No. SC98303

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,
Respondent-Appellee,

v.

LAMAR JOHNSON,
Defendant-Appellant.

On Appeal from the Circuit Court of the City of St. Louis,
The Honorable Elizabeth B. Hogan

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MISSOURI, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE INNOCENCE PROJECT, INC., THE INNOCENCE NETWORK, AND MIRACLE OF INNOCENCE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in Appellant's brief.

Interest of *Amici Curiae*

The American Civil Liberties Union of Missouri (ACLU of Missouri) is a nonprofit, nonpartisan membership organization founded to protect and advance civil liberties in Missouri. The ACLU of Missouri has more than 12,000 members in the state.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil-rights laws. In furtherance of their mission, the ACLU and its affiliates engage in litigation, by direct representation and as *amici curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. Through its Criminal Law Reform Project, the ACLU engages in nationwide litigation and advocacy to enforce and protect the rights of people accused of crimes.

The Innocence Project, Inc. (IP) is a 501(c)(3) national legal services and criminal justice reform organization based in New York. Founded in 1992, the Innocence Project pioneered the litigation model that has, to date, led to the exoneration of 365 wrongly convicted persons in the United States through post-conviction DNA testing. The IP's attorneys have served as lead or co-counsel for more than 200 exonerated individuals nationwide, including five in Missouri. The Innocence Project has also worked collaboratively with prosecutors' offices in more than a dozen states to establish Conviction Integrity Units ("CIUs")—designated units within a prosecutor's office, whose mandate is to independently review claims of actual innocence and/or due process violations, and conduct meaningful investigations into such claims. To date, the Innocence

Project has represented at least nineteen clients in six states who have been freed from prison and had their convictions overturned as a direct result of new evidence developed in collaboration with CIUs, after the elected prosecutor to whom the CIU reports consented to a post-conviction relief. A substantial number of these CIU-driven exonerations involved cases highly analogous to Appellant Johnson's, in that (1) the Innocence Project's clients had exhausted other avenues for post-conviction relief, yet the elected prosecutor did not invoke procedural bars to oppose a new trial under state law; and (2) the CIU's recommendation for relief was based in whole or in part on new, favorable evidence that had not been made available to the convicted defendant under the administration(s) of previous District Attorneys.

The Innocence Network is an affiliation of 67 organizations from all over the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, and working to redress the causes of wrongful convictions. Currently, the Innocence Network consists of 55 U.S. based and 12 non-U.S. based organizations. A current list of Innocence Network members can be found on the Innocence Network website at https://innocencenetwork.org/members.

The Miracle of Innocence (MOI) is a 501(c)(3) organization dedicated to seeking justice and comprehensive care for the innocent by helping to freeing innocent individuals who have been wrongfully incarcerated and assisting them when they return home. After MOI conducts an assessment and acceptance process, it assists innocent prisoners with referrals for legal representation, case investigation, case development, trial resources, appeals and prisoner representation. MOI was co-founded by individuals who understand

the hardship of wrongful conviction first hand. Co-founder Darryl Burton was wrongly convicted of a St. Louis, Missouri, murder in 1984. He was proven innocent and exonerated on August 29, 2008, after serving over 24 years in prison as an innocent man. Mr. Burton has since become a pastor at the largest United Methodist Church in the US. In 1994, co-founder Lamonte McIntyre, was wrongly convicted at the age of 17 in Wyandotte, Kansas for a double murder he never committed. Mr. LcIntyre was exonerated on October 13, 2017 at the age of 41 after serving 23 years as an innocent man. He since graduated from Headlines Barber Academy in October 2018 with his barber license and continues to work at Headlines where is now co-owner and a student instructor. Mr. McIntyre also attends Penn Valley Metropolitan Community College where he is pursuing a degree in Business.

All parties have consented to the filing of this brief.

Statement of Facts

Amici adopt the statement of facts as set forth in Appellant's brief.

Argument

This case presents an extraordinary situation that tests the integrity of the judicial system. As this Court and all of the parties have recognized, it is a court's duty to "not only dispense justice, but equally important, to maintain the integrity of the judicial system." *In re Carey*, 89 S.W.3d 477, 496 (Mo. banc 2002) (quoting *Contant v. Kawasaki Motors Corp.*, 826 F. Supp. 427, 429 (M.D. Fla. 1993)). Indeed, this Court has explained that "[s]ociety's confidence in the judicial system—and, in particular, the criminal justice system—depends on society's perception that the system is fair and its results are worthy of reliance. For that reason, it is essential that trials be fair." *State v. Lemasters*, 456 S.W.3d 416, 422 (Mo. banc 2015). And over 50 years ago, this Court made clear that "[i]t would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony." *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1968).

The conviction of Lamar Johnson rested on the perjured testimony of not just one witness, but at least three. This is in addition to the other police and prosecutorial misconduct described in detail on the Circuit Attorney's Motion for a New Trial. Despite overwhelming evidence of misconduct and the actual innocence of Mr. Johnson, the Circuit Court refused to entertain the Motion for a New Trial because the evidence was concealed and not discovered until long after the conviction. According to the trial court, it had no authority to hear the motion. But that decision is a misapplication of Missouri law and is out of step with out-of-state authority in cases involving similar situations. Missouri Courts have the inherent authority to review an out-of-time motion for a new trial in situations

such as this where the underlying conviction is based on perjured testimony and a manifest injustice would result, but for the review.

Without a determination on the merits of the Motion, there is a distinct possibility that Mr. Johnson will be denied any avenue to rectify his wrongful conviction or, at a minimum, that waiting for the relief could add years to the long sentence that Mr. Johnson has already wrongfully served. In addition, the procedural hurdle that the Circuit Court erected to the ability of Circuit Attorneys to carry out their duties to redress wrongful convictions would likely undermine the good work of Conviction Integrity Units. A determination on the merits of the Motion is thus important to uphold the integrity of the judicial system and to ensure that public confidence in the criminal justice system is not diminished.

While the *amici* respectfully appreciate the Circuit Court's application of Rule 29.11 in its Order, this procedural rule cannot overpower the highest obligations of all Missouri courts to ensure justice. This case exhibits exactly the type of "miscarriage of justice or manifest injustice" which Missouri courts have an inherent authority to prevent. As such, this Court should exercise that authority here and remand the case to the Circuit Court for a hearing, with the Circuit Attorney as the sole representative of the State. Alternatively, this Court should invoke its own inherent authority to prevent the perpetuation of the miscarriage of justice in Lamar Johnson's case and issue a writ of habeas corpus for his release pursuant to Rule 91.06.

I. Substantive Review of the Weighty Issues Raised in the Motion for New Trial is Required to Protect the Integrity of the Judicial System.

The Missouri Supreme Court has long adhered to the principle that "it is essential that trials be fair." *Lemasters*, 456 S.W.3d at 422. Indeed, they must also ***appear*** to be fair. *See id*. at 422–23. Procedures that "appear[] to be unfair can jeopardize society's confidence in the judicial system as a whole" and, in particular, in the criminal justice system. *Id*. Consequently, it is incumbent on the Courts to ensure that the criminal justice system promotes a public perception of legitimacy and impartiality. *See, e.g., Polish Roman Catholic St. Stanislaus Par. v. Hettenbach*, 303 S.W.3d 591, 598 (Mo. App. E.D. 2010).

This is particularly true in the current cultural climate in which questions about the justness and fairness of the criminal justice system are being raised all across the country, as well as here in Missouri. *See, e.g.*, Missouri Supreme Court Order dated September 20, 2016, regarding Rule 37.04 Supervision of Courts Hearing Ordinance Violations and Minimum Operating Standards for Missouri Courts: Municipal Divisions (revising standards for municipal courts after substantial issues were raised regarding the operation of those courts). In a recent case that implicated issues of fairness in the criminal justice system, this Court reaffirmed that the interplay between local police agencies and the local prosecuting attorney is an issue of great public importance. *See State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 395 n.7 (Mo. banc 2018). The failure of the Circuit Court to consider the Motion for New Trial implicates these important issues—as well as, of course, the life of Lamar Johnson.

A. Missouri Law Permits the Circuit Court to Consider a Motion for New Trial in Extraordinary Circumstances Such as These.

The Circuit Court determined that it lacked the authority to entertain the Circuit Attorney's Motion for a New Trial (which Mr. Johnson joined). But the Circuit Court has the inherent authority to entertain such motions where manifest justice would result if the motion were not heard, which is true in this case, where the evidence of Mr. Johnson's actual innocence and a conviction obtained through perjured testimony is overwhelming.

Courts have "inherent powers" to do what is necessary to protect the judiciary, independent of legislative grant. *State ex rel. Cain v. Mitchell*, 543 S.W.2d 785, 786 (Mo. banc 1976). Trial courts have a broad array of inherent powers and Missouri courts have explained that "[s]trict necessity is not a prerequisite to invoke these powers;" rather, a court can invoke inherent powers on the grounds of "[c]onvenience and suitability." *Mc Pherson v. U.S. Physicians Mut. Risk Retention Grp.*, 99 S.W.3d 462, 476 (Mo. App. W.D. 2003). The fact that the Circuit Attorney's Office itself has determined that it has the ethical duty to make such a motion makes the Circuit Court's consideration of the Motion on the merits even more paramount. Consequently, this Court should remand the case to the Circuit Court for a full hearing on the Motion for New Trial.

1. *Time Limits in the Criminal Rules are Not Jurisdictional.*

First, it is important to note that the 25-day time limit for a Court to hear a Motion for New Trial under Rule 29.11(b) is not jurisdictional, *see ,e.g.*, *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. S.D. 2015) ("Jurisdiction is not the problem."). Missouri recognizes only two types of jurisdiction: subject matter and personal. *See J.C.W. ex rel.*

Webb v. Wyciskalla, 275 S.W.3d 249, 252 (Mo. banc 2009). "Personal jurisdiction is, for the most part, a matter of federal constitutional law." *Id.* Subject matter jurisdiction in Missouri is governed solely by the State Constitution: "Article V, § 14 sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that '[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal.'" *Id.* at 253 (quoting Missouri Constitution, Article V, § 14). Treating statutory or rules-based restrictions as jurisdictional "erodes the constitutional boundary established by Article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the Constitution provides." *Id.* at 254. Consequently, a Circuit Court has subject matter jurisdiction in all criminal matters pursuant to the Missouri Constitution and has personal jurisdiction where the defendant appears before it and is represented by counsel, as was the case here. *See State v. Jacobs*, 421 S.W.3d 507, 512 (Mo. App. S.D. 2013).

The fact that the time limits for filing a motion for new trial are not jurisdictional is important; it means that the Circuit Court has the constitutional ability to sit in judgment with regard to the Motion for New Trial. Statutes and Rules may, of course, limit a Court's authority to provide certain remedies. *See Wyciskalla*, 275 S.W.3d at 255. But any statutory limits on remedies cannot upend the right in the Missouri Constitution to have a remedy for a legal wrong, the constitutional separation of powers principles, and the United States Constitution's due process rights. *See* Missouri Constitution, Article 1, § 14; *Wyciskalla*, 275 S.W.3d at 255. Circuit Courts in this state have long possessed the authority—and, more importantly, the responsibility—to avoid a "perversion of justice."

State v. Terry, 304 S.W.3d 105, 110 (Mo. banc 2010). The Circuit Court should have exercised that authority here.

2. *An Out-of-time Motion for New Trial is Appropriate When Perjury Underlies a Conviction.*

The State's use of perjured testimony to obtain a conviction permits deviation from statutory and rules-based limitations on authority. This Court has recognized that "[t]he starting point in any analysis of post-conviction relief based on perjury is the general rule that a conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated." *State v. Mims*, 674 S.W.2d 536, 538 (Mo. banc 1984). A Missouri appellate court also recently reaffirmed that, while it is normally not appropriate to use Missouri's post-conviction relief rules (*i.e.*, Rule 29.15) to examine newly discovered evidence, an exception is made "when it is later discovered that 'the state knowingly used perjured testimony' to obtain a conviction." *Williams v. State*, 497 S.W.3d 395, 398 (Mo. App. E.D. 2016) (quoting *Ferguson v. State*, 325 S.W.3d 400, 406 (Mo. App. W.D. 2010)); *see also State v. Cummings*, 838 S.W.2d 4, 7 (Mo. App. W.D. 1992) (confirming that there is an exception for the use of perjured testimony).

Indeed, this Court addressed a request to consider an out-of-time motion for new trial in an opinion issued over fifty years ago. In that case, the Court stated:

> It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony, and the court "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned," *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1949), would be under a duty to grant a new trial. That is to say, "(w)here it appears from competent and

> satisfactory evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."

State v. Harris, 428 S.W.2d at 500 (quoting 24 C.J.S. Criminal Law § 1454, pp. 188, 189). Similarly, over thirty years ago, a Missouri appellate court explained that "a trial judge is not powerless in all instances where a motion for new trial is not timely. The trial court might, where it is convinced the decision was based on perjured testimony, order a new trial on its own initiative." *State v. Davis*, 698 S.W.2d 600, 603 n.1 (Mo. App. E.D. 1985). These decisions flow directly from these courts' recognition of their inherent authority to correct actual or perceived miscarriages of justice.

3. *An Out-of-time Motion for New Trial is Also Appropriate When There are Extraordinary Circumstances as Appear in This Case.*

More recently, this Court confirmed that "an appellate court has the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence." *Terry*, 304 S.W.3d at 109; *see also State v. Starnes*, 318 S.W.3d 208, 215–16 (Mo. App. W.D. 2010) ("[W]e note that the failure to timely file a motion for new trial does not preclude this Court's review of any alleged error."). This decision cements a long line of lower appellate court decisions remanding for the Circuit Court to consider an out-of-time motion for a new trial where it was necessary to prevent manifest injustice. *See, e.g.*, *State v. Cook*, 307 S.W.3d 189, 190-91 (Mo. App. E.D. 2010) (remanding to allow defendant to file motion for new trial after untimely Rule 29.11 motion was filed based on newly discovered evidence of a victim's recantation that would have exonerated the defendant); *State v. Williams*, 673 S.W.2d 847,

848 (Mo. App. E.D. 1984) (where newly discovered evidence would have exonerated the defendant and attorney general agreed that jurisdiction should be returned to the trial court for a hearing on whether a new trial is warranted, Court of Appeals found that, "Under the unique circumstances of this case, we are willing to overlook the time constraints of Rule 29.11 as they relate to the newly discovered evidence. … This ruling may be subject to future limitation, but we see no reason for limitation where the State joins in the request for release."); *State v. Mooney*, 670 S.W.2d 510, 515 (Mo. App. E.D. 1984) (remanding matter to provide defendant opportunity to file motion for new trial based on newly discovered evidence that would have exonerated him, finding that, "in a case of this kind appellant must have some forum in the judicial system to present this issue"); *see also State v. Hill*, 884 S.W.2d 69, 76 (Mo. App. S.D. 1994) (recognizing legal authority for granting relief under Rule 29.11(b) by remanding to allow the defendant to file a motion for new trial, even when motion is untimely, where newly discovered evidence would have exonerated the defendant); *State v. Dorsey*, 156 S.W.3d 791, 797–98 (Mo. App. W.D. 2005) (same). As a Missouri appellate court aptly stated in *Mooney*:

> If it is "patently unjust" for a trial judge to refuse to grant a new trial in a case where the finding of guilt was based upon false testimony, is it any less unjust to deprive an appellant of an opportunity to present that issue to the trial court because he did not learn of the fact that the victim's testimony was false until after the time for filing a motion for new trial has expired?

Mooney, 670 S.W.2d at 515.[1]

[1] *Amici* acknowledge that there is authority from a Missouri appellate court for the proposition that remand from an appellate court for a new trial is only appropriate where the newly discovered evidence is presented while the case is pending on direct appeal. *See Clemmons v. State*, 795 S.W.2d 414, 418 (Mo. App. E.D. 1990). However, such authority

In order to obtain a new trial on the basis of newly discovered evidence, the movant must show that (1) the new evidence was discovered after the end of the trial; (2) movant's lack of prior knowledge is not owing to any want of due diligence on his part; (3) the evidence is so material that it is likely to produce a difference result at a new trial; and (4) the evidence is neither cumulative only nor merely of an impeaching nature. *See Terry*, 304 S.W.3d at 109. All of those elements are met in this case. The evidence of perjury by not one—but three—State witnesses and the other evidence of police and prosecutor misconduct did not arise until after Mr. Johnson's trial and he could not have known about it due to the attempts by the State to suppress the evidence. What is more, the evidence is not merely cumulative or impeaching as it demonstrates that three State witnesses provided false testimony.

Finally, there can be no doubt that the evidence would likely have produced a different result at trial. Mr. Elking was the sole witness to place Mr. Johnson at the scene of the crime and Mr. Elking has now admitted—in both sworn testimony and a personal letter to a pastor—that his testimony was false and that police pressured him into making the identification. This alone would be sufficient to obtain a new trial (*see, e.g.*, *Terry*, 304 S.W.3d at 110), and certainly is sufficient to require a hearing on the merits. In combination with the other perjured testimony and police and prosecutor misconduct, there

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provides no rational basis to distinguish between cases where the newly discovered evidence is uncovered while the case is still pending on direct appeal and cases where it takes more time to uncover the evidence. In addition, any distinction between such cases would appear to rest on the notion of jurisdiction that was rejected by this Court in *Wyciskalla*.

is simply no possibility that a new trial would result in a conviction. *See, e.g., Terry*, 304 S.W.3d at 111 ("[T]he newly discovered forensic evidence, if verified, appears to be central to the case and shows that Terry was convicted with the aid of false testimony from the alleged victim."). The evidence is overwhelming that two other individuals committed the crime for which Mr. Johnson was convicted, and that Mr. Johnson is innocent. This Court should not permit the manifest injustice of Mr. Johnson's continued incarceration to stand.[2]

4. *The Circuit Attorney's Determination that the Duties of Her Office Require Her to Remedy the Unlawful Conviction Reinforces the Court's Duty to Address the Manifest Injustice.*

The Circuit Attorney plays a central role in Missouri's criminal justice system. Prosecutors such as the Circuit Attorney are "not [] mere lackey[s] of the [C]ourt." *Boyer*, 561 S.W.3d at 398. They are duly elected officials with ethical and legal obligations that they are required to follow. *See, e.g.*, RSMo. §§ 56.450, 56.550; Model Rules of Prof'l Conduct r. 3.8(h). One of those obligations includes taking appropriate action when the prosecutor obtains evidence that casts doubt on the conviction—even after the conviction is final. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The duty of the prosecutor to do justice—not just seek convictions—supports the Circuit Attorney's right to waive the non-jurisdictional time limits in Rule 29.11. *See Henderson*, 468 S.W.3d at 425 (time limit on motion for new trial is not jurisdictional and was waived by the State).

[2] The Circuit Court relied on *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227 (Mo. banc 2017), in deciding that it lacked authority to hear the Motion for New Trial. *Zahnd*, however, did not involve evidence of perjured testimony and other misconduct as is present in this case. Indeed, *Zahnd* was not a challenge to a conviction at all, but rather a challenge under Rule 29.12(b) to the sentence imposed based on a change or clarification of law issued after sentencing. The *Zahnd* decision is therefore inapplicable.

This Court recently reiterated that "[p]rosecutorial power . . . is an outgrowth of the peculiar emphasis the United States places on local, democratic control. The 'locally elected status' of American prosecuting attorneys provides them with an 'independent source of power' and is the reason they enjoy 'discretionary privilege unmatched in the world.'" *Boyer*, 561 S.W.3d at 398 (quoting David Alan Sklansky, The Nature and Function of Prosecutorial Power, 106 J. Crim. L. & Criminology 473, 491 (2016) (footnotes omitted)). Interference with a prosecutor's discretion to take all action available—including preventing an avenue by which the prosecutor can actively undertake the legal and ethical obligations of the office—"unjustifiably circumvents the voters' choice to have their interests represented by [the prosecutor]." *Id*. at 398.

The fact that the Circuit Attorney's Office concluded—after a thorough investigation—that the conviction of Mr. Johnson is unfair, unjust, and unconstitutional provides even further reason that the Courts should address this manifest injustice via their own inherent authority.[3]

[3] The Circuit Court's Order raised some concerns about the approaches taken in the Circuit Attorney's review of Mr. Johnson's case. A*mici* submit that the questions regarding the review are analytically distinct from the facts that the Circuit Attorney's investigation uncovered. In fact, the Attorney General has not challenged any of the factual underpinnings of the Motion for New Trial or argued that Mr. Johnson is not innocent. The Circuit Court's Order could be read to imply that the Circuit Attorney's approach in conducting the Conviction Integrity Unit review justifies the possibility of Mr. Johnson continuing to serve a life sentence despite a viable case of actual innocence. This, in itself, would be a manifest injustice.

II. Federal and State Decisions Demonstrate the Need for the Missouri Courts to Address the Issues Raised in the Motion for New Trial.

The Circuit Court's Order distinguished this case from related cases in other states by arguing that the Missouri General Assembly has not passed enabling statutes like those in Virginia, Arizona, Minnesota, Montana, Utah, and the District of Columbia. While this is true, this does not end the inquiry. Other jurisdictions have created and used Conviction Integrity Units without an enabling statute under which the CIU operates.[4] Further, while statutes of some jurisdictions confer explicit powers, the powers conferred are no broader than the fundamental power underlying their respective court systems, which is the same fundamental power underlying the Missouri Courts: the powers to maintain the integrity of the judicial system and to prevent manifest injustice. *Cf. Terry*, 304 S.W.3d at 110; *Williams*, 673 S.W.2d at 848. As this Court has observed, these powers are at the disposal of the courts *right now*, without any enabling statute required to perfect them. *See, e.g.*, *Terry*, 304 S.W.3d at 110.

Missouri applies similar principles of criminal justice as sister states. This Court has noted, for example, that its application of Rule 29.09 was consistent with the way similar rules are treated in other jurisdictions. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 515

[4] *See, e.g.*, Cook County State's Attorney's Conviction Integrity Unit, available at: https://www.cookcountystatesattorney.org/conviction-integrity-unit; and Wayne County Conviction Integrity Unit, available at: https://www.waynecounty.com/elected/prosecutor/conviction-integrity-unit.aspx. These CIUs were created outside of statute and the respective prosecutors' offices do not apparently operate under a specified statutory mechanism. Similarly, the CIUs of the New York City area in Brooklyn, the Bronx, Manhattan, and Suffolk Counties were created without a statutory mechanism.

n.3 (Mo. banc 2010) (citing *State v. Rasinski*, 527 N.W.2d 593 (Minn. Ct. App. 1995)). This Court has also cited to other jurisdictions when interpreting Missouri statutes or recognizing trends across the nation. *See, e.g.*, *Missouri v. McLaughlin*, 265 S.W.3d 257, 266–68 (Mo. banc 2008) (citing a cross-section of cases in other jurisdictions that had similar statutes); *Alsbach v. Bader*, 700 S.W.2d 823, 824 (Mo. banc 1985) (noting the judicial trend in other states away from acceptance of hypnosis to determine that Missouri case law should be abrogated).

Like Missouri courts, courts outside of Missouri have recognized and applied the power of inherent authority to order a new trial, even where a defendant's appeal is not direct. For example, in *State* v. *Armstrong*, 700 N.W.2d 98 (Wisc. 2005), the Wisconsin Supreme Court addressed a situation similar to this one: the trial court denied a defendant's motion for new trial based on newly discovered DNA evidence that showed actual innocence. There, as here, the state argued that the courts lacked the authority to order a new trial. But the Wisconsin Supreme Court rejected that argument, holding that "we have the inherent authority to order a new trial, even where a defendant's appeal is not direct." *Id*. at 119.

In *State v. Lewis*, a Kansas court held an evidentiary hearing on the defendant's motion for a new trial based on the contention that the primary testifying witness had recanted her testimony. *See State v. Lewis*, 77 P.3d 1288 (Kan. Ct. App. 2003). In reviewing the Kansas trial court's actions, the Court of Appeals of Kansas noted that "a conviction based on perjured testimony is a violation of due process." *Id*. At 1288 (citing *State v. Brewer*, 11 Kan. App. 2d 655, 660 (1987). Similarly, in *State v. Boppre*, 243 Neb.

908, 909 (1993), the Nebraska courts engaged in substantive review of a post-sentencing, post-appeal motion for a new trial based at least in part on allegedly perjured testimony. Although the Kansas and Nebraska courts ultimately determined that a new trial was not warranted based on the specific facts of those cases, the courts engaged with the merits of the new trial motions despite the motions being out-of-time, rather than permitting procedural mechanisms to thwart their inherent authority to address and potentially correct a major injustice.

The New Mexico Supreme Court has similarly noted that it has the inherent power to provide relief to a defendant whose fundamental rights have been violated, even though that defendant "may be precluded by the terms of a statute or rules of appellate procedure." *State v. Traeger*, 130 N.M. 618, 624 (2001). This Court should likewise employ its inherent authority in the same way, to redress the manifest injustice in Mr. Johnson's case.[5]

The federal time limits for a motion for new trial are, like the limits in Missouri, non-jurisdictional. *See Eberhart v. United States*, 546 U.S. 12, 19 (2005). And like in Missouri, the government can waive enforcement of those limits. *See id*. In such cases, the United States Supreme Court has directed the court to "proceed[] to the merits" of the motion. *Id*. The Federal courts have also the issue of a new trial motion in the face of

[5] The Illinois courts have mitigated the substantial implications to the judicial system of allowing innocent people to remain incarcerated by recognizing a claim of actual innocence as a due-process claim under the Illinois Constitution for purposes of habeas corpus. *See People v. Washington*, 171 Ill. 2d 475, 487 (Ill. 1996). Missouri has recognized a claim of actual innocence for purposes of habeas relief in the context of death penalty cases (*see State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003)), but thus far the appellate courts have refused to extend that holding to non-death penalty cases. *See In re Lincoln v. Cassady*, 517 S.W.3d 11, 22 (Mo. Ct. App. 2016)).

potential perjured testimony by government witnesses. As recognized in those cases, "a deliberate deception on the part of the prosecution by the presentation of known false evidence is not compatible with the 'rudimentary demands of justice.'" *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976) ("[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair."). Where the prosecution knew of the perjury, a defendant need only show "any reasonable likelihood that the false testimony would have affected the judgment of the jury" in order to obtain a new trial. *Antone*, 603 F.3d at 569. For purposes of showing that the prosecution knew or should have known of the perjury, the knowledge of the police and investigators who participate in and testify about the case is imputed to the prosecutor. *See, e.g., id*. This is only logical and just. A conviction obtained by perjured testimony and misconduct on the part of the police is offensive to the criminal justice system whether the prosecutor has actual knowledge of the conduct or not—though in Lamar Johnson's case, it is clear that the line prosecutors had sufficient knowledge to prevent this miscarriage of justice.

In other words, the federal standards for upholding the integrity of the judicial system would certainly weigh in favor of a new trial upon a review of the actual evidence presented in this case. There is a reasonable likelihood that without the false testimony of three primary witnesses—the sole eyewitness who recanted his identification of Mr. Johnson, the compensated jailhouse informant who lied about his previous work with police and testimony in another case, and one of the testifying detectives whose statements

about the timing of Mr. Johnson's movements are refuted by modern technology—the jury would have reached a different result.[6]

III. Substantive Review of the Motion for New Trial Is In the Public Interest.

Given the reality that Mr. Johnson may have already wrongfully served a prison sentence of twenty-five years, it is impossible to argue that an institution committed to the integrity of the judicial system would turn its eyes from the problematic questions underlying Mr. Johnson's trial. Most notably, the court's silence regarding whether a *Brady* violation occurred and whether three government witnesses committed perjury is of great concern. Even if the Circuit Court ultimately were to deny a new trial, a fulsome analysis of these issues is justified and required to maintain the integrity of the judicial system and to protect the democratic rights that underlie the Circuit Attorney's position in our criminal justice system.

A. Other Avenues of Relief May Not Be Available and Are Not Satisfactory.

The Circuit Court stated that Mr. Johnson and those similarly situated are not without avenues of relief. But whether other avenues of relief such as habeas corpus or executive clemency are indeed available is not an easy question and was not answered definitively by the Circuit Court.

[6] The Circuit Court noted that Mr. Johnson was already afforded federal habeas review. But that case did not address many of the most important issues raised in the Motion for New Trial, including the admitted perjury of the sole witness placing Mr. Johnson at the scene.

1. *Habeas Relief*

Unless this Court invokes its authority to grant habeas on the basis of these proceedings, the typical habeas process is not satisfactory. As a starting point, a federal court could find itself constrained to dismiss Mr. Johnson's claims under the Antiterrorism and Effective Death Penalty Act (AEDPA), which precludes the filing of "second or successive" federal habeas corpus petitions. *Magwood v. Patterson*, 561 U.S. 320, 332–33 (2010). Although a narrow exception to the AEDPA bar exists when a judgment is modified after a first petition and a second petition is applied, these circumstances might not apply to Mr. Johnson. As a result, should Mr. Johnson file a habeas petition in the federal courts, there is a possibility that it would be dismissed based on the application of the AEDPA without hearing the merits of his petition, despite the fact that no federal court has ever heard much of the newly discovered evidence demonstrating that Mr. Johnson's conviction was obtained through perjury.

The availability of habeas relief in Missouri is also unclear. Mr. Johnson has already sought habeas relief in a Missouri Circuit Court, the intermediate appellate court, and this Court. While those cases did not address the fulsome evidence that is now available to show Mr. Johnson's innocence (because the evidence was not discovered until after the proceedings), there is the possibility that Mr. Johnson may be statutorily barred from presenting a new habeas claim to a Missouri state court. *See* Rev. Stat. § 532.040 (2017) ("Whenever an application under this chapter for a writ of habeas corpus shall be refused, it shall not be lawful for any inferior court or officer to entertain any application for the relief sought from, and refused by, a superior court or officer.").

Even if Mr. Johnson were permitted to present his evidence to a Missouri court through a successive habeas proceeding, that relief would almost certainly not involve the Circuit Attorney's Office. Under Missouri Rules, habeas proceedings must be instituted in the county where the individual is being incarcerated—not where the individual was convicted—and the prosecuting attorney for the *habeas* county participates on behalf of the State. A habeas proceeding would thus prevent the Circuit Attorney from presenting the findings of the detailed CIU investigation as the position of the State, despite the fact that she is closest to the facts and it is her duty to control all prosecutions in her Circuit and remedy errors such as those found in this case.

Finally, habeas is a complicated legal thicket and does not present a clean mechanism to obtain relief. Mr. Johnson has been incarcerated for almost twenty-five years based on a conviction that was secured through perjured testimony and other police and prosecutor misconduct. Subjecting Mr. Johnson to another procedural labyrinth at this stage would be a waste of judicial resources at best, and an unnecessary act of judicial cruelty at worst.

Indeed, if this Court believes that habeas is an appropriate mechanism for Mr. Johnson to obtain relief from his patently unjust and unconstitutional confinement, the Court should exercise its power under Rule 91.06 to immediately order a writ of habeas corpus for Mr. Johnson's release. Rule 91.06 provides that

> Whenever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge that any person is illegally confined or restrained of liberty within the jurisdiction of such court or judge, ***it shall be the duty of the court or judge to issue a writ of habeas***

corpus for the person's relief, although no petition be presented for such writ.

Missouri Rule 91.06 (emphasis added). Courts in Missouri have properly invoked this rule to prevent the types of manifest injustice that are present in this case. *See, e.g.*, *Smith v. Kintz*, 245 S.W.3d 257, 259 (Mo. App. E.D. 2008) (invoking Rule 91.06 to grant habeas relief on petition for mandamus); *cf. State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 702 (Mo. banc 2010) (noting that after the time for relief under Rule 29.15 has passed, a prisoner may invoke Rule 91.06 to obtain relief). This Court could—and should—use its powers expressed in Rule 91.06 to provide the appropriate relief to Mr. Johnson.

2. *Executive Clemency*

The availability of executive clemency in Missouri is not a meaningful avenue of relief in this case. Any individual confined in the Division of Adult Institutions (DAI) has the right to petition the governor for executive clemency if the individual meets certain requirements, including that all judicial remedies (*i.e.*, expungement, post-conviction relief, appeals, habeas corpus, etc.) have been exhausted. *See* Missouri Department of Corrections, "*Executive Clemency*." Whether or not Mr. Johnson has exhausted all legal remedies, particularly habeas corpus, is unclear, so executive clemency may not even be available to Mr. Johnson until he unsuccessfully navigates more procedural hurdles—hurdles that *amici* have already explained are unnecessary given the courts' inherent authority to remedy the injustices here directly.

Even if Mr. Johnson has exhausted all available judicial remedies, executive clemency is rarely granted. An article for St. Louis Public Radio notes that, "[i]n the 18

months [Governor Mike Parson] has been in office, [he] has acted on just one of over 3,500 clemency cases" when he declined to put an execution on hold. *See* Julie O'Donoghue, "*Missouri Clemency Request Backlong Continues under Parson*", December 20, 2019. The article continues, "The Republican governor inherited a decades-old backlog of clemency requests. Some of the cases have been pending for several years, with multiple governors before Parson not taking action." *Id*. An entirely discretionary executive clemency process that is subject to a decades-old backlog and administered by actors without direct knowledge of the facts is not an adequate protection for Mr. Johnson's due process rights, particularly since he has already suffered decades of injustice. The plethora of Missouri and non-Missouri law upholding courts' inherent authority to prevent miscarriages of criminal justice would be rendered moot if the answer in all cases were simply to go see the Governor.

B. CIUs are in the Public Interest.

Numerous Conviction Integrity Units have been created across the country to attempt to investigate and, if issues are found, remedy past convictions. This is of great value to the criminal justice system and to the public whom that system is supposed to serve. These CIUs are invaluable in ensuring both justice and the *appearance* of justice, which is of vital importance in ensuring that Missouri citizens have faith in the court system as a whole.

Unnecessary procedural hurdles to quick and efficient consideration of the evidence uncovered by CIUs risks discouraging investment in such units. If a Circuit Attorney cannot remedy the injustice uncovered through investigations of past convictions and free

innocent individuals, it is difficult to understand why any Circuit Attorney would continue to invest in the valuable work of reviewing previous convictions to ensure that the procedures used were just and appropriate—despite constitutional and ethical obligations to do so.

* * *

Amici respectfully understand that the Circuit Court was concerned about acting within the parameters of its authority. But the Circuit Court's analysis has called its authority too far into question. Rule 29.11 is a procedural limit, but not one that can or should bar the ability to secure justice, as proven by case law cited herein supporting Missouri courts' inherent authority to do so.

The evidence of Mr. Johnson's innocence and the unconstitutional mishandling of his case are overwhelming, and the courts can and must do something about it. Every continued moment of incarceration is a manifest injustice and the reality of his conviction threatens the integrity of the judicial system. Mr. Johnson's freedom should not be determined by the timing by which he (or the Circuit Attorney) was able to uncover the wrongful acts committed by those involved in the murder investigation and prosecution. His freedom should be determined by the Missouri courts reviewing the facts—including those newly uncovered—and doing justice by Mr. Johnson, as their inherent authority allows.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 55.03(a), the undersigned hereby verifies that the foregoing have been signed by counsel. Counsel will retain such original, signed copies for a period not less than the maximum allowable time to complete the appellate process. The brief complies with the limitations in Rule 84.06(b) and contains no more than 6953 words.

By: /s/ *J. Nicci Warr*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was forwarded to all attorneys of record via the Court's electronic filing system this 10th day of February, 2020.

By: /s/ *J. Nicci Warr*