No. SC98303

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

LAMAR JOHNSON,

Appellant.

Appeal from the Circuit Court of St. Louis City, Missouri
The Honorable Elizabeth Hogan
Case No. 22941-03706A-01

INTERVENOR'S SUBSTITUTE BRIEF

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INTRODUCTION

After carefully reviewing Lamar Johnson's case, the Circuit Attorney for the City of St. Louis came to the conclusion that Mr. Johnson had been wrongfully convicted for the murder of Marcus Boyd. He is innocent of the crime for which he has spent the last twenty-five years behind bars. The Circuit Attorney reached this conclusion after her investigation revealed that Mr. Johnson's conviction was based on perjured testimony, after the State withheld material exculpatory and impeachment evidence from Mr. Johnson. On top of that, the real perpetrators had credibly confessed to the crime under oath. Therefore, the Circuit Attorney, as a "minister of justice," filed for a new trial in Mr. Johnson's case. *State v.* Banks, 215 S.W.3d 118, 119 (Mo. 2007).

But this appeal is not about Mr. Johnson's innocence. Rather, it is about whether there is anything a Circuit Attorney can do to correct the injustice of a wrongful conviction. Below, the trial court held that the Circuit Attorney had no power to remedy a wrongful conviction. This cannot be the law. It is a "perversion of justice" for a Circuit Attorney "to close [her] eyes to the existence of [ ] newly discovered evidence" that proves an incarcerated person's innocence. *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010). When a prosecutor learns of a wrongful conviction—due to misconduct by the State, no less—she must be able to right that wrong.

The Circuit Attorney's ultimate obligation is to seek justice. *See State v. Walter*, 479 S.W.3d 118, 126 (Mo. 2016). And this Court has a duty to "dispense justice." *In re Carey*, 89 S.W.3d 477, 496 (Mo. 2002). Justice requires reversal.

JURISDICTIONAL STATEMENT

On July 19, 2019, the Circuit Attorney filed the State's Motion for New Trial in the case *State v. Lamar Johnson*, No. 22941-03706a, pursuant to Rule 29.11. On August 23, the Circuit Court of the City of St. Louis dismissed the motion. On September 6, 2019, the Circuit Attorney timely appealed the circuit court's ruling to the Court of Appeals, Eastern District, pursuant to Mo. Rev. Stat. § 547.200. Lamar Johnson also appealed the trial court's order, and the two appeals were consolidated. On November 14, 2019, the Court of Appeals granted the Attorney General's motion to dismiss the appeal filed by the Circuit Attorney on behalf of the State, and re-designated the Circuit Attorney as an "Intervenor."[1] After briefing and arguments, on December 24, 2019, the Court of Appeals issued an opinion dismissing the appeal and transferring the case to this Court pursuant to Rule 83.02. This Court has jurisdiction under Mo. Const., Art. V, § 10.

[1] The Circuit Attorney filed a motion to nullify this order pursuant to Rule 83.09, requesting that this Court re-designate her as appellant. The motion is still pending as of filing.

STATEMENT OF FACTS

A. Overview

One October night in 1994, Marcus Boyd was sitting on the front porch of his home with his co-worker Greg Elking, when two masked men ran up, fatally shot Mr. Boyd, and ran away.

The State tried Lamar Johnson for Mr. Boyd's murder. At trial, the State introduced two key pieces of evidence to prove Mr. Johnson's guilt: the testimony of Mr. Elking—who claimed Mr. Johnson was one of the masked men, and the testimony of William Mock—a jailhouse informant who claimed that he overheard Mr. Johnson discussing a shooting. In its rebuttal case, the State had one other important piece of evidence—Detective Joseph Nickerson's testimony undermining Mr. Johnson's alibi. Based on this evidence, the jury found Mr. Johnson guilty of first-degree murder. He was sentenced to life in prison without the possibility of parole. Mr. Johnson's co-defendant, Phillip Campbell, pleaded guilty to voluntary manslaughter and was sentenced to seven years in prison.

Kimberly M. Gardner was elected Circuit Attorney for the City of St. Louis in 2016. The following year, she established a Conviction Integrity Unit (CIU) to review old cases with credible claims of a wrongful conviction.

In 2018, the CIU started its review of Mr. Johnson's case. The review revealed that the critical evidence against Mr. Johnson was tainted by government misconduct. The State manufactured Mr. Elking's identification of Mr. Johnson and withheld evidence about the assistance it provided Mr. Elking in exchange for his testimony. The State withheld

evidence of the fact that Mr. Mock was promised, and was in fact given, assistance in exchange for his testimony. The State did not disclose the fact that Mr. Mock had made racist statements exhibiting bias towards Mr. Johnson. And the State failed to correct Detective Nickerson's false testimony that undermined Mr. Johnson's otherwise uncontested alibi.

The CIU's review also revealed a number of serious concerns with the police's investigation of Mr. Johnson's case, including that police identified Mr. Johnson as the perpetrator before interviewing a single witness, and went to great lengths to fabricate a motive for why Mr. Johnson shot Mr. Boyd. The pervasive misconduct, that infiltrated both the investigation and prosecution of Mr. Johnson, gave the Circuit Attorney serious pause about the reliability of his conviction.

The CIU also investigated evidence of Mr. Johnson's innocence. Shortly after Mr. Johnson's trial, jail officials seized letters that Mr. Johnson's co-defendant, Phillip Campbell, had sent to Mr. Johnson. In them, Mr. Campbell lamented that Mr. Johnson was convicted of a crime in which he had no role. Mr. Campbell also signed affidavits in 1996 and 2009 stating he was responsible for Mr. Boyd's death and that Mr. Johnson was not involved. Since trial, James Howard has admitted that he was the other masked man—that he committed the crime alongside Mr. Campbell. He has signed three affidavits attesting to this fact, and the CIU interviewed Mr. Howard and found his account credible.

Further shoring up Mr. Johnson's innocence, Mr. Elking recanted his identification of Mr. Johnson as the shooter. In 2003 letters to Reverend Larry Rice and to Mr. Johnson, Mr. Elking admitted his trial testimony was false. The CIU deposed Mr. Elking in 2019,

during which Mr. Elking admitted his trial testimony was false—his identification of Mr. Johnson was manufactured by the police.

Faced with credible evidence of Mr. Johnson's innocence, and in light of the pervasive misconduct in the investigation and prosecution of this case, the Circuit Attorney did what she was obligated to do as a "minister of justice"—file a motion for a new trial. Mr. Johnson joined the motion. The trial court, after asking the Attorney General to intercede, denied the motion, holding that it did not have authority to decide the motion because it was filed past Rule 29.11's 15-day deadline. The trial court reached this conclusion despite the fact that *the State* was conceding Mr. Johnson was wrongfully convicted. Before transferring the case to this Court, the Court of Appeals held that it did not have the authority to review the trial court's decision. Thus, no court has reviewed the new trial motion on its merits. Mr. Johnson is still behind bars for a murder he did not commit.

B. The Crime

On the night of October 30, 1994, Marcus Boyd was sitting on the front porch of his duplex apartment building with his co-worker Greg Elking. TR.Vol.I/P162, 220; D107/P1. Mr. Elking was visiting because he owed Mr. Boyd money for drugs and he wanted to buy some crack. TR.Vol.I/P157; D107/P1. Leslie Williams,[2] Mr. Boyd's girlfriend, was inside in their upstairs apartment tending to their baby. TR.Vol.I/P158, 220-21; D110/P6. The

[2] Because there is more than one witness with the last name Williams, the brief refers to witnesses with the last name Williams by their first name.

porch light was broken; the only lighting on the porch residually came from the upstairs apartment. TR.Vol.I/P189-90; D109/P9-10; D107/P2; D110/P6.

As Mr. Boyd chatted with Mr. Elking, two armed men ran up from the side of the building onto the porch. TR.Vol.I/P159; D116/P2; D118/P2; D107/P2. They had on dark clothing and ski masks—all you could see was their eyes. TR.Vol.I/P159, 222; D116/P2; D118/P2; D107/P2.

The masked men opened fire on Mr. Boyd, shooting him multiple times. TR Vol.I/P164. They then briefly trained their guns on Mr. Elking before turning around and running away. *Id.* at 164-65. As soon as the masked men were out of sight, Mr. Elking took off running too, heading back to his house, which was a few blocks away. TR.Vol.I/P165-66; D107/P2.

Leslie called 911 at 9:07 p.m. D101/P62, 67. Mr. Boyd was pronounced dead at 9:55 p.m. *Id.*

C. The Investigation

Responding officers questioned Leslie about the shooting. She told police that a white man named "Greg" was on the porch with Mr. Boyd when he was shot. *Id.* at 66. Leslie knew "Greg" as someone who would buy crack from Mr. Boyd. TR.Vol.II/P225. Leslie also told Detectives Ronald Jackson and Clyde Bailey that she could not see the face of either shooter because they were wearing masks, nor could she discern any identifying characteristics. *Id.*; D110/P15-16. Despite Leslie's admission that she could not identify a shooter, a police report stated that Leslie suspected that Lamar Johnson was involved in the crime. D101/P35-36. And a report dated the night of the shooting

stated that Mr. Johnson was the primary suspect *before* a single witness had been substantively interviewed and before the only eyewitness, "Greg," had even been identified or located. D101/P1.

Mr. Johnson, meanwhile, was with his girlfriend, Erika Barrow, at their friend Anita Farrow's house; Ms. Farrow's boyfriend, Robert Williams, was also there. Ms. Farrow lived 10 minutes by car from where Mr. Boyd was shot.[3] D120/P1; D119/P30; TR.Vol.II/P312-13; D121/P1.

The night of Mr. Boyd's murder, Mr. Johnson had arranged to meet a customer in the parking lot next to Ms. Farrow's house to make a drug sale. TR.Vol.II/P312; D119/P31; D121/P1. Mr. Johnson, Ms. Barrow, and their child arrived at Ms. Farrow's house at around 9:00 p.m. D119/P30-31; D120/P1. Shortly after their arrival, Mr. Johnson saw the customer arrive in the parking lot, got into the customer's car, and drove around the block to make the sale. D119/P31. Within minutes, Mr. Johnson was back inside Ms. Farrow's house where they hung out until around 10:00 p.m. TR.Vol.II/P313; D119/P31-32; D120/P1; D121/P1.

Shortly after Mr. Boyd was killed, Pamela Williams—the mother of Mr. Johnson's child and Leslie's cousin—paged Mr. Johnson. D101/P68; TR.Vol.II/P325; D119/P31-32; D120/P1; D121/P1. Mr. Johnson returned the page from Ms. Farrow's house. *Id.* On that call, Pamela told Mr. Johnson that Mr. Boyd had been killed and Leslie wondered

[3] Ms. Farrow lived at 3907 Lafayette Avenue, and Mr. Boyd was shot at 3910 Louisiana Avenue.

if Mr. Johnson was involved. D101/P68; TR.Vol.II/P314, 327; D119/P32; D120/P1; D121/P2. Mr. Johnson responded by asking Pamela to add Leslie to the call via three-way calling, which she did. D101/P68; D119/P32; D110/P14. The three spoke for a short time and Mr. Johnson told Leslie and Pamela that he was on Lafayette Avenue and that he was not involved in Mr. Boyd's death. Mr. Johnson was upset, asking Leslie, "Why would you think that?" *Id.*; D120/P1; D121/P2. After the call, Mr. Johnson and Ms. Barrow went home, where they remained for the night. TR.Vol.II/P315; D119/P32-33; D120/P1.

Detective Joseph Nickerson began his investigation into Mr. Boyd's death the next day. D101/P32. Detective Nickerson interviewed Ed Neiger, who had purchased drugs from both Mr. Boyd and Mr. Johnson in the past. *Id*. Detective Nickerson claimed that Mr. Neiger told him of a feud between the two and that the feud might be a reason why Mr. Johnson would kill Mr. Boyd. *Id.* at 33. Mr. Neiger disputed this account in his pretrial deposition, however, where he testified under oath that he knew of no fights between Mr. Boyd and Mr. Johnson and he did not know of anyone who would want to kill Mr. Boyd. D122/P6.

Detective Nickerson interviewed Dawn Byrd on November 1. D101/P36. His report of the interview stated that Ms. Byrd said that she had purchased drugs from both Mr. Johnson and Mr. Boyd and that she had heard rumors that Mr. Johnson was selling bad drugs. *Id*. The report stated that Ms. Byrd said she confronted Mr. Johnson about this on October 29, and that Mr. Johnson said he was going to see Mr. Boyd about the bad drugs. *Id.* at 37. According to the report, Mr. Byrd said she was worried about what was

going to happen. *Id*. In the report, Detective Nickerson wrote that Ms. Byrd reported seeing Mr. Boyd on the evening of October 30, and had given him a ride home *Id.* at 38. During the ride, Mr. Boyd told Ms. Byrd that he had noticed Mr. Johnson's car around his house recently, and he thought that he had seen Mr. Johnson's car on the ride home that evening. *Id*. However, in her pretrial deposition, Ms. Byrd testified that she did not know of any disagreement between Mr. Boyd and Mr. Johnson and that the disagreement she had with Mr. Johnson had "nothing to do with" Mr. Boyd, thus directly contradicting Detective Nickerson's report. D125/P5-6.

Also on November 1, Detective Nickerson interviewed Leslie again. *Id.* at 35. His report stated that Leslie said that she believed Mr. Johnson was responsible for Mr. Boyd's murder and that there had been a dispute between them about missing drugs and stolen money. *Id.* at 35-36. But on June 21, 1995, Leslie gave a pretrial deposition where she contradicted Detective Nickerson's report, testifying that Mr. Boyd and Mr. Johnson were once very close and that while they had drifted apart, she could not think of a reason why Mr. Johnson would kill Mr. Boyd. D110/P6, 12. She further testified that Mr. Boyd and Mr. Johnson had in fact spoken about a week prior to Mr. Boyd's murder when Mr. Johnson stopped by their apartment, and that there was no animosity between them. *Id.* at 10-12.

From October 31-November 3, 1994, Detective Nickerson attempted to locate Mr. Elking, the only witness to the shooting. D101/P34-35, 39. Detective Nickerson spoke with Mr. Elking's sister and his wife and asked them to persuade Mr. Elking to contact the police. *Id.* at 39. Finally, on November 3, Mr. Elking called Detective Nickerson and

confirmed that he was present on the porch when Mr. Boyd was killed. *Id.* at 39. Mr. Elking said that one perpetrator was "about 5'9" and the other was "taller," they both were armed, and they both were wearing dark clothing and masks. *Id.* at 40. Mr. Elking gave no additional information about the suspects during this call. *Id.* At around 2:00 p.m. that same day, Mr. Elking and his wife met with Detective Nickerson at a local diner. *Id.*

According to the report documenting the diner meeting, Mr. Elking told Detective Nickerson that he had gone to Mr. Boyd's apartment on the evening of October 30 to pay a small drug debt. *Id.* Mr. Elking said that as he and Mr. Boyd talked on the porch, two men, dressed in dark clothing and wearing masks, ran onto the porch from the alleyway next to the house. *Id.* at 41. One of the masked men appeared to be about 5'9 with a slim build, and the other was about 6'0 tall. *Id.* Mr. Elking gave no further description of the suspects. One of the gunmen grabbed Mr. Elking and told him to "Get the fuck up!" *Id.* The gunmen shot Mr. Boyd several times and then fled the scene on foot, leaving Mr. Elking unharmed. *Id.* at 41-42. Mr. Elking then ran home and told his wife about the shooting. *Id.* at 42.

Detective Nickerson brought five photographs, including pictures of Mr. Johnson and Mr. Campbell with him to the meeting, and showed Mr. Elking the array. *Id.* According to the police report, Mr. Elking said that Mr. Johnson's eyes looked "similar" to the eyes of one of the gunmen. D107/P3-4; D114/P77-79. Additionally, according to the report, Mr. Elking then identified Mr. Johnson as one of the shooters from the five-photo array, but refused to sign the back of Mr. Johnson's photograph. D101/P42-43.

At the diner, Detective Nickerson told Mr. Elking and his wife that the State would help them with money and expenses if he became a witness in the case. D114/P83-84; D107/P4-5. After interviewing Mr. Elking, Detective Nickerson told Assistant Circuit Attorney (ACA) Dwight Warren that Mr. Elking had identified Mr. Johnson as one of the shooters. D101/P43. At approximately 5:45 p.m. on November 3, Mr. Johnson and Mr. Campbell were arrested and taken to the station for questioning. *Id.* at 44-45. Thirty minutes later, Detective Nickerson informed Mr. Johnson that he was a suspect in Mr. Boyd's murder. *Id.* at 45.

Mr. Johnson denied involvement in the shooting and told Detective Nickerson that Mr. Boyd was his friend and that "he had been with his girlfriend on Lafayette" when the shooting occurred. *Id.* The police did not attempt to investigate Mr. Johnson's alibi, even though he told Detective Nickerson that he had "been with his girlfriend on Lafayette" and even though Leslie told detectives she had spoken to Mr. Johnson on the phone shortly after the shooting. *Id.* at 45, 68; D110/P14; TR.Vol.II/P224-25. The police made no attempt to collect pager or phone records to verify Mr. Johnson's alibi, nor does the police report reflect contact with a single alibi witness.

Later that evening, Detective Ralph Campbell arrived for his shift, and according to the report, asked Detective Nickerson if he could speak with Mr. Johnson about an unrelated matter. D101/P46. According to Detective Campbell's narrative, during the interview, Mr. Johnson—unprompted and after just stating that he was not involved in Mr. Boyd's murder and offering an alibi—made incriminating statements about the

shooting including that he "let the white guy live." *Id.* at 47. According to the report, Mr. Johnson refused to repeat what he had said in a recorded statement. *Id.*; TR.Vol.II/P233.

From approximately 6:00-8:30 p.m. on November 3, Detective Nickerson tried to locate Mr. Elking so that he could come to the station to view a lineup. D101/P46. Around 9:00 p.m., Mr. Elking contacted Detective Nickerson, who then picked up Mr. Elking and brought him to the station. *Id.* at 47-48. During the drive, Detective Nickerson told Mr. Elking that Mr. Johnson was responsible for a number of unsolved murders and that Mr. Elking's cooperation was critical to providing justice for Mr. Boyd and his family. D114/P84-85, 88; D107/P7.

Upon arriving at the station, Mr. Elking viewed Lineup #1 containing Mr. Johnson at least three times. D101/P48-49. Mr. Elking was unable to make an identification after the first two viewings. *Id.* at 49. On the third viewing, Mr. Elking identified a filler from the jail as the shooter; he did not identify Mr. Johnson. *Id.* at 18-19, 49; D105/P1.

Mr. Elking was then shown Lineup #2, which contained Mr. Campbell. D101/P49. Mr. Elking was unable to make an identification in Lineup #2. *Id.* at 20-21, 49; D105/2. After Mr. Elking was unable to make an identification in either lineup, he and Detective Nickerson got into the elevator to go to a higher floor of police headquarters. D101/P49. According to the police narrative, during that elevator ride, Mr. Elking told Detective Nickerson that he "wanted to do the right thing" but he was "scared" and "needed time to think about what [he] should do." *Id.*

Once they reached the upstairs homicide offices, according to the report, Mr. Elking told detectives that he lied when he did not make an identification, and that he

recognized the shooters but that he was afraid. *Id.* at 50. He then told Detective Nickerson that the shooters were in position #3 (Johnson) in Lineup #1 and position #4 (Campbell) in Lineup #2. *Id.* Detective Nickerson's narrative report stated that Mr. Elking said he recognized the gunmen in the lineup because one had a lazy eye and the other had a scar on his forehead. *Id.* This was the first reference to these identifying features in the police reports; they were not mentioned or recorded in any of the three earlier interviews Detective Nickerson had with Mr. Elking.

After these alleged identifications, detectives assisted Mr. Elking with crafting a statement. In the statement, Mr. Elking claimed that he was afraid, that he knew who the shooters were all along, and that he was sorry he had lied. *Id.*; D107/P6. On the morning of November 4, Detective Nickerson drove Mr. Elking to the Circuit Attorney's Office where Mr. Elking met with ACA Warren. D101/P50; D114/P104. ACA Warren issued warrants for Mr. Johnson and Mr. Campbell, charging them with First-Degree Murder and Armed Criminal Action. D101/P24, 51. He then offered witness payments to Mr. Elking and set him up with the witness protection program. D114/P105.

After the warrants were issued, Mr. Johnson and Mr. Campbell were booked into the City Jail and placed in the holdover unit—a crowded unit with cells that hold a number of detainees. D101/P50; D128. William Mock, an informant with an extensive criminal history, was also in the holdover unit. D101/P25, 51.

On November 5, Mr. Mock claimed to have overhead a conversation between three detainees regarding a murder. He allegedly spoke with Detective Jackson about what he heard, but this conversation was not recorded. *Id.* The next day, Mr. Mock

claimed to hear Mr. Johnson and Mr. Campbell discussing "taking care of the white boy"—a statement police inferred as referring to Mr. Elking. *Id.* at 26, 51-52. Mr. Mock gave a recorded statement relaying this to Detective Jackson on November 7. *Id.* at 26, 52-5.

D. The Trial

Mr. Johnson's trial was held July 11-12, 1995. During the State's opening statement, ACA Warren told the jury that he expected this to be "a very swift case"—that Greg Elking would testify that he "was positive that Lamar Johnson [was] the one that he saw," and that William Mock would testify that he overheard Mr. Johnson discussing the crime while they were both in the jail, and that Mr. Mock did not "want any special consideration" for his testimony, he just wanted to "tell the police what he heard." TR.Vol.I/P 149, 151, 153.

Mr. Elking testified that it was "dark" outside at the time of the shooting and that the only light was coming from inside the house. *Id.* at 189-90. He told the jury that two men with solid black "pullover" masks came from the side of the apartment, each holding a gun, and that one of the shooters had a lazy eye. *Id.* at 159-60. Mr. Elking identified Mr. Johnson in the courtroom as the man with the lazy eye and as one of the shooters. *Id.* at 160-61.

Mr. Elking also gave the jury an excuse for not identifying Mr. Johnson at first. He testified that at first he "didn't want to commit" to making any positive identification of the shooters during his first meeting with Detective Nickerson at the diner, *id.* at 179, and admitted that he viewed Lineup #1 (containing Johnson) twice and did not identify Mr. Johnson, identifying someone other than Mr. Johnson. *Id.* at 183. Mr. Elking explained his

failure to identify Mr. Johnson by claiming that he had not been up front at first because "he was intimidated." *Id.* at 170-71.

Leslie testified that at the time of the murder, she was in the upstairs apartment drawing a bath for her daughter when she heard a series of pops that she believed were fireworks. TR.Vol.II/P220-21. After hearing the pops, she ran downstairs and saw two armed men dressed in all black. *Id.* at 221-22. She could not see the men's faces because they were wearing black ski masks, *id.* at 222, thus she could not identify the shooters. D110/P8-9. Leslie testified that she knew Mr. Johnson because he was the father of her cousin's child, TR.Vol.II/P222-23, and that Mr. Boyd and Mr. Johnson had been close friends and roommates. D110/P5-6. She further testified that she was on a three-way call with Mr. Johnson and her cousin Pamela shortly after Mr. Boyd had been shot. TR.Vol.II/P224-25.

Detective Campbell testified that he interviewed Mr. Johnson on November 3, and that the interview was not about Mr. Boyd's murder. *Id.* at 228. According to Detective Campbell's trial testimony, Mr. Johnson spontaneously "turned the interview in that direction" and unprompted, stated that he "let the white guy live." *Id.* at 229. Detective Campbell acknowledged that he had both video and audio recording capabilities available to him, and claimed that he then asked Mr. Johnson to repeat the statement on tape, but that Mr. Johnson refused. *Id.* at 230, 233. He also admitted that he destroyed the notes that he took during the interview. *Id.* at 233-34.

The State's final key witness was William Mock. Mr. Mock claimed he overheard someone who identified himself as Mr. Johnson shouting from another cell saying, "They

didn't have the gun" or "the white boy." *Id.* at 246-47. Mr. Mock testified that he contacted the homicide detectives and was interviewed. *Id.* at 247-48. Detective Ronald Jackson confirmed that he interviewed Mr. Mock. *Id.* at 301. Mr. Mock further claimed to have overheard the man identified as Mr. Johnson talking on a separate occasion about another murder on the Southside involving the robbery of a "white boy." *Id.* at 249. After investigation, however, the police could find no record of any robbery on the Southside resulting in the murder of a "white boy." *Id.* at 307.

Mr. Mock testified that the only thing he asked for in exchange for his testimony was a letter from ACA Warren to the parole board, which ACA Warren provided. *Id.* at 249-50. On cross-examination, Mr. Mock stated he was not in the same cell as either Mr. Johnson or Mr. Campbell and he could not say how far away they were from him in the unit. *Id.* at 251-52. He testified that he had three felony convictions for burglary, tampering, and carrying a concealed weapon and that he still had five years of his sentence to serve. *Id.* at 244, 261-62.

The defense only called one witness, Mr. Johnson's girlfriend, Erica Barrow. Ms. Barrow testified that Mr. Johnson was with her the night Mr. Boyd was killed. *Id.* at 309, 315. They were at their friend Anita Farrow's house, located at 3907 Lafayette Avenue, and that Ms. Farrow's boyfriend, Robert Williams was there too. *Id.* at 311-12. Ms. Barrow testified that Mr. Johnson was with her from approximately 7:00 p.m. through the rest of the night with the exception of about five minutes when Mr. Johnson left Ms. Farrow's house. *Id.* at 315. On cross-examination, Ms. Barrow said it may have been "seven minutes" but that Mr. Johnson "wasn't gone long enough to go anywhere." *Id.*

Ms. Barrow testified that she and Mr. Johnson learned that Mr. Boyd had been killed when Pamela spoke with Mr. Johnson on the phone sometime after 9:00 p.m. *Id.* at 314, 325. Ms. Barrow confirmed that during that call, Pamela added Leslie Williams on three-way. *Id.* at 224-25; D121/P1-2.

In its rebuttal case, the State did not dispute that Mr. Johnson was at Ms. Farrow's house between 9:00 and 10:00 p.m. Nor did the State dispute that Mr. Johnson left Ms. Farrow's house and returned within minutes. Rather, the State called Detective Nickerson to the stand, who testified that he had driven the route from Lafayette Avenue (where Ms. Farrow lived) to Louisiana Avenue (where Mr. Boyd was killed) "twenty, thirty, forty, fifty times," and that the drive takes "no more than five minutes." TR.Vol.II/P329.

In closing, the State explained to the jury that the key question for it to decide was whether Mr. Johnson was one of the masked shooters. The State first emphasized Mr. Elking's testimony identifying Mr. Johnson—"He was positive that's the man who did it. He had ample opportunity to look at him." *Id.* at 348. The State explained away Mr. Elking's initial failure to identify Mr. Johnson by casting him as "a kid" who was "afraid." *Id.* at 348. The State then pointed to the testimony of Detective Campbell, to whom Mr. Johnson allegedly made the spontaneous unrecorded inculpatory statement. *Id.* Finally, the State highlighted Mr. Mock's testimony that he overheard Mr. Johnson making incriminating statements. *Id.* at 350-51. And then the State made sure to underscore that Mr. Mock would have no reason to lie:

> What motive does Mock have [to lie]? What is he gonna get of this a letter to the parole board? . . . He came and said to the police . . . I'm not asking for anything. I'm tellin' you what happened because of some terrible event

> that's happened in his life. The man may be a burglar, he may be someone who carries a gun, I think he had another charge there too but he's a man that draws the line. This was a terrible waste of a life. It was cold-blooded murder and you draw the line. Even criminals, people in jail have got some morals say you know, enough is enough on this murder stuff. There's just too much murder. I can't keep my mouth shut and turn my face because of what has happened. Mock stood up and was counting, counting as a honest, God-fearing man to tell you the truth.
>
> *Id.* at 352-53.

The jury returned a verdict finding Mr. Johnson guilty of first-degree murder and armed criminal action. *Id.* at 367; D90/P7. On September 29, 1995, the trial court sentenced Mr. Johnson to life in prison without the possibility of parole. D90/P16.[4]

E. The CIU's Review

Recognizing that the duty of a prosecutor is to seek the truth and pursue justice, in 2017, Circuit Attorney Kimberly M. Gardner established a Conviction Integrity Unit. The CIU was "tasked with reviewing old cases where credible claims of a wrongful conviction have surfaced." D100/P2. When conducting a review, the CIU looks "at all the evidence, both old and new. They may re-interview witnesses, consult with experts and use science and technology to evaluate the evidence." *Id.* The Circuit Attorney established the CIU because "[i]t offends our most basic notion of fairness, and corrodes public confidence in

[4] After Mr. Johnson's trial, Mr. Elking stopped cooperating with the Circuit Attorney's Office. Without Mr. Elking, the State offered Mr. Campbell a deal. Mr. Campbell pleaded guilty to voluntary manslaughter for his role in Mr. Boyd's death and was sentenced to seven years in prison. D141.

the justice system for anyone to be imprisoned for a crime they did not commit or because they did not receive a fair trial." *Id.*

The CIU started its review of Mr. Johnson's case in 2018. The review revealed both that Mr. Johnson did not receive a fair trial, and that he had been imprisoned for over 20 years for a crime he did not commit.

1. Police manufactured a fake motive for Mr. Johnson.

The State's theory was that Mr. Johnson killed Mr. Boyd over a drug dispute. However, subsequent investigation of the police reporting established that this motive was false and fabricated.

Detective Nickerson contacted Ed Neiger the day after Mr. Boyd's murder. His report indicated that Mr. Neiger told him that Mr. Johnson and Mr. Boyd were no longer in the drug business together because Mr. Johnson was selling bad drugs; the report claimed that Mr. Neiger told Detective Nickerson that Mr. Johnson "was not happy about the split." D101/P33. Later, after reviewing the report, Mr. Neiger swore out an affidavit attesting that he never told Detective Nickerson about any rift between Mr. Johnson and Mr. Boyd because he had no knowledge of their relationship. D106/P1-2.

Detective Nickerson interviewed Dawn Byrd a couple of days after Mr. Boyd's murder, and his report of that interview alleged that Ms. Byrd had told him that Mr. Johnson told her that he was going to confront Mr. Boyd about him selling bad drugs and that she was worried about what would happen. D101/P36-37. Ms. Byrd later reviewed the report and signed a sworn affidavit stating that she was never worried about what was going to

happen between Mr. Boyd and Mr. Johnson because she knew of no animosity between them and that the statements attributed to her in the police report were false. D112/P4-5.

Detective Nickerson also interviewed Christine Herrman. His report of the interview stated that Ms. Herrman told him that she was present for the conversation between Ms. Byrd and Mr. Johnson about bad drugs. D101/P38. In a sworn statement, Ms. Herrman attested that the account attributed to her in the police report was false; she was not present for any conversation between Mr. Johnson and Ms. Byrd about bad drugs—in fact, she had never met Mr. Johnson, and thus could not have heard Mr. Johnson say that he was going to see Mr. Boyd about bad drugs. D113/P2-4.

Detective Nickerson interviewed Leslie Williams, and claimed in his report that Leslie had told him that she believed Mr. Johnson shot Mr. Boyd over a drug dispute. D101/P35. However, her pretrial deposition flatly contradicted Detective Nickerson's account, as she testified that she could not think of a reason why Mr. Johnson would want to kill Mr. Boyd. D110/P5-6, 12. Moreover, in two separate interviews, Leslie viewed the police reports and said that the statements attributed to her were false, D132/P1, including statements suggesting that a severed drug business between Mr. Boyd and Mr. Johnson was the motive for the murder. *Id.* at 2-4.

In sum, the evidence showed that Detective Nickerson, one of the lead detectives in this case, outright fabricated a motive for Mr. Johnson shooting Mr. Boyd, and repeatedly attributed false statements to witnesses in order to build a case against Mr. Johnson.

2. Police manufactured Greg Elking's false identification of Mr. Johnson.

Even with the information known to the State at trial, Mr. Elking's identification of Mr. Johnson was unreliable. Mr. Elking said numerous times during the investigation that he did not know of and had never met Mr. Johnson. D109/P4-5; TR.Vol.I/P191; D126/P3; D123/P2; D107/P3; D114/P16, 21. Mr. Elking further told police that he did not know any of Mr. Boyd's associates or friends. D104/P5; D126/P3; D123/P2; D107/P3-4; D114/P15-16. Thus, Mr. Elking made clear throughout his interactions with police that the men who shot Mr. Boyd were complete strangers to him.

Moreover, Mr. Elking repeatedly explained to police the conditions under which the shooting occurred, which any reasonable officer would have known would make a stranger eyewitness identification highly unreliable. The shooting was at night on a dimly-lit porch, and Mr. Elking said that the perpetrators were wearing full ski-type masks that covered their heads, including their ears, necks, eyebrows, foreheads, cheeks, mouths, chins, and most of their noses. D114/P50-52; TR.Vol.I/P190. The circumstances of the shooting make a cross-racial stranger identification implausible. *See, e.g.*, *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

Detective Nickerson told Mr. Elking when he first met with him that he would receive assistance in exchange for being a witness in the case. D114/P83-84; D107/P4-5. Before Mr. Elking identified Mr. Johnson as a perpetrator, Detective Nickerson told him that the police had apprehended Mr. Johnson and that Mr. Johnson was responsible for Mr. Boyd's death. D114/P85-87. Detective Nickerson further told Mr. Elking that Mr. Johnson was responsible for a number of unsolved murders and that the police needed Mr. Elking's

testimony to put Mr. Johnson behind bars. *Id.* at 88; D107/P7. Despite Detective Nickerson's pressing, Mr. Elking viewed a lineup containing Mr. Johnson at least three times and was unable to make an identification. D101/P48-49.

In a 2019 deposition taken of Mr. Elking by the CIU and Mr. Johnson's counsel, Mr. Elking testified that at the time of the lineup, he felt like "had to pick" someone and chose the person in position #4—a filler, because he looked most like one of the men in a photo array Detective Nickerson previously had shown him. D114/P95. Mr. Elking further testified that he "did not recognize anyone" in the lineups and wanted badly to help but he was unable to make an identification because he did not see the gunmen's faces or other identifying features. D114/P91-92; D109/P5. He felt "pressured" and "intimidated" by the police, D126/P3; D123/P2; D107/P6; D114/P93, and was worried that he would be charged if he did not make the identifications Detective Nickerson wanted. D126/P4; D123/P3; D114/P103. Mr. Elking believed that Detective Nickerson knew who was responsible and he trusted Detective Nickerson. D114/P99-100. He wanted justice for Mr. Boyd and needed the assistance promised to him. D114/P100-01; D107/P5.

Mr. Elking testified that when he was unable to identify Mr. Johnson, Detective Nickerson's "mood changed"—he was in a "foul" mood. D114/P93, 96. Mr. Elking felt like he had "let everyone down." *Id.* at 94, 96; D107/P5. Thus, when Mr. Elking and Detective Nickerson got into the elevator after Mr. Elking was unable to make an identification, Mr. Elking asked Detective Nickerson to tell him the lineup numbers of the men that Detective Nickerson believed killed Mr. Boyd. D107/P6; D114/P98, 127-28. Detective Nickerson responded by telling Mr. Elking that the men were in position #3

(Johnson) and position #4 (Campbell). D104/P6; D126/P4; D123/P2-3; D107/P6; D114/P98, 127-28. Mr. Elking reiterated in his 2019 deposition that his identifications were false—that he did not recognize anyone in the lineups and that he had "no idea" who the shooters were. D114/P98-99.

Detective Nickerson unknowingly corroborated Mr. Elking's deposition testimony, because on December 6, 1996, at Mr. Johnson's Rule 29.15 hearing, Detective Nickerson testified that Mr. Elking "knew who we wanted. There was no question in my mind who was responsible." D119/24.

2019 was not the first time Mr. Elking admitted that his trial testimony was false. As early as 2003, Mr. Elking recanted his identification and trial testimony in a letter to Reverend Rice of St. Louis. In his letter to Reverend Rice, Mr. Elking said in part:

> When they [police] talked to me they showed me some photos of suspects, but could not identify no one, because I did not know them or seen [sic] their faces. Then when they [police] showed me a line-up in City Jail, I still could not pick out the suspects. Then the detectives and me had a meeting with the Prosecutor Dwight Warren and convinced me, that they could help me financially and move me & my family out of our apartment & and relocate use [sic] in the County out of harms [sic] way. They also convinced me who they said they knew who murdered Marcus Boyd.
>
> They [police] had me say the suspects numbers in the lineup, and told me to say the reason I didn't pick them out while the lineup was going on, was because I was scared & terrified. The reason I'm telling you this now is my consiance [sic]. I regret not coming to you or anyone else sooner. I don't believe it was [the] right thing to do then & more so now.

D104/P5-6. Mr. Elking also wrote a letter to Mr. Johnson in 2003 acknowledging that his trial testimony was false and that his identification of Mr. Johnson was manufactured. D126. Mr. Elking told Mr. Johnson that he knew Mr. Johnson had "suffered these past 9 years in prison for a crime [he] did not commit [and that he could] not even begin to tell

[Mr. Johnson] how sorry [he was] for that." *Id.* at P5. Mr. Elking explained that he was coming forward "with the truth because [he was] tired of it haunting [him]." *Id.* at 5.

In 2003 and 2010, Mr. Elking swore out affidavits admitting that his trial testimony was false and that he did not know who shot Mr. Boyd. D107; D123.

Thus, the State's only eyewitness admitted in a deposition under oath, in sworn affidavits, and in letters both to a Reverend and to Mr. Johnson that his trial testimony was false, that police manufactured his identification of Mr. Johnson, and that he did not know who shot Mr. Boyd.

3. The State concealed evidence that it provided Greg Elking assistance in exchange for his trial testimony.

When Detective Nickerson first met Mr. Elking in person at a diner on November 4, 1994, he told Mr. Elking and his wife that the State could help them with housing and expenses if he became a witness in the case. D114/P83-84; D107/P4-5. Mr. Elking testified that his financial situation was unstable and he needed the money. D114/P100-01.

In 2010, Mr. Elking and his ex-wife both signed affidavits stating they received several monetary payments from the State. D107/P4-5, 7; D134/P2. After they revealed that they had been paid by the State, Mr. Johnson repeatedly requested documentation of the payments to the Elkings from various entities, including the Circuit Attorney's Office, but no documentation concerning payments was ever disclosed to the defense. In fact, the documents were not only withheld, their existence was denied in writing. D111/P8; D135.

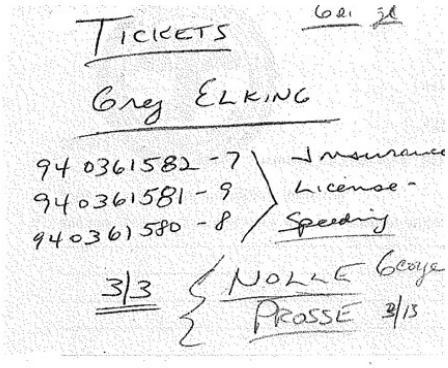
As part of the joint investigation between the CIU and Mr. Johnson's counsel, the CIU searched for and located 63 pages of documents related to payments to and on behalf

of Mr. Elking. D111. The concealed payments, totaling at least $4,241.08, began on November 4, 1994, and included cash payments, payment of back utilities, moving and living expenses, and rent. *Id.* at 7. These payments continued for months leading up to Mr. Johnson's trial. *Id.* The documents discovered by the CIU included copies of cancelled checks, correspondence with movers, and successful efforts to locate and pay for the Elkings' housing. D111. Just as Mr. Elking claimed, the payments began on the day Detective Nickerson brought Mr. Elking to meet ACA Warren, and continued for months thereafter, including undocumented cash payments before Mr. Elking testified. *Id.* [5]

Beyond the secret payments, the Circuit Attorney's Office "took care of" a number of traffic violations for Mr. Elking in exchange for his testimony. D114/P119-123; D139. In July 2019, as the CIU's investigation continued, documentation corroborating Mr.

[5] The trial court in its Order stated that the State did not provide documentation that the prosecutor knew of the payments to Mr. Elking. *See* Order at 8. One, this is irrelevant for *Brady* purposes, because the information was in the possession of the government. Two, this was belied by the record before the trial court. In 2003, Mr. Elking wrote to Reverend Rice: "Then the detectives and me had a meeting with the Prosecutor Dwight Warren and convinced me, that they could help me financially and move me & my family out of our apartment & and relocate use [sic] in the County out of harms [sic] way." D104/P5-6. In 2010, Mr. Elking described the first meeting with ACA Warren: "During this discussion with the prosecutor, I asked about witness protection money. Dwight [Warren] set me up with his witness protection lady." D107/P7.

Elking's claim that ACA Warren "took care of" traffic violations for him was discovered. Located in the State's file, was a handwritten note corroborating what Mr. Elking had been saying all along:



D139. The State concealed evidence of this assistance from Mr. Johnson.

4. The State failed to disclose impeachment evidence about William Mock and failed to correct his false testimony.

William Mock had an extensive criminal background and a history of cooperating as a jailhouse informant. He was incarcerated in the City Jail holdover unit at the same time as Mr. Johnson and Mr. Campbell, although Mr. Mock never shared a cell with them. D101/P25, 51. Still, Mr. Mock testified that he overheard incriminating conversations between three detainees about a murder. *Id.* at 26, 51-52.

Mr. Mock made provably false statements throughout his trial testimony. For example, he testified that he had never testified before, D124/P5, when in fact, he testified for the State in the 1992 prosecution of Joseph Smith. D137. In that case, Mr. Mock claimed that he overheard a jailhouse murder confession while in Jackson County jail, and testified to that fact in exchange for a reduction in sentence. *Id.* The State did not correct his false testimony.

Mr. Mock also falsely testified about his criminal history and the State did nothing to correct the record. In truth, Mock's criminal history included a number of arrests and convictions, both felony and misdemeanor, that were concealed from the defense. Among them: forgery, fraud, burglary, assault, multiple DUIs, larceny, escape, and stealing. D133.

Rather than correcting Mr. Mock's patently false testimony, the State falsely argued to the jury argued that Mr. Mock had no motive to lie and expected very little for his testimony against Mr. Johnson. TR.Vol.II/P352-53. In fact, Mr. Mock had written ACA Warren a letter before trial stating:

> I don't believe that anyone in the legal system will disagree with the value of my testimony in this trial as opposed to the conviction that I am now serving. I am willing to testify as long as I don't have to return to the Department of Corrections once I testify. I can't I won't live in protective custody or any institution after I testify. I am serving a five year sentence for CCW, which I have been serving since 1993. I feel my testimony is worth a pardon by Mr. Carnahan or a reduction in my sentence . . . I will uphold my end of the situation as I am certain you will fulfill your obligations to me.

D100/P33. The State did not disclose this letter to the defense.

Indeed, several letters were written by the Circuit Attorney's Office on Mr. Mock's behalf to remedy disciplinary incidents involving Mr. Mock; to request transfers within the DOC to preferred prisons; and to make recommendations for release to the parole board. D100/P34. None of these letters and additional communications between ACA Warren and Mr. Mock were disclosed to the defense.

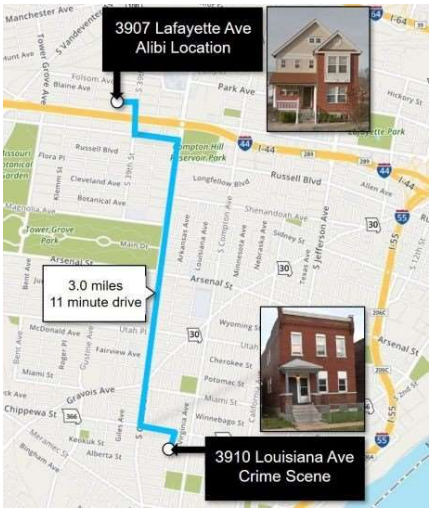
Finally, the State failed to disclose the fact that Mr. Mock exhibited clear racial bias against African Americans, Mr. Johnson in particular. In a letter that Mr. Mock wrote to ACA Warren, Mr. Mock referred to Mr. Johnson and Mr. Campbell as "two-bit niggers"

he was pleased to help convict. *Id.* Not only did the State fail to turn this evidence of clear racial bias over to the defense, it still proceeded to use Mr. Mock as a witness despite the fact that such obvious racial bias has no place in a fair criminal proceeding.

5. The State failed to correct Detective Nickerson's false testimony regarding Mr. Johnson's Alibi.

Erika Barrow, Mr. Johnson's girlfriend, testified that Mr. Johnson was with her at Anita Farrow's house the night Mr. Boyd was shot. TR.Vol.II/P309, 315. She also testified that Mr. Johnson spoke on the phone with Leslie and Pamela shortly after Mr. Boyd was killed. *Id.*

The State did not dispute Ms. Barrow's testimony at trial. Instead it capitalized on Ms. Barrow's testimony that Mr. Johnson left the house and returned within minutes, *id.*, by calling Detective Nickerson in the State's rebuttal case, who testified that Mr. Johnson could have driven from Ms. Farrow's house to the crime scene in "no more than five minutes." TR.Vol.II/P334. This testimony was false. Simple time and distance calculations show that the one-way drive alone is approximately 11 minutes.

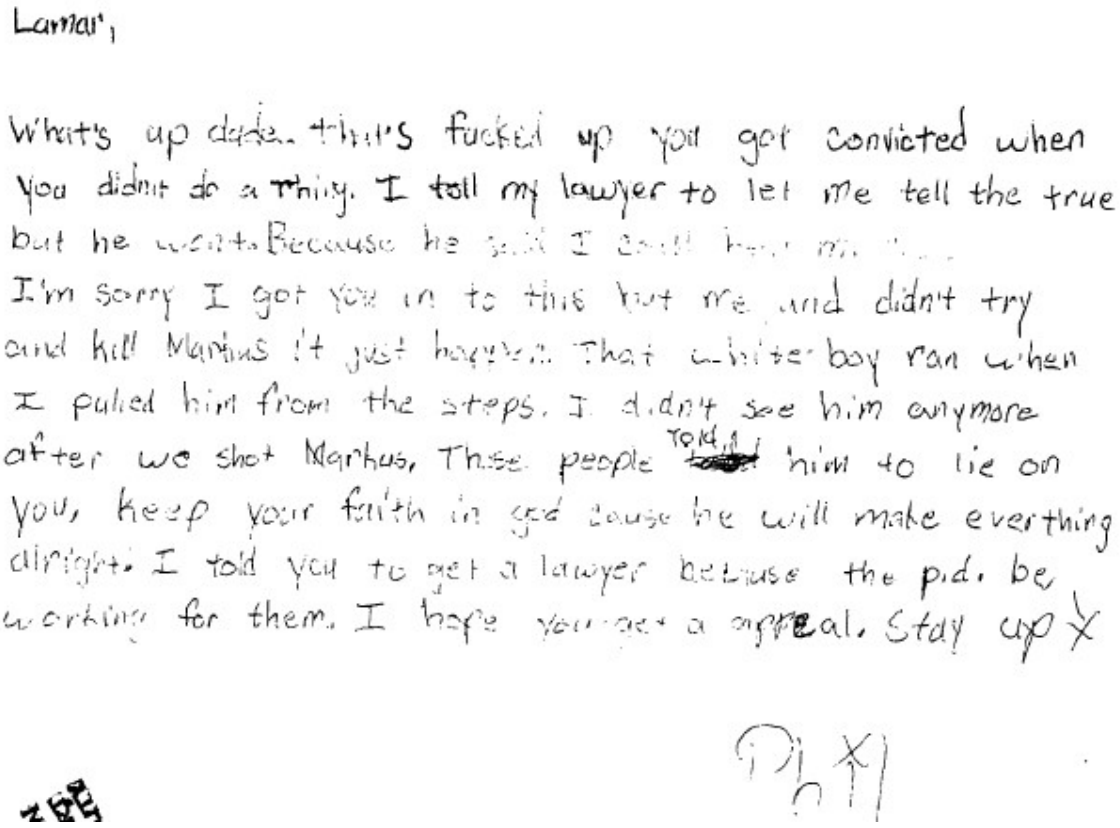


D99/P23. And according to the State's own witnesses, the gunmen arrived and left the scene by foot, not by car. The State's rebuttal case undermining Mr. Johnson's otherwise uncontested alibi was false.

6. Phillip Campbell and James Howard confessed to the crime and admitted Mr. Johnson had no involvement.

Not only did the CIU's review reveal that Mr. Johnson did not receive a fair trial, the CIU's review also found credible evidence proving Mr. Johnson's innocence—the real perpetrators confessed to the crime multiple times under oath.

Both Phillip Campbell and James Howard confessed to shooting Mr. Boyd and that Mr. Johnson was not involved. After Mr. Johnson's trial in July 1995, but before sentencing in September, Mr. Campbell wrote letters to Mr. Johnson while they both were in the City Jail. The letters were seized by jail officials pursuant to a search warrant and were the subject of an unsuccessful defense motion for new trial that was filed out of time. D103. The letters explain what happened on the night Mr. Boyd was killed, that Mr. Johnson was not involved, and that in fact, Mr. Campbell and Mr. Howard committed the murder.



Lamar',

What's up dude. that's fucked up you got convicted when you didn't do a thing. I tell my lawyer to let me tell the true but he won't. Because he said I could have my [illegible]. I'm sorry I got you in to this but me and didn't try and kill Markus it just happen. That white boy ran when I pulled him from the steps. I didn't see him anymore after we shot Markus, These people told him to lie on you, keep your faith in god cause he will make everything alright. I told you to get a lawyer because the pd. be working for them. I hope you get a appeal. Stay up X

D129.

In addition to the letters, Mr. Campbell signed an affidavit in 1996, just one year after Mr. Johnson was convicted stating that Mr. Johnson was not involved in the murder of Mr. Boyd. D117. Mr. Campbell signed another sworn statement in 2009, again stating he was responsible for Mr. Boyd's death and that Mr. Johnson was not involved. D118/P4. James "BA" Howard also signed affidavits in 2002, 2005, and 2009, stating that he was guilty of Mr. Boyd's murder and that Mr. Johnson was not involved. D142; D115/P1; D116/P3. These affidavits revealed the truth about Mr. Boyd's murder; each revealed key details about the crime, including its motive—a drug dispute between one of Mr. Howard's friends, Sirone "Puffy" Spates, and Mr. Boyd. As Mr. Howard stated succinctly in one affidavit: "Lamar Johnson was not involved in the death of Marcus Boyd. I know Lamar

Johnson is innocent of that crime because I was there and Lamar Johnson was not there." D116/P3.

The information in Mr. Campbell's and Mr. Howard's affidavits was corroborated by statements of other witnesses. In 2009, Anthony Cooper, an associate of Mr. Campbell and Mr. Howard signed a notarized affidavit stating:

> Soon afterwards [the shooting of Boyd] I began receiving letters from Phillip Campbell and James Howard referring to their involvement in the murder of Marcus Boyd, and discussing their concern that Lamar Johnson was being accused by the police of committing this crime. Both Campbell and Howard told me in their letters that Lamar Johnson had no involvement in Marcus Boyd's death.
>
> The day after I was released from prison in November 1995, I spoke to James Howard about the death of Marcus Boyd. Howard said that his cousin 'Puffy,' or someone he knew, had had a disagreement with Marcus Boyd. Howard told me that he and Campbell went over to pistol whip Marcus Boyd or rough him up and it got out of hand and Marcus got shot.

D130/P1.

In 2009, Lamont McClain, an associate of Mr. Campbell, Mr. Howard, and Mr. Johnson, signed a notarized affidavit:

> On Oct 30, 1994, the night Marcus Boyd was shot and killed outside his house at 3910 Louisiana, I was locked up in St Louis City Jail. About a week later, I saw Phillip Campbell in City Jail . . . Campbell told me that he and James Howard had gone to rob Marcus Boyd, but Boyd didn't cooperate. Boyd put up a fight and BA [Mr. Howard] shot Marcus . . . .
>
> At the time Campbell was telling me what happened to Marcus Boyd, Lamar Johnson was also in jail, suspected of killing Marcus Boyd. Campbell told me that Lamar Johnson was not there at Boyd's that night, and that Lamar had nothing to do with the killing of Marcus Boyd.

D131/P1-2.

In sum, Mr. Campbell's and Mr. Howard's affidavits unequivocally stated that they killed Mr. Boyd and that Mr. Johnson was not involved. Both men offered motive evidence

that was corroborated by other witnesses. Their accounts of the shooting were consistent in describing the masks and clothing that they wore and the routes that they took to Mr. Boyd's house and when fleeing the scene. And their accounts were consistent with the testimony of Mr. Elking and Leslie Williams—the only witnesses on the scene.

On September 27, 2018, the CIU interviewed Mr. Howard regarding his role in Mr. Boyd's death. D100/P22. The CIU found Mr. Howard to be credible, *id.*, and reached the unmistakable conclusion that Mr. Johnson was innocent of the crime for which he had been convicted.

F. Procedural History

Faced with irrefutable evidence that Mr. Johnson had been wrongfully convicted, that he was in fact innocent, the Circuit Attorney filed a Motion for New Trial on July 19, 2019. D99. The 66-page motion detailed the above facts and was supported by numerous exhibits, including the 70-page report from the Conviction Integrity Unit. *Id.* The motion soberly concluded that the State obtained Mr. Johnson's conviction "through perjured testimony, suppression of exculpatory and material impeachment evidence of secret payments to the sole eyewitness, and undisclosed *Brady* material related to a jailhouse informant with a history of incentivized cooperation with the State." *Id.* at 1. As a result of its misconduct, the State was able "to obtain a conviction and sentence of life without the possibility of parole against Johnson despite overwhelming evidence of innocence." *Id.* The Circuit Attorney was therefore compelled to file the new trial motion "[b]ased on the record now known and the professional, ethical, and constitutional duties of a prosecutor to seek justice." *Id.* at 1-2.

Ten days later, the trial court *sua sponte* appointed the Attorney General to weigh in without providing any reasons or citing any law that supported the order. After a status hearing, on August 1, the trial court ordered the parties to brief the issue "of the court's authority to entertain" the Motion for New Trial. D146.

On August 15, 2019, the Circuit Attorney filed the "State's Brief in Support of Court's Authority to Entertain the Motion for New Trial." In the brief, the Circuit Attorney argued that the trial court had jurisdiction to entertain the Motion for New Trial, that the Circuit Attorney was duty-bound to move for a new trial, and that the trial court had a corresponding duty to entertain the motion. D162. That same day, the Attorney General filed his brief arguing that the Circuit Attorney does not have the power to file a motion for new trial and that the trial court had no jurisdiction to consider the Motion. D161. On August 16, 2019, the Circuit Attorney filed a motion to strike the Attorney General's Response, arguing that the trial court had failed to explain the appointment and that the Attorney General's filing infringed upon the Circuit Attorney's statutory right to appear on behalf of the State in criminal matters before the trial court. D164.

On August 23, 2019, the trial court issued its Order from which the Circuit Attorney now appeals. D167. In its Order, the court began by addressing its *sua sponte* appointment of the Attorney General. First, the trial court espoused that Mr. Johnson's counsel had improperly contacted jurors without the Court's approval. *Id.* at 3. Second, the trial court said that it "appeared there may be a conflict on the part of the Circuit Attorney in that the assistant circuit attorney accused by the Circuit Attorney of prosecutorial misconduct worked for this same Circuit Attorney office," and therefore the trial court believed that

the allegation of prosecutorial misconduct "should have been referred out for an independent investigation" as recommended by the Innocence Project's best practices. *Id.* at 5. The trial court did not actually find a conflict warranting the disqualification of the Circuit Attorney, however. *See id.* at 3.

Ultimately, the trial court held that it lacked authority to even hear the Motion for New Trial because it was untimely, and dismissed the motion without a hearing. In so ruling, the trial court questioned whether the Circuit Attorney could even file a new trial motion, and held that in any event, even if the Circuit Attorney could file such a motion, she was bound by the 15-day time limit set forth in Rule 29.11. *Id.* at 13. According to the trial court, once that 15-day deadline expired, the Circuit Attorney had no power to act. *See id.* The Circuit Attorney timely appealed. D168. Mr. Johnson also appealed the trial court's order.

After the Court of Appeals consolidated the appeals and expedited consideration of the case, the Circuit Attorney and Mr. Johnson filed their opening briefs on October 23, 2019. On October 31, the Attorney General filed a motion to dismiss the Circuit Attorney's appeal on behalf of the State pursuant to Mo. Rev. Stat. § 27.050, and a motion to strike the Circuit Attorney's brief. On November 14, Chief Judge Dolan granted the motion to dismiss the Circuit Attorney's appeal on behalf of the State, re-designated her as an Intervenor, and denied the motion to strike the brief.

After oral arguments on December 11, the Court of Appeals issued its opinion on December 24, 2019. In its Opinion, the Court of Appeals acknowledged that this was an important case "of first impression," but held that Mr. Johnson did not have a statutory

right to appeal the trial court's order. *See* Order at 6. The Court of Appeals in a footnote acknowledged that there was statutory authority for the Circuit Attorney to appeal, but said that that appeal had been dismissed by the State. *Id.* & 6 n.4. The Court of Appeals dismissed the appeal and transferred the case to this Court. The Court of Appeals concluded that transfer was appropriate because the issues this case raises "are undeniably important and include questions fundamental to our criminal justice system." *Id.* at 10. These questions include:

> [W]hether and to what extent an elected prosecutor has a duty to correct wrongful convictions in her jurisdiction; whether and to what extent there is or should be a mechanism for her to exercise that duty; whether and to what extent the limitations of any such mechanism (such as the Rule 29.11 timelines) impact a trial court's authority to consider the matter or the statutory right to appeal a trial court's ruling on the matter; and whether and to what extent the Attorney General has or should have a role in that process.

Id. at 10-11.

POINTS RELIED ON

A. The trial court erred in dismissing the Circuit Attorney's Motion for New Trial based on Rule 29.11's deadlines because under Rule 29.11, the Circuit Attorney had the authority to file, and the trial court therefore had the authority to hear, the motion.

Connick v. Thompson, 563 U.S. 51 (2011)

Imbler v. Patchman, 424 U.S. 409 (1976)

State ex rel. Gardner v. Boyer, 561 S.W.3d 389 (Mo. 2018)

State v. Terry, 304 S.W.3d 105 (Mo. 2010)

U.S. Const. amend. XIV

Mo. Const. Art. I, § 10

Mo. Rev. Stat. § 56.450

Mo. Rev. Stat. § 56.550

Mo. Rules of Prof'l Conduct r. 4-3.8

B. The trial court erred in holding that it did not have the authority to consider the Circuit Attorney's Motion for New Trial under plain error review, and this Court should exercise its inherent authority to make clear that prosecutors always have the authority to file new trial motions when faced with evidence of a wrongful conviction.

D.C.M. v. Pemiscot Cty. Juvenile Office, 578 S.W.3d 775 (Mo. 2019)

State v. Terry, 304 S.W.3d 105 (Mo. 2010)

Sprung v. Negwer Materials, Inc., 727 S.W.2d 883 (Mo. 1987)

Fields v. State, 572 S.W.2d 477 (Mo. 1978)

Mo. Const., Art. V, § 5

C. The trial court erred in *sua sponte* appointing the Attorney General because the Circuit Attorney is the recognized representative of the State in criminal matters before the trial court, and no legal basis supported the appointment.

State ex rel. Gardner v. Boyer, 561 S.W.3d 389 (Mo. 2018)

State v. Todd, 433 S.W.2d 550 (Mo. 1968)

Mo. Rev. Stat. § 27.030

Mo. Rev. Stat. § 27.060

Mo Rev. Stat. § 56.450

Mo. Rev. Stat. § 56.550

ARGUMENT[6]

When transferring this case, the Court of Appeals explained that this case presents issues that "are undeniably important" and includes "questions fundamental to our criminal justice system." Op. at 10.

The first question that the Court of Appeals noted was "whether and to what extent an elected prosecutor has a duty to correct wrongful convictions in her jurisdiction." *Id.* Answer: an elected prosecutor *always* has a duty to correct wrongful convictions.

The next two questions noted by the Court of Appeals were "whether and to what extent there should be a mechanism for her to exercise that duty, and "whether and to what extent the limitations of any such mechanism impact a trial court's authority to consider the matter . . . ." *Id.* (parenthetical omitted). Answers: there *must* be a mechanism for a prosecutor to right a wrongful conviction, and that mechanism should not be limited by arbitrary timelines given that both prosecutors and the courts have an unceasing duty to do justice.

The final question noted by the Court of Appeals was "whether and to what extent the Attorney General has or should have a role in that process." *Id.* at 11. Answer: the Attorney General should have no role in the circuit court. Circuit and Prosecuting Attorneys have the sole power to represent the State in criminal matters in the trial court.

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[6] The Circuit Attorney preserved the arguments presented herein in her "Brief in Support of Court's Authority to Entertain the Motion for New Trial." D162.

While the answer to these questions are fleshed out below, this case boils down to one overarching question: does Circuit Attorney Kimberly M. Gardner have any power to remedy Lamar Johnson's wrongful conviction—a man who has spent over half of his life in prison for a crime he did not commit? Consistent with basic notions of justice, this Court must hold that she does, and reverse the decision of the circuit court.

A. The trial court erred in dismissing the Circuit Attorney's Motion for New Trial based on Rule 29.11's deadlines because under Rule 29.11, the Circuit Attorney had the authority to file, and the trial court therefore had the authority to hear, the motion.

The trial court's holding that it had no authority to hear the State's Motion for New Trial because the Circuit Attorney filed it past Rule 29.11's 15-day deadline essentially means that the Circuit Attorney has no procedural vehicle to fulfil her ethical, statutory, and constitutional obligations to correct the wrongful conviction of an actually innocent person. This is not and should not be the law. The structure of Rule 29.11, case law interpreting the Rule, and sound policy principles make clear that prosecutors must be able to file new trial motions whenever the interests of justice so require, and since the new trial motion filed by the Circuit Attorney in this case was properly before the trial court, the trial court was obliged to decide the motion on its merits.

The case presents the issue of the correct interpretation of Rule 29.11 and the scope of the Circuit Attorney's, this Court's, and the trial court's authority. These are questions of law reviewed de novo. *Hervey v. Missouri Dep't of Corr.*, 379 S.W.3d 156, 163 (Mo. 2012); *State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 881 (Mo. 2009). "The same principles used to interpret statutes apply when interpreting this Court's rules,

with the difference being that this Court is attempting to give effect to its own intent." *In re Hess*, 406 S.W.3d 37, 43 (Mo. 2013).

1. The Circuit Attorney was duty-bound to act.

The Circuit Attorney was constitutionally, statutorily, and ethically required to take action to correct Lamar Johnson's wrongful conviction.

Starting with the Constitution. Both the Missouri and United States Constitutions declare that "no person shall be deprived of life, liberty or property without due process of law." Mo. Const., Art. I, § 10; U.S. Const. amend. XIV. The State violated Mr. Johnson's constitutional due process rights in two distinct ways. First, the fact that Mr. Johnson's conviction is based on perjured testimony is a clear violation of due process. The Supreme Court has explained that "a conviction obtained through use of false testimony, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). And this Court has made a similar observation, stating, "No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony. The trial court had the duty to grant a new trial if satisfied that perjury has been committed and that an improper verdict or finding was thereby occasioned." *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1948).

Second, the State violated Mr. Johnson's due process rights by withholding critical exculpatory and impeachment evidence from Mr. Johnson during trial. The Supreme Court and this Court have made clear that the withholding of such information violates due process. Said the Supreme Court: "suppression by the prosecution of evidence favorable to

an accused upon request violates due process where the evidence is material to either guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This Court has reiterated the point made in *Brady*, reminding that "due process requires the prosecution to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment." *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. 2001).

Given these constitutional violations, once the Circuit Attorney was aware of the fact that the State violated Mr. Johnson's due process rights, and that the violations resulted in his wrongful conviction and continued wrongful incarceration, the law required her to act. When the Circuit Attorney took office, she swore an oath to uphold both the United States and Missouri Constitutions. *See* Mo. Rev. Stat. § 56.550 ("Before entering upon the duties of their office, the circuit attorney and said assistants shall be severally sworn to support the Constitution of the United States and the Constitution of Missouri, and to faithfully demean themselves in office."). This oath obligated the Circuit Attorney to correct any constitutional wrongs previously perpetrated by her office. She could not, consistent with her oath of office, allow clear constitutional violations committed by her office go unchecked.

The Circuit Attorney was also bound to act by the rules of ethics that govern her conduct as elected prosecutor for the City of St. Louis. The Missouri Rules of Professional Conduct make clear that a prosecutor's role is "a minister of justice and not simply that of an advocate," and therefore, the office of the prosecutor "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Mo. Rules of Prof'l Conduct r. 4-3.8 cmt. 1. When the Circuit

Attorney learned that not only was Mr. Johnson denied "procedural justice," but also that the evidence of his guilt was no longer "sufficient"—he was in fact innocent—the Circuit Attorney, as a "minister of justice," was bound to right Mr. Johnson's wrongful conviction. With the knowledge of the wrongful conviction in hand, she could not sit idly by while an innocent man languished in prison for the rest of his life. *See also* ABA Model Rules of Professional Conduct, Rule 3.8 ("When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."). The rules of ethics compelled the Circuit Attorney to take action to remedy the injustice of Mr. Johnson's wrongful conviction.

The Supreme Court and this Court have made clear that a prosecutor's job is to do justice—not just to maintain a conviction. *See Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) ("Prosecutors have a special duty to seek justice, not merely to convict."); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"); *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010) (prosecutor's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction."). Consistent with the special ethical obligations of the prosecutor, sometimes doing justice means admitting that the State was wrong and taking steps to make it right. As a duly elected minister of justice, the Circuit Attorney's obligation to correct a wrongful conviction never ceases, and she had to take action in Mr. Johnson's case.

It is hard to imagine how the public could maintain faith in our system of justice if the law was such that a prosecutor could learn that a person had been wrongfully convicted, but the prosecutor did not have the power to right that wrong. Our system of justice operates under the fundamental premise that only the guilty are incarcerated. If the State agrees that a person has been wrongfully incarcerated, then the public would expect that injustice to be swiftly corrected. It is no secret that people both in this State and around the country have been wrongfully convicted. Our criminal justice system is ran by humans and is therefore bound to be flawed. This reality means that a prosecutor's role as minister of justice cannot end simply because a jury has returned a verdict or a judge has handed down a sentence. Justice must be both prospective and retrospective. For the public to continue to have faith in our justice system, they must know that there are mechanisms in place to remedy the grave injustice of a wrongful conviction. Given their special importance in the community and in the justice system, prosecutors should be the first to ensure defendants receive fair trials, that only the guilty are incarcerated, and that people who have been wrongfully convicted are afforded new trials.

Here, the Circuit Attorney found clear and convincing evidence that Mr. Johnson is innocent of the murder that her office had prosecuted him for, and that his conviction was obtained solely through perjured testimony, after the State withheld critical impeachment and exculpatory information. These startling revelations required prompt action from the Circuit Attorney in an effort to remedy Mr. Johnson's wrongful conviction. And the way that she could fulfill her constitutional, statutory, and ethical obligations was to file a motion for a new trial in Mr. Johnson's case pursuant to Rule 29.11.

2. Rule 29.11 permitted the Circuit Attorney to file a motion for a new trial outside of the 15-day deadline provided by the Rule.

When reviewing the Circuit Attorney's motion for a new trial, the trial court expressed skepticism about whether a prosecutor could file a new trial motion under Rule 29.11. *See* Order at 9-10. Then the trial court held that even if the Circuit Attorney could file a new trial motion under Rule 29.11, the Circuit Attorney could not file the motion outside the 15-day window provided by the Rule. *See* Order at 12-13. The trial court's ruling is inconsistent with the text and structure of Rule 29.11, and case law interpreting the Rule.

Rule 29.11, in pertinent part, provides:

> 29.11. Misdemeanors or Felonies - After-Trial Motions - Preservation of Error
>
> (a) Granting a New Trial. The court may grant a new trial upon good cause shown. A new trial may be granted to all or any of the defendants.
>
> (b) Time for Filing Motion. A motion for a new trial or a motion authorized by Rule 27.07(c) shall be filed within fifteen days after the return of the verdict. On application of the defendant made within fifteen days after the return of the verdict and for good cause shown the court may extend the time for filing of such motions for one additional period not to exceed ten days.

By its own terms, Rule 29.11 does not limit which party can file a new trial motion under the Rule. And when this Court intends to limit the ability of a party to file a motion, it does so explicitly. For example, this Court's Rule regarding post-conviction proceedings, Rule 29.15, makes clear that only a "person convicted of a felony" may file a motion under that that Rule. *See* Rule 29.15 (providing that a "person convicted of a felony after trial . . . may seek relief"). The lack of comparable language in Rule 29.11 is a clear indication that this Court intended for either party to be able to file a new trial motion under the Rule.

To limit new trial motions to defendants would require this Court to read words into the Rule that simply are not there. *Cf. Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 355 (Mo. 2016) ("This Court will not add words to a statute under the auspice of statutory construction."). Despite the trial court's musings to the contrary, the Circuit Attorney could file a new trial motion under Rule 29.11.

Moreover, this Court's case law supports this reading of Rule 29.11. In *State ex rel. Norwood v. Drumm*, this Court stated unequivocally that "the prosecuting attorney or the defendant may move for a new trial based on newly discovered evidence." 691 S.W.2d 238, 241 (Mo. 1985). The trial court attempted to cast aside the clear statement in *Norwood* as dicta, but the dicta is a direct reflection of the new trial rule's language, and the fact that it does not limit the ability to file a new trial motion to just the defendant.

As a policy matter, it makes sense that this Court would state that a prosecutor could file a new trial motion "based on newly discovered evidence." *Id.* This accords directly with a prosecutor's role as a "minister of justice." *State v. Banks*, 215 S.W.3d 118, 119 (Mo. 2007). A prosecutor must be able to file a new trial motion if newly discovered evidence casts doubt on a conviction. Thus, this Court's previous understanding of Rule 29.11 allowing for prosecutors to file new trial motions not only gels with the language of the Rule, it also aligns with a prosecutor's obligation to "see that justice is done," *Connick*, 563 U.S. at 65-66, 71, which does not necessarily mean that a prosecutor should "obtain or [ ] sustain a conviction." *Terry*, 304 S.W.3d at108 n.5. Allowing Circuit and Prosecuting Attorneys to file new trial motions when faced with newly discovered evidence ensures

there is mechanism in place for prosecutors to fulfill their obligations to seek justice in the face of a wrongful conviction.

Relatedly, to fulfill her obligations as a minister of justice, the Circuit Attorney must be able to file new trial motions past the 15-day deadline provided by Rule 29.11. This reading is faithful to Rule 29.11's structure, the policy reasons behind the Rule, and how Rule 29.11 had been previously treated by courts across the State.

It is clear from the structure of Rule 29.11 that the 15-day deadline for new trial motions should not apply to motions made by the prosecution. Immediately after setting forth the 15-day deadline, Rule 29.11 states: "On application of the defendant made within fifteen days after the return of the verdict and for good cause shown the court may extend the time for filing of such motions for one additional period not to exceed ten days." Notably, the Rule does not mention any limits to extensions being sought by the prosecutor, which makes perfect sense given prosecutors' statutory authority to "manage and conduct all criminal cases" in the circuit court. Mo. Rev. Stat. § 56.450. The ability to file a new trial motion, when there is a question about the correctness of the conviction, falls squarely within the prosecutor's power to "manage and conduct" criminal cases, and her obligation to do justice.

Moreover, it makes little sense to find that defendants can request an extension of the 15-day deadline set forth by Rule 29.11, but not prosecutors, which is what the trial court concluded. The reason why defendants need to be limited in their extension of filing new trial motions is that there is an interest in finality of convictions. It would be extremely burdensome on the criminal justice system if a defendant could file new trial motions long

after a conviction is final. That is why there are other post-conviction procedures outside of new trial motions for defendants to use in an attempt to obtain relief.[7]

Prosecutors do not have the same avenues available to affirmatively right wrongful convictions, and the same finality concerns do not attend a prosecutor filing a new trial motion based on newly discovered evidence. It is the State that has a "weighty interest[] in ensuring the finality of convictions and sentences." *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). And this Court has said that finality is important to public confidence in the courts. *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 886-887 (Mo. 1987). When the Circuit Attorney, who represents the State on behalf of the public, decides a new trial motion should be filed, she has decided that the interest of finality must yield to the interests of justice. This is the type of decision-making that the law affords prosecutors. As elected officials, Circuit and Prosecuting Attorneys are "best suited to represent the interests of the people." *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. 2018). The people of St. Louis elected the Circuit Attorney precisely for her "decision-making skills" to allow her to exercise "her discretion." *Id.* The Circuit Attorney is therefore in the best position to decide when and whether finality interests must give way to justice, especially since there is no legitimate interest in keeping an innocent man in prison. In that situation, a prosecutor

[7] The trial court in its order suggested that habeas corpus is an adequate avenue for relief for Mr. Johnson. Order at 12. However, that says nothing about whether it is an adequate avenue for the *Circuit Attorney* to fulfill her constitutional, ethical, and statutory duties, which is the pertinent question in this appeal.

must be able to vindicate the "public interest in the fair administration of criminal justice." *In re Schuessler*, 578 S.W.3d 762, 773 (Mo. 2019). Finality "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engel v. Isaac*, 456 U.S. 107, 135 (1982). It will destroy public confidence in the judicial system if a prosecutor can learn of a wrongful conviction but can do nothing to remedy that injustice. While it may make sense to limit a defendant's ability to file a new trial motion, it does not make sense to limit a prosecutor's ability to file a new trial motion in the same way.

To be clear, that there may be additional avenues of relief available to a defendant does not speak to or relieve a prosecutor of *her* obligation "to inform the appropriate authority of after acquired or other information that casts doubt upon the correctness of the conviction." *Imbler*, 424 U.S. at 427 n.25. A prosecutor's duty extends beyond individual defendants to the community that she serves. When a person has been wrongfully removed from the community, the prosecutor has a duty to her constituents to make it right. This duty is only magnified in cases like Mr. Johnson's, where government misconduct contributed to a wrongful conviction. When that happens, a prosecutor, as a "quasi-judicial officer," must take special steps to preserve "the public trust in both the scrupulous administration of justice and in the integrity of the bar." *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 791 (Mo. Ct. App. 2016). This must include the prosecutor going before the court in her home jurisdiction—where the wrongful conviction happened in the first instance—and admitting what went wrong and then trying to make it right.

And as a practical matter, if this Court concludes that a prosecutor cannot file a new trial motion outside of the 15-day window provided by Rule 29.11, that would mean that a

prosecutor could almost never file a motion for a new trial in the face of a wrongful conviction. Such a holding would blink the reality that wrongful convictions happen, and that it sometimes takes time for a prosecutor to uncover a wrongful conviction, especially when the conviction was begotten through government misconduct. That interpretation of Rule 29.11 would mean that a prosecutor has no role in remedying a wrongful conviction. It would elevate procedure over justice, when the guiding star for prosecutors and the courts is always supposed to be justice.

Indeed, before this case, the Court of Appeals had held that prosecutors can waive Rule 29.11's deadline. For example, the Court of Appeals held in *State v. Henderson* that the prosecutor waived Rule 29.11's deadlines by urging the trial court to consider the defendant's untimely new trial motion. 468 S.W.3d 422, 424-425 (Mo. Ct. App. 2015). Also before this case, it has been reported that circuit courts have allowed Prosecuting Attorneys to file new trial motions when faced with evidence of a wrongful conviction well past Rule 29.11's 15-day deadline.[8] Before this case, the courts had implicitly recognized

[8] *See* Tony Messenger, *Messenger: When Does a Prosecutor's Responsibility to Seek Justice End? A Tale of Two Cases*, ST. LOUIS POST-DISPATCH, Dec. 13, 2019, https://www.stltoday.com/news/local/columns/tony-messenger/messenger-when-does-a-prosecutor-s-responsibility-to-seek-justice/article_18377c14-74d3-5036-a042-480ea82c74a3.html. At oral argument before the Court of Appeals, the Attorney General alluded to the fact that Prosecuting Attorneys in other parts of the State have successfully filed new trial motions in the face of wrongful convictions.

that Rule 29.11's deadline is designed to protect the State's interest in the finality of convictions, and therefore, when *the State* seeks to extend Rule 29.11's deadline, especially when to correct a wrongful conviction, the finality interests disappear and justice must prevail. This case therefore marks an unprecedented break from previous understandings of Rule 29.11. This Court should hold that Circuit and Prosecuting Attorneys can file new trial motions when faced with evidence of a wrongful conviction *whenever* that evidence comes to light.

Because the Circuit Attorney had the authority to file the new trial motion, the trial court had the obligation to decide the motion on its merits. The trial court's decision that it did not have the authority to decide the new trial motion because it was untimely was erroneous and this Court should reverse. The Circuit Attorney's new trial motion should granted or, at a minimum, should be heard on its merits.

B. The trial court erred in holding that it did not have the authority to consider the Circuit Attorney's Motion for New Trial under plain error review, and this Court should exercise its inherent authority to make clear that prosecutors always have the authority to file new trial motions when faced with evidence of a wrongful conviction.

If this Court finds that Rule 29.11 does not speak directly to Circuit or Prosecuting Attorneys filing new trial motions when faced with evidence of a wrongful conviction, this Court should take this opportunity to clarify the Rule or announce procedures governing new trial motions filed by prosecutors. Specifically, this Court should hold that given that nothing in the law prevents a Circuit or Prosecuting Attorney from filing a new trial motion, and nothing in the law prohibits a Circuit or Prosecuting Attorney from filing a new trial motion more than fifteen days after the verdict, a trial court must always consider a

prosecutor's motion for a new trial when the motion is based on the discovery that a person has been wrongfully convicted.

1. This Court has the power to clarify Rule 29.11.

It is uncontestable that this Court has the power to clarify or amend Rule 291.11, or correct any erroneous interpretation of the Rule. *See Berdella v. Pender*, 821 S.W.2d 846, 850 (Mo. 1991) ("This Court has the power to make procedural rules governing all legal matters subject only to the limitations of federal law and the Missouri Constitution."); Mo. Const., Art. V, § 5 (empowering this Court to "establish rules relating to practice, procedure and pleading for all courts . . . which shall have the force and effect of law . . . ."). And this Court has not hesitated to enact procedures when its Rules are silent to ensure that there is an adequate mechanism in place to address potential constitutional violations or other similarly grave injustices.

For example, in *State v. Terry*, "[t]he overriding issue [was] what this Court should do to ascertain whether there may be a miscarriage of justice—a conviction based on largely perjured testimony." 304 S.W.3d 105, 108 (Mo. 2010). There, the complainant in a statutory rape case was pregnant during trial "and testified that Terry was the father because she had not had sex with anyone else during [the relevant period]." *Id.* at 106. After trial, however, "a DNA test done after the child's birth show[ed] that Antoine Terry [was] not the father." *Id.* at 107. Terry filed a motion for a new trial based on this newly discovered evidence that undermined the complainant's testimony, but filed it past Rule 29.11's prescribed deadline. *Id.* at 108. This Court noted that "Missouri rules have no

provision for granting a new trial based on newly discovered evidence even if the evidence is available prior to sentencing." *Id.* at 109. Still, this Court explained that "an appellate court has the inherent power to prevent a manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal." *Id.* Thus, despite there being no express rule countenancing this Court remanding the case back to the trial court for it to decide the untimely new trial motion on its merits, this Court granted that relief pursuant to its "inherent power to prevent miscarriages of justice," recognizing the Court's "responsibility to avoid a prevision of justice." *Id.* at 110.

Likewise, just last year in *D.C.M. v. Pemiscot Cty. Juvenile Office,* this Court was faced with a situation where a juvenile who was adjudicated delinquent argued that his attorney "was ineffective in representing him in the juvenile proceeding." 578 S.W.3d 776, 779 (Mo. 2019). Recognizing "juveniles have a due process right to effective assistance of counsel under Missouri law," the issue in this case was "what procedure should be followed when reviewing ineffective assistance of counsel claims in juvenile cases." *Id.* at 782. This Court noted that "[d]espite the right to effective assistance of counsel, no statute or case from this court provides a mechanism for a committed juvenile to raise an ineffective assistance of counsel claim." *Id.* "Neither the legislature nor this Court's rules [had] established how to address claims of ineffective assistance in a juvenile hearing when the record is insufficient to do so on direct appeal." *Id.* at 784. To allow D.C.M. the ability to fully adjudicate his ineffective assistance of counsel claim, this Court remanded the case for an evidentiary hearing on the claim despite there not being an express rule supporting that relief.

Terry and *D.C.M* are instructive for how this Court should resolve this case. There is no question that the Circuit Attorney's new trial motion raises the question of "whether there may be a miscarriage of justice—a conviction based largely on perjured testimony," as was the case in *Terry*, 304 S.W.3d at 108. This case also involves critical due process rights under federal and Missouri law, the same as in *D.C.M.*, 578 S.W.3d at 782. There is also an added fundamental issue implicated in this case: how does a prosecutor fulfill "the ethics of [her] office" and "inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of [a] conviction[?]" *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). To the extent this Court finds Rule 29.11 does not speak directly to this point, then like in *Terry* and *D.C.M.*, Missouri law is silent on what should happen next. Thus, like in *Terry*, this Court should use its "inherent power to prevent miscarriages of justice." *Terry*, 304 S.W.3d at 110. And like in *D.C.M.*, this Court should, at a minimum, remand this case to the trial court to allow the Circuit Attorney's new trial motion to be fully addressed. *D.C.M.*, 578 S.W.3d at 784. That procedural remedy is consistent with this Court's overarching "responsibility to avoid a perversion of justice." *Terry*, 304 S.W.3d at 110.

To the extent this Court finds that Rule 29.11 does not speak to the situation at hand, this Court could also amend the Rule similar to how it amended Rule 27.26 in *Fields v. State*, 572 S.W.2d 477 (Mo. 1978).[9] At the time this Court decided *Fields*, Rule 27.26(h)

[9] Rule 27.26 was repealed and replaced by Rules 29.15 and 24.035. *See Fincher v. State*, 795 S.W.2d 505, 506 (Mo. Ct. App. 1990).

stated "that counsel shall be appointed if a [post-conviction] motion presents questions of law or issues of fact." *Id.* at 482 (quotation marks and parentheses omitted). However, this Court noted that over time, "there appear[ed] to have developed a tendency to appoint counsel less frequently"—counsel was only being appointed where a "Pro se motion actually pleaded facts which, if true, would entitle the [petitioner] to relief." *Id.* at 482-83. This Court explained that this was "not what the rule intended," and that the "case-by-case method" used by courts to determine "whether to appoint counsel . . . has not proved to be satisfactory." *Id.* at 483. Therefore, in its opinion, this Court "decided to adopt a Per se rule" that "Counsel is appointed for indigents in all [Rule 27.26] cases." *Id.* This Court announced that "[a]n appropriate amendment of Rule 27.26 will be made and published," but "[m]eanwhile, the directions contained [in the opinion were] to be followed." *Id.* at 483 n.4. Moreover, although this Court made the rule change "effective prospectively only," it granted "relief to the litigant whose case brought about the change made by the opinion." *Id.* at 483.

This Court could take similar action here, and find that the trial court interpreted Rule 29.11 in way that this Court had not "intended," and therefore make clear in this opinion that Circuit and Prosecuting Attorneys can file new trial motions under Rule 29.11 based on newly discovered evidence at any time. This Court can order that this is the correct reading of the Rule going forward, and amend Rule 29.11 as appropriate, ensuring that the Circuit Attorney's motion gets the benefit of any rule change as she is "the litigant whose case [would bring] about the change made by the opinion." *Fields*, 572 S.W.2d at 483.

Simply put, even if Rule 29.11 does not expressly allow for Circuit and Prosecuting Attorneys to file new trial motions based on newly discovered evidence past Rule 29.11's 15-day deadline, this Court has the tools at its disposal to ensure that prosecutors are able to correct wrongful convictions whenever they come to light.

2. The Circuit Attorney's new trial motion convincingly demonstrates Mr. Johnson was wrongfully convicted.

The Circuit Attorney's new trial motion convincingly demonstrates why the motion must be decided on its merits—it shows Mr. Johnson's conviction was obtained through government misconduct and is based on false testimony. It also shows that Mr. Johnson is innocent.

The Conviction Integrity Unit's review of Mr. Johnson's case established that the State's only eyewitness, Greg Elking, perjured himself when he identified Mr. Johnson as one of the shooters. Mr. Elking has since recanted the identification. He explained that his identification of Mr. Johnson was manufactured and false. And he admitted in personal writings, affidavits, and deposition testimony that he was never able to identify the gunmen because they wore masks that covered nearly all of their faces. Indeed, Mr. Elking initially told police that he could not identify the shooters and continued to tell police more than once that he did not recognize or know the gunmen. *See supra* pp. 28-31.

To compel Mr. Elking to testify, Detective Nickerson promised Mr. Elking money if he agreed to be a witness against Mr. Johnson, knowing that Mr. Elking could not identify the perpetrators. Mr. Elking finally succumbed to the pressure, intimidation, and promise of money, and agreed to sign a statement identifying Mr. Johnson that was hand-crafted by

Detective Nickerson. At trial, Mr. Elking knowingly provided false testimony against Mr. Johnson. The newly-discovered evidence that Mr. Elking committed perjury when he identified Mr. Johnson is overwhelming:

(1) In 2003, Mr. Elking wrote a letter to Reverend Rice admitting that he testified falsely against Mr. Johnson.

(2) In a series of letters to Mr. Johnson, Mr. Elking admitted that his identification was coerced and false.

(3) In 2003, Mr. Elking signed an affidavit stating that he testified falsely.

(4) In 2010, Mr. Elking signed an affidavit stating that he testified falsely.

(5) In 2019, Mr. Elking met with the CIU and admitted that he could not see the assailants, never had any ability to identify the assailants, and testified falsely when he identified Mr. Johnson.

(6) In 2019, Mr. Elking testified under oath that his identification of Mr. Johnson was false and manufactured.

(7) Receipts of payment from the State to Mr. Elking, never disclosed to the defense, corroborate Mr. Elking's account.

See supra pp.28-33.

Without Mr. Elking's identification, there would have been no case against Mr. Johnson. Mr. Elking was the sole witness to the murder, and accordingly, was an essential witness for the State. Undoubtedly, Mr. Elking's perjury and false identification prejudiced Mr. Johnson.

In another instance of prejudicial perjured testimony, Detective Nickerson testified falsely regarding Mr. Johnson's alibi. It was undisputed that at the time of the murder, Mr. Johnson was, with the exception of about five minutes, at an apartment with friends located at 3907 Lafayette Avenue. Thus, to undermine Mr. Johnson's alibi, the State presented Detective Nickerson's false testimony that Mr. Johnson could have traveled from 3907 Lafayette to the crime scene in "no more than five minutes," because Detective Nickerson had personally driven the route anywhere from "20-50 times" and therefore knew this to be true. Yet the undisputed evidence proves that the assailants arrived on foot, and simple distance calculations contradict Detective Nickerson's false testimony about how long it takes to drive from one location to the other. *See supra* pp. 35-36.

In addition to the knowingly perjured testimony from Mr. Elking and Detective Nickerson, the State put on testimony from William Mock, who had made racist statements against Mr. Johnson and had an extensive criminal history and a history of cooperating as a jailhouse informant. On top of Mr. Mock's questionable character, the State misled the jury by arguing Mr. Mock had no motive to lie. Evidence that the State hid from the defense proves this false. In a series of undisclosed exculpatory and impeaching correspondences between Mr. Mock and ACA Dwight Warren, several letters were written by ACA Warren on Mr. Mock's behalf for varying purposes, including to remedy disciplinary incidents involving Mr. Mock, to request transfers for Mr. Mock within the DOC, and to make recommendations for Mr. Mock's release to the parole board. None of these favors were disclosed to the defense, and Mr. Mock lied to the jury about his expectation of receiving beneficial treatment in exchange for his testimony. Mr. Mock further testified falsely about

his criminal history and about being a government witness in the past, and the State did not correct his false testimony. *See supra* pp. 33-35.

But not only did the CIU's review prove that Mr. Johnson had been wrongfully convicted, it showed that he was innocent. Mr. Johnson's co-defendant, Phillip Campbell, over the course of two decades, repeatedly stated both in unsolicited letters and under oath that Mr. Johnson had no involvement in the crime. And James Howard attested three times under oath that he was the other masked shooter, and after being interviewed by the CIU, the Circuit Attorney found Mr. Howard's account credible. *See supra* pp. 36-39. Therefore, there is compelling evidence that Mr. Johnson is innocent of Mr. Boyd's murder, and as long as he remains in prison from the crime, the Circuit Attorney is hamstrung from bringing the real perpetrator to justice.

In short, the Circuit Attorney established with credible and overwhelming evidence that: (1) Greg Elking, Detective Nickerson, and William Mock falsely testified at Mr. Johnson's trial; (2) the State withheld critical exculpatory and impeachment evidence from Mr. Johnson leading up to trial; and (3) Mr. Johnson is innocent. These "extraordinary circumstances" warrant granting the Circuit Attorney's new trial motion or, at a minimum, warrant a remand to the trial court for a hearing on the motion.

* * *

At bottom, this Court has made clear that "within the inherent power of the courts is the authority to do all things that are reasonably necessary for the administration of justice." *State ex rel. Weinstein v. St. Louis Cty.*, 451 S.W.2d 99, 101 (Mo. 1970). This Court has also declared that "a primary goal of the judicial system is to seek the truth and

to do justice between the parties. To promote this goal a case must be decided on the merits; procedural 'niceties' should not pose insurmountable barriers." *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 887 (Mo. 1987). And this Court stated unequivocally that "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." *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1968).

Yet because of "procedural 'niceties,'" *Sprung*, 727 S.W.2d at 887, the trial court refused to hear the Circuit Attorney's new trial motion on its merits even though there is compelling evidence that Mr. Johnson "was found guilty of a crime on the basis of false testimony," *Harris*, 428 S.W.2d at 500. Mr. Johnson has been wrongfully incarcerated for over twenty-five years for a crime he did not commit. The circumstances of this case are extraordinary. *State v. Parker*, 208 S.W.3d 331, 334 (Mo. Ct. App. 2006) ("extraordinary circumstances" exist for remanding for a new trial "where the newly discovered evidence would have completely exonerated the defendant"); *State v. Williams*, 673 S.W.2d 847, 848 (Mo. Ct. App. 1984) (finding Williams was entitled to file a motion for a new trial and receive a hearing on the motion where Williams' evidence was "detailed" and "if believed, the newly discovered evidence would completely exonerate the defendant of any complicity in the crime for which he was convicted"). Pursuant to its inherent "authority to do all things that are reasonably necessary for the administration of justice," *Weinstein*, 451 S.W.2d at 101, this Court should grant the Circuit Attorney's Motion for New Trial or remand this case to the trial court so that the Circuit Attorney's motion can be adjudicated on its merits.

C. The trial court erred in *sua sponte* appointing the Attorney General because the Circuit Attorney is the recognized representative of the State in criminal matters before the trial court, and no legal basis supported the appointment.

Below, the circuit court purported to appoint the Attorney General to "protect the integrity of the legal process," Order at 9, despite the fact that the Circuit Attorney was representing the State as was her statutory right. In so doing, the circuit court acknowledged it was not removing the Circuit Attorney from the case, but nevertheless appointed another official to represent the State. *Id.* The law makes clear that this appointment was invalid.

Under Missouri law, the Circuit Attorney has the power to handle criminal matters within her jurisdiction before the circuit court. *See* Mo. Rev. Stat. §§ 56.450, 56.550. By contrast, the Attorney General can only appear in criminal cases in the trial court "[w]hen directed by the *governor*" to "*aid* any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts." Mo. Rev. Stat. § 27.030 (emphasis added). Therefore, as this Court has explained, while the Attorney General is "the chief legal officer of the State . . . the various offices of the prosecuting attorneys are 'carved out of' this overriding authority, with local implications." *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968). The Attorney General cannot usurp the Circuit Attorney's "carved out" authority in the jurisdiction she was elected to serve.

Despite this clear statutory language, below, the Attorney General argued that Mo. Rev. Stat. § 27.060 authorized his appointment. However, Section 27.060 only applies to "civil suits and other proceedings at law or in equity." *Id.* A *different* statute deals with the involvement of the Attorney General in criminal cases, *see* Mo. Rev. Stat. § 27.030, and that statute greatly limits when the Attorney General can appear in circuit court in criminal

matters. Under the law, there is no provision that allows the Attorney General to make an appearance in circuit court in a criminal matter to take a position opposite that of the governing Circuit or Prosecuting Attorney.

In the face of this clear statutory language, the circuit court claimed that it appointed the Attorney General pursuant to its "inherent authority." Order at 9. But inherent authority cannot trump clear statutory mandates. Indeed, this Court recently disclaimed such a broad assertion of the circuit court's "inherent authority" in a case involving this Circuit Attorney. *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 397 (Mo. 2018) ("The circuit court does not have the authority to ensure every action taken anywhere in the CAO is done in accordance with its general notions of fairness.").

And even if the circuit court did have the authority to appoint the Attorney General, the circuit court did not give a sufficient reason to justify the appointment in this case. The circuit court justified its appointment of the Attorney General by expressing concern with the fact that the Innocence Project had contacted some of the jurors in Mr. Johnson's case and obtained affidavits which, according to the circuit court, violated a local court rule. Order at 4-5.[10] But even if the Innocence Project violated a local court rule by contacting

[10] There is a question about whether this local court rule is constitutional given that the Supreme Court recently recognized that courts must receive evidence of juror's exhibiting racial bias during deliberations, which in that case took the form of juror affidavits. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). If this local rule were to remain in

jurors, the Circuit Attorney did not, which is presumably why the circuit court did not find it to be a basis to disqualify the Circuit Attorney. Then, after criticizing the Innocence Project's practices, the circuit court expressed concern with the fact that the Circuit Attorney did not follow the Innocence Project's "best practices" for investigating cases involving allegations of prosecutorial misconduct by referring the case to an outside entity. *Id.* at 5-6. However, the Circuit Attorney not following the best practices of an outside organization is not a reason to appoint the Attorney General, especially when the Attorney General did not even purport to review the Circuit Attorney's assertion that Mr. Johnson had been wrongfully convicted. In fact, since the filing of the new trial motion, the Attorney General has never once challenged the Circuit Attorney's claim that Mr. Johnson has been wrongfully convicted and is innocent.

It is deeply problematic that two separate officials both purporting to represent the State can take diametrically opposed positions in the same criminal case—which is why statutorily, it is not allowed. Unless the Circuit Attorney is disqualified, which in this case she was not, she has the sole power to manage criminal cases in her jurisdiction. Thus, this Court should hold that the trial court erred by *sua sponte* appointing the Attorney General.

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effect, a defendant would often be unable to vindicate the constitutional right recognized in *Pena-Rodriguez.*

CONCLUSION

For the reasons above, this Court should reverse the trial court's ruling and remand the case for a new trial or, at a minimum, remand for a hearing on the State's Motion for New Trial. This Court should also hold that the trial court erred by *sua sponte* appointing the Attorney General.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my understanding that all counsel are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on February 10, 2020, upon the filing of the foregoing document.

/s/Daniel S. Harawa

Daniel S. Harawa

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word in Times New Roman, 13-point font. And it contains 17,320 words, excluding the Tables, Signature Block, and Certificates, which does not exceed the 31,000 words allowed for an Appellant's initial brief under Rule 84.06.

/s/Daniel S. Harawa

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