No. SC98303

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Plaintiff-Appellee,

vs.

LAMAR JOHNSON,

Defendant-Respondent.

BRIEF OF MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (MACDL) AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND INTERVENOR

This brief is being filed with the consent of all parties.

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BRIEF OF THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND INTERVENOR[1]

JURISDICTIONAL STATEMENT

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

IDENTITY AND INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide

[1] The motion of intervenor Kimberly Gardner for restoration to the status of appellant is pending before this Court.

membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in obtaining redress for innocent persons who have been unjustly convicted, and in ensuring the integrity of prosecutors.

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of NACDL.

STATEMENT OF FACTS

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

STATEMENT OF CONSENT

This brief is being filed with the consent of all parties.

ARGUMENT AND AUTHORITIES

POINT I

CONVICTION OF INNOCENT PERSONS CANNOT BE TOLERATED AS A MATTER OF LAW. A PROSECUTOR SHOULD HAVE THE ABILITY TO EXERCISE HER STATUTORY AND ETHICAL DUTY TO ASSIST IN OVERTURNING WRONGFUL CONVICTIONS.

Amici are organizations of criminal defense lawyers who represent the criminally accused and convicted at all stages in the proceedings in courts throughout the state of Missouri and the United States. We are the persons the system entrusts with assuring that all persons who are accused of crimes are represented by competent counsel who vigorously and thoroughly investigate each case. In the cases of innocent clients, we have the responsibility of convincing a decision-maker that a person should be acquitted, or if in an appellate or post-conviction proceeding, should be exonerated.

But, not unlike our clients, we are only human, and sometimes, despite our best efforts, we fail.[2] Through combined centuries of practice, we have become profoundly aware of the unfortunate reality that, whether due to our own mistakes, strategies which, while often rationally based, were ultimately unsuccessful, inadequacy of resources or just plain bad luck, some innocent people are sentenced to and remain in prison, even after federal habeas

[2] There are many reasons this sometimes happens that have nothing to do with the level of skill or dedication of any particular defense attorney.

corpus courts have completed review of their cases. When the state imprisons an innocent person, not only do we as a society steal an individual person's freedom, livelihood, potential, and future, we create a profound and unnecessary drain on state resources. And, we deprive the state and its citizens of the useful contribution that person could be making if living within its borders as a free person. The power of the state to imprison its citizens is a profound and awesome power. That is why, as Benjamin Franklin said, "That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved."[3]

While the system's successes in convicting the guilty likely far outnumber its failures in condemning the innocent, the latter is a problem that the continued legitimacy and integrity of our system requires that we make every effort to remedy whenever possible. The recognition of this fact is why Conviction Integrity Units are appearing in prosecutor's offices throughout the country, devoting "the awesome power"[4] of the state not only

[3] BENJAMIN FRANKLIN, letter to Benjamin Vaughan, March 14, 1785.—The Writings of Benjamin Franklin, ed. Albert H. Smyth, vol. 9, p. 293 (1906).

[4] "Any person faced with the awesome power of government is in great jeopardy, even though innocent. Facts are always elusive and often two-faced. What may appear to one to imply guilt may carry no such overtones to another. Every criminal prosecution crosses treacherous ground, for guilt is

to protecting society and punishing individuals' bad deeds, mistakes, and imperfections when they are crimes, but also protecting individuals from the terrible results that occur when bad deeds, or simple mistakes or imperfections result in official state action of wrongfully imprisoning innocent citizens for crimes they did not commit.

County prosecutors are uniquely positioned to do this, for reasons similar to those that make them the appropriate party to represent the State in prosecuting these crimes. As the elected representatives of the jurisdiction in which the crime took place and was prosecuted, representatives of prosecutors' offices are uniquely connected to the people in those jurisdictions. They are thus best positioned to have trusting relationships with witnesses within that jurisdiction, and thereby may learn new information that undermines a prior theory of the case under which that office might have proceeded.

Moreover, county prosecutors are tasked with the responsibility of prosecuting persons who they deem to have committed crimes and, where (as for the offense at issue here) there is no statute of limitations, that responsibility exists for as long as the person who committed the crime is

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common to all men." *Johnson v. Louisiana,* 406 U.S. 380, 392 (1972) (Douglas, dissenting) (quoting Learned Hand).

unprosecuted. A prosecutor cannot prosecute the correct person while the wrong person remains convicted for the crime and in prison. In his briefing in the court of appeals, the attorney general suggested that nothing prevents a prosecutor from proceeding against the actual perpetrator of a crime while the wrong person remains convicted and in prison. But Missouri courts have specifically ruled that the due process clause prevents this. *Bankhead v. State*, 182 S.W.3d 253, 258 (Mo. Ct. App. 2006) ("The use of theories that are factually contradictory to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event violates the principles of due process"; *State v. Carter*, 71 S.W.3d 267, 271–72 (Mo. App. S.D. 2002); *Smith v. Groose*, 205 F.3d 1045, 1053–54 (8th Cir. 2000) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The 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.' . . . 'It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.") Further, the doctrine of collateral estoppel would likely provide a complete defense to any person against whom a County prosecutor later attempted to proceed for as long as the conviction of the wrong person stood. As the court held in *Shahan v. Shahan*, 988 S.W.2d 529, 532–33 (Mo. 1999):

> The doctrine of collateral estoppel provides that an issue judicially determined in one action may not be relitigated in another action. . . . When deciding whether the application of collateral estoppel is appropriate, courts should consider: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.")

(Further citations omitted).

Stripping a county prosecutor of any ability to correct and vacate a wrongful conviction therefore also strips her of her ability to prosecute the actual perpetrators. In order for a county prosecutor to do her job, the law must provide a means by which she can correct wrongful convictions.

In investigating cases of wrongful convictions, prosecutors have certain tools at their disposal that defense attorneys don't have. It can at times be difficult for defense attorneys to secure the cooperation of witnesses because they fear either retaliation from a prosecutor if they are to testify or otherwise provide evidence against the State or fear that possibly in the context of testifying, they find themselves in a position of having to admit involvement in another crime themselves. And in cases of wrongful convictions, cases often deal with witnesses who may have previously given perjured testimony. An understanding of what portions of testimony was

false and what their motivations were for providing perjured testimony is essential to the context and understanding of the truth of the entire case. Prosecutors can offer immunity, leniency, and other benefits in exchange for truthful cooperation that defense attorneys and their investigators do not have the ability to provide. These tools can be essential in uncovering the truth in a case involving a wrongful conviction.

Finally, a vast majority of criminal defense attorneys are solo and small firm practitioners. The cost in terms of both time and money of pursuing a case involving actual innocence is immense, and the majority of people in prison who are actually innocent generally are poor and do not have the resources necessary to devote to actually pursuing one of these cases. We regularly receive correspondence from people in prison who have claims of actual innocence but lack the resources to hire an attorney or the investigators or experts necessary to pursue those claims with the vigor and dedication it takes to reach the very high bar the courts have set for proving innocence claims. As solo and small firm practitioners, defense attorneys generally also do not have the resources to take these kinds of cases on pro bono and devote the kind of time and resources necessary to pursue them with the vigor and dedication required.

The issue of innocent persons in prison is a systemic problem which requires a systemic solution. Simply put, a prosecutor must be able to say "I

was wrong. I have more information, I know that now," and our system must empower that prosecutor to do something about it. This is particularly true when, as here, the prosecutor has determined not only that Mr. Johnson is innocent but that the investigation in his case was flawed by police misconduct. Since the police operate as agents of the prosecutor, it is the prosecutor's responsibility to address that issue.

POINT II

MO SUP. CT. R. 91, MISSOURI'S HABEAS CORPUS RULE, IS INADEQUATE TO PROVIDE A REMEDY TO INNOCENT PERSONS WHO ARE WRONGFULLY CONVICTED.

This case presents a situation that is likely to be unusual, but nonetheless demands clear and decisive action by this Court. As the Circuit Attorney and Mr. Johnson's counsel explain, the Circuit Attorney, working through its Conviction Integrity Unit, has now determined both that there is clear and convincing evidence that Mr. Johnson is actually innocent and that his conviction was the result of suppression of evidence and police misconduct. In her motion for new trial, the Circuit Attorney asserted:

> 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.

[L.F. D99 p. 1]

The Circuit Attorney's response to this conclusion was to file a motion under Mo. Sup. Ct. R. 29.11 for a new trial. In the court below, the Attorney General of the State of Missouri, which had been designated to represent the state by the circuit court, argued that this rule did not encompass the filing here. Instead, the state contended, Mr. Johnson should have himself proceeded under Mo. Sup. Ct. R. 91 and filed a petition for writ of habeas corpus.

The state's reliance on this rule as an alternate remedy is disingenuous. The state has previously argued that a freestanding claim of actual innocence is insufficient to support habeas corpus relief. *In Re Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. App. 2017). There have been ten exonerations in Missouri since 2009 in which newly discovered evidence was presented through Rule 91 proceedings. The Attorney General opposed relief in each of these cases, often claiming a procedural bar to relief for petitioner's proceeding under Rule 91. *See, e.g., State ex rel. Hawley v. Beger*, 549 S.W.3d 507 (Mo. App. 2018) (State sought certiorari review contending newly discovered evidence claim was procedurally barred); *State ex rel. Koster v.*

Green, 388 S.W.3d 603 (Mo. App. 2012) (State sought certiorari review contending petitioner was not prejudiced by *Brady* violation); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. 2011) (State sought certiorari review contending claims of innocence were procedurally barred). The state's attempt to present this remedy as a substitute for the filing by the Circuit Attorney here should be viewed with suspicion.

Rule 91 as presently written is insufficient to protect the rights of actually innocent persons. Under that rule, a habeas petition can only be filed by "Any person restrained of liberty within this state." Mo. Sup. Ct. R. 91.01(b). Thus, the prosecuting attorney has no jurisdiction to file a habeas petition on behalf of such a person. Moreover, this Court has recently made abundantly clear that for incarcerated defendants like Mr. Johnson, the habeas petition must be filed in the county where the prisoner is incarcerated. Mo. Sup. Ct. R. 91.02(b); *State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604 (Mo. banc 2018). The prosecuting attorney has no jurisdiction to represent the state outside of his or her county. Mo. Rev. Stat. § 56.060.

The effect of these rules is that it will fall upon the innocent incarcerated prisoner to institute and prosecute the legal proceedings that will lead to his or her release. Mr. Johnson has had the good fortune to be well represented in this matter, despite the fact that he has been wrongfully incarcerated for 25 years. But this Court should not assume that just because

a circuit attorney has determined that a prisoner is actually innocent, the prisoner will either have the financial means to retain counsel to present his habeas petition to the court, or the education, intellectual capability, or legal understanding to be capable of doing so himself. Moreover, although a prisoner can seek to proceed as a poor person, his filing will be subject to the Missouri Prison Litigation Reform Act, Mo. Rev. Stat. §§ 506.360 ff. That statute requires that the prisoner must pay 20% of the average balance in his prison account on a monthly basis until the full filing fee is paid. Mo. Rev. Stat. § 506.369.1. This is an additional financial hardship for the innocent prisoner.

If an evidentiary hearing is granted, the petitioner will be responsible for securing the attendance of witnesses, who, because the proceeding does not occur in the county where the crime occurred, will need to be served with out-of-county subpoenas and will need to travel (after being provided with travel expenses). If, due to the passage of time or for other reasons, necessary witnesses are out of state, the process is even more complex as it often requires engaging an out-of-state attorney to file a case in an out-of-state court and appear at a hearing to have subpoenas issued. This procedure is almost impossible for persons attempting to represent themselves pro se from prison. It is also particularly burdensome in a case where the *prosecutor* has become convinced of the prisoner's innocence. There is no mechanism by

which the prosecutor can assist the prisoner in litigating his habeas corpus case.

Finally, the review process if a circuit court rejects a habeas corpus claim is unwieldy. The petitioner may not appeal the court's determination. Instead he or she must file and serve a new habeas corpus petition in order to seek review in a higher court. Again, the unrepresented indigent prisoner will have difficulty doing this.

For all of these reasons, this Court should reject any contention that Mo. Sup. Ct. R. 91 proceedings, as presently constituted, are adequate to protect the interests of a prisoner determined to be innocent by a Conviction Integrity Unit.

POINT III

MO. SUP. CT. RULES 29.11 AND 29.12 SHOULD BE READ TO ALLOW A PROSECUTOR TO FILE A MOTION IN THE CIRCUIT COURT TO CORRECT PLAIN ERROR IN ORDER TO VACATE THE CONVICTIONS OF INNOCENT PERSONS

The Attorney General's position in this case would require a finding by this Court that the rules and statutes in place leave no room for a prosecuting attorney to exercise her legal and ethical duty to remedy wrongful conditions or a Constitutional means by which to exercise her statutory and legal duty to prosecute old cases upon a finding that she has

convicted and is incarcerating an innocent person. Such an interpretation of the rules is not consistent with either the language or intent of the criminal rules.

The same canons of statutory construction applicable in interpreting statutes are utilized in interpreting rules promulgated by this Court. *Garland v. American Family Mut. Ins. Co.* 458 S.W.2d 889 (App. 1970). These canons require that, if possible, the rules be read and interpreted in a manor that upholds their constitutional validity.

Article V, section 5 of the Missouri Constitution specifically gives this Court power to fashion rules, "relating to practice, procedure and pleading for all courts . . ." The same subsection specifically requires that, "The rules shall not change substantive rights."

Forty years ago, if a prosecutor wanted to seek to vacate a judgment of conviction after an investigation revealed that a convicted person was actually innocent, the prosecutor could have proceeded by way of a writ of error coram nobis. Specifically, the writ was an "extraordinary remedy" designed to correct errors of fact extrinsic to the record which were unknown at the time of trial to the court and to the *party seeking relief* and could not have become known to him through reasonable diligence. *Johnson v. State,* 614 S.W.2d 781, 783 (Mo. Ct. App. 1981). The remedy was available when "no other method exist[ed] for reviewing, correcting, or vacating a judgment." *Id.*

at 782. While most commonly used by criminal defendants,, the rule by its terms suggested that either party could seek relief, so long as the facts at issue were facts unknown to him at the time of trial and could not have been discovered by due diligence. "The errors of fact must bear upon the validity of the proceeding and "be such as to affect the power and the right of the court to render the particular judgment facts which, if known, would have prevented its rendition." *Id.* (citing *City of St. Louis v. Franklin Bank*, 173 S.W.2d 837, 846 (Mo. 1947)). In 1988, with the enactment of Rule 74.06, this Court abolished Writs of Error Coram Nobis. See Mo. Rule 74.06(d) ("Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.") Since that time, courts have held that the post-conviction rules (currently Rules 29.15 and 24.035) provide the exclusive means by which a defendant may seek post-conviction relief from the circuit court. See *Watkins v. State,* 784 S.W.2d 347-48 (Mo. App. 1990); *Buck v. State,* 70 S.W. 3d 652, 653 (Mo. App. 2002).

While Rule 74.06 on its face authorizes an independent action in equity to replace these writs, this Court has held that such an action may not be filed in a post-conviction case. *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253 (Mo. banc 2006). *Roath v. State*, 998 S.W.2d 590, 593 (Mo. App. 1990),

cited with approval in *Nixon*, held that an independent action may not be filed in a criminal case, either.

Were the Missouri rules to have completely stripped a prosecutor of any right at all to proceed to correct a judgment in the trial court when they eliminated the writ of coram nobis, that would have been a change in the prosecutor's substantive rights under the law, and therefore would have gone beyond the constitutional authority of this Court to create rules. (Mo. Const. Art. V § 5: "The rules shall not change substantive rights. . . ." Therefore, another rule must have provided for or replaced the right to proceed under coram nobis.

Rules 29.11 and 29.12 do this. The plain language of Rule 29.11 specifically provides that a new trial may be granted for good cause shown. The rule places specific time limits for requesting said relief on a criminal defendant, but does not place the same time limits on a prosecutor seeking relief under the rule. *Id.* Nor does the rule, by its terms, limit the ability to seek relief to defendants.

Rule 29.12 gives a court specific jurisdiction to consider the effect of plain errors effecting substantial rights where they result in manifest injustice. Like Rule 29.11, this rule does not by its terms require that the party seeking relief be the convicted person. A prosecutor thus may seek relief under this rule. Read together, and in the context of all of the criminal

rules and their history and purpose, which was, partly, "[a] desire to avoid confinements contrary to fundamental justice", *Fields v. State*, 572 S.W.2d 477, 481 (Mo. 1978), Rules 29.11 and 29.12 provide that a prosecutor may seek a new trial where substantial rights are involved.

Finally, where the rules are deemed insufficient to assure the purposes they are designed to achieve, this Court may promulgate a rule or an amendment to a rule, to be applied retroactively to the case before it. See *Fields*, 572 S.W.2d 477 (amending former Rule 27.26 to provide for appointment of counsel in all cases and applying that amendment to resolve Mr. Fields' case in his favor). Should this Court find that the current rules do not provide the prosecutor with the ability to proceed on behalf of a person she has determined is wrongfully convicted, this Court should promulgate a rule such as Rule 74.06 for criminal cases to permit actions like that of the prosecutor here.

CONCLUSION

For the foregoing reasons, MACDL and NACDL pray the Court to reverse the determination of the Missouri Court of Appeals, Eastern District, that the prosecutor could not file a motion on behalf of a defendant under Rule 29.11, or in the alternative determine a method by which the prosecutor

may perform her duty to remove the stain of conviction from an innocent person.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 3963 words.

/s/ Kathryn B. Parish
Kathryn B. Parish

CERTIFICATE REGARDING SERVICE

I hereby certify that on February 10, 2020 the foregoing was filed electronically with the clerk of the Court to be served by operation of that system on all attorneys of record.

/s/ Kathryn B. Parish
Kathryn B. Parish