SC98303

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Plaintiff - Respondent,

v.

LAMAR JOHNSON,

Defendant-Appellant.

Appeal from the Circuit Court of St. Louis City, Missouri
The Honorable Elizabeth Hogan
Case No. 22941-03706A-01
On Transfer from Eastern District Court of Appeals Case No. ED108193

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case presents extraordinary circumstances and undeniably important questions fundamental to our justice system. The office responsible for prosecuting Lamar Johnson has determined, after an investigation spanning more than a year, that he is innocent by clear and convincing evidence. Despite the overwhelming evidence showing Johnson was wrongfully convicted through perjured testimony and misconduct,[1] the most extraordinary circumstance in this case is that despite the prosecutor's Motion for New Trial (D99), he remains in the custody of the Missouri Department of Corrections. Shortly after filing the Motion for New Trial, the trial court, *sua sponte*, appointed the Attorney General "to appear on behalf of the State," D146; D167/P3, which effectively halted the Circuit Attorney's efforts to exonerate an innocent person in favor of an unnecessary tug-of-war between to diametrically opposed state entities. The innocent person caught in the middle is Lamar Johnson.

The trial court's holding that the Attorney General can interfere with and usurp an elected prosecutor's authority to rectify a wrongful conviction in her jurisdiction is unprecedented. The trial court's unsupported appointment of the Attorney General and its dismissal of the State's Motion for New Trial without a hearing thwarted the Circuit Attorney's ability to discharge her constitutional and ethical duties. Despite the Attorney General's arguments to the contrary, Lamar Johnson's innocence—especially when

[1] Although this case centers on Johnson's wrongful conviction, the State has failed to refute a single factual assertion or allegation contained in the Circuit Attorney's Motion for New Trial.

admitted by the same prosecutor's office that obtained his conviction—is the hallmark of a rare and extraordinary circumstance.

The trial court determined that the Circuit Attorney is powerless to correct a wrongful conviction like Johnson's, relying on a rigid and incorrect application of procedural rules and ignoring the overwhelming evidence of innocence presented by the State. No rule of procedure should be interpreted so inflexibly as to permit the elevation of form over fairness because procedural technicalities designed to serve principles of finality "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engel v. Isaac*, 456 U.S. 107, 135 (1982).

This Court should exercise its constitutional authority to reexamine existing law and to clarify that an elected Missouri prosecutor has the ability and authority to satisfy her ethical and constitutional obligations to seek a new trial where new evidence establishes that a person was wrongfully convicted on the basis of perjured testimony. Fairness and equity require reversal.

JURISDICTIONAL STATEMENT

In 1995, Lamar Johnson was tried and convicted of First Degree Murder and Armed Criminal Action in the Circuit Court of St. Louis City, Missouri for the October 30, 1994 shooting death of Marcus Boyd and was sentenced to life in prison without the possibility of parole. D101/P3; TR.Vol.I/P162, 220; D107/P1.[2] On July 19, 2019, the Circuit Attorney

[2] The Legal File will be cited by system-generated document number (D) and system-generated page number (P) from the original record on appeal, *e.g.*, D101/P3. The consecutively paginated transcript (TR) will be cited by Volume and page number, *e.g.*, TR.Vol.I.

for St. Louis City, Kimberly Gardner, filed a Motion for New Trial for Johnson after an internal investigation by her office discovered that Johnson was innocent of the crime and that his conviction had been secured through perjured testimony. D99/P1. Johnson joined the Motion. D98.

On August 23, 2019, the trial court issued an Order denying the Circuit Attorney's Motion for New Trial, holding that it lacked authority to hear the Motion. D167. Johnson and the Circuit Attorney filed timely notices of appeal, (D174, D176), and the case was argued in front of the Eastern District Court of Appeals on December 11, 2019. On December 24, 2019, the Court of Appeals issued an Order transferring the case to the Missouri Supreme Court pursuant to Mo. Sup. Ct. R. 83.02, holding:

> The issues in this case are undeniably important and include questions fundamental to our criminal justice system: whether 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. The resolution of these issues is of obvious import and general interest throughout this State. But the case has also garnered national attention given the numerous jurisdictions with conviction integrity units facing similar questions of significance to the administration of justice in those states. Moreover, resolution of these issues may require reexamination of existing law. Under these circumstances, we find transfer appropriate.

A053-54.[3] After transfer pursuant to Rule 83.02, this Court now has jurisdiction under MO. CONST. ART. V, § 10, which provides, in relevant part:

> Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

MO. CONST. ART. V, § 10. *See J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W. 3d 249, 255 (Mo. 2009) ("subject matter jurisdiction of Missouri courts is governed directly by the state's constitution").

In addition, the issues in this case may implicate this Court's residual powers under Mo. Const. Art. V, § 4 which provides, in relevant part:

> The supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power.

MO. CONST. ART. V, § 4.

[3] Appellant Johnson's Appendix is consecutively paginated, any references to Appellant Johnson's Appendix will by cited by document (A) and page number. *e.g.* A001.

STATEMENT OF FACTS

The Crime

On October 30, 1994, Marcus Boyd was sitting on the front porch of his apartment with Greg Elking, a co-worker. TR.Vol.I/P162, 220; D107/P1. Elking had come by to repay a debt he owed Boyd for drugs and to purchase some crack. TR.Vol.I/P157; D107/P1). The porch was lit by a single light bulb at the top of the stairs on the inside of the upstairs apartment's screen door; the exterior porch light was broken. TR.Vol.I/P189-90; D109/P9-10; D107/P2; D110/P6. As Boyd spoke with Elking on the dimly lit porch, two masked men ran from the side of the house without warning. TR.Vol.I/P159; D116/P2; D118/P2; D107/P2.

The masked assailants wore dark clothing and ski masks, attire that concealed every physical feature but their eyes. TR.Vol.I/P159, 222; D116/P2; D118/P2; D107/P2. According to affidavits by Phillip Campbell, James Howard, Elking, and the trial testimony, the masks worn by the assailants looked like this:

Id.

Elking was able to see the skin of the perpetrators and described one of them as "practically as black as the hood covering his face." D107/P3. Each was armed with a gun. TR.Vol.I/P159; D116/P2; D118/P2; D107/P2. Both masked men opened fire on Boyd. *Id.* Elking focused on the gun pointed at him and was "in shock" and "feared for [his] own life." D114/P48-49; D123/P1; D114. Elking fled the scene on foot and went home, a few blocks away. TR.Vol.I/P165-66; D107/P2.

The Police Investigation[4]

At the time of the shooting, Leslie Williams, Boyd's girlfriend, was inside their upstairs apartment tending to their baby. TR.Vol.I/P158, 220-21; D110/P6. Leslie Williams called 911 at 9:07 p.m. D101/P62, 67. Boyd was pronounced dead at a nearby hospital at 9:55 p.m. *Id.* at 1, 62.

Responding officers questioned Leslie Williams and neighbors living in the vicinity. One neighbor saw two men running through the alleyway between the houses. *Id.* at 65. Leslie Williams informed the officers that that a white man named "Greg" was on the porch when Boyd was shot. *Id.* at 66. Leslie Williams knew "Greg" as a customer of Boyd's crack business. TR.Vol.II/P225. No witness reported seeing a car arrive or flee the scene.

[4] Post-trial investigation indicates that critical aspects of the following account are largely false. However, in order to provide the complete record, the law enforcement investigation as it existed in 1994-1995 is summarized in this section. Further, because the Circuit Attorney's ethical and constitutional duties flow from the newly discovered evidence of innocence, a summary of the police investigation and the evidence presented at trial is necessary to understand and assess the weight of the newly discovered evidence of innocence and prejudicial constitutional violations at trial.

Leslie Williams informed detectives that she could not see the face of either shooter, both of whom wore some type of mask over their faces. D101/P66. Even though Leslie Williams was within feet of the gunmen, she could not make out any identifying characteristics because the masks concealed their faces. *Id.*; D110/P15-16. Even so, according to the police report, Leslie Williams suspected Johnson was involved in the shooting. D101/P35-36.

In a report dated the night of the homicide, police stated that Johnson was the primary suspect at the scene, *before* a single witness had been substantively interviewed and before the only eyewitness, "Greg," had even been identified or located. D101/P1. The following is an excerpt of a police report dated the night of the homicide, October 30, 1994:

Scene Investigation:
FOUR 25 CAL. SHELL CASINGS WERE RECOVERED FROM THE FRONT PORCH AND ONE FROM THE FRONT LAWN AT 3910 LOUISIANA. ONE SPENT PROJECTILE WAS ALSO RECOVERED FROM THE FRONT PORCH. DURING THE COURSE OF THIS INVESTIGATION THE NAME OF LAMAR JOHNSON B/M 20 DOB 12/6/73 LID #232319 SURFACE AS A SUSPECT.

Followup: POST, LAB RESULTS, INTERVIEW ASSOCIATES AND FURTHER INVESTIGATION ON LAMAR JOHNSON. LOCATE AND INTERVIEW GREG HE ONCE WORKED WITH THE VICTIM AT SAYERS PRINTING CO. PH# 968-5400 EXT. 328. GREG LIVES ON BAMBURGER A FEW DOORS EAST OF CHIPPEWA.

D101/P1.

Johnson learned of the shooting sometime between 9:00 p.m. and 10:00 p.m. on the night of Boyd's murder. D101/P1; D119/P30-32. During that time, Johnson and his girlfriend, Erika Barrow, were at their friend Anita Farrow's house with Anita Farrow and her boyfriend, Robert Williams. Anita Farrow's house was located at 3907 Lafayette, at least 10 minutes one-way by car from the scene at 3910 Louisiana. D120/P1; D119/P30; TR.Vol.II/P312-13; D121/P1.

Johnson had previously arranged to meet a customer outside of Anita Farrow's house to make a drug sale. TR.Vol.II/P312; D119/P31; D121/P1. Johnson, Erika Barrow, and their child arrived at Anita Farrow's house around 9:00 p.m. D119/P30-31; D120/P1. Shortly after their arrival, Johnson saw the customer arrive, exited Anita Farrow's apartment, got into the customer's car, and drove around the block to make the sale. D119/P31. Within minutes, Johnson was back inside Anita Farrow's house where the four continued to socialize until around 10:00 p.m. TR.Vol.II/P313; D119/P31-32; D120/P1; D121/P1.

Shortly after Boyd was killed, Pamela Williams (the mother of Johnson's eldest child and the cousin of Leslie Williams—Boyd's girlfriend) paged Johnson. D101/P68; TR.Vol.II/P325; D119/P31-32; D120/P1; D121/P1. Johnson returned Pamela William's page from inside Anita Farrow's house. *Id.* On that call, Pamela Williams told Johnson that Boyd had been killed and that Leslie Williams wondered whether Johnson was involved. D101/P68; TR.Vol.II/P314, 327; D119/P32; D120/P1; D121/P2.

Johnson asked Pamela Williams to add Leslie Williams into the call via three-way calling, which she did. D101/P68; D119/P32; D110/P14. The three spoke for a short time and Johnson told Leslie Williams and Pamela Williams that he was on Lafayette Avenue and that he was not involved in Boyd's death. Johnson became angry, asking Leslie Williams "Why would you think that?" *Id.*; D120/P1; D121/P2. Robert Williams, Anita Farrow, and Erika Barrows were with Johnson and present while Johnson was on the telephone call with Leslie and Pamela Williams. After the call from Pamela Williams,

Johnson and Erika Barrow went home with their baby where they remained for the rest of the evening. TR.Vol.II/P315; D119/P32-33; D120/P1.

On October 31, 1994, Detective Nickerson began his investigation into Boyd's homicide D101/P32. Nickerson interviewed Ed Neiger, who had purchased drugs from both Boyd and Johnson. *Id*. Nickerson claimed that Neiger told him of a feud between the two and that the feud might be a reason Johnson would kill Boyd. *Id.* at 33. Neiger disputed this account in his June 21, 1995, pretrial deposition, wherein he stated that he knew of no fights between Boyd and Johnson and he did not know of anyone who would want to kill Boyd. D122/P6.

Nickerson interviewed Dawn Byrd and Kristine Herrman on November 1, 1994. D101/P36. According to the report, Dawn Byrd reported that she purchased drugs from both Johnson and Boyd and that she heard rumors that Johnson was selling bad drugs. *Id*. The report states that Dawn Byrd said she confronted Johnson on October 29, 1994, and that Johnson said he was going to see Boyd about the bad drugs. *Id.* at 37. According to the report, Dawn Byrd said she was worried about what was going to happen between Boyd and Johnson. *Id*. In the report, Nickerson wrote that Dawn Byrd reported seeing Boyd on the evening of October 30, 1994, and had given him a ride home *Id.* at 38. While together, Boyd told Dawn Byrd that he had noticed Johnson's car around his house recently and on the drive to Boyd's home, Boyd thought he saw Johnson's car. *Id*.

In her June 21, 1995, pretrial deposition, Dawn Byrd testified that she knew of no disagreement between Boyd and Johnson and that the disagreement she had with Johnson

on October 29, 1994 had "nothing to do with Marcus," directly contradicting the contents of Nickerson's report. D125/P5-6.

Nickerson interviewed Kristine Herrman on November 1, 1994. The report indicates Kristine Herrman confirmed that she had been present for the October 29 conversation between Dawn Byrd and Johnson about bad drugs and that she had gone to visit Leslie Williams on October 30, 1994. D101/P38.

On November 1, 1994, Nickerson interviewed Leslie Williams again. *Id.* at 35. The police report states that Leslie Williams told Nickerson she believed Johnson was responsible for Boyd's murder and that there had been a dispute between them about missing drugs and stolen money. *Id.* at 35-36. On June 21, 1995, Leslie Williams gave a pretrial deposition, where she testified that Boyd and Johnson were once very close and that they had drifted apart, but she could think of no reason that Johnson would want to kill Boyd. D110/P6, 12.

Leslie Williams further testified during that pretrial deposition that Boyd and Johnson had spoken about a week prior to the homicide when Johnson stopped by their apartment, and that there was no animosity or words exchanged between them and there had never been any threats between them. *Id.* at 10-12. This further contradicted Nickerson's report.

From October 31-November 3, 1994, Nickerson attempted to locate Elking, the only witness to the homicide. D101/P34-35, 39. Nickerson spoke with Elking's sister and his wife and asked them to persuade Elking to contact police and give a statement. *Id.*at 39. Nickerson attempted to locate Elking through his employer. *Id.* at 34.

Finally, on November 3, 1994, Elking called Nickerson and confirmed that he was present on the porch when Boyd was killed. *Id.* at 39. Elking stated that each of the masked perpetrators was armed, one subject was "about 5'9" and the other was "taller," and both were wearing dark clothing and masks. *Id.* at 40. *Elking gave no further identifying information about the suspects. Id*. At around 2:00 p.m. on November 3, 1994, Elking and his wife Kelly Elking met Nickerson at a local diner. *Id*.

According to the police narrative about that meeting, Elking told Nickerson that he had gone to Boyd's apartment on the evening of October 30, to pay a small drug debt. *Id.* Elking stated that as he and Boyd talked on the porch, two men, dressed in dark clothing and wearing masks ran onto the porch from the alleyway between the houses. *Id.* at 41. One subject appeared to be about 5'9" with a slim build, and the second was about 6'0" tall. *Id*. Elking gave no further description of the suspects. One of the gunmen grabbed Elking and told him to "Get the fuck up!" *Id.* The gunmen fired several shots into Boyd and then fled the scene on foot, leaving Elking unharmed. *Id.* at 41-42. Elking then ran home where he told his wife about the shooting. *Id.* at 42.

Nickerson brought five department photographs with him to the meeting at the diner. Johnson and Phillip Campbell were among the photographs in the array. *Id*. Elking stated that the eyes in the photo of Johnson looked "similar" to the eyes of one of the gunmen. D107/P3-4; D114/P77-79. According to the report, Elking identified Johnson as one of the shooters from the five-photo array, but refused to sign the back of Johnson's photograph. D101/P42-43.

At the diner, Nickerson told 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 Elking at the diner on November 3, 1994, Nickerson told Assistant Circuit Attorney (ACA) Warren that Elking had identified Johnson as one of the shooters. D101/P43. At approximately 5:45 p.m. on November 3, 1994, Johnson and Phillip Campbell were arrested and taken to the station for questioning. *Id.* at 44-45. Approximately thirty minutes later, Nickerson informed Johnson that he was a suspect in Boyd's homicide. *Id.* at 45.

Johnson denied involvement in the shooting and told Nickerson that 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 Johnson's alibi, even though Johnson told Nickerson immediately upon questioning that he had "been with his girlfriend on Lafayette" and even though Leslie Williams told detectives she had spoken to Johnson on the phone shortly after the homicide. *Id.* at 45, 68; D110/P14; TR.Vol.II/P224-25. The police made no attempt to collect pager or telephone records, nor does the police report reflect contact with a single alibi witness.

At approximately 8:00 p.m. on November 3, 1994, Det. Campbell arrived for his shift, and according to the report, asked Nickerson if he could speak with Johnson about an unrelated matter. D101/P46. According to Det. Campbell's narrative, Johnson—unprompted and after stating that he was not involved in Boyd's homicide and offering his alibi evidence to Nickerson—made an incriminating statement about the Boyd homicide including that he "let the white guy live." *Id.* at 47. According to the police report, Johnson

then refused to make a recorded statement about what Campbell claimed he had said. *Id.*; TR.Vol.II/P233.

From approximately 6:00-8:30 p.m. on November 3, 1994, Nickerson attempted to locate Elking so that he could come to the station to view a lineup. D101/P46. Around 9:00 p.m., Elking contacted Nickerson, who then picked up Elking and transported Elking to the station. *Id.* at 47-48. During the drive to Police Headquarters, Nickerson told Elking that Johnson was responsible for a number of unsolved homicides and that Elking's cooperation was critical to providing justice for Boyd and his family. D114/P84-85, 88; D107/P7.

Upon arriving at Police Headquarters, Elking viewed Lineup #1 containing Johnson at least three times. D101/P48-49. Elking was unable to make an identification after the first two viewings. *Id.* at 49. On the third viewing, Elking identified a man named Donald Shaw, a filler from the jail holdover, as the shooter. *Id.* at 18-19, 49; D105/P1.

Elking was then shown Lineup #2, which contained Phillip Campbell. D101/P49. Elking was unable to make an identification in Lineup #2. *Id.* at 20-21, 49; D105/2. After Elking was unable to make an identification in either lineup, he and 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 Elking told 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 homicide offices, according to the report, 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. Elking then told Nickerson that the shooters were

in position #3 (Johnson) in Lineup #1 and position #4 (Campbell) in Lineup #2. *Id*. Nickerson's narrative then states that Elking said he recognized the gunmen in the lineup because one had a lazy eye[5] and the other had a scar on his forehead. *Id*. This is the first reference to these identifying features in the police report, and was not mentioned or recorded in any of the three earlier interviews Nickerson had with Elking.

After this alleged identification, detectives then assisted in preparing Elking a statement which indicated 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, 1994, Nickerson drove Elking to the Circuit Attorney's Office where Elking met with the prosecutor. D101/P50; D114/P104. ACA Warren then issued warrants for Johnson and Phillip Campbell charging them with Murder First Degree and Armed Criminal Action. D101/P24, 51. ACA Warren offered witness payments to Elking and set him up with the witness protection program. D114/P105.

On November 4, 1994, Johnson and Phillip Campbell were booked into the City Jail and placed in the holdover unit, a crowded unit with cells that hold a number of inmates. D101/P50; D128. William Mock, an informant with an extensive criminal history, was also in the City Jail holdover unit. D101/P25, 51.

On November 5, 1994, Mock claimed to have overhead an incriminating conversation between three inmates regarding a murder. He spoke with Detective Jackson,

[5] Johnson has never been treated for a lazy eye, photographs—past and present—do not depict a lazy eye, and the Conviction Integrity Unit (CIU), when interviewing Johnson in person, documented that it did not detect a lazy eye. D100/P11.

but this conversation was not recorded. *Id*. On November 6, Mock claimed to have heard another conversation regarding Boyd's homicide, namely that Johnson and Phillip Campbell discussed "taking care of the white boy," interpreted as referring to Elking. *Id.* at 26, 51-52. Mock repeated this statement to Jackson on November 7, which was recorded. *Id.* at 26, 52-53.

The Evidence at Trial

Johnson's trial was held on July 11-12, 1995 before the Honorable Booker T. Shaw. During the State's opening statement, ACA Warren told the jury that Mock did not "want any special consideration" for his testimony against Johnson and just wanted to "tell the police what he heard." TR.Vol.I/P 153.

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 testified that two men with solid black "pullover" masks came from the side of the apartment, each holding a gun, *Id.* at 159, and that one of the shooters had a lazy eye. Elking identified Johnson in the courtroom as the man with the lazy eye and as one of the shooters. *Id.* at 160-61.

According to Elking's trial testimony, Elking "didn't want to commit" to making any positive identification of the shooters during his first meeting with Nickerson at the diner, *Id.* at 179, and that he walked away from Lineup #1 (containing Johnson) twice, unable to make an identification. *Id.* at 183. Elking testified that after leaving the lineup, however, he revealed to Nickerson that he had identified the wrong person because "he was intimidated." *Id.* at 170-71.

Leslie Williams testified at trial 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 someone in all black firing a gun. *Id.* at 221-22. She could not see the face of either shooter because the black masks covered their faces. *Id.* at 222. She did not recognize the shooters. D110/P8-9. Leslie Williams testified that she knew Johnson because he was the father of her cousin's child, that he had a lazy eye, TR.Vol.II/P222-23, and that Boyd and Johnson had been close friends and roommates. D110/P5-6. She testified that she was on a three-way call between Johnson, herself, and her cousin Pamela Williams shortly after Boyd was killed. TR.Vol.II/P224-25.

Detective Campbell testified that he interviewed Johnson on November 3, and that the interview was not about Boyd's murder. *Id.* at 228. According to Detective Campbell, Johnson "turned the interview in that direction" and unprompted stated that he "let the white guy live." *Id.* at 229.

Mock testified that he overheard someone who identified himself as Johnson shouting from another cell and saying, "They didn't have the gun" or "the white boy." *Id.* at 246-47. Mock testified that he contacted the homicide detectives and was interviewed. *Id.* at 247-48. Mock testified that he overheard the man identified as Johnson also talking about committing another murder on the south side 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.

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 Warren provided. *Id.* at 249-50. On cross-examination, Mock stated he was not in the same cell as either Johnson or Phillip Campbell and he could not say how far away they were from him in the unit. *Id.* at 251-52. Mock testified that he had three felony convictions for burglary, tampering, and carrying a concealed weapon. *Id.* at 244, 261-62.

The defense called one witness, Erika Barrow, Johnson's girlfriend, who testified that Johnson was with her on the night Boyd was killed. *Id.* at 309, 315. They were socializing with friends at the house shared by Anita Farrow and Robert Williams, located at 3907 Lafayette. *Id.* at 311-12. Erika Barrow testified that Johnson was with her from approximately 7:00 p.m. through the rest of the night with the exception of about five minutes when Johnson left Anita Farrow's and Robert William's house at 3907 Lafayette. *Id.* at 315. On cross examination, Erika Barrow stated that it may have been "seven minutes" but nonetheless, that Johnson "wasn't gone long enough to go anywhere." *Id.*

Erika Barrow testified that they learned Boyd was killed when Pamela Williams spoke with Johnson on the telephone sometime after 9:00 p.m. *Id.* at 314, 325. During that call, Pamela Williams added Leslie Williams via a three-way call. *Id.* at 224-25; D121/P1-2. Evidence corroborating Johnson's alibi was not presented to the jury, including the testimony of Pamela and Leslie Williams, Anita Farrow and Robert Williams and pager and telephone records. It was undisputed at trial that Johnson was at Anita Farrow's between 9:00 and 10:00 p.m. It was undisputed at trial that Johnson left Anita Farrow's apartment and returned within minutes.

In rebuttal, the State presented evidence from Nickerson that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes." TR.Vol.II/P329. During closing argument, ACA Warren stated that Mock had no motive to lie:

> What motive does Mock have? What is he gonna get of this a letter to the parole board? For that—and remember, he didn't have anything in the beginning. He came and said to the police I just got to go back there on this CCW. 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.

On July 12, 1995, a jury found Johnson guilty of murder in the first degree and armed criminal action. The judgment was entered on July 12, 1995, and Johnson was sentenced to life without the possibility of parole on September 29, 1995. D103/P2-3.

THE POST-TRIAL INVESTIGATION EVIDENCE OF INNOCENCE

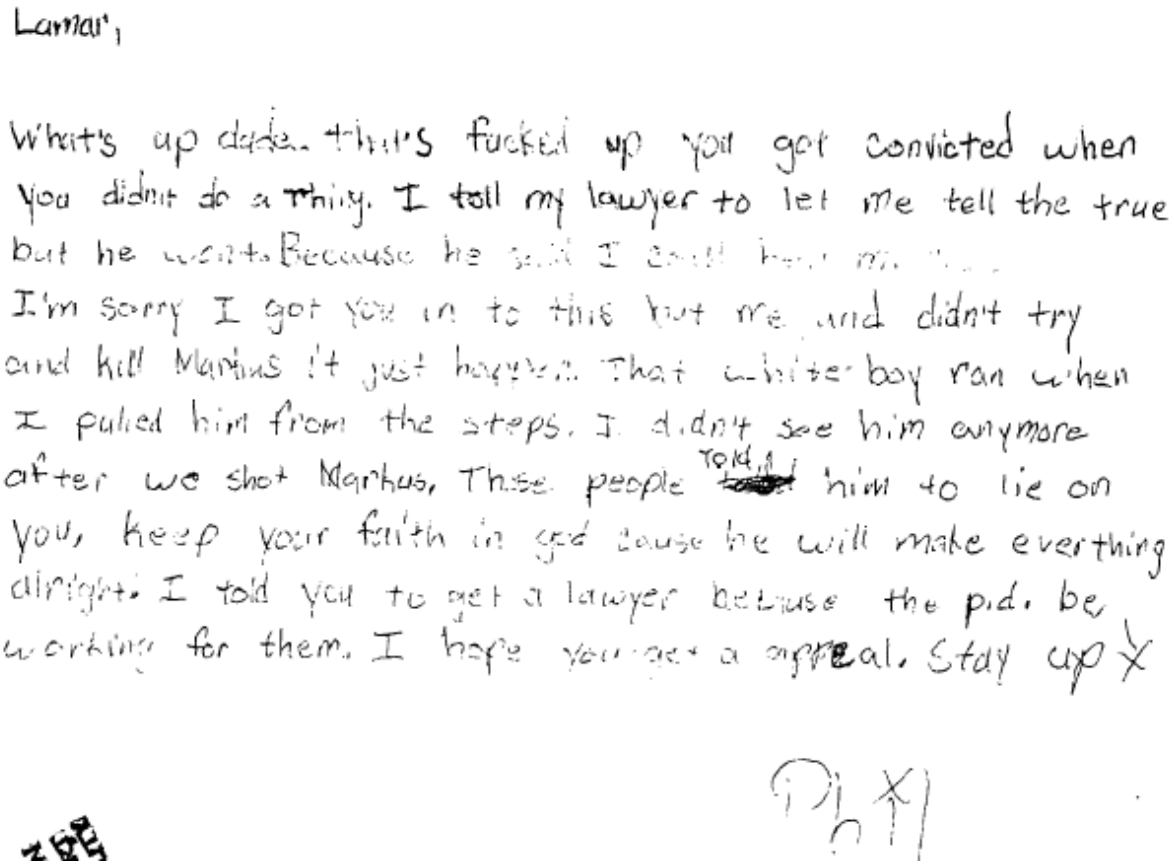
James "BA" Howard and Phillip Campbell Confess to Killing Boyd

As a result of investigation conducted after Johnson's trial, the Circuit Attorney believes that the evidence presented against Johnson was false and perjured.

Phillip Campbell and James Howard confessed to shooting Boyd in sworn affidavits stating that they killed Boyd and that Johnson was not involved. D142; D117; D116/P3; D118/P4. After Johnson's trial in July of 1995, but before his sentencing on September 29,

1995, Phillip Campbell wrote letters to Johnson while 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. During the pendency of Johnson's direct appeal, Phillip Campbell provided an affidavit dated August 9, 1996, stating that Johnson was not involved in the shooting death of Boyd. Johnson filed a Motion for New Trial in the Circuit Court and the Court of Appeals for the Eastern District on October 28, 1996. *See State v. Johnson*, ED69212, Motion for New Trial Based on Newly Discovered Evidence filed Oct. 28, 1996. That motion was denied.[6] D103. The letters explain what happened on the night Boyd was killed, that Johnson was not involved, and that Phillip Campbell and James Howard committed the murder.

[6] Notably, the Attorney General opposed Johnson's request to have his evidence heard then, too. In his response to the Motion for New Trial filed while the direct appeal was pending, the Attorney General asked the Court of Appeals to reject the holding of *State v. Mooney* permitting remand based on newly discovered evidence and deny Johnson's request to return to the trial court for a hearing on the motion for new trial because the circumstances were not "exceptional" and did not exonerate Johnson. At that time, the Attorney General suggested Johnson apply for clemency. *See State v. Johnson*, ED69212, *Respondent's Suggestions in Opposition to Appellant's Motion for New Trial Based on Newly Discovered Evidence and Prosecutorial Misconduct*, filed Nov. 4, 1996



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 [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 everthing alright. I told you to get a lawyer because the pid. be working for them. I hope you get a appeal. Stay up

D129.

In addition to the letters Phillip Campbell wrote in 1995, he also signed an affidavit in 1996, just one year after Johnson was convicted. D117. Phillip Campbell signed another sworn statement in 2009, again stating he was responsible for Boyd's death and that Johnson was not involved. D118/P4.

James Howard signed affidavits in 2002, 2005 and 2009 stating Johnson was not involved. D142; D115/P1; D116/P3. James Howard and Phillip Campbell stated in their affidavits that on October 30, 1994, they were socializing at James Howard's house located at 3944 Louisiana Avenue. D116/P1; D118/P1. James Howard's house was less than 400 feet from Boyd's house at 3910 Louisiana Avenue.

James Howard told Phillip Campbell about a disagreement between Howard's friend, Sirone Spates, and Boyd about a business transaction involving the "crumbs" from drug sales. D116/P1. Boyd and Sirone Spates agreed that Boyd could keep the crumbs and when the crumbs accumulated, Boyd could either give them to Spates or pay him for their value. *Id*. Sirone Spates asked Boyd about the crumbs and Boyd continued to "put him off." *Id*. Because Sirone Spates was injured, James Howard agreed to go to Boyd's house on the night of October 30, 1994 "to teach Marcus a lesson, and also rob him, so that I could get the money Marcus owed [] Puffy." *Id.* at 2.

The two put on dark clothing and masks that "were the 'Ninja' style masks, which covered the entire head, and had one large hole in the face for the two eyes." *Id.; See also* D118/P2 ("The masks could be pulled up over the nose, revealing not much more than our eyes."). James Howard explained that "[he] had no intention of killing Marcus[]" but things happened quickly and during the struggle, Phillip Campbell discharged his gun. *Id*. Phillip Campbell, "t[ook] a few steps up the porch and pointed [his] gun at the white guy sitting to the left of Boyd and [] grabbed the man's shoulder." *Id.* at 3.

After fleeing the scene, Phillip Campbell and James Howard "ran down the gangway between houses and then jumped fences through back yards all the way back to [his] mom's back door." D116/P3; *see also* D118/P3. ("After the shooting, James and I ran back down the gangway to the alley and back to James' house.")). Each of the affidavits unequivocally state that James Howard and Phillip Campbell killed Boyd and provide details about the motive, and other information that is corroborated as summarized above. James Howard states succinctly that "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.

In 2009, Anthony Cooper, an associate of Phillip Campbell and James Howard, signed a notarized affidavit:

> 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 Phillip Campbell, James Howard, and 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 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.

Phillip Campbell's and James Howard's affidavits clearly state that they killed Boyd. Both Phillip Campbell and James Howard offered motive evidence that is

independently corroborated by the statements of other witnesses including Lamont McClain and Anthony Cooper regarding a dispute over crumbs between Boyd and James Howard's friend, Sirone Spates. Phillip Campbell and James Howard's accounts are consistent in the way the masks were worn, the clothing they wore, the route they took to Boyd's house and the route they travelled when they fled the scene. The evidence corroborating that Phillip Campbell and James Howard killed Boyd is extensive and credible:

(1) Phillip Campbell wrote letters in July of 1995 while in the City Jail before he was convicted describing his role and Johnson's innocence in Boyd's murder. D129.

(2) Phillip Campbell signed affidavits in 1996 and 2009 that he killed Boyd with James Howard and that Johnson was not present or involved in the crime. D117; D118.

(3) James Howard signed affidavits in 2002, 2005 and 2009 swearing that he killed Boyd with Phillip Campbell and that Johnson was not present or involved in the crime. D142; D115; D116

(4) James Howard and Phillip Campbell's affidavits provide details that are corroborated by the physical evidence including the type of masks worn, motive, types of guns used, the clothing they wore during the crime, the route they travelled to and from the scene, and the location of Howard's house where they fled after the crime. D116/P1-3; D118/P1-4.

(5) The accounts of James Howard and Phillip Campbell are corroborated by Elking and Leslie Williams who were present at the scene.

(6) The CIU interviewed James Howard regarding his role in the homicide. The CIU found him credible and his version of events is corroborated by Elking, Leslie Williams, Phillip Campbell and the physical evidence, including the type of masks and clothing worn, the firearms used, how the shooters arrived on the porch at 3910 Louisiana, and how they left the scene.

(7) Anthony Cooper and Lamont McClain signed affidavits in 2009 corroborating Phillip Campbell and James Howard regarding the motive evidence and statements that James Howard and Phillip Campbell made to them that Johnson was not involved in the crime. D130/P1; D131/P1-2.

After Johnson's trial, Phillip Campbell's counsel uncovered additional, undisclosed criminal history for Mock, and Elking stopped cooperating with the Circuit Attorney's Office. Without Elking, the State offered Phillip Campbell a deal which he accepted. Phillip Campbell pled guilty in a one-count indictment to voluntary manslaughter for his role in Boyd's homicide and was sentenced to seven years in custody. D141.

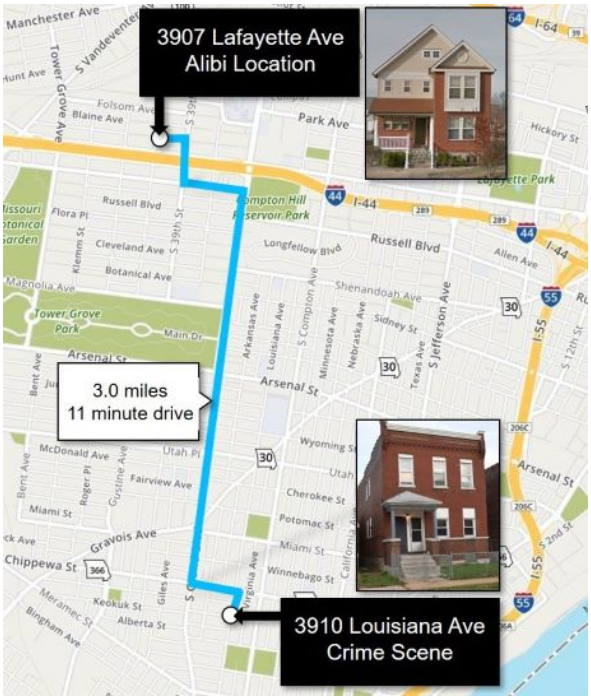
Johnson's Alibi Evidence Proves He Did Not Kill Boyd

Erika Barrow, Johnson's girlfriend, testified that Johnson was with her on the night Boyd was killed. TR.Vol.II/P309, 315. The summary of her testimony is included above, including where she and Johnson were when Boyd was killed, who they were with, and that Johnson spoke on the phone with Leslie Williams and Pamela Williams shortly after

Boyd was killed and that the conversation was in the presence Erika Barrow, Robert Williams, and Anita Farrow. *Id.*

Although it was undisputed at trial that Johnson was at Anita Farrow's and Robert Williams' house between 9:00 and 10:00 p.m. and that Johnson left the house and returned within minutes, the State presented false evidence in rebuttal, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes." TR.Vol.II/P334. This is false testimony and the State knew or should have known it was false. This false testimony offered by the State ignored undisputed evidence in the record: the witnesses testified the assailants arrived on foot and no witness testified to seeing a car arrive or flee the scene; and, Phillip Campbell was not with Johnson at Anita Farrow's.

Simple time and distance calculations contradict the State's testimony in rebuttal of Johnson's undisputed alibi location. The one-way drive alone is approximately 11 minutes.



D99/P23.

The testimony offered by the State that Johnson could have travelled to the scene, picked up Phillip Campbell, killed Boyd, dropped off Phillip Campbell, and returned to 3707 Lafayette in a matter of minutes was false.

The Motive Evidence was False and Manufactured

The State's theory was that Johnson killed Boyd because of a drug feud between them. The police report attempted to establish this motive, but subsequent investigation indicates that the motive evidence was false and fabricated.

Ed Neiger was contacted by Nickerson on October 31, 1994. The police report indicates that Ed Neiger told Nickerson that Johnson and Boyd's drug business had severed as a result of Johnson selling bad drugs and that Johnson "was not happy about the split." D101/P33. After reviewing the police narrative attributed to him, Ed Neiger signed a notarized affidavit swearing that he never told Nickerson of any split between Johnson and Boyd because he had no knowledge of their relationship. D106/P1-2.

Dawn Byrd was interviewed by Nickerson on November 1, 1994 and motive evidence was attributed to her as described above. D101/P36.

Dawn Byrd reviewed the police narrative attributed to her and signed a sworn affidavit stating that Boyd never told her that Johnson had been hanging around his house in the days leading up to the homicide and that she and Boyd had not seen Johnson's car on the evening of October 30, 1994. D112/P4-5. Dawn Byrd was never worried about what was going to happen between Boyd and Johnson because she knew of no animosity between them and that the above statements attributed to her in the police report are false.

Id. Dawn Byrd's sworn affidavit also states that she never called Boyd and Leslie Williams the day before Boyd was killed in attempt to warn him that Johnson would be visiting. *Id.* at 3. Dawn Byrd credibly claims that the entire police narrative that claims her as a source of the information relating to Johnson's motive to kill Boyd is false. *Id.* at 3-5.

The police narrative indicates that Kristine Herrman confirmed that she had been present for the October 29, 1994 conversation between Dawn Byrd and Johnson about bad drugs and that she had gone to visit Leslie Williams on October 30, 1994. D101/P38. In a sworn statement, Kristine Herrman stated that the account attributed to her in the police report is largely false: she was not present for any conversation between Johnson and Dawn Byrd about bad drugs. D113/P2-4. She had never met Johnson, and consequently had never heard Johnson say he was going to see Boyd about the bad drugs. *Id.*

On November 1, 1994, Nickerson interviewed Leslie Williams and the summary of what Nickerson claims she said is summarized above. D101/P35. Leslie Williams' pretrial deposition on June 21, 1995, however, contradicts the police account during which she stated she could think of no reason that Johnson would want to kill Boyd. D110/P5-6, 12.

In two interviews, Leslie Williams viewed the police report and the statements attributed to her. D132/P1. She told the investigator that information within the reports suggesting a severed drug business between Boyd and Johnson as the motive for the murder was false. *Id.* at 2-4. All four witnesses the State claimed offered evidence of motive—Ed Neiger, Leslie Williams, Kristine Herrman, and Dawn Byrd— reviewed the statements attributed to them and all four credibly claim that the motive statements attributed to them are false. D106/P1-3; D132/P2-4; D113/P2-4; D112/P2-5.

Greg Elking's Identification of Johnson was Manufactured and False

Even with the information known to the State at trial, Elking's identification was unreliable. Elking stated on numerous occasions during the trial period that he did not know Johnson and had never met him. D109/P4-5; TR.Vol.I/P191; D126/P3; D123/P2; D107/P3; D114/P16, 21. The crime was committed at night by two black men 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.

Elking testified at his 1995 deposition that the porch light was not illuminated and that "it was dark." D109/P9-10; TR.Vol.I/P189-90. Elking told Nickerson that he did not know Boyd's associates, that he did not socialize with any of Boyd's friends, and that he did not recognize or know the gunmen. D104/P5; D126/P3; D123/P2; D107/P3-4; D114/P15-16, 74-75. The circumstances of the crime make a reliable and accurate identification of a person unknown to the witness implausible. *See Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). When Elking and his wife met with Nickerson at the diner on November 3, 1994, Nickerson told Elking that the State could help him with money and expenses if he became a witness in the case. D114/P83-84; D107/P4-5.

Prior to viewing the lineups, Nickerson told Elking that the police had apprehended Johnson and that Johnson was responsible for Boyd's death. D114/P85-87. Nickerson further told Elking that Johnson was responsible for a number of unsolved homicides and that the police needed Elking's testimony. *Id.* at 88; D107/P7. Elking viewed the lineup containing Johnson at least three times and was unable to make an identification.

D101/P48-49. On the third viewing, Elking falsely identified a filler from the City Jail. *See* D104/P5-6; D126/P3; D123/P2; D107/P6; D114/P93-95.

In 2019, Elking testified that at the time of the lineup, he felt like "had to pick" someone and chose position #4, the position of Donald Shaw, because he looked *most like* one of the photographs in the array shown to him by Nickerson. D114/P95.

Elking testified that he "did not recognize anyone" in the lineups and wanted badly to help but he simply was unable to make an identification because he did not see the gunmen's faces or other identifying features. D114/P91-92; D109/P5. Elking felt "pressured" and "intimidated" by the police during the lineup. D126/P3; D123/P2; D107/P6; D114/P93. Elking was worried that he would be charged if he did not make the identifications that Nickerson wanted him to make because police made clear to him that they knew he was the last person to see Boyd alive. D126/P4; D123/P3; D114/P103. Elking believed Nickerson when he told Elking that he knew who was responsible and Elking trusted Nickerson. D114/P99-100. He wanted justice for Boyd and needed the money and assistance promised to him. D114/P100-01; D107/P5.

When Elking was unable to identify Johnson, Nickerson's "mood changed" and was in a "foul" mood. D114/P93, 96. Elking felt like he "let everyone down." *Id.* at 94, 96; D107/P5. When Elking and Nickerson got into the elevator after Elking was unable to make an identification, Elking asked Nickerson to tell him the lineup position numbers of the men that Nickerson believed killed Boyd. D107/P6; D114/P98, 127-28. Nickerson then told Elking the men were in position #3 and position #4. D104/P6; D126/P4; D123/P2-3; D107/P6; D114/P98, 127-28.

In 2019, Elking reiterated that he did not recognize anyone and that he had "no idea" who the shooters were:

Q. Did he indicate that he knew that you knew them?
A. Yeah. I -- it gets so -- it gets somewhere right as soon as we get on the elevator that hey, look, I don't -- I was scared that -- you know, that's -- that's -- I think that's what it came out as like I'm scared. I'm -- I was scared. I didn't -- I didn't feel comfortable, you know, down there.
And him going -- he goes yeah, so do you know who they were? And I'm like well, you tell me the numbers in the line-up and I'll tell you if you're right. And he then said three and four. And I said that's who they were.
Q. If he would have said one and two, would you have said yes, that's who they were?
A. Oh, yeah.
Q. So you were -- had no idea who they were?
A. I had no idea.

D114/P98-99.

After this conversation in the elevator, detectives assisted in creating a statement that Elking said he lied when he did not identify anyone during the lineups because he was scared. D101/P50; D107/P6. Elking succumbed to the impermissible pressure and the undisclosed promise of funds to "help him get back on his feet" and ultimately testified against Johnson despite having no opportunity to see or identify the shooters. D114/P94; D107/P5.

As early as 2003, the State's key witness, Elking, recanted his identification and trial testimony in a letter to Reverend Rice of St. Louis. The letter was found years later after Elking told Johnson that he had been trying to tell the truth about his false testimony. In part, Elking's 2003 letter to Reverend Rice states:

> 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.

This 2003 account by Elking is corroborated by the record. On December 6, 1996, at Johnson's 29.15 PCR hearing Nickerson testified:

> [T]he witness [Elking] had known Mr. Johnson prior to this incident…I felt at the time Mr. Elking knew who we were looking for. *We knew who was responsible.* Anything even by name anything more was – at that time it wasn't necessary. It might have been done. It might not have been done, but *he knew who we wanted. There was no question in my mind who was responsible*.

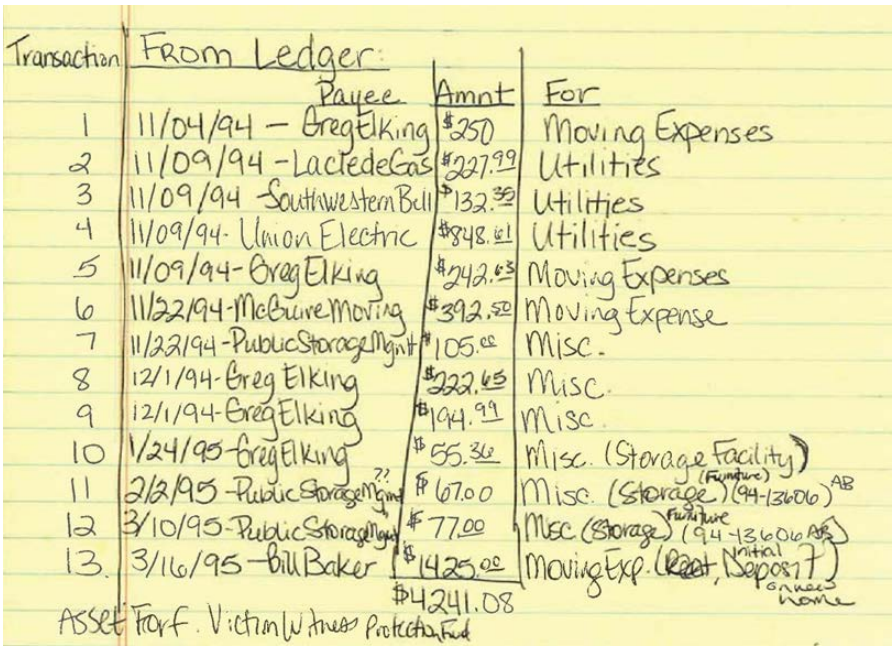
D119/P23-24 (emphasis added).

The State Paid Greg Elking to Identify Johnson

During the November 4, 1994, meeting at the diner, Nickerson told Elking and his wife that the State could help them with housing and expenses. D114/P83-84; D107/P4-5. Elking's financial situation was unstable and he needed the money. D114/P100-01.

In 2010, Elking and his ex-wife both signed affidavits indicating that they received several monetary payments from the State. D107/P4-5, 7; D134/P2. After the Elkings revealed that they had been paid by the State, Johnson repeatedly requested documentation of the payments to Elking from various entities, including the Circuit Attorney's Office, but the documentation was never disclosed. 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 Johnson's counsel, the CIU searched for and located 63 pages of documents related to undisclosed payments to and on behalf of 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 Johnson's trial. *Id*. The documents discovered by the CIU include copies of cancelled checks, correspondence with movers and successful efforts to locate and pay for Elking's housing. D111. Just as Elking claimed, the payments began on the day Nickerson presented Elking to ACA Warren and continued for months thereafter, including undocumented cash payments before Elking testified. *Id.* A previously undisclosed ledger discovered by the Circuit Attorney documents payments to and on behalf of Elking:

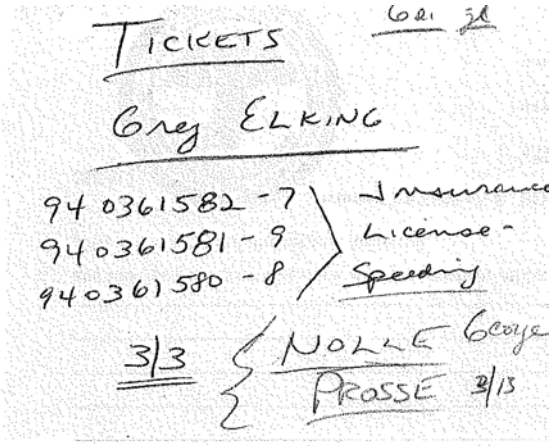


Transaction	From Ledger: Payee	Amnt	For
1	11/04/94 – Greg Elking	$250	Moving Expenses
2	11/09/94 - Laclede Gas	$227.99	Utilities
3	11/09/94 Southwestern Bell	$132.39	Utilities
4	11/09/94 - Union Electric	$848.61	Utilities
5	11/09/94 - Greg Elking	$242.63	Moving Expenses
6	11/22/94 - McGuire Moving	$392.50	Moving Expense
7	11/22/94 - Public Storage Mgmt	$105.00	Misc.
8	12/1/94 - Greg Elking	$222.65	Misc.
9	12/1/94 - Greg Elking	$194.99	Misc.
10	1/24/95 - Greg Elking	$55.30	Misc. (Storage Facility)
11	2/2/95 - Public Storage Mgmt ??	$67.00	Misc. (Storage) (Furniture) (94-13606) AB
12	3/10/95 - Public Storage Mgmt	$77.00	Misc (Storage) Furniture (94-13606 AB)
13	3/16/95 – Bill Baker	$1425.00	Moving Exp. (Rent, Deposit) Initial Owners Name
		$4241.08	

Asset Forf. Victim/Witness Protection Fund

D111/P2; D100/P107.

In addition to secret payments to the only witness to the crime, the Circuit Attorney's Office "took care of" a number of traffic violations for Elking in exchange for his testimony. D114/P119-123; D139. In July of 2019, as the CIU's investigation continued, documentation corroborating 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 Elking had been saying all along:



TICKETS 6 21 21

GREG ELKING

94 0361582 - 7
94 0361581 - 9
94 0361580 - 8
} Insurance
License -
Speeding

3/3 { NOLLE George
PROSSE 3/13

D139. This assistance provided to Elking was concealed from Johnson.

Documentation in the State's file describes Elking as an "essential witness" and there can be no doubt that he was—without Elking there was no case against Johnson. D111/P53; Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power Is Being Stripped Away*, NY Times, Nov. 25, 2019, https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html, last visited Feb. 10, 2020.

The State Did Not Disclose Mock's Complete Criminal or Informant History

Mock, a man with an extensive criminal history and history of cooperating as a jailhouse informant, was incarcerated in the City Jail holdover unit at the same time Johnson and Campbell were housed there, though Mock was never celled with Johnson or Campbell. D101/P25, 51. Nonetheless, Mock testified he heard incriminating conversations involving three inmates about a murder. *Id.* at 26, 51-52.

Mock, a material witness, testified falsely in a number of instances. The State argued at trial that Mock had no motive to lie and that he expected little for his testimony against Johnson. TR.Vol.II/P352-53. That testimony was false.

Mock expected much in return for his testimony. In an undisclosed letter from Mock to ACA Warren dated June 3, 1994, Mock wrote:

> 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.

D136/P1-2.

In a series of undisclosed and impeaching correspondence between Mock and ACA Warren, several letters were written by the Circuit Attorney's Office on Mock's behalf: to remedy disciplinary incidents involving Mock, to request transfers within the DOC to preferred prisons, and to make recommendations for release to the parole board. D136.

In one of the undisclosed letters to ACA Warren, Mock referred to Johnson as a "two-bit nigger," a clear indication of witness bias, prejudice, and racial animus that bears directly on Mock's credibility and motivation to testify against Johnson. *Id*.

Mock testified falsely about his criminal history and the State did not correct the false record. In truth, Mock's criminal history included a number of arrests and convictions, both felony and misdemeanor, that were concealed. Among them: forgery, fraud, burglary, assault, multiple DUIs, larceny, escape, and stealing. D133.

Finally, the State did not disclose that Mock was an incentivized jailhouse informant for the State in 1992 in the prosecution of Joseph Smith. Mock testified, in exchange for a reduction in sentence, that he overheard a jailhouse murder confession while housed in the Jackson County jail. D137. When Mock was specifically asked whether he had been a witness or testified in a criminal case he lied:

Q. Have you ever testified before?

A. No, I haven't.

Q. Have you ever given a deposition?

A. No, I haven't.

Q. Have you ever been a witness in a criminal case before?

A. No, I haven't.

D124/P5.

The post-trial investigation uncovered facts that revealed Johnson's conviction to be fundamentally unjust; no credible evidence to support the verdict remains. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2003). It is within this factual context that the Circuit Attorney moved for a new trial.

PROCEDURAL HISTORY

In 1995, Lamar Johnson was convicted of First Degree Murder and Armed Criminal Action for the October 30, 1994 shooting death of Marcus Boyd and was sentenced to life in prison without the possibility of parole. D101/P3; TR.Vol.I/P162, 220; D107/P1. Johnson has always maintained his innocence—from arrest, to conviction, to present day. In 2017, elected Circuit Attorney Kimberly Gardner established a Conviction Integrity Unity ("CIU") tasked with reviewing old cases where credible claims of a wrongful conviction have surfaced.[7] In 2018, the CIU began its review of Johnson's case and

[7] Extensive studies have concluded that "conviction integrity" units or programs are critical to ensure that the public has confidence that criminal convictions are of the guilty, not the innocent. *See, e.g.*,

identified constitutional errors presenting clear and convincing evidence of Johnson's innocence. *See* D100; *State v. Lamar Johnson*, Case No. 22941-03706A-01.

On July 19, 2019, the State filed a 66-page Motion for New Trial for Johnson, setting forth its findings of fact and ultimately concluding as follows:

> The conviction against Lamar Johnson was obtained 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. The violation of Johnson's constitutional rights enabled the State of Missouri to obtain a conviction and sentence of life without the possibility of parole against Johnson despite overwhelming evidence of innocence. The undisclosed secret payments to the sole eyewitness in a case that was undeniably thin fatally undermines the reliability of the verdict. Based on the record now known and the professional, ethical, and constitutional duties of a prosecutor to seek justice, the Circuit Attorney moves this Court to grant her motion for a new trial.

D99/P1. On July 29, 2019, the trial court *sua sponte* appointed the Missouri Attorney General to appear without providing any findings of fact or conclusions of law supporting this appointment. D161. On August 1, 2019, 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 arguing, *inter alia*, that the trial court has jurisdiction to entertain the Motion for New Trial, that the Circuit Attorney is duty-bound to move for a new trial, and that the trial court has a corresponding duty to entertain the Motion. D162. On the same day, the Attorney General filed a Response

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http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf (last visited Oct. 22, 2019).

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 its appointment of the Attorney General and that the Attorney General's filing infringed upon the Circuit Attorney's statutory and Constitutional powers. D164. Johnson joined the Motion to Strike. D165.

On August 23, 2019, the trial court issued its Order denying the Circuit Attorney's Motion for New Trial. D167. In its Order, the trial court began by addressing its *sua sponte* appointment of the Attorney General. First, the trial court found that Johnson's counsel had improperly contacted jurors without the Court's authority. D167/P3. Second, the trial court found 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 that the allegation of prosecutorial misconduct "should have been referred out for an independent investigation." D167/P5. The trial court nonetheless acknowledged the issue of the appointment of the Attorney General was moot. D167/P3 ("[O]ther issues may be dispositive of this case, making its reasons for the appointment moot.").

Instead, the trial court held that it lacked authority to even hear the State's Motion for New Trial and dismissed the Motion without a hearing or any fact-finding. In so ruling, the trial court found that the 15-day time limit in Rule 29.11 governed the filing of a new trial motion by the State and thus held that the Circuit Attorney had no power to act after that time limit expired. D167/P13. ("While it may be true that the time limits are no longer

jurisdictional, they are a limit on the Court's authority."). Notably, the trial court acknowledges that the Court of Appeals could "conduct plain error review and in extraordinary circumstances may remand the case to a trial court." D167/P12. Following the Order, the Circuit Attorney and Johnson timely filed notices of appeal to the Eastern District Court of Appeals, D174, D176, which were expedited and consolidated upon the court's own motion.

After Johnson's and the Circuit Attorney's briefs were filed (and over a month after the initial notices of appeal were filed), the Attorney General filed a Notice of Dismissal of the State's Appeal under Rule 30.13 and moved to strike the Circuit Attorney's brief. A020-24. The Attorney General argued that under Mo. Rev. Stat. § 27.050, it was the only party that "shall appear on behalf of the [S]tate" in all appeals. *Id*. The Circuit Attorney and Johnson opposed dismissal. A025-41. The court of appeals ultimately permitted the Attorney General to dismiss the State's notice of appeal filed by the Circuit Attorney, but allowed the Circuit Attorney to remain in the case as an intervenor in Johnson's appeal.[8] A042-43.

This case was argued and submitted on December 11, 2019.[9] On December 24, 2019, the Court of Appeals issued an Order transferring the consolidated appeal to this

[8] On January 8, 2020, the Circuit Attorney filed a Motion to Restore the Case to the Original Appeal, which remains pending.

[9] On December 10, 2019, the Court of Appeals in the Southern District issued its opinion in *Finley v. State*, 2019 WL 6711461 (Mo. App. Order Dec. 10, 2019), holding that the Court of Appeals may "reacquire jurisdiction via the judicial power to recall the mandate"…[]..."to obtain relief from convictions and sentences that are inconsistent with federal constitutional rules." *Id.* Johnson filed a letter with the Court of Appeals on December 13, 2019, notifying the court of the *Finley* decision pursuant to Rule 84.20.

Court. In its Order, the Court of Appeals found that the trial court's rulings appealed by Johnson—the appointment of the Attorney General and the dismissal of the motion for new trial—had no statutory basis and were therefore not appealable. A049-53. The Court of Appeals nonetheless transferred the case to this Court pursuant to Mo. Sup. Ct. R. 83.02, holding:

> The issues in this case are undeniably important and include questions fundamental to our criminal justice system: whether 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. The resolution of these issues is of obvious import and general interest throughout this State. But the case has also garnered national attention given the numerous jurisdictions with conviction integrity units facing similar questions of significance to the administration of justice in those states. Moreover, resolution of these issues may require reexamination of existing law. . . . . Under these circumstances, we find transfer appropriate.

A053-54.

Johnson simultaneously filed a Motion to Recall the 1999 Mandate in which the Court of Appeals affirmed Johnson's conviction and the denial of his post-conviction motion. Johnson's Motion to recall the mandate is still pending. *See State v. Johnson*, ED69212, Motion to Recall the Mandate filed Dec. 13, 2019.

POINTS RELIED ON

I. The Trial Court Erred In Dismissing The Motion For New Trial Based On Rule 29.11 Deadlines Because The Trial Court Has Authority To Hear, And The Circuit Attorney Has Authority To File The Motion In That The Circuit Attorney Must Have A Vehicle To Fulfil Her Constitutional Duty And Ethical And Professional Obligations To Correct An Unjust Conviction Within Her Jurisdiction.

State v. Williams, 673 S.W.2d 847 (Mo. App. 1984)

Donati v. Gualdoni, 216 S.W.2d 519, 521 (Mo. 1948)

Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976)

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

MO. CONST. ART. I, § 10

Mo. Rev. Stat. § 56.550

Mo. Rev. Stat. § 56.450

Mo. Rev. Stat. § 556.036

Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1

ABA Model Rules of Professional Conduct, Rule 3.8 – Special Responsibilities of a Prosecutor

MO. SUP. CT. R. 29.11(b)

MO. SUP. CT. R. 19.03

MO. SUP. CT. R. 19.04

MO. CONST. ART. V, § 5

II. In The Alternative, The Trial Court Denied The Requested Relief Subject To The Inherent Authority Of A Court Of Appeals To Conduct Plain Error Review And Remand The Case For A New Trial, And The Court Should Do So Here Because "Extraordinary Circumstances" Exist In That Johnson Is Actually Innocent And His Conviction Was Obtained Through Perjured Testimony.

State v. Williams, 504 S.W.3d 194 (Mo. App. 2016)

State v. Mooney, 670 S.W.2d 510 (Mo. App. 1984)

State v. Mims, 674 S.W.2d 536 (Mo. banc 1984)

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

MO. SUP. CT. R. 30.20

MO. SUP. CT. R. 74.06

MO. SUP. CT. R. 91.02

MO. SUP. CT. R. 41.02

MO. CONST, ART. V, § 14

MO. CONST, ART. V, § 5

III. The Trial Court Erred In *Sua Sponte* Appointing The Attorney General To Represent The State Because The Circuit Attorney Is The Recognized Representative Of The State In That No Legally Supported Basis Exists For The Appointment Of The Attorney General, And, Further, The Appointment Created A Constitutional Crisis By Giving Rise To The State Taking Contradictory Positions, When In Fact There Is No Conflict That Prevents The Circuit Attorney From Moving For A New Trial.

State v. Cooper, 336 S.W.3d 212 (Mo. App. 2011)

State v. Todd, 433 S.W.2d 550, 554 (Mo. 1968)

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003)

MO. 22ND CIR. R. 53.3

MO. CONST. ART. II, § 1

Mo. Rev. Stat. § 56.450

Mo. Rev. Stat. § 27.030

Mo. Rev. Stat. § 27.060

IV. The Trial Court Erred In Dismissing The State's Motion For New Trial Because Lamar Johnson Is A Victim Of A Manifest Injustice In That He Is Actually Innocent, His Conviction Was Obtained Through Perjured Testimony, Which The State Knowingly Failed To Correct, And The State Concealed Material Exculpatory And Impeachment Evidence In Violation Of Johnson's State And Federal Constitutional Rights.

Brady v. *Maryland*, 373 U.S. 83 (1963)

Schlup v. Delo, 513 U.S. 298, 320-21 (1995)

State ex rel Amrine v. *Roper*, 102 S.W.3d 541 (Mo. 2003)

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

U.S. CONST. AMEND V

U.S. CONST. AMEND VI

U.S. CONST. AMEND XIV

MO. CONST, ART. I, § 10

MO. SUP. CT. R. 91.05

MO. SUP. CT. R. 91.06

ARGUMENT

I. The Trial Court Erred In Dismissing The Motion For New Trial Based On Rule 29.11 Deadlines Because The Trial Court Has Authority To Hear, And The Circuit Attorney Has Authority To File The Motion In That The Circuit Attorney Must Have A Vehicle To Fulfil Her Constitutional Duty And Ethical And Professional Obligations To Correct An Unjust Conviction Within Her Jurisdiction.[10]

The trial court's holding that it has no authority to hear the State's Motion for New Trial means that the Circuit Attorney has no procedural vehicle to fulfil her ethical, professional, and constitutional obligations to correct the wrongful conviction of an actually innocent person. This is not and cannot be the law.

A. The Circuit Attorney is duty-bound to act to remedy Johnson's wrongful conviction.

The Circuit Attorney is constitutionally, statutorily, and ethically required to act to correct the legal wrong that is the wrongful conviction of an innocent man secured by perjured testimony.

The starting point for this analysis is the Missouri Constitution which protects the liberty of its citizens and promises "[t]hat no person shall be deprived of life, liberty or property without due process of law." MO. CONST. ART. I, § 10. Johnson's conviction based

[10] The issue of the court's authority presents a question of law, which is reviewed *de novo*. *Amsden v. State*, 567 S.W.3d 241, 244 (Mo. App. 2018). Johnson preserved the arguments presented herein in his motion to join the Circuit Attorney's Brief in Support of Court's Authority to Entertain the Motion for New Trial, D162, as well as through his motion to join the Circuit Attorney's Motion for New Trial. D98.

on perjured testimony—and his continued unconstitutional imprisonment—is a clear violation of his rights under the Constitution. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (a conviction obtained through use of false testimony, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears); *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1948) ("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.").

Once this constitutional violation was identified, the Circuit Attorney was and is duty-bound to act to remedy it. She is required by Missouri statute to so act because she swore an oath to uphold both the United States and Missouri Constitutions. Mo. Rev. Stat. § 56.550, **Circuit attorneys and assistants — oaths — duties** ("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.").

Additionally, the Circuit Attorney is a prosecutor, elected by the individuals of St. Louis, and subject to the special Rules of Professional Conduct that govern a prosecutor's obligation to remedy constitutional violations like those in Johnson's case. Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility 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."). The American Bar Association ("ABA") has clarified these obligations further: "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." ABA Model Rules of Professional Conduct, Rule 3.8 – Special Responsibilities of a Prosecutor.

Further, fundamental Constitutional law makes clear the Circuit Attorney is ethically *required* to act where she has identified the conviction of an innocent person based on perjured testimony. *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959) ("[T]he district attorney has the responsibility and duty to correct what [s]he knows to be false and elicit the truth."); *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) (The prosecutor's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction."). As a duly elected minister of justice, a prosecutor's obligation to correct such a known injustice never terminates.

The Attorney General conceded in the lower court that it unequivocally agrees that a prosecutor must adhere to such ethical principles and that a prosecutor must take corrective action when confronted with a potential injustice in a criminal case. The Attorney General also further agrees that a prosecutor should take appropriate corrective

action through "proper legal channels," but fails to offer a single mechanism available to a prosecutor when confronted with evidence of a wrongful conviction, instead arguing against any avenue offered by the Circuit Attorney and focusing on procedures he believes *Johnson* should take instead.[11] A defendant, however, cannot satisfy the duties of a prosecutor.

Even so, whenever a *pro-se* Johnson did file postconviction motions on any of the claims presented here, the Attorney General argued that Johnson was not entitled to process in those proceedings, either. In *every single action* where the Attorney General's Office was participated as a party or responded, it objected on procedural or jurisdictional grounds and claimed Johnson was not entitled to review of his claims of innocence and constitutional violations at trial.[12] As a result, Johnson has *never* had a hearing on his claims of innocence or the constitutional violations which arose from his trial.

The Attorney General's response to colorable claims of innocence and constitutional violations at trial affecting the reliability of the verdict is not limited to

[11] At oral argument below, the Attorney General posited that post-conviction proceedings are available to Johnson without identifying what such proceedings would be. The relevant inquiry before the Court is what is the remedy available to the Circuit Attorney.

[12] *Johnson v. Luebbers*, Case No. 4:00CV-00408-HEA (USDC EDMO, Order March 24, 2003) (habeas corpus petition denied without hearing); *Johnson v. Dwyer*, Case No. 04CV745399 (33rd Cir. Order June 10, 2004) (Rule 91 petition, denied without order to show cause or hearing); *Johnson v. Dwyer*, Case No. 04CV746835 (33rd Cir., Order Dec. 15, 2004) (Rule 91 petition denied without hearing); *Johnson v. Dwyer*, No. SD26750 (S.D. Ct. of Appeals, Order Feb. 15, 2005) (Rule 91 petition denied without show cause order issued or hearing); *Johnson v. Dwyer*, Case No. SC86666 (Order May 31, 2005) (Rule 91 petition denied after response to show cause order and without appointment of Special Master). Johnson was unrepresented in each of these actions.

Johnson's case. The National Registry of Exonerations[13] maintains a nationwide database of exonerations since 1989. The registry lists 24 exonerations in Missouri over the past 10 years. These exonerees obtained relief in 6 separate ways: (1) direct appeals/newly discovered evidence in underlying criminal proceedings; (2) post-conviction proceedings; (3) state habeas corpus relief; (4) federal habeas corpus relief; (5) post-conviction DNA testing and/or joint motions to vacate convictions with local prosecutors; or, (6) pardons. Based on its involvement in appeals and habeas corpus cases, the Attorney General's Office has been a party in the proceedings that resulted in an exoneration in 20 of the 24 cases. The Attorney General's Office has opposed overturning the conviction in every single exoneration case in the past decade.[14]

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[13] Available at https://www.law.umich.edu/special/exoneration/Pages/about.aspx

[14] These cases include:

(1) Three exonerations arising from motions for new trial based on newly discovered evidence, where the Attorney General's Office opposed relief and the conviction was overturned by a unanimous Court. *See State v. Stewart*, 313 S.W.3d 661 (Mo. banc 2010); *State v. Terry*, 304 S.W.3d 105 (Mo. banc 2010); *see also State v. Faria*, No. ED100964, Order dated Feb. 24, 2015.

(2) Three exonerations resulting from post-conviction proceedings where the Attorney General's Office opposed relief in all three cases. *See Hall v. State*, SD31870, Opinion May 1, 2013; *Buchli v. State*, WD67269, Opinion Nov. 13, 2007; *Smith v. State*, SD30971 and SC92127, Opinion Oct. 11, 2011.

(3) Ten exonerations through newly discovered evidence presented in state habeas corpus proceedings. In every single case, the Attorney General's Office opposed relief. In 7 of these 10 cases, either this Court or the Court of Appeals unanimously upheld relief. *See State ex rel Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc 2010); *State ex rel. Hawley v. Beger*, 549 S.W.3d 507 (Mo. App. 2018); *State ex rel. Robinson v. Cassady*, SC95892, 2016 Mo. LEXIS 554 (Mo. banc Dec. 20, 2016); *Ferguson v. Dormire*, 413 S.W.3d 40 (Mo. App. 2013*); State ex rel. Koster v. Green*, 388 S.W.3d 603 (Mo. App. 2012); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. 2011); *But see State ex rel. Griffin v. Denney*, 347 S.W.3d (Mo.

Here, the Circuit Attorney has found that there is clear and convincing evidence that Johnson is actually innocent of the murder and armed criminal action for which he was convicted in her jurisdiction, and that his conviction was solely obtained through perjured testimony and misconduct. These facts and the State's findings are unrefuted. This implicates Johnson's constitutional rights and, correspondingly, the Circuit Attorney is duty-bound to act to remedy the wrongful conviction.

B. The Circuit Attorney's duty to act gives her authority to act.

Because the Circuit Attorney is duty-bound to act, she must have the power to pursue an appropriate remedy in court, as she has done here. *See State ex rel. Weinstein v. St. Louis Cty.*, 451 S.W.2d 99, 101 (Mo. 1970) ("within the inherent power of the courts is the authority to do all things that are reasonably necessary for the administration of justice"); *see also D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 784 (Mo. 2019) (finding that the court had the inherent power to create criminal procedure where

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banc 2011). In the two cases that did not reach an appellate court, *Kidd* and *Kezer*, the circuit court found that the petitioners had successfully presented freestanding claims of innocence. *See Kidd v. Pash*, 18DK-CC00017 (43rd Cir. Order Aug. 14, 2019); *Ketzer v. Dormire*, 08AC-CC00293 (19th Cir. Order Feb. 17 2009).

(4) Four exonerations resulting from extrajudicial action or outlier proceedings, including: one pardon, Rodney Lincoln (the Attorney General opposed relief in every one of Lincoln's post-conviction proceedings, including *In re Lincoln v. Cassady*, 15AC-CC00597 and WD79854); *State v. Amick*, SC94324 (Amick was acquitted during retrial proceedings after this Court overturned his conviction.); *Wilkerson v. Stringer*, 16BU-CV03327 (habeas corpus relief granted based on lack of pretrial evaluation of his mental condition prior to pleading not guilty by reason of mental disease or defect. The Attorney General's Office opposed habeas relief. The Circuit Court granted relief—and 17 years after the conviction, new DNA testing showed that another man committed the crime.); and, *State v. McKay*, ED101298 (conviction overturned and remanded for new trial where charges were later dismissed). In each of these four cases, the Attorney General's Office opposed relief.

there was no statute or court rule directly on point). This Court has recognized that either "the prosecuting attorney or the defendant may move for a new trial based on newly discovered evidence." *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. banc 1985). This power cannot be circumscribed by the 15-day deadline in Rule 29.11.

As a threshold issue, the deadlines in Rule 29.11 are not applicable here. Rule 29.11 restricts the remedies available to a *convicted defendant* to challenge his conviction. *See, e.g.*, MO. SUP. CT. R. 29.11(b) ("A motion for a new trial or a motion authorized by Rule 27.07(c) [governing application of a ***defendant*** for a new trial] 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.") (emphasis added). The purpose of Rule 29.11 is "to allow the trial court the opportunity to reflect on its action during the trial" and "be given an opportunity to review and correct its own errors before the aid of an appellate court can justly be involved." *State v. Bartlik*, 363 S.W.3d 388, 391 (Mo. App. 2012). Accordingly, the 15-day time limitations cannot justly be read to restrict the remedies available to the Circuit Attorney. *See* MO. SUP. CT. R. 19.03 ("Rules 19 to 36, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every criminal proceedings.").

Indeed, finding that the Circuit Attorney must act within the deadlines of Rule 29.11 diminishes her express authority under Mo. Rev. Stat. § 56.450, **Circuit Attorney — duties (St. Louis City)**, which empowers her to "manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have

jurisdiction." Such a rule would also contravene Mo. Rev. Stat. § 556.036 which provides that "[a] prosecution for murder. . .may be commenced at any time," in that it would prohibit her from prosecuting the actual perpetrators of a murder when new evidence surfaces regarding the true culprit. In these ways, the trial court's Order limiting the Circuit Attorney to the Rule 29.11 deadlines is inconsistent with Mo. Sup. Ct. R. 19.04 which provides that "[i]f no procedure is specially provided by rule, the court having jurisdiction shall proceed in a manner consistent with judicial decisions or ***applicable statutes***." (Emphasis added.) In fact, it is questionable whether the trial court's construction of Rule 29.11 is constitutional. MO. CONST. ART. V, § 5 ("The rules [of criminal procedure] shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.").

Alternatively, even if the time requirements in Rule 29.11 apply here, they have been waived. As established in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. 2009), the time limits function as a "limit on remedies." Since noncompliance with Rule 29.11 deadlines "is not a jurisdictional defect," the Circuit Attorney may waive any applicable deadlines, which she has expressly done here. *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. 2015); *see also State v. Oerly*, 446 S.W.3d 304, 307-10 (Mo. App. 2014) (noncompliance with Rule 29.11(c) is not a jurisdictional defect); *Henderson*, 468 S.W.3d at 425, n.5 (the prosecution waived compliance with Rule 29.11(b) when it "twice pressed the trial court to consider the untimely *Brady* claim.").

Finally, the Supreme Court of Missouri recognizes a "manifest injustice" exception to time bars in cases of newly discovered evidence. *State v. Terry*, 304 S.W.3d 105, 109

(Mo. banc 2010). The exception is clearly implicated here, particularly when the Motion for New Trial was filed by the State and joined by Johnson. *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984) ("[W]e see no reason for limitation where the State joins in the request for release. Mindful though we are of the exclusivity of this Court's jurisdiction once a notice of appeal has been properly filed, we are equally cognizant of the perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence.... [I]n light of the State's concession that the evidence exists, it should be heard.").

For these reasons, the trial court erred in holding that it had no authority to entertain the State's Motion for a New Trial.

II. In The Alternative, The Trial Court Denied The Requested Relief Subject To The Inherent Authority Of A Court Of Appeals To Conduct Plain Error Review And Remand The Case For A New Trial, And The Court Should Do So Here Because "Extraordinary Circumstances" Exist In That Johnson Is Actually Innocent And His Conviction Was Obtained Through Perjured Testimony.[15]

Because exceptional circumstances exist in this case, this Court "has the inherent power to prevent a miscarriage of justice or manifest injustice[.]" *State v. Terry*, 304

[15] The issue of the court's authority presents a question of law, which is reviewed *de novo*. *Amsden v. State*, 567 S.W.3d 241, 244 (Mo. App. 2018). Johnson preserved the arguments presented herein in his motion to join the Circuit Attorney's Brief in Support of Court's Authority to Entertain the Motion for New Trial, (D162) as well as through his motion to join the Circuit Attorney's Motion for New Trial. D98.

S.W.3d 105, 109 (Mo. 2010); *see also State v. Starnes*, 318 S.W.3d 208, 215-16 (Mo. App. 2010) ("[W]e note that the failure to timely file a motion for new trial does not preclude this Court's review of any alleged error."). Thus, even if this Court were to find the motion for new trial is filed out of time, an appellate court may conduct plain error review under Mo. Sup. Ct. Rule 30.20 to determine whether "extraordinary circumstances" exist that justify remand for a new trial because of newly discovered evidence presented in a motion for new trial filed out of time. *State v. Williams*, 504 S.W.3d 194, 197 (Mo. App. 2016). "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." MO. SUP. CT. R. 30.20. "Plain error review is used sparingly and is limited to those cases where there is a clear demonstration of manifest injustice or miscarriage of justice." *Id.* In making such a plain error review, this Court may reach a number of different remedies to correct this manifest injustice through its inherent rulemaking authority.

Here, "extraordinary circumstances" exist because the Circuit Attorney has shown clear and convincing evidence establishing Johnson is actually innocent and that his conviction was secured through false testimony.

A. Newly discovered evidence of actual innocence renders the verdict improper and unjust.

First, "extraordinary circumstances" exist because newly discovered evidence completely exonerates Johnson. *See Williams*, 673 S.W.2d at 848 (finding that 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"). Here, nothing is left to convict Johnson—the real perpetrators have confessed and previously undisclosed impeachment evidence, including the suppressed payments to Elking and the full extent of support offered to Mock as well as Mock's bias and racial animus—leave no reliable evidence even supporting an arrest in this case. Because the evidence fully exonerates Johnson, "extraordinary circumstances" exist that warrant remanding the case to the trial court for a new trial.

The newly-discovered evidence could not have been procured by Johnson at the time of trial. Through the course of the CIU investigation, the Circuit Attorney uncovered the new evidence documenting witness payments to Elking that was not available to the defense at trial and was undiscoverable by Johnson. The affidavits of Phillip Campbell, James Howard, Lamont McClain, Anthony Cooper, and Elking, as well as the personal writings of Phillip Campbell and Elking, could not have been known to Johnson at trial. When Johnson attempted to collect new evidence in the years after his trial, the State concealed and failed to disclose such exculpatory evidence, thwarting every one of his attempts. Finally, the evidence of innocence was unavailable to Johnson because the State failed in its duty to investigate the crime, presented an identification that was manufactured, false, and incentivized, presented false testimony relating to the alibi, and failed to disclose exculpatory evidence in violation of *Brady* and its progeny. *See* D99 and D100-142.

This evidence is precisely the type of "extraordinary circumstances" recognized by Missouri courts. *See, e.g., State v. Parker*, 208 S.W.3d 331, 334 (Mo. App. 2006)

("extraordinary circumstances" exist for remanding for a new trial "where the newly discovered evidence would have completely exonerated the defendant"). Indeed, the Circuit Attorney found the newly-discovered evidence presented here clearly and convincingly exonerates Johnson. D99/P17-38. For these reasons, the Court should remand the case for a new trial.

B. Perjury by material witnesses renders the verdict improper and manifestly unjust.

In addition to the newly-discovered evidence, "extraordinary circumstances" exist because clear and convincing evidence shows that State witnesses deliberately perjured themselves and, and without this false testimony, Johnson would not have been convicted. "The starting point in any analysis of post-conviction relief based on perjury is the general rule that a conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated." *State v. Mims*, 674 S.W.2d 536, 538 (Mo. 1984) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (conviction reversed); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976); *Miller v. Pate*, 386 U.S. 1, 7 (1967); *State v. Moore*, 435 S.W.2d 8, 16 (Mo. 1968); *Coles v. State*, 495 S.W.2d 685, 687 (Mo. App. 1973). "The granting of a new trial on perjury grounds requires a showing that the witness willfully and deliberately testified falsely." *March v. Midwest St. Louis, L.L.C.*, 417 S.W.3d 248, 255 (Mo. 2014) (citation omitted). "Even when a witness has provided false testimony, a trial court may grant a new trial only when it is satisfied that the perjury was material in character as to render an improper verdict." *Id.* at 256; *see also State v. Mooney*, 670 S.W.2d 510, 516 (Mo. App. 1984) ("Where it appears from

competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."). "[T]he determination of the materiality of alleged false testimony is a question of law for the determination of the court." *March*, 417 S.W.3d at 256. There are multiple instances of perjury that occurred during Johnson's trial that were unknown to Johnson or his defense counsel at trial.

The evidence establishes that on multiple occasions, the State's star witness at trial, Elking, perjured himself at Johnson's trial. Elking recanted his initial identification—an identification that was both manufactured and false—and admitted in personal writings, affidavits, and deposition testimony that he was never able to make an identification because the gunmen wore masks that covered nearly all of their faces and told Nickerson that he could not identify the gunmen. TR.Vol.I/P159. Indeed, throughout the investigation, Elking told police that he did not know any of Boyd's associates and did not recognize or know the gunmen. D104/P5; D126/P3; D123/P2; D107/P3-4; D114/P15-16, 74-76.

To compel Elking to testify, Nickerson promised Elking money if he agreed to be a witness against Johnson, knowing that Elking could not identify the perpetrators. Elking finally succumbed to the pressure, intimidation, and promise of money and agreed to a statement identifying Johnson. D101/P50; D107/P6. At trial, Elking knowingly provided false testimony against Johnson at the time he testified, again supporting the statement crafted by detectives. The newly-discovered evidence revealing that Elking committed perjury when he identified Johnson is overwhelming:

(1) In 2003, Elking wrote a letter to Reverend Rice admitting that he testified falsely against Johnson. D104/P5-6.

(2) In a series of letters to Johnson, Elking admitted that his identification was coerced and false. D126.

(3) In 2003, Elking signed an affidavit stating that he testified falsely. D123.

(4) In 2010, Elking signed an affidavit stating that he testified falsely. D107.

(5) In 2019, 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 Johnson.

(6) In 2019, Elking testified under oath that his identification of Johnson was false and manufactured. D114.

(7) Receipts of payment from the State to Elking, never disclosed to the defense, corroborate Elking's account. D111.

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

Yet, this was not the only perjured testimony used to convict Johnson. In addition to Elking, Nickerson testified falsely when he testified about the reliability of Johnson's alibi. It was undisputed that at the time the murder occurred, Johnson was at an apartment with friends located at 3907 Lafayette Avenue with the exception of about five minutes. TR.Vol.II/P313; D119/P31; D121/P1; D120/P1. Nonetheless, the State presented perjured

testimony, through Nickerson, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes," and that he had personally driven the route anywhere from "20-50 times." TR.Vol.II/P334-35. Yet, this is not true. A one-way drive between these locations takes 11 minutes, or 22 minutes round trip. D99/P23. The undisputed evidence proves that the assailants arrived on foot, and even if he had a car, there is no way Johnson could have even traveled the distance in 5 minutes, let alone traveled, committed the murder, and returned. Without Nickerson's false testimony, Johnson's alibi evidence would have proven his innocence and Nickerson's testimony prejudiced Johnson.

And yet there is still more. In addition to Elking and Nickerson, the State also put on testimony from William Mock, a man with an extensive criminal history and history of cooperating as a jailhouse informant, yet misrepresented to the jury that Mock had no motive to lie. That was false. In a series of undisclosed, exculpatory, and impeaching correspondence between Mock and the prosecutor, motive evidence in the form of incentives provided by the prosecutor were made clear. This correspondence included several letters written by prosecutors on Mock's behalf for varying purposes including to remedy disciplinary incidents involving Mock, to request transfers for Mock within the DOC to preferred prisons, and to make recommendations for Mock's release to the parole board. None of these favors were disclosed to the defense, and Mock lied to the jury about his expectation of receiving beneficial treatment in exchange for his testimony. Mock further testified falsely about his criminal history, and the State did not correct the false record offered to the jury. D101/P25, 51.

The credible and overwhelming evidence reviewed and uncovered by the CIU makes clear that Elking, Nickerson, and William Mock knowingly testified falsely at Johnson's trial. These "extraordinary circumstances" warrant remand to the trial court for a hearing on the State's Motion for New Trial.

Because exceptional circumstances exist in this case, this Court "has the inherent power to prevent a miscarriage of justice or manifest injustice." *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010). The following section reviews just a few of the options available to this Court.

C. This Court has the power in equity to correct this manifest injustice.

In its Order transferring the case, the Court of Appeals stated, "resolution of these issues may require reexamination of existing law." A054. In response, Johnson offers the following for the Court's consideration, and also directs the Court's attention to the *Brief of Post-Conviction Scholars as Amici Curiae in Support of the State's Motion for New Trial*.

This Court has the power to correct a manifest injustice and can do so, where necessary, through its inherent rule-making authority or by interpreting existing law to reflect the Circuit Attorney's constitutional and ethical obligations to remedy a wrongful conviction. Within the inherent power of the courts is the authority to do all things that are reasonably necessary for the administration of justice. *See D.C.M. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 784 (Mo. 2019) (finding that the court had power to create a criminal procedure where there was no rule on point).

Procedural technicalities designed to serve principles of finality "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engel v. Isaac*, 456 U.S. 107, 135 (1982). The judiciary is conferred with "broad remedial powers" to ensure the legality of confinement. *Boumediene v. Bush*, 553 U.S. 726, 776 (2008). This Court has held that procedural rules placing limits on the court's ability to grant relief are not absolute; they are "subject to the right recognized by Article I, Section 14 to have a remedy for a legal wrong." *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. 2009).

The Missouri Constitution, Article V, section 5, states:

> **Rules of practice and procedure—duty of supreme court—power of legislature**—*The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law.* The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

MO. CONST. ART. V, § 5 (emphases added).

Article V, section 5 grants the Supreme Court authority to establish rules of practice and procedure for all courts "which shall have the force and effect of law." *Porter By & Through Aylward v. Gottschall*, 615 S.W.2d 63, 65 (Mo. 1981) (Court adopted Rule 56.01(b)(3)). "Pursuant to [Article V, section 5's] authorization, this court has adopted various rules which establish practice and procedure for original writs as well as practice and procedure in criminal and civil cases, both at the trial and appellate level." *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 721 (Mo. 1976). "The Court's rule-making authority under Article V, section 5, was succinctly stated in *Sprung v. Negwer Materials, Inc.*:

> There are two ways that this Court may effectively overrule cases. The first is by an opinion so stating. The second, pursuant to the rulemaking power granted the Court by the constitution, Mo. Const. Art. V, § 5, is to adopt a rule contrary to the existing case law. One is as effective as the other. It follows that by a subsequent case we may as effectively emasculate or repeal a rule. We were right in adopting revised Rule 74, and there should be consistency in the cases that follow.

Sprung v. Negwer Materials, Inc., 775 S.W.2d 97, 114 (Mo. 1989) (Welliver, J., dissenting).

In addition, rules promulgated pursuant to Article V, section 5 "supersede all statutes and existing court rules inconsistent therewith," and if a conflict exists between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings. MO. SUP. CT. R. 41.02; *Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. banc 1983).

In *Fields v. State*, the Supreme Court of Missouri discussed its rule-making authority, and the precedential value a change in the law can have on post-conviction appellants, holding that "[e]ven when a change is made effective prospectively only, as this rule change is, it is customary to grant relief to the litigant whose case brought about the change made by the opinion." 572 S.W.2d 477, 484 (Mo. 1978). In *Fields*, an appellant convicted of rape and sentenced to twenty-five years imprisonment filed three successive *pro se* motions pursuant to rule 27.26 in order to vacate his sentence. *Id.* at 478. The first two motions contained similar allegations of error, but both were denied. *Id.* The third motion, raised ineffective assistance of counsel claims for the first time; the appellant explained that he did not raise the claim before because he "didn't know or understand what could be raised on a 27.26 motion." *Id.* The court of appeals relied on several supreme

court cases in ruling that the third successive motion could not be entertained as lack of legal knowledge was an insufficient excuse. *Id.* The Missouri Supreme Court granted transfer "for the purpose of reviewing our procedures in respect of postconviction motions to vacate…" *Id.*

The Court in *Fields* described the purpose of post-conviction rules, noting "the desire to avoid confinements contrary to fundamental justice" is important. *Id.* at 481. The Court also acknowledged the "implementation and the practice under [Rule 27.26] have been confused by the plethora of appellate judicial opinions which construe the application of the rule in various circumstances." *Id.* Thus, when this Court amended Rule 27.26 in its opinion, this Court clearly stated that, "an appropriate amendment of rule 27.26 will be made and published. Meanwhile, the directions contained herein are to be followed." *Id.* at 483, n.4.

As in *Fields,* this Court has the ability and the authority to change the current landscape of the post-conviction appellate procedure concerning prosecutors and Conviction Integrity Units and should do so in the narrow circumstances here—where the continued incarceration of an innocent man whose conviction was obtained through false and perjured testimony also frustrates a prosecutor's ability to meet her constitutional and ethical obligations. Although the ability of an appellate court to remand a case for a hearing on the merits when "manifest injustice" or "extraordinary circumstances" exists is clear, *see e.g., State v. Williams*, 504 S.W.3d 194, 197 (Mo. App. 2016); *State v. Parker*, 208 S.W.3d 331, 334 (Mo. App. 2006); *State v. Mooney*, 670 S.W.2d 510 (Mo. App. 1984); *March v. Midwest St. Louis*, L.L.C., 417 S.W.3d 248 (Mo. 2014), the Court of Appeals

misconstrued this Court's precedent and authority. As a result, the authority for trial and appellate courts alike to act in this rare and extraordinary instance is murky and confusing at best. Johnson asks this Court to use its rule-making authority to clarify an elected prosecutor's ability to correct a wrongful conviction in her jurisdiction. Below Johnson has briefly summarized some of the potential avenues available to this Court.

Missouri Supreme Court Rule 29.11

This Court could revise Rule 29.11 if the Court finds the Rule inadequate in its current form. Amending the rule to permit prosecutors to file a motion for new trial based on newly discovered evidence at any time in cases of a wrongful conviction would eliminate any confusion in the courts below, recognize a vehicle for prosecutors to discharge their constitutional, ethical, and professional duties and ensure that similarly situated defendants are not treated differently.[16] The rule change could specifically permit

[16] Notably, while the Attorney General is challenging the prosecutor's authority here, the ability of another prosecutor to overturn two unjust convictions was not challenged just two years ago. In 2018, St. Charles County Prosecuting Attorney Tim Lohmar, president of the Missouri Association of Prosecuting Attorneys, filed motions "to set aside the convictions" of two Missouri men because their prior convictions "lacked integrity." Tony 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, last visited Feb. 9, 2020.

Describing his actions, Lohmar stated in 2018, "When I as a prosecutor have reason to believe that a conviction lacks integrity, I have a responsibility to make it right. That's why it was important for us to take these steps to have these men exonerated." Denise Hollinshed, *2 rape convictions set aside in St. Charles County after police find evidence 'victim was untruthful'*, St. Louis Post Dispatch, Aug. 22, 2018, https://www.stltoday.com/news/local/crime-and-courts/rape-convictions-set-aside-in-st-

a prosecuting attorney who is presented with or uncovers newly discovered evidence that seriously undermines the validity of the verdict to file a Motion for New Trial at any time. Such a change would not render Rule 29.11's time limits meaningless. As the Court pointed out in *Schlup*, the miscarriage of justice exception rests in part on the fact that "substantial claims of actual innocence are extremely rare." *Schlup v. Delo*, 513 U.S. 320, 321 (1995).

Missouri Supreme Court Rule 91

In the alternative, this Court has the authority to construe the Circuit Attorney's Motion for New Trial as a petition for writ of habeas corpus pursuant to Missouri Supreme Court Rule 91.

Rule 91.02 requires that a habeas petition be filed in the county of incarceration or "for good cause," in a higher court. This restriction is one of venue, not jurisdiction. MO. SUP. CT. R. 91.02; *State ex rel. Heartland Title Servs. v. Harrell*, 500 S.W.3d 239 (Mo. banc 2016). The Court could clarify that Rule 91.02 permits the filing of a petition for writ of habeas corpus in the jurisdiction of conviction where the *prosecutor* petitions or joins the petition for relief, or that the trial court, when presented with a motion for new trial, like the trial court here, should consider that motion for new trial pursuant to Rules 91.05 and 91.06. *See* pp. 92-93, *infra*.

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charles-county-after-police/article_50fa6512-38a3-5827-b212-736cab224fef.html, last visited Feb. 9, 2020.

Lohmar should be applauded for his actions to correct a wrongful conviction, but he should not be alone in his authority to do so.

Missouri Supreme Court Rule 74.06(b) and (d)

Additionally, this Court can consider the Circuit Attorney's Motion for New Trial as an independent action in equity. "[A] trial court should look to the substance of the motion seeking relief to see if it invokes the equitable powers of the court and, thus, may be considered an independent suit in equity." *Cozart v. Mazda Distribs. (Gulf) Inc.*, 861 S.W.2d 347, 352 (Mo. App. 1993). Missouri Rule 74.06(d) contemplates an independent action: "This Rule 74.06 does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order or to set aside a judgment for fraud upon the court." MO. SUP. CT. R. 74.06(d); *see Brief for Post-Conviction Scholars as Amici Curiae*, p. 26, *State v. Johnson*, ED10893.

> Under common law, an application for *coram nobis* was
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> > made to the trial court to correct errors of fact, not appearing on the face of the record, affecting the validity of the proceedings which errors of fact were unknown to the party now seeking relief and to the court at the time of the disposition of the particular case, and which errors of fact, had they been known, would have prevented the rendition of the judgment. The motion or application is considered a new action—is in the nature of an independent and direct attack upon the judgment—with the purpose of revoking or annulling the judgment.

State v. Harrison, 276 S.W.2d 222, 223 (Mo. 1995); *see also Brief for Post-Conviction Scholars as Amici Curiae*, p. 26, *State v. Johnson*, ED10893.

Alternatively, Rule 74.06(b)(4) provides that a "court may relieve a party or his legal representatives from a final judgment or order" where "the judgment is void." *Smith v. Smith*, 524 S.W.3d 95, 99 (Mo. App. 2017) (citing *Christianson v. Goucher*, 414 S.W.3d 584, 588 (Mo. App. 2013). A judgment is void "if the court that rendered judgment lacked

jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process." *K & K Investments, Inc. v. McCoy*, 875 S.W.2d 593, 596 (Mo. App. 1994) (quoting Black's Law Dictionary 1574 (6th ed. 1990)). "The concept of a void judgment is 'narrowly restricted' under Rule 74.06." *Forsyth Fin. Grp. LLC v. Hayes*, 351 S.W.3d 738, 740 (Mo. App. 2011).

Coram nobis is appropriate where "the circumstances are so compelling to achieve justice" or where an alleged error is "of such fundamental character as to compel relief." *Arnold v. State*, 552 S.W.2d 289, 293 (Mo. App. 1977). *Coram nobis* acts as "the machinery for righting conceivable wrongs which otherwise would stand uncorrected." *State v. Sodulski*, 298 S.W.2d 420, 424 (Mo. Div. 1 1957). Here, the Circuit Attorney's Office and Johnson agree that the newly discovered evidence proves that Johnson is innocent and that the verdict was occasioned through false evidence and perjured testimony. This rare and compelling case would certainly qualify for relief under *coram nobis* were the common law remedy still available.

Admittedly, Missouri courts have decided that Rule 74.06 is not available to criminal defendants as a means of challenging their convictions. *See State ex rel. Nixon v. Daughtery*, 186 S.W.3d 253 (Mo. banc 2006); *Vicory v. State*, 117 S.W.3d 158, 160 (Mo. App. 2003); *Roath v. State*, 998 S.W.2d 590, 592 (Mo. App. 1999); *Bolden v. State*, 106 S.W.3d 579 (Mo. App. 2003). This case, however, presents an opportunity for the Court to clarify and revisit those holdings for an exceptional case like this one. Further, Johnson suggests *State v. Johnson* is distinguishable for two compelling reasons.

First, the newly discovered evidence completely exonerates Johnson as outlined above. *See* pp. 31-49, *supra*. The Motion for New Trial, filed by the State, was based on evidence that was withheld from Johnson and unknown to the trial court, including confessions by both perpetrators and undisclosed payments and benefits to the only witness to the crime and an incentivized informant that offered testimony against Johnson. The motive evidence presented at trial has been disproven. No credible evidence to support the verdict remains. *See State ex rel. Amrine v. Rope*r, 102 S.W.3d 541, 547 (Mo. 2003).

Perhaps equally important, the Motion for New Trial was filed *by the State*. The rulings foreclosing actions pursuant to Rule 74.06 in criminal cases rest on the premise that *defendants* could proceed with post-conviction actions under Rules 29.15, 24.035, or 91, *see State ex rel. Nixon v. Daughtery*, 186 S.W.3d 253 (Mo. banc 2006); *Vicory v. State*, 117 S.W.3d 158, 160 (Mo. App. 2003); *Roath v. State*, 998 S.W.2d 590, 592 (Mo. App. 1999); *Bolden v. State*, 106 S.W.3d 579 (Mo. App. 2003), but make no mention of the ability of the prosecutor to use such a mechanism. Here, the Circuit Attorney moved for a new trial for Johnson, and because the State was the moving party, this case is fundamentally different and distinguishable.

If this Court determines that neither Rules 29.11 nor 91 are available to the Circuit Attorney, she is left without any legal remedy to discharge her duty. Thus, to restrict Rule 74.06 to civil cases without any other avenue available in an exceptional circumstance like presented here would be fundamentally unfair. This Court can revive the writ of *coram nobis* for the rare circumstance where a prosecutor moves for relief, or it can clarify that Rule 74.06 is available as a vehicle in criminal cases for *prosecutors* who determine that a

conviction is fundamentally unjust. *See Hurst v. State*, 352 S.W.3d 407 (Mo. App. 2011) ("We see no need to determine whether 74.06(b)(4) is a proper vehicle for a challenge to a void judgment in a post-conviction context because here the underlying allegations, even if meritorious, amount to trial error correctable through a direct appeal of the 1992 judgment.").

To hold that there is no remedy available to a Missouri prosecutor who determines by clear and convincing evidence that a wrongful conviction has occurred in her jurisdiction is fundamentally unjust and cannot stand under the Missouri Constitution, which demands "That the courts of justice shall be open to every person, and certain remedy afford for every injury to person, property, or character, and that right and justice shall be administered without sale, denial or delay." MO. CONST. ART. V, § XIV.

III. The Trial Court Erred In *Sua Sponte* Appointing The Attorney General Because The Circuit Attorney Is The Recognized Representative Of The State In That No Legally Supported Basis Exists For The Appointment, And, Further, The Appointment Created A Constitutional Crisis By Giving Rise To The State Taking Contradictory Positions, When In Fact There Is No Conflict That Prevents The Circuit Attorney From Moving For A New Trial.[17]

[17] This Court reviews the appointment of the Attorney General for an abuse of discretion. *State v. Eckelkamp*, 133 S.W.3d 72, 74 (Mo. App. 2004). The Circuit Attorney preserved this argument in its Brief in Support of Court's Authority to Entertain the Motion, D162, which Johnson joined. D160. Johnson joined the State's Motion to Strike the Attorney General's Response. D164, D165.

The trial court did not disqualify the Circuit Attorney, but instead appointed the Attorney General *sua sponte* to simultaneously represent the State and invited the Attorney General to file a brief diametrically opposed to the Circuit Attorney's position on the issue of authority. D161. The trial court justified the appointment as protecting the "integrity of the legal process" in two respects: first, Johnson's counsel may have violated a court rule in contacting jurors, and second there was no "independent" review of the "allegations of non-conclusory prosecutorial misconduct." D167/P8-9. Neither are factually or legally valid bases for appointment of the Attorney General, and in doing so, the trial court has forced a constitutional crisis. This Court should remedy this error by reversing the *sua sponte* appointment of the Attorney General.

A. An alleged violation of Local Rule 53.3 is not a basis to usurp the Circuit Attorney's authority and appoint the Attorney General.

The Twenty-Second Judicial Circuit's Local Trial Rule 53.3 **Post-Trial Juror Contact**, states, that "no attorney…shall contact any member of a jury which has heard evidence in any cause in this circuit" unless permission is granted by the court. MO. 22ND CIR. R. 53.3. There is no allegation that the Circuit Attorney contacted jurors in violation of Local Rule 53, a fact that the Order recognizes. D167. The Order took issue with juror contact more than two decades after the verdict by Johnson's counsel, not the Circuit Attorney. Further, Judge Booker Shaw told Johnson's jury: "And the admonition that I previously gave you about not discussing the case is removed and you can freely discuss the case if you wish to or if you don't want to, you don't have to talk about it." TR.Vol.II/P380. Such interviews are typical in innocence cases as the burden of proof is

high in showing that "no reasonable juror" would convict based on the newly discovered evidence. *See Schlup v. Delo*, 513 U.S. 298 (1995); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003).

While the juror's statements were given to the CIU to aid in its fact-finding mission, their incorporation into the CIU's report is not a basis for disqualifying the Circuit Attorney or appointing the Attorney General. Neither is the trial court's unreasonable fear that statements from jurors who were presented false and perjured testimony is a "threat to the integrity of the legal process" owed to Johnson. D167/P3-5, 9.

In fact, no Missouri court has denied a Motion for New, or usurped the Circuit Attorney's authority on this basis, and there is no valid support to take such drastic measures where an innocent person's liberty is at stake. This is particularly true where the alleged violation was made by *an attorney other than the one filing the motion.*

The violation, if one exists, has no bearing on the State's duty and discretion to bring the Motion for New Trial, is unrelated to the State's finding that the newly discovered evidence of innocence, perjury, and misconduct exonerates Johnson, and is not a valid basis for the appointment of the Attorney General. Accordingly, the Court should vacate the trial court's order appointing the Attorney General.

B. The CIU's independent investigation into prosecutorial misconduct in its own office is not a basis to usurp the Circuit Attorney's authority.

There is no conflict in the St. Louis Circuit Attorney's CIU reviewing Johnson's case for prosecutorial misconduct within its own office that happened nearly 25 years ago. Indeed, the very purpose of CIU's is to "ensure the accuracy, and therefore the

legitimacy—that is, the integrity—of all criminal convictions secured by the Office." *See* John Holloway, *Conviction Review Units: A National Perspective, Quattrone Center for the Fair Administration of Justice*, April 2016, available at https://www.law.upenn.edu/live/files/5522-cru-final. Because a CIU is reviewing cases within its jurisdiction, a "[CIU] must be open to the possibility that mistakes have been made in the Office over time, and it must have the support of the [prosecuting attorney] and Office leadership to conduct full investigations that may dredge up unpleasant facts for the [prosecuting attorney] or his or her colleagues." *Id.* at 23.

Here, the trial court erred in concluding a conflict exists based on allegations of prosecutorial misconduct in the Circuit Attorney's office 25 year ago. D167/P5. This is precisely why CIUs exist—to review the integrity of convictions obtained by the office previously, which includes reviewing the work of former attorneys employed by that office.

Prosecuting attorneys, like the Circuit Attorney here, are aware of this purpose and have taken steps to ensure that CIUs have a degree of independence, although decisions must ultimately be made by the Circuit Attorney. Since individuals independent from those who sought the convictions in the first place are important in CIU's, the Innocence Project released its "Conviction Integrity Best Practices" recommending, among other things, that CIUs should "either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority…" Innocence Project, *Conviction Integrity Unit Best Practices*, October 2015, at 3, available at https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-

Unit.pdf. Contrary to the trial court's conclusion that the CIU did not follow these practices, which is still not a valid reason to usurp the Circuit Attorney's authority and appoint the attorney general, the Circuit Attorney hired former public defender, Jeffrey Estes, to review CIU cases as part of his duties. His review of Johnson's case was clearly "independent" as he was not a part of the office or team that wrongfully convicted Johnson 25 years ago.

For similar reasons, the trial court misunderstood the "best practices" guidelines by suggesting the CIU should have referred the case to some other "independent authority" to investigate prosecutorial misconduct. D167/P6. The CIU *is* an independent authority with respect to Johnson's case and Estes' prosecution of other cases is only relevant if he were reviewing those same cases as part of the CIU. *See Conviction Review Units: A National Perspective*. The Circuit Attorney's CIU satisfies all elements for independence.

Additionally, both the CIU and the Midwest Innocence Project conducted independent and joint investigations, concluding in a July 18, 2019, CIU Report, 70 pages long, outlining the clear and convincing violations of Johnson's constitutional rights, Johnson's actual innocence, and the prosecutorial misconduct and perjury that plagued his criminal trial. None of those findings are in dispute, and it is difficult to imagine what additional "independent review" would be necessary, at the very least for the trial court to conduct a hearing on the evidence therein. Indeed, the trial court's reasoning, if adopted by other courts, would essentially render every CIU around the country powerless. Since 2014, most exonerations in the United States have resulted from the work of full-time "professional exonerators," including both CIUs and innocence organizations. National Registry of Exonerations, *Exonerations in 2018*, April 9th, 2019, available at

https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf. In 2018 alone, 58 individuals were exonerated by the work of CIUs—work that was done by the very offices that convicted the defendants they exonerated. *Id.* This trend makes sense—prosecutors are often in the best position to know whether evidence of a wrongful conviction exists within their file and they often have custody and control of the trial evidence and the best access to the witnesses. Surely, prosecutors are better positioned than an unrepresented person in custody, the position most prisoners with colorable claims of innocence find themselves. The well-resourced, represented litigant in post-conviction proceedings is rare indeed.

C. The trial court's *sua sponte* appointment of the Attorney General violates the separation of powers doctrine and creates a constitutional crisis

The trial court's appointment of the Attorney General created an avoidable and unnecessary constitutional confrontation. Both the Circuit Attorney (a quasi-judicial officer and member of the judicial branch) and the Attorney General (a member of the executive branch) now purport to represent the State of Missouri and have taken diametrically opposed viewpoints in this matter. This implicates the separation of powers clause in the Missouri Constitution:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

MO. CONST. ART. II, § 1.

The Circuit Attorney speaks for the State in this matter, not the Attorney General. As succinctly stated in the *Amicus Curie* Brief filed in Support of the Circuit Attorney's Motion for New Trial:

> There is [*sic*] no basis in existing law for the Court to appoint the Circuit Attorney's Office and the Attorney General's Office to represent the State *simultaneously* in a criminal case. Nor is there any basis for the appointment of the Attorney General's Office – or anyone else – as a special prosecutor.
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> The Circuit Attorney [*sic*] is the representative of the State who is solely responsible for the handling of criminal cases within this Court's geographical territory, such as Johnson's. *See* R.S. Mo. §§ 56.450, 56.550. The Attorney General's Office, on the other hand, has no jurisdiction to prosecute Johnson. These are separate offices, voted on by different constituencies, which carry out different roles within Missouri.

D155/P14-15, 19. Indeed, the Missouri legislature makes clear that the Circuit Attorney has the duty to "manage and conduct all criminal cases," Mo. Rev. Stat. § 56.450, whereas the Attorney General's role is 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); Mo. Rev. Stat. § 27.060 (the Attorney General "may also appear and interplead, answer or defend, in any proceeding or tribunal in which the State's interest are involved."). The Attorney General's dual statutory obligations, when read together, create a clear limitation on the Attorney General's authority in those cases when a prosecuting attorney "discharge[s] their duties in the trial courts." Indeed, the Attorney General was not appointed to "aid" the Circuit Attorney here, but to oppose the elected prosecutor's assessment of a criminal case in her own jurisdiction.

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.

While the trial court recognized it has "the inherent power to do what is reasonably necessary for the administration of justice," D167/P3, the trial court abused its authority by appointing the executive branch (the Attorney General) to usurp the Circuit Attorney's essential judicial powers and functions.

For these reasons, this Court should remedy the trial court's error by reversing the *sua sponte* appointment of the Attorney General as an abuse of the Circuit Court's discretion and remanding the case for a new trial, or at a minimum, a hearing on the Circuit Attorney's motion.

IV. The Trial Court Erred In Dismissing The State's Motion For New Trial Because Lamar Johnson Is A Victim Of A Manifest Injustice In That He Is Actually Innocent, His Conviction Was Obtained Through The Perjured Testimony, Which The State Knowingly Failed To Correct, And The State

Concealed Material Exculpatory And Impeachment Evidence In Violation Of Johnson's State And Federal Constitutional Rights.[18]

The Circuit Attorney's Motion for New Trial (D99) and supporting exhibits (D100-D142) explain the factual basis supporting the evidence of innocence and prejudicial constitutional violations described above.

Johnson's trial was fundamentally unfair and unreliable. The undisputed evidence supporting Point IV includes overwhelming evidence that (1) Lamar Johnson is innocent, (2) that Johnson's conviction was obtained through the use of perjured testimony, and (3) that the conviction was obtained through repeated and prejudicial official misconduct, including:

1. Phillip Campbell and James Howard credibly confessed in personal writings, conversations, and sworn statements;
2. The gunmen were fully masked, Elking did not see the shooters faces, and never was able to make an identification;
3. Johnson's alibi evidence is persuasive, credible, and supported by corroborating evidence and witness testimony; and,
4. The motive evidence presented at trial was false and manufactured.
5. Elking, the only witness to the crime, committed perjury when he CD falsely identified Johnson;
6. William Mock falsely testified about his criminal history and history as an incentivized informant for the State;
7. William Mock falsely testified that he heard Johnson make

[18] The issue of the court's dismissal presents a question of law, which is reviewed *de novo*. *Amsden v. State*, 567 S.W.3d 241, 244 (Mo. App. 2018). Johnson preserved the arguments presented herein in his motion to join the Circuit Attorney's Circuit Attorney's Motion for New Trial. D98

incriminating statements in the City Jail;

8. Detective Nickerson falsely testified that Johnson could have committed the crime and returned to his alibi location in a matter of minutes.

9. The failure to correct testimony the State and its agents knew or should have known was false;

10. The knowing presentation of false and manufactured evidence; and

11. The concealment of witness payments, favors, and incentives that were hidden from Johnson at trial and for more than twenty years thereafter.

Appellant Johnson contends that the court below erred in failing to correct a manifest injustice—as the Circuit Attorney concedes, new evidence establishes Johnson's innocence. Indeed, the Circuit Attorney's Motion for New Trial admits that Johnson is actually innocent of the crimes for which he is incarcerated, and that the prosecution concealed for many years exculpatory evidence, including evidence impeaching Greg Elking and jailhouse informant William Mock and establishing that their testimony was false. D99.

If a credible showing of actual innocence is made and is "strong enough to undermine the basis of the conviction" the continued imposition of the sentence is "manifestly unjust." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003). The Missouri Supreme Court has provided a standard "to account for those rare situations...in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial." *Id.* The evidence of innocence must "make a clear and convincing showing of actual innocence that undermines confidence in the corrections of the judgment." *Id.* Evidence is clear and convincing when it "instantly

tilts the scales in the affirmative when weighed against the opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id.* at 548. The evidence discovered since Johnson's trial exonerates him.

"[S]uppression by the prosecution of [material] evidence favorable to an accused" is a due process violation, regardless of the good or bad faith of the prosecutor's withholding of such evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose encompasses evidence which is either directly exculpatory or would impeach a state witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). "A conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated." *State v. Mims*, 674 S.W. 2d 536, 538 (Mo. banc 1984); *see also Napue v. Illinois*, 360 U.S. at 269; *United States v. Agnrs*, 427 U.S. 97, 103 (1976). Johnson's conviction is manifestly unjust because it rests on "perjured testimony, knowingly used by the State authorities to obtain his conviction, and the deliberate suppression by those same authorities of evidence favorable to him." *Pyle v. Kansas*, 317 U.S. 213, 216 (1942).

The record presented by the Circuit Attorney was extensive and thorough, and included testimony, affidavits, and suppressed evidence that undermines the integrity of the verdict and renders Johnson's trial fundamentally unfair. *See* D99-142. A court's equitable authority is at its apex when constitutional errors at trial result in the conviction of an innocent person. Criminal judgments are always open to collateral attack to remedy this miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *State ex rel. Amrine v. Roper*, 102 S.W. 3d 541, 546

(Mo. banc 2003); *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000). "The injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. *Schlup*, 513 U.S. at 325.

Such claims must be heard even if their timing or form fails to comply with procedural rules because the ends of justice require adjudication when "a proper showing of actual innocence" is made. *Herrara v. Collins*, 506 U.S. 390, 404 (1993). New evidence of innocence, withheld at trial in violation of the federal constitution, "eliminate[s] the state's power to proscribe the defendant's conduct or impose a given punishment." *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016).

Where, as here, constitutional violations have been pled and proffered by clear and convincing evidence that conviction is unlawful, the court is required to act. Rule 91.05 requires that

> A court to which a petition for a writ of habeas corpus is presented shall forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the petition that the person restrained is not entitled hereto.

MO. SUP. CT. R. 91.05. Similarly, Rule 91.06 directs this Court

> Whenever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge that any person is illegally confined or restrained of liberty within the jurisdiction of such court or judge, it shall be the duty of the court or judge to issue a writ of habeas corpus for the person's relief, although no petition be presented for such writ.

MO. SUP. CT. R. 91.06. This Court has the "duty" to issue a writ of habeas corpus for relief if it is presented with "evidence from any judicial proceedings…[that Johnson] is illegally confined or restrained of liberty. *Id*.

"The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). If the Court determines that Rules 29.11, 91, or 74.06 are unavailable to the Circuit Attorney, it is within the equitable power of this Court to issue the writ of habeas corpus based on the record before it, or in the alternative, this Court could consider the Motion for New Trial and accompanying exhibits (D99-D142) as a petition for a writ of habeas corpus and appoint a Special Master to hear and take evidence. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013).

CONCLUSION

For one or more reasons stated in Points I-IV, this Court should exercise its residual power, reverse the trial court's ruling, and order a new trial or at a minimum a hearing on the merits of Johnson's innocence. The Court should also:

1. Determine that Rule 29.11 time limitations do not apply to a prosecutor, or if they do that they have been waived and remand for a new trial; or,
2. In the alternative amend Rule 29.11 to clearly state that a prosecutor can file a motion for new trial in the court of conviction to correct a manifest injustice at any time; or,
3. Amend Rule 91 to permit the filing of a petition for habeas corpus in the court of conviction where the prosecutor consents; or,
4. Consider the Circuit Attorney's Motion for New Trial as a petition for writ of habeas corpus under Rule 91.05 and 91.06 as evidence that Johnson is illegally confined

and issue the writ of habeas corpus discharging Johnson from his sentence, or in the alternative, appoint a Special Master to take and hear evidence; or,

5. Revive the writ of *coram nobis* for the rare circumstance where a prosecutor moves for relief, or in the alternative, clarify that Rule 74.06 is available as a vehicle in criminal cases for *prosecutors* who determine that a conviction is fundamentally unjust; and,
6. Reverse the trial court's *sua sponte* appointment of the Attorney General; and,
7. Enter further judgment that this Court deems just and equitable.

Dated: February 11, 2020

Respectfully submitted,

/s/ Lindsay J. Runnels

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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 11, 2020, upon the filing of the foregoing document.

/s/ Lindsay J. Runnels
Lindsay J. Runnels

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(a) that this brief was prepared using Times New Roman 13-point font. I further certify pursuant to Rule 84.06(c), that Appellant Johnson's brief includes the information required by Rule 55.03, was served through the electronic filing system in compliance with Rule 103.08 and 43.01(c), and complies with the limitations contained in rule 84.06(b). I further certify that this brief contains 23,841 words, excluding the cover page, certificates required by Rule 84.06(c), and signature block as directed by rule 84.06(c), as determined by the Microsoft word 2010 word-counting system.

/s/ Lindsay J. Runnels
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