

421 F.3d 1152 (2005)

**Timothy JOHNSTON, Appellant,
v.
Donald P. ROPER, et al., Appellees.**

[No. 05-3353.](#)

United States Court of Appeals, Eighth Circuit.

September 1, 2005.

Christopher Edward McGraugh, Leritz & Plunkert, Michael J. Gorla, St. Louis, MO, for Appellant.

Timothy Johnston, Mineral Point, MO, pro se.

Denise Garrison McElvein, Attorney General's Office, St. Louis, MO, for Appellees.

Before LOKEN, Chief Judge, WOLLMAN, ARNOLD, MURPHY, BYE, RILY, MELLOY, SMITH, COLLOTON and GRUENDER, Circuit Judges.

SECOND AMENDED ORDER

PER CURIAM.

Appellees' Petition for Rehearing En Banc is granted, and the stay of execution granted by the panel is vacated.

Chief Judge Loken, Judge Bye and Judge Melloy would deny the Petition for Rehearing.

Judge Duane Benton took no part in the vote on the Petition for Rehearing En Banc.

Rehearing En Banc having been granted, and the panel's stay order having been vacated, the matter comes before the Court En Banc, including Judge Heaney and Judge Bowman, on appellant's motion for a stay of execution of a sentence of death. The motion is denied.

Chief Judge Loken, Judge Heaney, Judge Bye and Judge Melloy would grant the motion.

Judge Duane Benton took no part in the vote on the motion for a stay of execution.

The clerk is directed to append Judge Heaney's dissent to this order. The order and the dissent shall be published.

HEANEY, Circuit Judge, dissenting.

I cannot vote to send Timothy Johnston to his death tonight without first having an opportunity to review the entire district court record relating to his claim that Missouri's execution protocol subjects him to cruel and unusual punishment. I voted to stay Johnston's execution for the modest period of roughly one week to provide myself and the other judges an opportunity to review the entire record, rather than the incomplete record we have so far received.

The state opposed Johnston's motion to stay his execution and has now attempted to convince a majority of our en banc court that its interest in a swift execution is more important than allowing this court to review the entire record so as to make an informed decision about whether Johnston's Eighth Amendment claim has any merit. I reserve the right to set forth my views more fully at a later time.