

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY  
STATE OF MISSOURI

State of Missouri	)	
	)	Cause No. 2105R-02833-01
Vs.	)	
	)	Division 7
Kevin Johnson	)	

**ORDER AND JUDGEMENT**

This matter comes before the Court upon the Special Prosecutor E.E. Keenen's and Defense Counsel Joseph Luby's Motions to Amend Judgment and Alternatively, for New Trial.

1. In October of 2022 the Prosecuting Attorney for Saint Louis County requested that a Special Prosecutor be appointed to review this case in light of the conflict of interest arising from the current employment of attorney Robert Steele by the Saint Louis County Prosecuting Attorney. Robert Steele had previously represented the Defendant Kevin Johnson in this matter.

2. On or about October 12, 2022 this Court entered an Order pursuant to the Provisions of §56.110 RsMo appointing by consent, E.E. Keenan and the law firm of Keenan and Bhatia to act as Special Prosecutor for all matters related to this investigation and prosecution.

Section 56.110 reads as follows:

**56.110. If interested in case, court to appoint substitute.** — If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause. Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered an appointed prosecutor for purposes of section [56.360](#).

3. On November 7, 2022 the Supreme Court of Missouri entered an Order denying the Defendant's Motion to Stay the Execution Warrant in this matter.

4. On or about November 15, 2022 this Court received pleadings filed in cause no. 2105R-02833-01 entitled Motion to Vacate Judgement pursuant to the provisions of § 547.031 RsMo(2021) and signed by attorney E.E. Keenen who had been appointed as set out in paragraphs 2 above.

§547.031 states as follows:

**547.031. Information of innocence of convicted person — prosecuting or circuit attorney may file to vacate or set aside judgment — procedure.** — 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.

5        On or about November 16, 2022 this Court entered an Order denying the Motion to Vacate the Judgement.

6        No Writ of Mandamus or any other avenue of appellate review has been filed following the November 16, 2022 Order to clarify the authority of this court to act in the current procedural posture of the case.

7.       On or about November 17, 2022 E.E. Keenen requested a phone conference with the Court and all parties. The same request was granted. A phone conference with the Court and all parties was conducted on November 18, 2022 at 10:30 a.m. Megan Granda, court reporter for Division 7 reporting. A transcription of that conference was ordered by Defense counsel Joseph Luby.

8.       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. *See State ex rel Schmitt v. Harrell*, 633 S.W.3d. 463, 468 (MO App. WD 2021) (finding that three days was insufficient time to adequately prepare for a hearing pursuant to the provisions of §547.031).

9.       The Missouri Court of Appeals Western District has held in reference to the provisions of §547.031 RsMo.(2021) that:

This Court appreciates the significant public interests involved in this proceeding, and the Circuit Court's efforts to resolve this proceeding swiftly. Nevertheless, in order to permit the Attorney General to meaningfully participate in the hearing, he must be given notice sufficient to allow his office a reasonable opportunity to prepare for the hearing, given the extensiveness of the relevant record, and the complexity and gravity of the issues involved. Scheduling a merits hearing on three days' notice, on a motion to vacate a conviction of ...[murder], fails to give the Attorney General a meaningful opportunity to prepare for, and participate in, the hearing. *Id. at 467.*

There is neither sufficient time between now and the date currently set for the execution of Mr. Johnson for a reasonable and adequate opportunity for the parties to prepare and present

evidence, to conduct discovery, to subpoena witnesses nor for the court to thoughtfully consider the evidence at such hearing and to prepare appropriate findings of fact and conclusions of law.

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. *Id.*

10. The date set for Mr. Johnson's execution is November 29, 2022, and this Court notes that between November 15, 2022 when the §547.031 motion was first filed, and that date there are six business days available for such a hearing. The initial Motion to Vacate having been filed so close in time to the date of execution adversely impacts the careful and thorough preparation and consideration of evidence that may be admitted at a hearing and included in the required findings and conclusions.

11. Many of the claims raised in the Motion at issue herein renew arguments and claims previously raised on behalf of Kevin Johnson and rejected in the various Courts of Appeal in the State and Federal systems. The failure to bring these claims to this Court's attention pursuant to §547.031 RsMo (2021) prior to November 15, 2022, or fourteen days prior to the date set for the execution of Kevin Johnson is inexplicable. Similarly, the failure of the Saint Louis County Office of Prosecuting Attorney to recognize the conflict of interest described in paragraph 1 above prior to October of 2022 is disconcerting.

12. This Court does not believe, and can not find authority to support the assertion by Defense Counsel that it has the authority to stay an Execution Warrant previously reviewed and

affirmed by the Missouri Supreme Court, even in the face of the provisions of § 547.031 RsMo (2021) requiring a hearing and allowing for adequate time for the parties to prepare.

13. This Court notes that both the Motion to Vacate Judgment filed on November 15, 2022, and the subsequent Motion to Amend Judgment and alternatively for New Trial are filed in Cause no. 2105R-02833-01, the criminal case number. The Supreme Court of Missouri has Ordered in the appeal, cause no. SC89168 that E.E. Keenen is not a party to the actions currently on appeal in cause no. SC89168 and derived from 2105R-02833-01. *See (SC89168 order of 11-17-2022)*

14. On November 18, 2022 Defense Counsel for Kevin Johnson, Joseph Luby filed a pleading adopting the Motion to Amend Judgment and alternatively for New Trial filed by E.E. Keenen.

15. 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.

16. The Defense acknowledges that they are not claiming actual innocence pursuant to §547.031(RsMo.2021), and certainly §547.031 requires something more than the rearticulation of previously litigated claims at the eleventh hour.

17. **Therefore it is the Order and Judgment of the Court** that the Motions to Amend Judgment and Alternatively for New Trial are DENIED.

**SO ORDERED:**



Mary Elizabeth Ott  
Presiding Judge  
November 19, 2022

Division 7