzing its provisions and the appropriate administration of Due Process of Law and Equal Protection of the law as insufficient time remains to comply in a meaningful and appropriate manner given the grave punishment at issue herein. This weighs heavily upon this court.

Order and Judgement, November 19, 2022 at 5.

E. On Balance the Pursuit of Justice Outweighs any Harm Occasioned by the Granting of a Stay.

The Special Prosecutor recognizes that the surviving victims of this tragedy have an interest in finality. But this is not a case where a death row prisoner is bringing a last-minute motion for stay of execution as a tactical step. The statute here became effective on August 28, 2021. He filed his application for review under it just over two months later, on December 1, 2021. He has pursued this new avenue for relief diligently, and justice requires that the claims be heard Once the Prosecuting Attorney's office determined it had a conflict, it had to first identify a willing and capable candidate to serve as special prosecutor, a process that counsel understands took significant time. Once appointed, counsel acted quickly.

The Circuit Court seemingly agrees that neither the Special Prosecutor nor Mr. Johnson are to blame for the "inexplicable" failure to present the claims sooner, singling out only the "failure of the Saint Louis County Office of Prosecuting Attorney to recognize the conflict of interest" sooner. Order and Judgment, November 19, 2022, at 4.

Nor can it be said such relief was previously available to Mr. Johnson. The Special Prosecutor had unique access to documents and personnel in the course of the investigation, access impossible for Mr. Johnson to have benefitted from prior to the passage of RSMo § 547.031. He could not, as a practical matter, have sought comparable relief. Indeed, the law precluded

such action by the prosecuting attorney. *State v. (Lamar) Johnson*, 617 S.W.3d 439, 444 (Mo. banc 2021).

F. A Stay Serves the Public Interest.

No public interest is more paramount than ensuring that the rule of law be respected. The Supreme Court has admonished "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Denial of a stay would irrevocably conflict with a number of rights, the interest of all three branches of government, and would deny Mr. Johnson statutory and constitutional protections.

1. Denying the State the Opportunity to Prove its Allegations Would Offend the Doctrine of Separation of Powers.

In its current, and unusual, procedural posture, this case sits at the intersection of the powers and duties of the executive, judicial and legislative branches. This Court has recognized that "separation of the powers [is] vital to our form of government … because it prevents the abuses of power that would surely flow if power accumulated in one department." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997) (internal citation and quotation omitted). This Court observed:

> There are two broad categories of acts that violate the constitutional mandate of separation of powers. One branch may interfere impermissibly with the other's performance of its constitutionally assigned power. Alternatively, the doctrine of separation of powers may be violated when one branch assumes a power that more properly is entrusted to another.

State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 231 (Mo. banc 1997) (internal punctuation omitted).

Here, the Legislature authorized a prosecuting attorney to seek to remedy an unjust judgment, and provided a procedural forum to effect its intent. The statute requires the Circuit Court to "order a hearing" and "issue findings of fact and conclusions of law on all issues presented." RSMo § 547.031(2). Unfortunately, the Circuit Court is already running afoul of this textual command by summarily denying the motion. The State is seeking to remedy this error, and also has the absolute right to appeal. *See id.*

To deny the State the opportunity to give proper effect to the Legislature's expression of the electorate's will, would "interfere impermissibly" with the duty the constitution has assigned that body.

The "common law maxim … [w]here there is a right, there is a remedy [is an] essential doctrine [and] precept of our law." *State ex inf. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 109 (Mo. App. W.D. 1984). Here, the Legislature provided the Prosecutor the right to correct an unjust judgment; to deny the Prosecutor the opportunity to do so would nullify that right and impermissibly subvert the powers entrusted exclusively to the Legislature. And by extension, since the right at issue was granted the State, to fail to afford a reasonable opportunity to do what it is constitutionally

mandated to do—seek justice—would similarly diminish powers reserved for the Executive Branch.

Finally, the statute imposes specific duties on the judiciary itself. The court conducting the mandated hearing "shall … issue findings of fact and conclusions of law on all issues presented." If the Circuit Court denies the motion, "[t]he prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal." *Id.* Denial of a stay would obviate a duty—to find and state publicly the applicable facts and conclusions law and hear an appeal on the merits—that the Legislature rightfully imposed.

2. Denial of a Stay Would Contravene Due Process.

It is anathema to due process to elevate the interest in the expeditious carrying out of the execution of Mr. Johnson over the interest in ensuring all constitutional and statutory remedies be meaningfully made available.

This is an expression of the State's interest as much as Mr. Johnson's. As one court has stated, "[t]he state … is entitled to due process just as much as the petitioner [and] has an interest in its punishments being carried out in accordance with the Constitution." *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990) (upholding grant of stay to permit evidentiary hearing on whether petitioner was denied competent psychiatric assistance at trial). *See also Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018) ("If we do not grant a stay, we will necessarily be deciding or rendering moot his appeal . . . . At a

minimum, due process requires that [the defendant] be afforded an opportunity to present his appeal to us").

Due process rights are further implicated when a state irrationally or arbitrarily applies a right granted under state law. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). If a stay were to be denied, this would necessarily be an arbitrary result as it would render the full and fair hearing and adjudication required under RSMo § 547.031 impossible. Such an outcome would be particularly irrational here, as the process was commenced about nine months prior to the issuance of the warrant, but extended into the warrant period only because the St. Louis County Prosecuting Attorney's Office was exercising due diligence in ensuring Mr. Johnson's application could be reviewed unencumbered by a conflict of interest.

3. Discovery of Potentially Exculpatory Impeachment Evidence has Further Due Process Implications.

The State's review of work product and other documents not available to Mr. Johnson has revealed evidence that undermines the credibility determinations made in Mr. McCulloch's favor, in particular Mr. McCulloch's proffered race neutral reasons for striking Black jurors. The evidence permits the inference that that there was an office policy crafted by Mr. McCulloch to evade the rule in *Batson*.

The Special Prosecutor further notes that although relevant to action under RSMo § 547.031, the undisclosed evidence could well support an independent cause of action by Mr. Johnson. Failure to disclose these materials and Mr. McCulloch's false representations, should the Circuit Court so find, implicates due process.

Events as they are unfolding almost hourly only reinforce the admonition that a prosecutor has the duty to "inquire into the matter with care and accuracy." *McKittrick*, 182 S.W.3d at 318–19. Although the evidence marshaled thus far amply proves by clear and convincing evidence a constitutional violation undermining confidence in the verdict, there is likely even more evidence of discrimination to be uncovered. Similarly, there remain numerous, potentially illuminating witnesses to be interviewed, especially in light of recent discoveries. Finally, there are credible accounts of Mr. McCulloch publicly making overt and derogatory racial references. (Ex. 1, Hummel Aff.) Mr. McCulloch refuses to speak with the Special Prosecutor, only further undermining this process. (Ex. 4, McCulloch Corr.) Further investigation of these and potentially similar incidents, to the extent they may bear on the question of discriminatory intent in Mr. Johnson's case, is necessary.

The Legislature has passed a clear statute that sets forth a clear process. The public has already expressed its interest through its duly-elected

Legislators. The protection of constitutional rights, and the importance of public confidence in the integrity of criminal judgments, also supports a pause to allow this appeal and any further proceedings to reach an on-the-merits conclusion.

CONCLUSION

The State is mindful that cases such as this have reverberations beyond the Court and parties, particularly for the victim's family and law enforcement colleagues. But it is the prosecutor's duty to do justice. Further, the Legislature has specifically conferred on the prosecutor a vehicle for pursuing that justice - a vehicle that the other branches of government must honor. The State, Mr. Johnson, and the Circuit Court are prepared to conduct the hearing in an expeditious but fair manner. Justice requires that the clock be modestly reset to permit the hearing required under RSMo § 547.031. The State requests that the execution be stayed.

Dated: November 21, 2022

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify service a copy of the foregoing was electronically filed on November 21, 2022 with the Court's ECF and was also sent via electronic mail on November 21, 2022 to the following case participants:

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