

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Respondent,

vs.

LAMAR JOHNSON

Appellant.

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SC98303

BRIEF OF LEGAL ETHICS SCHOLARS AS *AMICI CURIAE*

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INTEREST AND IDENTITY OF *AMICI CURIAE*

Amici are 107 renowned legal scholars whose scholarship, teaching, and professional service focus on legal ethics and professional responsibility, including the professional norms governing the work of criminal prosecutors. Collectively, *amici* have authored well respected and widely cited scholarship on legal ethics. In particular, *amici* have authored an abundant legal academic and professional literature regarding prosecutors' duty to seek justice, and exploring the implications of this duty. *Amici* have also been involved in the drafting and passage of directly relevant American Bar Association Model Rules of Professional Conduct regarding the ethical duties of prosecutors, including post-conviction. They are uniquely well-suited to consider the special role of prosecutors in the United States.

Amici respectfully submit this brief to address the ethical and professional conduct of the Circuit Attorney in moving to set aside Lamar Johnson's conviction.

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CONSENT OF THE PARTIES

The Appellant, Respondent, and Intervenor, have consented to the filing of this brief by Legal Ethics Scholars *Amici Curiae*.

SUMMARY OF ARGUMENT

The Circuit Court below expressed skepticism about whether, in filing a Motion for a New Trial in Lamar Johnson's case, Circuit Attorney Gardner acted consistently with her ethical and professional obligations. The implication may have been that the Circuit Attorney's obligation was to defend the conviction and to defend the propriety of the state's conduct in securing it, even after concluding, based on a post-conviction investigation and the review of newly discovered evidence, that Johnson was innocent and his conviction was secured by procedural misconduct amounting to a denial of due process. While *Amici* recognize that the propriety of the Circuit Attorney's conduct is not directly at issue in this appeal, and that the Supreme Court of Missouri is unlikely to share the Circuit Court's concern, we write to make it plain that the Circuit Attorney acted in the best traditions of her office. Prosecutors have a duty to seek justice, which includes a duty to seek to rectify wrongful convictions. The Circuit Attorney acted in accordance with this duty when she moved to set aside Johnson's conviction after she concluded, based on her office's post-conviction investigation of new evidence in Johnson's case, that Johnson had been wrongly convicted due to prosecutorial misconduct and was innocent.

STATEMENT OF FACTS¹

In 2018, the Conviction Integrity Unit (“CIU”) of Circuit Attorney Kimberly Gardner’s office began a review of Lamar Johnson’s case. According to the CIU Report, the CIU initiated a joint investigation into the facts of the case and Johnson’s claim of innocence and constitutional error with Johnson’s post-conviction counsel, the Midwest Innocence Project. While much of the new, material evidence of Johnson’s actual innocence had been discovered before the CIU began its review, the CIU nonetheless conducted a thorough review of the Circuit Attorney’s files from the case, interviewed Mr. Johnson, as well as the previously unidentified, true second perpetrator. In addition to the significant evidence of actual innocence presented to the CIU by Mr. Johnson’s post-conviction attorneys, the CIU’s investigation produced additional evidence of prosecutorial and police misconduct. The details of the new, material evidence of innocence and state misconduct are summarized below, after the summary of the facts of the underlying crime.

Crime & Conviction

Lamar Johnson was convicted in 1995 of the murder of Marcus Boyd. On October 30, 1994, at approximately 9:00 p.m., Boyd and Greg Elking were sitting on the front porch of Boyd’s apartment when two black men wearing masks and dark clothing, each

¹ This summary of relevant facts relied upon the facts presented in the Report of the Conviction Integrity Unit, which was attached to the Motion for New Trial as Exhibit 1, hereinafter “CIU Report.” For purposes of the legal argument presented by *Amici* in this brief, *Amici* assume the truth of the facts as presented by the Circuit Attorney. These facts appear to have been unrefuted in the Circuit Court. August 23, 2019 Order.

armed with a gun, ran up to the porch from the side of the house without warning.²

According to Elking, black ski masks concealed all the facial characteristics of the two men, except for their eyes. The masked assailants shot Boyd several times and he was pronounced dead shortly after arriving at the hospital. After a short police investigation, lasting approximately four days,³ Lamar Johnson and Phillip Campbell were charged with Boyd's murder and armed criminal action. On July 12, 1995 after a two-day trial, a jury returned a guilty verdict against Johnson. On September 29, 1995, Johnson was sentenced to life without the possibility of parole. Johnson is currently serving that sentence in the custody of the Missouri Department of Corrections.

Post-Conviction Innocence Investigation

Before the CIU became involved (or even existed), Mr. Johnson's post-conviction counsel discovered significant evidence of Mr. Johnson's innocence. This evidence included, but was not limited to: (1) confessions from both of the true perpetrators, Campbell and the previously-unidentified second perpetrator James Howard, in sworn affidavits and corroborated by multiple other pieces of evidence; (2) a recantation in a sworn affidavit from the single eyewitness who identified Mr. Johnson, as well as his sworn explanation that the police "convinced" him to make an identification after he failed to identify Mr. Johnson from a photo array and a live line-up, because they

² This summary of the crime comes from the CIU report, at page 3.

³ See CIU Report at 4 (summarizing the police reports regarding the investigation and stating the police investigation commenced on October 30, 1994, and concluded on November 3, 1994).

convinced him that they knew who actually killed Boyd and offered “to help [him] financially and . . . relocate” him and his family; (3) a sworn affidavit from the recanting eyewitness’s ex-wife confirming that they received several payments from the State; (4) sworn affidavits from Mr. Johnson’s alibi witnesses; and (5) evidence strongly suggesting that there was significant impeachment evidence regarding the jailhouse informant who testified at Johnson’s trial regarding purported inculpatory statements made by Johnson in jail, including undisclosed criminal history (for crimes involving dishonesty, as well as others), his past history as jailhouse informant, and assistance provided by the State.

Conviction Integrity Unit’s Reinvestigation of Case

The CIU’s reinvestigation of this case confirmed the innocence evidence produced in prior investigations and developed significant additional evidence of prosecutorial and police misconduct. As part of its investigation, the CIU conducted a rigorous review of the Circuit Attorney’s files from this prosecution, interviewed the self-professed true second perpetrator James Howard, and interviewed Mr. Johnson. The CIU’s investigation produced evidence of several “errors so prejudicial” that the Circuit Attorney decided she was “compelled to correct them,” including:

- (1) the concealment of more than \$4,000 in payments to the sole eyewitness;
- (2) the failure to disclose the complete criminal and informant history of the State’s jailhouse informant;
- (3) the fabrication of false witness accounts during the law enforcement investigation used to provide a motive that did not exist;

- (4) the failure to conduct a thorough and competent investigation into the facts of the case;
- (5) the use of improper and unconstitutional police investigation tactics; and,
- (6) the presentation of false and misleading evidence to the jury and prosecutorial misconduct that further prejudiced Johnson and rendered the result of the trial fundamentally unfair.⁴

In particular, the CIU learned that the lead detective in the case manufactured statements from multiple witnesses in order to produce a motive for Mr. Johnson to kill Boyd. The CIU also discovered that the Assistant Circuit Attorney who prosecuted the case committed multiple forms of misconduct, including but not limited to, knowingly presenting false testimony from the lead detective in rebuttal, knowingly presenting false testimony from the jailhouse informant, knowingly presenting an unreliable eyewitness identification to the jury, and withholding multiple forms of *Brady* material from the defense before Mr. Johnson's trial.

Ultimately, the CIU concluded that the witnesses who provided evidence of Mr. Johnson's actual innocence, including Mr. Johnson himself, were reliable and credible. The CIU concluded that no credible evidence remains to support Mr. Johnson's conviction. The CIU further concluded that the "errors" and state misconduct uncovered were "so prejudicial" that it was "compelled to correct them."⁵ Based on the CIU's

⁴ This summary of the prejudicial errors in Mr. Johnson's case was copied from page 2 of the CIU Report.

⁵ CIU Report at 2.

reinvestigation and conclusions, Circuit Attorney Gardner decided to take action to correct Mr. Johnson's conviction and sentence by filing a Motion for a New Trial.⁶

The Circuit Attorney filed the Motion for New Trial on July 19, 2019. Post-conviction counsel for Mr. Johnson joined in the motion on the day of filing. On July 29, 2019, the Circuit Court appointed the Attorney General to represent the State, without providing any reason. At the request of the parties, the Circuit Court held a brief informal status conference on August 1, 2019, which focused on the question of the Court's authority to entertain the motion, as well as the Court's authority to appoint the Attorney General to represent the State in the matter. The Court subsequently ordered the parties, including the Attorney General, to submit briefing on whether the Court has authority to entertain the Motion for New Trial and regarding the appointment of the Attorney General. Order at 2-3.

On August 23, 2019, the Circuit Court denied the Circuit Attorney's motion as untimely, finding it was filed approximately twenty-four years after the deadline in Rule 29.11 for such a motion. Order at 16. The Court concluded that it did not have authority to entertain the untimely motion. *Id.* at 10-16. In the Order, the Court for the first time explained why she appointed the Attorney General to the case: "after its initial review of the motion, it had concerns that the Circuit Attorney and Innocence Project may have violated Court Rules in this proceeding and there may be a conflict of interest in the

⁶ CIU Report at 44-45.

Circuit Attorney making allegations of prosecutorial misconduct against one of her own former employees.” Aug. 1, 2019 Order (“Order”) at 2.

The Court then reaffirmed its appointment of the Attorney General to represent the interests of the State, and denied the Circuit Attorney’s Motion to Strike the Attorney General’s brief, holding that the “appointment of the Attorney General was necessary to protect the integrity of the legal process.” *Id.* at 9. In response to an amicus brief filed by 43 prosecutors from across the country, including prosecutors whose office includes a conviction integrity unit, the Court stated: “Contrary to the concerns of amici, this was done in order to insure the defendant presently gets whatever process he is due from this court, without compromising the integrity of the legal system.” *Id.* at 9. In justifying the appointment of the Attorney General, the Court specifically expressed concern about juror interviews conducted by post-conviction counsel prior to the CIU’s involvement, but which the CIU did not disclose to the Circuit Court when it reinvestigated the case, and found that the CIU “deviat[ed] from best practices of conviction integrity units” by not referring the prosecutorial misconduct allegations to an independent authority for investigation and review.” *Id.* at 8, 16. The Court further held that the Circuit Attorney’s failure to refer the investigation to an independent body “compounded the threats to the integrity of the legal process.” *Id.* at 9.

ARGUMENT

IN SEEKING TO RECTIFY JOHNSON’S WRONGFUL CONVICTION, THE CIRCUIT ATTORNEY ACTED CONSISTENTLY WITH HER DUTY AS A MINISTER OF JUSTICE

Prosecutors have a duty, as ministers of justice, to seek justice, not simply to seek convictions. Federal and state courts uniformly recognize this obligation. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case but that justice shall be done”); *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010) (a prosecutor’s “role is to see that justice is done—not necessarily to obtain or to sustain a conviction”); *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) (“We have several times underscored the ‘special role played by the American prosecutor in the search for truth in criminal trials’”). State and national professional standards acknowledge this obligation. *See, e.g.,* Missouri Rules of Professional Conduct, Rule 4-3.8, cmt. [1] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); ABA Model Rules of Professional Conduct, Rule 3.8, cmt. [1] (same); ABA Criminal Justice Standards for the Prosecution Function (“Prosecution Function Standards”), Standard 3-1.2(b) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”); National District Attorneys Association (“NDAA”), National Prosecution Standards, Standard 1-1.11 (3d ed.) (“The primary responsibility of a prosecutor is to

seek justice”).⁷ There is abundant legal academic and professional literature building on the understanding that prosecutors’ duty is to seek justice, and exploring the implications of this duty.⁸

Among the most fundamental aspects of prosecutors’ duty to seek justice is the responsibility to avoid convicting innocent people. *Berger v. United States*, 295 U.S. at 88 (stating that a prosecutor “is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape *or innocence suffer*”) (emphasis added). See ABA Model Rules of Professional Conduct, Rule 3.8, cmt. [1]

⁷ In general, professional standards such as the ABA’s Prosecution Function Standards and the NDAA’s National Prosecution Standards, while building on the law, “give lawyers guidance about how to conduct themselves within the bounds of the law.” Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1103-04 (2011). The ABA’s Standards, in particular, are intended to reflect a consensus view of the entire criminal justice community “about what good, professional practice is and should be.” *Id.* at 1099 (quoting earlier edition of the Standards). Their utility is recognized in Missouri’s professional conduct rules. See Missouri Rules of Professional Conduct, Rule 4-3.8, cmt. [1] (“Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense.”). Further, courts have referred to the Standards in determining or commenting on the bounds of proper prosecutorial conduct. See Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159, 1172 (2011).

⁸ See, e.g., Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URBAN L.J. 607, 633-37 (1999); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285 (2014); Peter A. Joy & Kevin C. McMunigal, *Why Should Prosecutors “Seek Justice”?*, 20 ABA CRIM. JUST. 65 (Summer 2005); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor’s Ethical Obligation to “Seek Justice” in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004); Cyrus R. Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629 (2013); see also Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC’Y 18 (1940).

(“This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent . . . the conviction of innocent persons.”).

Prosecutors’ obligations, as ministers of justice, to prevent the suffering of the innocent, does not end when a conviction is obtained. Prosecutors’ responsibility as ministers of justice includes a responsibility “to rectify the conviction of innocent persons.” ABA Model Rules of Professional Conduct, Rule 3.8, cmt. [1]. Whether or not prosecutors have enforceable legal obligations to seek to rectify wrongful convictions, there is a national consensus in the legal profession, including among prosecutors themselves, that prosecutors should not allow convictions of innocent people to stand, especially when innocent people are in prison. The National District Attorneys Association’s standards provide: “When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should . . . seek the release of the defendant if incarcerated.” NDAA, National Prosecution Standards, Standard 8-1.8. The accompanying Comment explains, in pertinent part:

In those extremely rare instances in which a prosecutor is presented with credible evidence that a convicted person may actually be innocent, these standards set forth his or her responsibilities that are consistent with the role of the prosecutor as a minister of justice. In fulfilling that role, the prosecutor must strike a balance between his or her responsibility to see that valid convictions are upheld and the duty to see that the innocent are protected from harm. Finding that balance will perhaps pose the greatest challenge a prosecutor will have to face, especially in a situation where the evidence, after being reasonably evaluated, indicates that a mistake has been made. In making the reasonable evaluation, the prosecutor must put aside concerns of personal embarrassment and pride, the possible embarrassment to law

enforcement, and any other factors that would deter him or her from seeing that justice is accomplished.

Id., Standard 8-1.8, cmt.

In furtherance of prosecutors’ professional obligation to rectify wrongful convictions, prosecutors’ offices, after securing a conviction, are expected to disclose and investigate significant new evidence of innocence of which they become aware. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (observing that 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”); *Ortiz v. Case*, 2018 U.S. Dist. LEXIS 85044, *42 (W.D.N.Y. May, 18 2018) (stating that prosecutors have “the ‘continuing ethical obligation to disclose exculpatory information discovered post-conviction’ and the duty to seek [criminal defendant]’s exoneration and confess error to correct an erroneous conviction”) (quoting *Warney v. Monroe County*, 587 F.3d 113, 125 & n.15 (2d Cir. 2009)).

In 2008, the ABA amended Rule 3.8 of the Model Rules of Professional Conduct to give expression to these expectations and to establish, as a basis of professional discipline, a standard governing prosecutors’ post-conviction obligations. Model Rule 3.8(g) requires prosecutors who receive substantial new evidence of innocence to investigate the evidence and disclose it to the defense;⁹ in turn, Model Rule 3.8(h)

⁹ ABA Model Rule 3.8(g) provides:

requires prosecutors to seek a remedy when the evidence is clear and convincing that their office convicted an innocent person.¹⁰ Following the ABA's lead, nineteen state judiciaries have now amended their professional conduct rules to include provisions based on Model Rule 3.8(g), Model Rule 3.8(h), or, in most cases, both.¹¹ Importantly, the disciplinary provisions are not meant to give full expression to prosecutors' obligations but only to establish the minimum for disciplinary purposes. *See* New York City Bar, Committee on Professional Ethics, Formal Op. 2018-2 (titled "Prosecutor's post-conviction duties regarding potential wrongful convictions") (observing that: "These Rules are not meant to state the limit of what prosecutors and their offices can or should

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority; and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

¹⁰ ABA Model Rule 3.8(h) provides: "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."

¹¹ The following states have adopted a modified version or a verbatim version of one or both provisions: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Massachusetts, Michigan, New Mexico, New York, North Carolina, North Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming.

do to rectify wrongful convictions. Many prosecutors' offices develop, and train prosecutors regarding, obligations that are considerably more demanding and detailed than the disciplinary rule.”).¹²

Most state judiciaries, including that of Missouri, have not adopted Rules 3.8(g) and (h), and prosecutors in some states have opposed their adoption when their state judiciaries have considered them. However, that should not be taken as an expression that courts or prosecutors dispute the underlying premise regarding the professional expectations of a prosecutor's office. As the NDAA Standards reflect, prosecutors acknowledge a professional responsibility, if not a legal one, to rectify wrongful convictions. *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 891 (2012) (quoting Wisconsin prosecutors association's petition in support of the rules, stating that the rules were “‘consistent with prevailing policies and practices’ and ‘the overwhelming majority of prosecutors across the country have acted to remedy wrongful convictions when they became known’”); *see also Comm'n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 184 (Tex. App. 2016) (stating that although Texas's disciplinary rules did “not impose a post-conviction duty of disclosure under the circumstances of this case, prosecutors nevertheless should strive to see that

¹² This opinion is available at: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-2-prosecutors-post-conviction-duties-regarding-potential-wrongful-convictions>. For discussions of the background to Rule 3.8(g) and (h), *see* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. Colo. L. Rev. 309 (2010).

justice is done before and after conviction”). Prosecutors who have opposed incorporating these understandings into the disciplinary rules have not asserted that prosecutors may ignore significant new evidence of a convicted defendant’s innocence or fail to act when new evidence convincingly establishes that a convicted defendant was wrongly convicted. Rather, for various reasons, prosecutors have simply challenged whether these understandings should be incorporated into disciplinary codes, thereby subjecting prosecutors to disciplinary complaints, investigations and sanctions based on the Model Rules. Green, *Prosecutors and Professional Regulation*, *supra*, at 891-93.

Against this background, there is no fair cause for skepticism regarding the propriety of Circuit Attorney Gardner’s Motion for New Trial. On the contrary, the Circuit Attorney acted consistently with her professional obligations as a minister of justice. When she became aware of evidence that cast doubt on Lamar Johnson’s guilt and on the fairness of his trial, she directed prosecutors in her office’s Conviction Integrity Unit to reinvestigate the case. The extensive reinvestigation, in partnership with Johnson’s post-conviction counsel, persuaded the Circuit Attorney that Johnson was innocent and had been wrongly convicted as a result of prosecutorial and police misconduct. In light of that conclusion, she sought to rectify Johnson’s wrongful conviction by moving in court to set it aside. That was precisely what the above-quoted standards of the National District Attorneys Association call for – namely, that “[w]hen the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should . . . seek the release of the defendant if incarcerated.” NDAA, National

Prosecution Standards, Standard 8-1.8. *See also* Prosecution Function Standards, *supra*, Standards 3-8.1 & 3-8.3.

In particular, there was no legitimate basis for skepticism about the Circuit Attorney's motivation or impartiality in making the new trial motion. If anything, a prosecutor's office will ordinarily be motivated to *defend* a wrongful conviction, not to seek to remedy it. Where, as here, a prosecutor's office investigates an innocence claim and the elected prosecutor concludes, based on her and her office's review of the evidence, that her office wrongfully convicted an innocent person, the prosecutor's judgment is entitled to respect, not skepticism, because the prosecutor will have to overcome strong institutional biases in favor of defending questionable convictions.

As the NDAA Standards recognize, the conventional risk is that the prosecutor will be deterred from identifying, and seeking to remedy, an injustice because of "concerns of personal embarrassment and pride, the possible embarrassment to law enforcement, and . . . other factors." *Id.*, Standard 8-1.8, cmt. A prosecutor must overcome that tendency, in order to strike the "balance between his or her responsibility to see that valid convictions are upheld and the duty to see that the innocent are protected from harm." *Id.* While the prosecutor who secured the conviction will have the greatest difficulty reviewing new evidence objectively, "others who identify with the office and its work" will have the same inherent bias. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 489-90 (2009).

Out of concern that prosecutors' biases will impede their rectification of wrongful convictions, England and Canada, as well as the state of North Carolina, have established independent bodies to investigate and evaluate new exculpatory evidence following a criminal conviction. *Id.* at 490-93. In other states, however, prosecutors' offices must ordinarily conduct post-conviction reviews of their own cases. In the majority of states, "discretion is left to prosecutors and the police (or other investigators) regarding whether and when to investigate new evidence of innocence," and "the prosecutor has discretion whether to assert to a court . . . that a conviction should be reviewed or set aside." *Id.* at 493-94. Prosecutors' "[o]ffices may decide such questions on an ad hoc basis or establish policies and institutional structures to deal with post-conviction decision making." *Id.* at 494.

Although the Circuit Court suggested that the Circuit Attorney had a conflict of interest in investigating allegations of prosecutorial misconduct by a subordinate lawyer in the same office, prevailing professional norms presuppose that allegations of prosecutorial misconduct will be investigated by a prosecutor's office internally. *See* Prosecution Function Standards, *supra*, Standard 3-1.12(a).¹³ Further, contrary to the Circuit Court's assumption that the Circuit Attorney's investigation was somehow

¹³ This Standard provides: "The prosecutor's office should adopt policies to address allegations of professional misconduct, including violations of law, by prosecutors. At a minimum such policies should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations. Investigations of allegations of professional misconduct within the prosecutor's office should be handled in an independent and conflict-free manner."

deficient because her Conviction Integrity Unit was not staffed by a criminal defense attorney, there is no universally accepted approach to reviewing post-conviction innocence claims. *See generally* Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613 (2014).

In this case, the Circuit Court may have conjectured that the elected Circuit Attorney had a personal interest that would motivate her in the opposite direction from the ordinary chief prosecutor – for example, an interest in advancing her political prospects by denigrating the work of her predecessor. If so, this conjecture would not justify the appointment of the state Attorney General. A theoretical self-interest in “showing up” one’s predecessor, especially if one’s predecessor was a political opponent, is built into the structure of a political system in which chief prosecutors are elected, as distinguished from those systems in which chief prosecutors are appointees or employed as career prosecutors. Virtually all prosecutors in our system have an interest in self-advancement, and virtually all elected prosecutors, as well as many appointed ones, have additional political self-interests. But these kinds of theoretical “conflicts of interest,” which are pervasive and inherent in our criminal justice process, are rarely, if ever, disqualifying. *See, e.g., Starr v. Mandanici*, 152 F.3d 741, 743 (8th Cir. 1998) (rejecting claim that independent counsel had a disqualifying conflict of interest arising out of his political affiliation); *see generally* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463, 493 (2017) (“Courts have been

generally unreceptive, if not hostile, to attempts to disqualify prosecutors based on pervasive and institutional conflicts.”).

In part, this is because prosecutors as professionals can ordinarily be trusted to subordinate their inherent political or personal self-interests in order to serve the public interest as ministers of justice. *See, e.g., Hollywood v. Superior Court*, 182 P.3d 590, 599 (Cal. 2008) (denying disqualification of a prosecutor who contemplated writing a book about the case, because every attorney in a high-profile case has an “interest in burnishing his legacy,” and “we must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties fairly and justly”). But it is also in part because a court’s interference with an elected prosecutor’s constitutional authority, based on a conjectural conflict of interest, is anti-democratic. *See, e.g., In re Schumer v. Holtzman*, 454 N.E.2d 522, 526 (N.Y. 1983) (“A court may intervene to disqualify an attorney only under limited circumstances. Particularly is this so in the case of a District Attorney who is a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations.”). The appointment of another lawyer to serve as co-counsel on behalf of the state in a criminal case – as in this case, where the Circuit Court appointed the state Attorney General – without the elected Circuit Attorney’s consent, is no less extraordinary, and anti-democratic, than removing the elected Circuit Attorney. Such an extreme step can be justified only where the elected prosecutor has strong familial or business relationship to a defendant or victim or a comparable conflict of interest that is unique and substantially likely to undermine the

prosecutor's disinterestedness. Nothing remotely of that kind or magnitude was identified here.

Likewise, the Circuit Court's apparent concern about how the Circuit Attorney's Conviction Integrity Unit investigated Lamar Johnson's prosecution – and, in particular, the court's concern that prosecutors may have acted contrary to rules regarding the impeachment of jury verdicts – would not justify removing the Circuit Attorney or, as in this case, assigning the state Attorney General as co-counsel on the state's behalf. The cases where courts remove prosecutors because of prosecutorial misconduct are rare and extreme. A court cannot rely on prosecutorial misconduct to justify disqualifying a Circuit Attorney or otherwise limiting her legally assigned responsibility for criminal cases unless the court first conducts a fact-finding and determines that there was egregious misconduct. A mere expression of concern, as in this case, cannot suffice to justify the Circuit Court's unusual action.

CONCLUSION

The central question in this case is whether the state court had the authority to entertain an untimely motion to set aside the conviction of an innocent man whose trial was infected by state misconduct. If this Court finds that the lower court had such authority and remands for further proceedings, the Court may go on to consider, or comment on, the legitimacy of the Circuit Court's appointment of the state Attorney General as co-counsel on behalf of the State. If so, we urge this Court to find that there was no justification for that appointment, and that the Circuit Attorney should reassume sole responsibility for representing the State in this case.

While *Amici* take no position on the question whether the Circuit Court had authority to rule on the Circuit Attorney's Motion for a New Trial, in the event that this Court finds that the Circuit Court did have authority and remands for further proceedings, then *Amici* urge this Court should (1) hold that Circuit Attorney Gardner acted well within her ethical, professional, and legal obligations as a minister of justice in taking steps to remedy the wrongful conviction of Lamar Johnson, and (2) vacate the order appointing the Attorney General and allow the Circuit Attorney to proceed, as the sole representative of the state and the people, to litigate the case.

Respectfully submitted,

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Dated: February 7, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the Brief of *Amici Curiae* Legal Ethics Scholars in Support of the State's Motion for New Trial 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 7,620 words, excluding the cover page, certificates required by Rule 84.06(c), and signature block as directed by Rule 84.06(c), and as determined by the Microsoft Word 2010 word-counting system.

/s/ Peter A. Joy

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, I electronically filed the foregoing Brief of *Amici Curiae* Legal Ethics Scholars in Support of the State's Motion for New Trial with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Peter A. Joy