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## Undermining Confidence in The Judgment: The Supreme Court of Missouri's Flawed Application of Missouri's Wrongful Conviction Statute

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## NOTE

### **Undermining Confidence in The Judgment: The Supreme Court of Missouri's Flawed Application of Missouri's Wrongful Conviction Statute**

*State v. Johnson*, 654 S.W.3d 883 (Mo. 2022) (*en banc*).

Salvatore Paris\*

#### I. INTRODUCTION

In recent decades, the problem of wrongful convictions has garnered much attention from both legal scholars and the public at large.<sup>1</sup> However, one element of wrongful convictions that deserves more attention is the fact that it is remarkably difficult for a wrongfully convicted person to gain his or her freedom. The appeals and post-conviction process for freeing an innocent person is a tangled web of procedural complexities and technicalities.<sup>2</sup> For wrongfully convicted *capital* defendants, the stress of the complex process compounds the cloud of impending execution hanging over the defendant's head.

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<sup>1</sup> Marvin Zalman & Robert J. Norris, *Measuring Innocence: How to Think About the Rate of Wrongful Conviction*, 24 NEW CRIM. L. REV. 601, 602 (2021).

<sup>2</sup> Charles E. Atwell & Lindsay Runnels, *An Alliance for Justice: The Exoneration of Kevin Strickland*, 46 THE CHAMPION 10, 14 (Apr. 2022).

In 2021, the Missouri legislature passed section 547.031 of the Missouri Revised Statutes to facilitate the process of achieving freedom for at least some wrongfully convicted persons.<sup>3</sup> Specifically, section 547.031 allows a prosecutor in the convicting jurisdiction to reach out a hand and “pull” the wrongfully convicted defendant from the confusing and complex process.<sup>4</sup> The statute authorizes prosecutors to file a motion to vacate a defendant’s conviction.<sup>5</sup> A prosecutor may file this motion for two reasons: (1) the prosecutor has evidence that the inmate is “actually innocent,” or (2) the prosecutor has evidence of a constitutional error at the trial or with the plea.<sup>6</sup>

How does, or how should, this statute operate in capital cases where a prosecutor files a motion to vacate a sentence *after* a death row inmate’s execution date has been set? The Missouri Supreme Court recently addressed this issue in *State v. Johnson*.<sup>7</sup> In *Johnson*, a special prosecutor filed a section 547.031 motion with the circuit court, arguing that Johnson’s conviction and death sentence were unconstitutional because (1) the county prosecutor sought the death penalty based on discriminatory intent and (2) new evidence supported Johnson’s previously rejected claim that the prosecutor violated *Batson* in exercising peremptory challenges.<sup>8</sup> The problem for Johnson, though, was that the special prosecutor filed the section 547.031 motion *after* Johnson’s execution date was set.<sup>9</sup> In fact, the special prosecutor filed the motion merely fourteen days before Johnson’s execution date.<sup>10</sup> As a result, the circuit court faced a dilemma: section 547.031 requires the circuit court to order a hearing on the motion, but the court did not have adequate time before Johnson’s execution to hold that hearing.<sup>11</sup> Finding that it lacked authority to stay his execution, the circuit court denied the motion.<sup>12</sup> Both Johnson and the special prosecutor subsequently appealed to the Missouri Supreme Court and filed motions for a stay of Johnson’s execution.<sup>13</sup> Premised on the interpretation

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<sup>3</sup> MO. REV. STAT. § 547.031 (2021).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 654 S.W.3d 883 (Mo. 2022) (en banc).

<sup>8</sup> *Id.* at 889–90.

<sup>9</sup> *Id.* at 889.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 890.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

of section 547.031, the Missouri Supreme Court then had the option to grant Johnson's and the special prosecutor's motions for a stay.<sup>14</sup>

Part II of this Note examines the facts and the complex procedural history of *State v. Johnson*. Part III analyzes the history and legislative intent behind section 547.031 and the applicable rules of statutory interpretation. Part IV details the majority's reasoning for denying Johnson's and the special prosecutor's motions for a stay of Johnson's execution as well as the dissent's arguments for why the court should have granted the motions. Part V argues that the Missouri Supreme Court erred in Johnson's case with respect to its interpretation and application of section 547.031 motions and explores how these motions should operate instead.

## II. FACTS AND HOLDING

On July 5, 2005, police officers in Kirkwood, Missouri investigated the presence of Kevin Johnson's vehicle at his residence due to an outstanding warrant related to a probation violation.<sup>15</sup> While the police investigated, Johnson's younger brother suffered a seizure in the house next door, and the family sought help from police.<sup>16</sup> The police never saw Johnson and ceased their investigation until an ambulance and more police arrived.<sup>17</sup> Sergeant William McEntee was among the additional police officers that arrived.<sup>18</sup> That night, Johnson's brother passed away at the hospital due to a preexisting heart condition.<sup>19</sup> Johnson blamed his brother's death on the police, claiming that police ignored his brother's emergency because they were preoccupied in their search for Johnson.<sup>20</sup>

Two hours after Johnson's brother's seizure, Sergeant McEntee responded to a report of fireworks in the neighborhood.<sup>21</sup> While Sergeant McEntee spoke with three juveniles, Johnson approached the passenger window and said, "You killed my brother."<sup>22</sup> Johnson then fired a handgun five times, hitting Sergeant McEntee in the head and upper torso

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<sup>14</sup> *See id.*

<sup>15</sup> *Id.* at 886.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

and hitting a juvenile bystander in the leg.<sup>23</sup> Still secured in his car, Sergeant McEntee and the car rolled down the street, hitting a parked car.<sup>24</sup> After it came to a rest, Sergeant McEntee exited the vehicle and sat on his knees.<sup>25</sup> Johnson walked up to Sergeant McEntee and shot him in the head twice.<sup>26</sup> Johnson then left the scene and drove to his father's apartment, where he remained for three days before he agreed to surrender.<sup>27</sup>

Johnson was indicted in St. Louis County, and a jury unanimously convicted him for the first-degree murder of Sergeant McEntee.<sup>28</sup> The jury found four aggravating factors and recommended the death penalty, and the trial court subsequently sentenced him to death.<sup>29</sup> Johnson exhausted both his state and federal post-conviction relief.<sup>30</sup> The most relevant points

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<sup>23</sup> *Id.* After the shooting, Johnson took Sgt. McEntee's .40 caliber handgun and started walking down the street where he saw his mother and her boyfriend and said, "that m\_\_\_\_\_ f\_\_\_\_\_ let my brother die, he needs to see what it feel[s] like to die." *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Johnson was also indicted on first-degree robbery, first-degree assault, and three counts of armed criminal action, however, the court severed the murder count from the other counts. *Id.*

<sup>29</sup> *Id.* at 887 (The aggravating factors were: "(1) 'the defendant by his act of murdering Sgt. William McEntee knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person;' (2) 'the murder of Sgt. William McEntee "DID" involve depravity of mind, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman;' and (3) 'the murder of Sgt. William McEntee was committed against a peace officer while engaged in the performance of his official duty.'").

<sup>30</sup> *Id.* at 886–88. On direct appeal in 2009, Johnson argued eleven points which were all denied. *Id.* at 887 n.2. The United States Supreme Court denied certiorari. *Johnson v. Missouri*, 558 U.S. 1054 (2009). Johnson later filed a motion for postconviction relief in state court under Rule 29.15, where he made another eleven claims that the court denied, and which the Missouri Supreme Court affirmed. *State v. Johnson*, 654 S.W.3d 883, 887 n.3 (Mo. 2022) (en banc). The United States Supreme Court again denied certiorari. *Johnson v. Missouri*, 571 U.S. 1240 (2014). Johnson continued to seek relief from the Missouri Supreme Court on several other occasions, and every time the Missouri Supreme Court denied relief and rejected his claims. *Johnson*, 654 S.W.3d at 887. The court overruled his motion for stay of execution. *State v. Johnson*, No. SC89168 (Nov. 7, 2022). The court overruled his motion to recall the mandate, and alternatively, petition for writ of habeas corpus. *State v. Johnson*, No. SC89168 (Aug. 30, 2022). The court overruled his motion for an order directing transportation of Johnson for brain imaging, and alternatively, petition for writ of habeas corpus. *State v. Johnson*, No. SC89168 (Oct. 26, 2021).

he argued throughout his state and federal appeals included a *Batson* challenge, in which the Court accepted the state's race-neutral explanation for its strike of Juror Debra Cottman, and an argument of selective prosecution in violation of the Eighth and Fourteenth Amendments.<sup>31</sup> Johnson's arguments for selective prosecution were based on statistical evidence that he claimed demonstrated his prosecuting attorney, Robert McCulloch, had a racial bias against Black defendants accused of killing white police officers.<sup>32</sup> As for his *Batson* argument, Johnson claimed that McCulloch's strike of Juror Debra Cottman was racially motivated.<sup>33</sup> These arguments, along with all of Johnson's other post-conviction arguments, were denied in both state and federal courts.<sup>34</sup>

Eventually, Johnson filed an application with the Conviction and Incident Review Unit ("CIRU") in the St. Louis County Prosecuting Attorney's office on December 1, 2021, asking the CIRU to review his allegations of racial discrimination by his prosecuting attorney, McCulloch.<sup>35</sup> About five months later, on May 11, 2022, the Missouri Attorney General sought an execution date for Johnson, because Johnson had exhausted all his direct appeals and postconviction relief.<sup>36</sup> Before the Missouri Supreme Court set an execution date, the CIRU notified the court that its preliminary investigation did not result in any pertinent

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The court overruled the motion to recall the mandate and, in the alternative, petition for writ of habeas corpus. *State v. Johnson*, No. SC89168 (Feb. 28, 2017). The Court overruled the motion to recall the mandate and, in the alternative, petition for writ of habeas corpus. *State v. Johnson*, No. SC89168 (Oct. 27, 2015). Further, Johnson also sought habeas corpus relief in federal courts which also rejected his claims and denied him relief. *Johnson*, 654 S.W.3d at 888; *Johnson v. Steele*, No. 4:13-CV-2046-SNLJ, 2018 WL 3008307 (E.D. Mo. June 15, 2018) (amended memorandum and order denying petition); *Johnson v. Steele*, 999 F.3d 584 (8th Cir. 2021) (denying certificate of appealability and affirming district court's refusal to recuse).

<sup>31</sup> *Johnson*, 654 S.W.3d at 887–88 nn.4–5. McCulloch defended the *Batson* claim against juror Cottman by explaining that she had worked at a children's home that provided services to Johnson when he was a child. *Id.* at 895.

<sup>32</sup> *Id.* at 887 n.4. Johnson's argument was that this bias existed primarily because McCulloch's father, a White police officer, was killed while on-duty by an African American man. *Id.*

<sup>33</sup> *Id.* at 888 n.5.

<sup>34</sup> *Id.* at 887 n.4, 888 n.5.

<sup>35</sup> *Id.* at 889. This claim was again based on abuse of prosecutorial discretion and a violation of *Batson*. *Id.* Johnson added to his application a statistical study that he claimed proved his assertions. *Id.* The study involved analysis of McCulloch's application of the death penalty, and the results showed that he sought it more frequently against African Americans, and especially so when the victim was white, and even more so when the victim was a white police officer. *Id.* at 893.

<sup>36</sup> *Id.* at 889.

conclusions.<sup>37</sup> Unbeknownst to the Missouri Supreme Court and the circuit court, the CIRU was instead unsuccessfully attempting to locate a special prosecutor because of a conflict of interest between the CIRU and the entire prosecutor's office.<sup>38</sup> On August 24, 2022, the Missouri Supreme Court granted the Attorney General's motion for Johnson's execution, and it set the date of execution for November 29, 2022.<sup>39</sup> The St. Louis County Prosecutor's Office alerted the circuit court of its conflict of interest on October 12, 2022, less than two months before Johnson's execution date.<sup>40</sup> The office asked for a special prosecutor appointment under section 56.110 and recommended E. E. Keenan for the appointment.<sup>41</sup> The circuit court approved the appointment.<sup>42</sup>

Two weeks before Johnson's execution, Special Prosecutor Keenan filed a motion under section 547.031 to vacate Johnson's conviction.<sup>43</sup> The special prosecutor argued that the prosecution had violated Johnson's equal protection rights due to discriminatory intent and that new evidence supported Johnson's previously argued *Batson* claim.<sup>44</sup> The circuit court overruled the special prosecutor's motion on November 16, 2022; thereafter, the special prosecutor and Johnson moved to amend the circuit

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The conflict of interest arose from Johnson's prior defense attorney being employed at the St. Louis County Prosecutor's Office. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 889–90. The special prosecutor supplanted Johnson's post-conviction litigation arguments with evidence unavailable to Johnson during his post-conviction appeals. *Id.* at 900 (Breckenridge, J., dissenting). One piece of unavailable evidence the special prosecutor brought was a study that analyzed charging decisions of the St. Louis County Prosecutor's office during McCulloch's time there. *Id.* This study showed that the office was "three and a half times more likely to seek the death penalty for murders involving white victims than those involving black victims." *Id.* The special prosecutor also raised evidence that the trial prosecuting attorney's explanation for striking juror Cottman was pretextual. *Id.* at 901. As previously discussed, the prosecuting attorney struck Cottman for working at a children's home that provided services to Johnson. *Id.* However, Johnson had stayed there for only one week as a child and Cottman did not know Johnson, or anyone associated with the case. *Id.* The special prosecutor argued that striking Cottman was pretextual because the prosecuting attorney did not strike four white members who had worked in the department of family services, where Johnson spent much of his childhood. *Id.* These arguments, and more, were brought by the special prosecutor and not heard at a section 547.031 hearing. *See id.*

court's judgment or, alternatively, grant a new trial.<sup>45</sup> On November 19, 2022, the circuit court overruled both motions.<sup>46</sup> The circuit court admitted that the language of section 547.031 required the court to order a hearing on the motion but determined that it was unable to hold one due to the quickly-approaching execution date.<sup>47</sup> Additionally, the circuit court recognized the thorny situation it was in: it lacked both the authority to stay the execution and reasonable time to hear the section 547.031 motion and issue an opinion before Johnson's execution.<sup>48</sup> Accordingly, the circuit court denied the motion.<sup>49</sup>

Johnson and the special prosecutor separately appealed the denial of the special prosecutor's section 547.031 motion to the Missouri Supreme Court, and both filed motions to stay Johnson's execution based on their pending appeals.<sup>50</sup> Rather than taking up the appeals, the court considered only the merits of the underlying appeal in the standard for a stay of execution.<sup>51</sup> The court held that neither Johnson nor the special prosecutor could satisfy the standard for a stay of execution because they could not demonstrate a likelihood of success on their appeals from the circuit court's denial of the special prosecutor's section 547.031 motion.<sup>52</sup> Johnson then unsuccessfully applied to the United States Supreme Court for a stay of execution.<sup>53</sup>

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<sup>45</sup> *Id.* at 890 (majority opinion).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The circuit court blamed the Prosecutor's Office for being late in reporting the conflict of interest and seeking a special prosecutor appointment. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 890–91.

<sup>51</sup> *Id.* at 895.

<sup>52</sup> *Id.*

<sup>53</sup> *Johnson v. Missouri*, 143 S. Ct. 417 (2022) (mem). Justice Jackson, joined only by Justice Sotomayor, dissented from the Supreme Court's denial of Johnson's application for a stay of his execution. *Id.* (Jackson, J., dissenting). Justice Jackson explained that in "rare" cases, a defendant can claim that when a state erroneously interprets or does not follow its own law, a federal due process violation occurs, and that Johnson was able to make that rare claim. *Id.* Justice Jackson explained that the Missouri Supreme Court ignored the mandates of a simple procedural statute by ignoring the three steps that the statute prescribes in a particular order. *Id.* Further, Justice Jackson demonstrated that it was an error for the Missouri Supreme Court to hold that there was not clear and convincing evidence of a constitutional error because the mandatory hearing that the circuit court did not hold might have produced the evidence to meet that burden. *Id.* In addition, Justice Jackson also pointed out that a State cannot provide a postconviction review process and then arbitrarily refuse to follow it, which is what Justice Jackson believed happened in Johnson's case. *Id.*



## III. LEGAL BACKGROUND

For any statute it is imperative that a court properly consider both the legislative intent and the relevant rules of statutory interpretation. However, for those seeking relief under section 547.031, it is even more important that these considerations are on the forefront of the court's mind, given that the statute deals with an inmate's freedom. Part A of this Section explains the legislative history and intent behind section 547.031 of the Missouri Revised Statutes. Part B then outlines the general statutory interpretation rules in Missouri that are pertinent to this statute.

*A. The Legislative History of Section 547.031 of the Missouri Revised Statutes*

Section 547.031 is a recent statute enacted by the Missouri Legislature in August 2021.<sup>54</sup> The statute is titled, "Information of innocence of convicted person—prosecution or circuit attorney may file to vacate or set aside judgment—procedure."<sup>55</sup> It consists of four sections, with the first three specifying the "steps" a prosecutor must take to file a motion to vacate or set aside a conviction.<sup>56</sup> The first section allows a prosecuting attorney in the convicting jurisdiction to file a motion if the prosecutor has information that the convicted individual is innocent or was erroneously convicted.<sup>57</sup> The second section requires the circuit court to order a hearing on a section 547.031 motion and then issue findings of facts and law.<sup>58</sup> The third section compels a court to grant the section 547.031 motion when there is clear and convincing evidence of "actual innocence or constitutional error at the original trial or plea that

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Thus, Justice Jackson believed the Missouri Supreme Court's reading of section 547.031 was so "fundamentally flawed" that Johnson would have succeeded on a Fourteenth Amendment violation. *Id.*

<sup>54</sup> *Missouri Enacts New Mechanism for Prosecutors to Address Wrongful Convictions*, EQUAL JUST. INITIATIVE (Nov. 23, 2021), <https://eji.org/news/missouri-enacts-new-mechanism-for-prosecutors-to-address-wrongful-convictions/> [<https://perma.cc/CL5W-M6LT>] [hereinafter EQUAL JUST. INITIATIVE].

<sup>55</sup> MO. REV. STAT. § 547.031 (2021).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ("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.") (emphasis added). This section also requires that the Attorney General have notice of the hearing and allows them to appear, question witnesses, and make arguments at the hearing. *Id.*

undermines the confidence in the judgment.”<sup>59</sup> This section also permits the court to consider evidence from the original trial or plea, any evidence from direct appeal or post-conviction appeals, and information and evidence from the hearing on the motion.<sup>60</sup> The final section gives the prosecutor authority to file and maintain an appeal of the denial of a section 547.031 motion.<sup>61</sup>

Essentially, legislators intended the statute to permit local prosecutors to pursue relief for a wrongful conviction.<sup>62</sup> Prior to the statute, prosecutors primarily addressed wrongful convictions through Conviction Integrity Units (“CIU”).<sup>63</sup> However, in Missouri, these CIUs lacked legislative support because they failed to secure relief in two troubling cases that garnered much attention.<sup>64</sup> These two particular cases laid the foundation for the legislature’s ultimate enactment of section 547.031.<sup>65</sup>

One such case was *State v. Johnson*.<sup>66</sup> After a CIU reviewed Lamar Johnson’s 1994 murder conviction in 2019, the City of St. Louis Circuit Attorney Kimberly Gardner sought a new trial based on recently discovered evidence that proved his innocence.<sup>67</sup> Gardner filed the motion

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* The Attorney General may also file a motion to intervene as well as file a motion to dismiss the motion to vacate or set aside the judgment. *Id.*

<sup>62</sup> EQUAL JUST. INITIATIVE, *supra* note 54.

<sup>63</sup> Atwell & Runnels, *supra* note 2, at 15. A CIU is a team in the prosecutor’s office that attempts to remedy wrongful convictions. *Id.* Dallas County, Texas started the first CIU in 2007, and the number of CIUs has skyrocketed since with over 90 nationwide now. *Conviction Integrity Units*, THE NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/99Y6-AUBP>] (last visited Oct. 16, 2023).

<sup>64</sup> Atwell & Runnels, *supra* note 2, at 15.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> 617 S.W.3d 439 (Mo. 2021) (en banc). While also entitled *State v. Johnson*, this case involved a different defendant, Lamar Johnson, with a different set of facts. *See id.*

<sup>67</sup> *Id.* at 440. Johnson was convicted in 1995 for first-degree murder and armed criminal action. *Id.* at 441. In 1994, two masked men murdered Johnson’s friend Marcus Boyd on Boyd’s front porch. Jim Salter, *Lamar Johnson, Now Free: ‘I Was Finally Heard’*, FOX2NOW (Feb. 23, 2023, 11:52 AM), <https://fox2now.com/news/missouri/lamar-johnson-now-free-i-was-finally-heard/> [<https://perma.cc/DNZ5-GMDY>]. Police arrested Johnson a few days later, and blamed the killing on a drug dispute since he and Boyd were drug dealers. *Id.* Johnson maintained his innocence, and prosecutors built the case primarily on an eyewitness who pointed Johnson out from a police lineup and a jailhouse informant who claimed

for a new trial because Missouri had no mechanism in place to permit a prosecutor to vacate a wrongful conviction.<sup>68</sup> She argued that her ethical duty as a prosecutor required her to file the motion even though Johnson had previously exhausted his state and federal appeals.<sup>69</sup> The circuit court dismissed Gardner's motion for a new trial, holding that the court lacked authority to rule.<sup>70</sup> The court reasoned that it lacked authority to rule on the motion because Gardner lacked authority to file the motion in the first place, and even if she possessed authority, the motion was untimely.<sup>71</sup>

Johnson and Gardner appealed the decision.<sup>72</sup> In its ruling on the appeal, the Missouri Supreme Court explained that the case was not about whether Johnson was innocent; rather, the case was only about whether authority existed to allow an appeal from a dismissal of a motion for a new trial decades after a finalized criminal conviction.<sup>73</sup> The court concluded that there was no authority for such appeals and dismissed them, leaving Johnson in prison with his freedom still compromised.<sup>74</sup> Those who believed this outcome to be unjust were able to find some solace on the issue through a concurrence by Judge Draper.<sup>75</sup> In his concurrence, Judge Draper explained that the legislature's enactment of a law would be the best, and maybe only, opportunity for a prosecuting attorney to address wrongful convictions.<sup>76</sup>

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to hear Johnson discuss the crime. *Id.* The eyewitness testified at Johnson's section 547.031 hearing in December of 2022 that police highly influenced him to pick Johnson out, and the informant's integrity was called into question. *Id.* However, maybe the most compelling evidence was that an inmate, James Howard, told the judge that he and someone else were the killers and that Johnson was not involved. *Id.* This evidence was enough for a judge to vacate Johnson's conviction. *Id.*

<sup>68</sup> Atwell & Runnels, *supra* note 2, at 15. The litigation stemming from the motion for a new trial attracted attention and amici support from many national organizations such as the National Association of Criminal Defense Lawyers, the Missouri Association of Criminal Defense Lawyers, 45 prosecutors, the Innocence Project, the ALCU, retired Missouri judges, and over 100 legal ethics experts. *Id.*

<sup>69</sup> *Johnson*, 617 S.W.3d at 442.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Gardner filed the motion decades after the conviction, and Rule 29.11 motions regarding new trials require that the motion be filed no more than 25 days after a verdict. *Id.*

<sup>72</sup> *Id.* at 440.

<sup>73</sup> *Id.* at 445.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (Draper, J., concurring).

<sup>76</sup> *Id.* at 446. Notably, Judge Draper said, "[o]ne's sense of justice and belief that innocent people should not be imprisoned for crimes they did not commit requires there to be some mechanism for the state to redress an error it helped create." *Id.* at 445.

The other case that lead to the enactment of section 547.031 was Kevin Strickland's case.<sup>77</sup> Strickland was convicted of murder in 1979 in Jackson County, Missouri.<sup>78</sup> He maintained his innocence throughout his trial and post-conviction proceedings, and the *Kansas City Star* published an article investigating Strickland's innocence in September 2020.<sup>79</sup> In November 2020, the Midwest Innocence Project asked the Jackson County Prosecutor's Office to look into the case.<sup>80</sup> After the prosecutor's office CIU reinvestigated the evidence, Jackson County Prosecutor Jean Peters Baker held a press conference on May 10, 2021, where Baker apologized for the "mistake" that resulted in Strickland's imprisonment.<sup>81</sup> In Baker's report, she stated that Strickland's incarceration "serves no conceivably

<sup>77</sup> Atwell & Runnels, *supra* note 2, at 16–17.

<sup>78</sup> *Kevin Strickland*, THE NAT'L REGISTRY OF EXONERATIONS (Dec. 6, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6081> [https://perma.cc/L987-J5L8]. Strickland was convicted in 1979 for a triple murder. *Id.* One of the victims had let two men into their home, when the men pulled out weapons and let two more men with weapons into the home. *Id.* The surviving victim, Cynthia Douglas, recognized the first two men personally, however she did not recognize the second set of men. *Id.* Officers later testified that Douglas had mentioned a nickname of Strickland's, who they brought in for questioning. *Id.* In his interview, Strickland told police that it was possible he had handled one of the known killer's shotgun a few days prior to the shooting and had even given him some shells. *Id.* In a second interview with Douglas, police responded to Douglas' description of one of the killers by saying that they sounded like Strickland. *Id.* In the second interview, Douglas then claimed that Strickland, whom she had known for several years, was one of the killers. *Id.* Police blamed Douglas for the discrepancies between the two interviews. *Id.* After the second interview, police put Strickland in a four-man line-up, and instead of asking if one of them was the four men, they asked Douglas which one was Strickland. *Id.* Strickland also maintained his innocence throughout. *Id.* Further, two of the killers, P.H. Bell and Kilm Adkins had both pleaded guilty to the crime and had claimed that Strickland was not involved. *Id.* Further, Douglas, who passed away in 2015, had sent an email in 2009 to the Midwest Innocence Project claiming that she had wrongfully accused someone in 1978 and that she would like to help them. *Id.* However, their policies prevented them from helping Douglas. *Id.* All this, and much more, contributed to Strickland's release in 2021 under section 547.031. *Id.*

<sup>79</sup> *Id.*; Luke Nozicka, *Kevin Strickland Has Spent More Than 40 Years in Prison "For Nothing," Said a Man Who Admitted Guilt in the Killings*, THE KANSAS CITY STAR (Jan. 11, 2022, 12:04 PM), <https://www.kansascity.com/news/local/crime/article245920830.html> [https://perma.cc/24RM-RQTT].

<sup>80</sup> *Strickland*, THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 78.

<sup>81</sup> Luke Nozicka & Bill Lukitsch, *Prosecutor Apologizes to Kansas City Man Who She Says is Innocent in 1978 Murders*, THE KANSAS CITY STAR (June 8, 2021, 6:33 PM), <https://www.kansascity.com/news/local/crime/article251274189.html> [https://perma.cc/URC3-AWH8].

just purpose.”<sup>82</sup> However, due to the holding in Lamar Johnson’s case, there was nothing Baker could do to free Strickland, as he had also exhausted all state and federal appeals.<sup>83</sup>

The dissenting opinion in Johnson’s case, along with the CIU report in Strickland’s case, inspired a small bipartisan group to provide prosecutors a way to address wrongful convictions even after an inmate’s state and federal appeals processes have been exhausted.<sup>84</sup> The group negotiated the language and added the provision to Missouri Senate Bill 53 in the final weeks of the legislative session.<sup>85</sup> Finally, with only a few days left in the session, the Missouri Legislature passed the bill with bipartisan support.<sup>86</sup> On July 14, 2021, Missouri Governor Mike Parsons signed the bill.<sup>87</sup> It took effect on August 28, 2021.<sup>88</sup> Thanks to section 547.031, both Lamar Johnson and Kevin Strickland were able to subsequently vacate their convictions.<sup>89</sup>

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<sup>82</sup> Letter from Jean Peters Baker, Jackson County Prosecuting Attorney, to Robert J. Hoffman, Partner, Bryan Cave Leighton Paisner, and Tricia J. Rojo Bushnell, Midwest Innocence Project (May 8, 2021), [https://www.jacksoncountypProsecutor.com/DocumentCenter/View/1746/FINAL-Hoffman-Letter-Re-Strickland-CIU-Investigation-5-8-21\\_Signed?bidId=](https://www.jacksoncountypProsecutor.com/DocumentCenter/View/1746/FINAL-Hoffman-Letter-Re-Strickland-CIU-Investigation-5-8-21_Signed?bidId=) [https://perma.cc/93SS-J9TB].

<sup>83</sup> Atwell & Runnels, *supra* note 2, at 17.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Governor Parson Concludes 2021 Bill Signings*, MO. GOVERNOR (July 14, 2021), <https://governor.mo.gov/press-releases/archive/governor-parson-concludes-2021-bill-signings> [https://perma.cc/3YN7-HGG8].

<sup>88</sup> MO. REV. STAT. § 547.031 (2021).

<sup>89</sup> *Kevin Strickland Exonerated 42 Years After Wrongful Capital Murder Conviction in Missouri*, DEATH PENALTY INFO. CTR. (Nov. 24, 2021), <https://deathpenaltyinfo.org/news/kevin-strickland-exonerated-42-years-after-wrongful-capital-murder-conviction-in-missouri> [https://perma.cc/LE6Y-JEN4]; Rebecca Rivas, *Lamar Johnson to be Set Free After Decades in Missouri Prison for Murder He Didn’t Commit*, MO. INDEP. (Feb. 14, 2023, 1:46 PM), <https://missouriindependent.com/2023/02/14/lamar-johnson-to-be-set-free-after-decades-in-missouri-prison-for-murder-he-didnt-commit/> [https://perma.cc/4QZZ-CYK8]; *Strickland*, THE NAT’L REGISTRY OF EXONERATIONS, *supra* note 78; *Lamar Johnson*, THE NAT’L REGISTRY OF EXONERATIONS (Mar. 1, 2023), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6547> [https://perma.cc/S5LE-DJ5S]. Johnson remained in prison until 2023, almost a full two years after the law became effective. *Id.* Also of note, as of June 1, 2023, Lamar Johnson and Kevin Strickland are the only two prisoners to be freed under section 547.031. Deion Broxton, *Missouri Prisoner’s Innocence Case Puts New Circuit Attorney Against Attorney General*, KMOV 4 (June 1, 2023, 6:50 PM),

*B. Statutory Interpretation in Missouri*

At any level, a court's job when interpreting a statute is to simply discern the legislative intent, and this standard is no different in Missouri.<sup>90</sup> The best evidence of intent is found in the plain language of the statute.<sup>91</sup> Only if the legislative intent is not determinable from the plain language do courts turn to other rules of statutory construction.<sup>92</sup> In Missouri, courts interpret a statute in a manner that advances its purpose and avoids an interpretation that renders the statute ineffective.<sup>93</sup> If the language of the statute is clear and unambiguous based on its plain and ordinary meaning, the court is bound to follow that meaning.<sup>94</sup> If statutory canons support two outcomes based on the language, courts should turn to the legislative history and circumstances to help determine legislative intent.<sup>95</sup> Finally, and most relevantly, the word "shall" in a statute generally creates a mandatory responsibility.<sup>96</sup> These statutory interpretation considerations are highly relevant to the interpretative issues involved in *State v. Johnson*.

## IV. INSTANT DECISION

The question before the Missouri Supreme Court in *State v. Johnson* was whether to sustain Johnson's or the special prosecutor's motions for a stay of execution based on their appeals from the denial of the special prosecutor's section 547.031 motion.<sup>97</sup> The court explained that motions for a stay of execution are considered under the standard for injunctive relief, which is a four part balancing test: "(1) the movant's probability of success on the merits; (2) the threat of irreparable harm absent a stay; (3) the balance between harm to the movant absent the stay and the injury inflicted on other interested parties if the stay is granted; and (4) the public

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<https://www.kmov.com/2023/06/01/missouri-prisoners-innocence-case-puts-new-circuit-attorney-against-attorney-general/> [<https://perma.cc/6CK5-75YS>].

<sup>90</sup> *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. 2014) (en banc).

<sup>91</sup> *Id.*

<sup>92</sup> *BASF Corp. v. Dir. of Revenue*, 392 S.W.3d 438, 444 (Mo. 2012) (en banc).

<sup>93</sup> Matthew Davis, Note, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1129 (2016).

<sup>94</sup> *Id.*

<sup>95</sup> *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. 2014) (en banc) ("Insight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of the enactment.") (quoting *Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. 2003) (en banc)).

<sup>96</sup> *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 76 (Mo. 2009) (en banc).

<sup>97</sup> *State v. Johnson*, 654 S.W.3d 883, 891 (Mo. 2022) (en banc).

interest.”<sup>98</sup> The court relied solely on the first factor in overruling the motion, and it did not consider the other factors.<sup>99</sup> The court determined that neither Johnson nor the special prosecutor could satisfy the standard, because they did not have a probability of success on the merits of the underlying appeal from the section 547.031 motion.<sup>100</sup> The court reasoned that Johnson had no substantive claims for relief pending, and he could not rely on the special prosecutor’s chance of success on the merits because the special prosecutor would not have a chance of success on the merits himself.<sup>101</sup> The dissent disagreed, arguing that Johnson and the special prosecutor could satisfy the four-prong balancing test to justify a stay of execution.<sup>102</sup>

### *A. Majority Opinion*

Johnson argued that he would prevail on his appeal from the denial of the special prosecutor’s motion to vacate and that the special prosecutor would prevail on his claims on remand to the court.<sup>103</sup> The Missouri Supreme Court overruled Johnson’s motion, because he had no claims left in any court and would fail in relying on the special prosecutor’s motion, given that the special prosecutor’s motion also had no likelihood of success on the merits.<sup>104</sup> The court explained that if Johnson filed a writ of petition for habeas corpus or raised similar claims to the special prosecutor in any other action for relief, Johnson would fail.<sup>105</sup> The court reasoned that Johnson already raised the claims brought by the special prosecutor, and the court already denied those claims on several occasions since Johnson’s conviction.<sup>106</sup> Thus, Johnson’s motion for a stay of execution failed prong one of the standard for a stay of execution.<sup>107</sup>

The court also concluded that, even if the special prosecutor received a hearing and the court issued the findings of fact and conclusions of law that section 547.031 mandates, the special prosecutor’s motion would fall

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<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 891–92.

<sup>101</sup> *Id.* at 891.

<sup>102</sup> *Id.* at 895 (Breckenridge, J., dissenting).

<sup>103</sup> *Id.* at 891 (majority opinion). Johnson made this argument because he had no claims to succeed on since he had no more avenues for substantive relief from either state or federal courts. *Id.*

<sup>104</sup> *Id.* at 895.

<sup>105</sup> *Id.* at 891.

<sup>106</sup> *Id.* at 892.

<sup>107</sup> *Id.*

short of clear and convincing evidence of constitutional error as the statute requires.<sup>108</sup> In the special prosecutor's original section 547.031 motion, he argued that there were two constitutional errors with Johnson's original conviction.<sup>109</sup> First, the then-prosecuting attorney McCulloch violated equal protection rights by seeking the death penalty disproportionately against African American defendants.<sup>110</sup> Second, newly discovered material from the prosecutor's office supported Johnson's *Batson* claim.<sup>111</sup> In its rejection of the equal protection claim, the court explained that attacks on capital charging decisions demanded a high bar, and there must be "exceptionally clear proof" that the prosecutor abused its discretion in the case at hand.<sup>112</sup> According to the court, the special prosecutor's motion lacked evidence to make this showing.<sup>113</sup> Further, the court rejected the special prosecutor's *Batson* argument because it had already rejected that claim when deciding Johnson's earlier post-conviction relief appeals.<sup>114</sup> The court also commented that the special prosecutor did not change that argument in a material way.<sup>115</sup> Therefore, the court argued the special prosecutor's motion did not improve the chances of this argument succeeding and, thus, also failed the first requirement for a stay of execution.<sup>116</sup>

The court explained that the motions by Johnson and the special prosecutor involved questions of first impression.<sup>117</sup> For Johnson's motion, the question involved Johnson's ability to make arguments on the special prosecutor's motion since Johnson had already exhausted all avenues of relief.<sup>118</sup> For the special prosecutor's motion, the question entailed three considerations: (1) the first time a death sentence triggered the 547.031 procedure; (2) the first time a "special prosecutor" triggered the 547.031 procedure; and (3) even if section 547.031 gives a prosecutor the ability to appeal a denied motion under 547.031, the statute does not have language that implies that a prosecutor can seek a stay of execution when an execution date was set before the section 547.031 motion was

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<sup>108</sup> *Id.* at 892–93.

<sup>109</sup> *Id.* at 895.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 893.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 895.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 891–92.

<sup>118</sup> *Id.* at 891.



filed.<sup>119</sup> However, the court set aside the issues of first impression and made its ruling based solely on the special prosecutor's motion falling short of the requirements of section 547.031 and, as a result, the standard for a stay of execution.<sup>120</sup>

### *B. Dissent*

Judge Breckenridge dissented with Judge Draper joining, arguing that the motions for a stay represented the only way to grant the special prosecutor and Johnson the compulsory process section 547.031 requires.<sup>121</sup> The dissent pointed out that, with respect to the likelihood of success on the merits, a party need only show "fair ground for litigation," not a fifty-one percent chance of success.<sup>122</sup> The dissent explained that, in assessing the likelihood of success prong, the court must consider the fact that it is the prosecutor making a claim on behalf of a defendant under section 547.031.<sup>123</sup> The dissent emphasized that a prosecutor bringing a claim on behalf of a defendant is significant by itself, and adds considerable weight to the inmate's position even if the defendant brought the claim previously.<sup>124</sup> Further, the dissent noted that section 547.031 requires a hearing in which the court hears both previously presented evidence and new evidence that may prove innocence or constitutional error.<sup>125</sup>

In consideration of both old and new evidence, the dissent concluded that Johnson satisfied the four-prong analysis for a stay of execution.<sup>126</sup>

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<sup>119</sup> *Id.* at 892.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 895 (Breckenridge, J., dissenting).

<sup>122</sup> *Id.* at 898.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 902. The dissent explained that the other factors weighed in favor of a stay: (2) the threat of irreparable harm is obvious because Johnson will be executed while the lawfulness of his conviction has not been determined under 547.031; (3) in balancing between harm to movant absent the stay and the injury inflicted on other interested parties, this weighs towards Johnson because his life is at stake, whereas the costs to the state are not as imperative; (4) and the public has a high interest in minimizing constitutional errors at trial as embodied in section 547.031. *Id.* As for the prongs for the standard for a stay of execution that the majority did not reach, Judge Breckenridge argued that (1) the threat of irreparable harm is obvious because if the state deprived the process required in section 547.031, Johnson will be executed and deprived of his rights under the statute; (2) the balance weighs towards Johnson

The first prong, the special prosecutor's likelihood of success on the merits, is the most relevant analysis because the majority started and ended its discussion on this prong. The dissent reasoned that, under the special prosecutor's equal protection argument, the special prosecutor presented evidence that the court did not previously consider in Johnson's appeals process.<sup>127</sup> According to the dissent, this reasoning countered the majority's conclusion that the special prosecutor's motion would fail based on Johnson's past claims.<sup>128</sup> Therefore, the dissent believed the special prosecutor had shown a possibility to succeed on the merits.<sup>129</sup> As for the special prosecutor's *Batson* challenge, the dissent emphasized new considerations brought by the special prosecutor that had not been raised previously.<sup>130</sup> The dissent was again convinced by both the new and old evidence presented by the special prosecutor and believed that the special prosecutor also had a likelihood of success on the merits of this argument.<sup>131</sup>

Additionally, the dissent determined that a stay would be the only way to grant the special prosecutor and Johnson the full force of rights guaranteed by section 547.031.<sup>132</sup> The dissent emphasized that the mandatory, unambiguous language of the statute required a hearing, and argued that the lower court failed to meet this requirement.<sup>133</sup> Further, the dissent demonstrated that the statute does not mention that a hearing "shall" be ordered only if the prosecutor or circuit attorney shows a likelihood of success on the merits.<sup>134</sup> Rather, the dissent explained that the statute's language outright mandates certain rights: a hearing, notice given to the attorney general, and an issuing of findings of fact and conclusions of law.<sup>135</sup> Thus, under the dissent's view, giving section 547.031 its full legislative purpose would require a stay.<sup>136</sup>

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because the harm to him is irrevocable, and while the harm to the state may be significant, it still does not outweigh Johnson's harm; and finally (3) the public interest in vacating convictions that violate a defendant's constitutional rights is strong. *Id.*

<sup>127</sup> *Id.* at 899.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 902–03.

<sup>130</sup> *Id.* at 902.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 903.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Lastly, the dissent discussed section 547.031 and the statute's relationship with a defendant's post-conviction relief.<sup>137</sup> Judge Breckenridge claimed that the language of Rule 30.30(a)-(c), which discusses setting and staying an execution, does not mention resolving a section 547.031 motion before setting an execution date, since the legislature enacted section 547.031 after Rule 30.30.<sup>138</sup> This fact was important to the dissent because it determined Rule 30.30 should not be read as excluding section 547.031 motions.<sup>139</sup> According to the dissent, since a prosecutor is the party to bring the motion, the court could not reasonably determine when a section 547.031 motion might be filed or even conclude.<sup>140</sup> Finally, per the dissent, a stay is the only way the legislative intent of section 547.031 would be fulfilled.<sup>141</sup>

### V. COMMENT

The majority opinion in *State v. Johnson* undermines an inmate's right to a hearing as required under section 547.031. The language of the statute unambiguously mandates a hearing when a prosecutor files a section 547.031 motion, leaving no wiggle room for courts to deny such a hearing. The Missouri Supreme Court's opinion denied Johnson the procedural rights guaranteed by section 547.031.

#### *A. The Missouri Supreme Court's Decision Undermines the Legislative Intent of Section 547.031 of the Missouri Revised Statutes*

The Missouri Supreme Court's decision frustrates the legislative intent behind section 547.031. The State of Missouri executed Johnson without granting him the full protection of the rights that the legislature contemplated when enacting section 547.031. The legislative intent behind section 547.031 was to provide a mechanism to help free those incarcerated based on actual innocence or constitutional error.<sup>142</sup> To avoid violating an inmate's due process rights, courts must ensure that they grant an inmate his full statutory rights granted by the legislature.<sup>143</sup> However, the court failed to do that for Johnson. In denying the stay and ordering a

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See MO. REV. STAT. § 547.031 (2021).

<sup>143</sup> *Johnson v. Missouri*, 143 S. Ct. 417, 418 (2022) (Jackson, J., dissenting).

hearing, the Missouri Supreme Court interpreted and applied section 547.031 in a manner that denied Johnson his statutorily created rights.

The Missouri Supreme Court's decision puts an arbitrary time limit on a prosecutor's ability to file a section 547.031 motion, hinging the success of the motion on whether an execution date is set. This time requirement is one that the legislature did not delineate or consider when enacting the statute. This "time limit" may lead to problematic outcomes in the future. For example, say a defendant receives a death sentence, and one week before the inmate's execution date, the real killer comes forward and admits to the crime. If it is undeniable that the confessor is the killer, but the execution date is already set, it is still too late for a section 547.031 hearing under the court's reasoning in *Johnson*.<sup>144</sup> Instead, the inmate may avoid execution only if he can satisfy the burden required for injunctive relief. Meeting that burden is a difficult task, though, especially when the court denies the hearing designed to test the veracity of the new evidence that may help satisfy the inmate's burden. Without the hearing that the statute requires, the court is denying an inmate a statutory right. Consequently, this interpretation forces the state to execute an innocent person.

The Missouri Supreme Court has judicially created a time limit through its strict reliance on a set execution date in defiance of the plain reading of the statute and in deviation from the legislative intent.<sup>145</sup> This denies the rights of future death row inmates. If legislators intended to prevent section 547.031 motions once an execution date was set, they would have included language to that effect in the statute. Instead, death row inmates must hope that a prosecutor stumbles upon mercy before his execution date is set; otherwise, section 547.031 becomes useless. The legislative intent behind the statute suggests that section 547.031 was meant to help defendants *at any time*, rather than creating a seemingly arbitrary barrier to relief.

In *State v. Johnson*, the Missouri Supreme Court claimed that the special prosecutor and Johnson both failed to provide clear and convincing evidence to support a sufficient likelihood of success on the merits of their claims.<sup>146</sup> However, the court denied them the very hearing that would have allowed them to present evidence to satisfy that hurdle.<sup>147</sup> Lower courts may now feel empowered by the Missouri Supreme Court's decision to forgo section 547.031's mandated hearings when they believe

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<sup>144</sup> See *Johnson*, 654 S.W.3d at 893.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Johnson*, 143 S. Ct. at 418 (Jackson, J., dissenting).

a hearing is unnecessary because there is already enough evidence in the case. Thus, instead of fulfilling the legislative intent of helping those wrongfully convicted based on innocence or constitutional error, the Missouri Supreme Court limited the circumstances in which defendants—whose death sentences are based on major flaws—can seek justice.

*B. Righting the Wrong: Giving Section 547.031 its Full Effect*

The role of statutory interpretation in Missouri is to give effect to the legislative intent as reflected in the plain language of the statute.<sup>148</sup> Nothing in the language of section 547.031 is ambiguous—it is clear what courts must do.<sup>149</sup> Although Missouri courts do not consider outside circumstances unless multiple canons of construction apply,<sup>150</sup> one would be hard-pressed to find a judge who is unaware of the growing problem of wrongful convictions. Section 547.031 clearly addresses the problem of wrongful convictions, and a court's requirement of a hearing—thus adhering to the mandatory language of the statute—is the only way to advance the legislative intent. The fact that the two wrongfully convicted men who inspired the statute successfully implemented its effects to finally gain their long-deserved freedom after running out of appeals only enforces the idea behind the legislative intent. Section 547.031 is ultimately *the* mechanism by which a wrongfully convicted individual can gain his or her freedom after having exhausted all previous appeals.

Simply reading the plain language of the statute results in the same conclusion as considering its legislative history. The statute says that when a prosecutor files a motion under the statute, “the court *shall* order a hearing and *shall* issue findings of fact and conclusions of law.”<sup>151</sup> Thus, when a prosecutor files a 547.031 motion, the statute imposes a mandatory duty to hold a hearing and issue findings.<sup>152</sup> As the dissent compellingly argued, the statute does not require a hearing only if a defendant can successfully demonstrate that the four-prong standard for a stay of execution required the hearing; rather, the court must automatically grant that hearing.<sup>153</sup>

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<sup>148</sup> *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. 2014) (en banc).

<sup>149</sup> *See* MO. REV. STAT. § 547.031 (2021).

<sup>150</sup> *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. 2014) (en banc).

<sup>151</sup> *See* MO. REV. STAT. § 547.031 (2021).

<sup>152</sup> *Id.*

<sup>153</sup> *State v. Johnson*, 654 S.W.3d 883, 903 (Mo. 2022) (en banc) (Breckenridge, J., dissenting).

Further, with respect to the questions of first impression that the court presented and set aside, a defendant should not be precluded from success on his or her section 547.031 motion based on those questions. The relevant questions of first impression, as presented by Johnson and the special prosecutor's motions, entailed: (1) the first time a death sentence triggered the section 547.031 procedure; (2) the first time a "special prosecutor" triggered the section 547.031 procedure; and (3) even if section 547.031 gives a prosecutor the ability to appeal a denied motion under 547.031, the statute does not have language that implies that a prosecutor can seek a stay of execution when an execution date was set before the section 547.031 motion was filed.<sup>154</sup> The statute in no way prevents someone with a death sentence from receiving relief. Although the statute is not specifically directed at death sentences or capital cases, the consideration of wrongful convictions has always been prevalent in the death penalty context, as those cases have the most at stake—a human life.<sup>155</sup> It would make sense, and further the legislative intent, to allow a death row inmate to be able to vacate his or her sentence based on section 547.031.

A few of the other issues of first impression are also easily disposed of by looking at the language of the statute. Once again, nothing in the statute prohibits a special prosecutor from seeking the motion for a defendant.<sup>156</sup> It is sensible to allow a special prosecutor to seek this motion if the prosecutor's office cannot bring it because of some ethical duty preventing them from doing so. Without allowing this alternative, this statute becomes useless anytime there is an ethical conflict. Therefore, providing a plausible solution to an ethical problem only makes sense and should not bar a defendant's relief under section 547.031, especially when it is not a self-created problem.

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<sup>154</sup> *Id.* at 892 (majority opinion). The other question of first impression the court brought up but did not address was Johnson's ability to make arguments on the special prosecutor's motion since Johnson already exhausted all avenues of relief. *Id.* at 891. However, this question can likely be easily dismissed since section 547.031 makes no mention of a defendant being able to make arguments on the prosecutor's motion, therefore it is probable that the statute does not permit a defendant to this, even if a defendant still had other avenues of relief. MO. REV. STAT. § 547.031 (2021).

<sup>155</sup> Since 1973, almost 200 people sentenced to death have been exonerated. *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> [<https://perma.cc/7L49-ZCBM>] (last visited Oct. 16, 2023). "Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it." *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring).

<sup>156</sup> MO. REV. STAT. § 547.031 (2021).

Turning to the last question of first impression, the dissent's argument is most compelling. It is practically impossible for a defendant to know whether or when a prosecutor is going to seek a section 547.031 motion on his or her behalf. Further, the statute does not prescribe a particular point in the process for which a prosecutor must seek the motion;<sup>157</sup> therefore, a prosecutor may bring a section 547.031 motion at any point. This would be the only way for the statute to be fully effectuated. It is unfair to punish an inmate for the negligent timing and investigation of a prosecutor's office, which is exactly what happened in Johnson's case. A death-sentenced inmate has no control over when a prosecutor makes these determinations; consequently, a defendant's rights under section 547.031 should persist up until the very last second before the execution.

Further, as the dissent explained about the rule for setting an execution date, it cannot be read to preclude a hearing or relief based on a section 547.031 motion, because the legislature enacted section 547.031 later than Rule 30.30.<sup>158</sup> Accordingly, a prosecuting attorney can seek a stay in execution where the execution warrant is issued even before the prosecuting attorney files a motion to vacate under section 547.031. The statute does not explicitly nor implicitly include this prohibition.<sup>159</sup> In fact, it is necessary to allow a prosecuting attorney to do so to ensure that the statute fulfills its legislative intent relating to wrongful convictions and death sentences.

In addition, the primary issue with precluding a prosecutor from raising arguments previously raised by defendants is that it effectively nullifies the statute. Prosecutors rarely find an unargued constitutional or innocence claim in a case. If a prosecutor cannot argue and expound upon a previous argument, then the statute serves no purpose. Even if the defendant already brought certain claims in earlier proceedings, section 547.031 permits the prosecutor to assert *any and all* claims to show clear and convincing evidence that the conviction consisted of a constitutional error that undermines the confidence in the judgment. There is nothing in

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<sup>157</sup> While there is not a "prescribed" time for a prosecutor to pursue the motion, the best time for a prosecutor to do so would be after a defendant has exhausted all his appeals. That would allow a prosecutor to build on all arguments and evidence that a defendant has previously brought, and also ensure that any argument a prosecutor brings under the section 547.031 motion that fails does not potentially hinder a defendant's similar future argument. *Id.*

<sup>158</sup> *State v. Johnson*, 654 S.W.3d 883, 903 (Mo. 2022) (en banc) (Breckenridge, J., dissenting).

<sup>159</sup> MO. REV. STAT. § 547.031 (2021).

the statute that prohibits or bars these types of repeated claims.<sup>160</sup> Therefore, the plain language of the statute is further evidence that the legislature did not intend to bar *any* claims in these motions, even ones previously asserted by the defendant.

Both *Batson* violations and selective prosecution violations of the type that Johnson argued are clear constitutional errors that would undermine confidence in a judgment. Thus, even though there may be a high bar for success on these claims,<sup>161</sup> the statutory language permits a prosecutor to make these arguments regardless of a court's prior ruling, even if the United States Supreme Court previously denied those arguments.<sup>162</sup> To give full effect to this statute, prosecutors may present new evidence to bolster a constitutional argument that a defendant may have already argued. This evidence may come from newly discovered information that was not available at any of the defendant's post-conviction appeals. In addition, it is compelling that these arguments are coming from prosecutors, as prosecutors have an ethical obligation to seek justice even if that means admitting a horrible mistake.<sup>163</sup> In sum, the Missouri Supreme Court needs to give inmates the full range of procedural rights guaranteed by section 547.031. This would be the only way to fully effectuate the legislative intent, which seeks to ensure that substantive arguments may be heard beyond the end of a defendant's post-conviction and appeals process.

## VI. CONCLUSION

Section 547.031 motions are not frivolous motions brought by defendants to prevent or delay their execution in the final minutes. Instead, prosecutors are the party bringing these motions to seek justice for wrongful convictions. It is necessary prosecutors weigh the decision to bring a section 547.031 motion carefully, as the prosecutor must overcome a tough hurdle of clear and convincing evidence to succeed on his or her claims.<sup>164</sup> Further, it is not as if those whose convictions are vacated only for constitutional error will be able to walk free given that nothing in the statute prevents prosecutors from re-filing the charges against the defendant. Instead, the statute simply ensures that an incarcerated defendant does not serve his or her time based on a trial with

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<sup>160</sup> *See id.*

<sup>161</sup> *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *see generally* *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>162</sup> *See* MO. REV. STAT. § 547.031 (2021).

<sup>163</sup> *Johnson*, 654 S.W.3d at 898 (Breckenridge, J., dissenting).

<sup>164</sup> MO. REV. STAT. § 547.031 (2021).



a constitutional flaw or a credible claim of innocence, either of which will inevitably undermine society's confidence in the judgment. The state will not allow these motions to go unopposed—the Missouri Attorney General's office has opposed relief in every Missouri exoneration, at least from 2000-2020.<sup>165</sup> Thus, for the wrongfully convicted, the circumstances of stalwart state opposition and complexity in the legal process make for an overbearing obstacle, whether that conviction is based on actual innocence or constitutional error. The Missouri Supreme Court's decision in *State v. Johnson* only hinders the mechanism intended to aid these defendants.

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<sup>165</sup> Emily Hoerner, *Missouri Attorney General's Office Pushes to Keep Innocent People in Prison*, INJUSTICE WATCH (Sept. 11, 2020), <https://www.injusticewatch.org/news/2020/missouri-attorney-general-fights-exonerations/> [https://perma.cc/TXB3-JTDP].