

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Plaintiff/Respondent,)	
)	Supreme Court No. SC98303
v.)	Eastern Dist. No. ED108193
)	Cir. Ct. No. 22941-03706A-01
LAMAR JOHNSON,)	
)	
Defendant/Appellant.)	

**AMICI CURIAE BRIEF OF RETIRED MISSOURI JUDGES
IN SUPPORT OF THE STATE'S MOTION FOR NEW TRIAL**

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I. JURISDICTIONAL STATEMENT

Amici Curiae adopt the jurisdictional statements set forth in Appellant's Brief.

II. INTEREST OF AMICI CURIAE

A. The following retired Judges of Missouri Trial Courts, Appellate Courts and the Missouri Supreme Court state as follows:

The Amici Curiae are comprised of the following retired judges:

- (a) Judge Michael Wolff—retired Judge of the Missouri Supreme Court.
- (b) Judge Ron Holliger—retired Circuit Judge for the 16th Judicial Circuit and for the Missouri Court of Appeals, Western District.
- (c) Judge Vic Howard—retired Judge of the Missouri Court of Appeals, Western District.
- (d) Judge Lisa VanAmburg—retired Circuit Judge for the 22nd Judicial Circuit and retired Judge of the Missouri Court of Appeals, Eastern District.
- (e) Judge Charles Atwell—retired Circuit Judge for the 16th Judicial Circuit.
- (f) Judge Robert Cohen—retired Circuit Judge of the 21st Judicial Circuit.
- (g) Judge Jacqueline Cook—retired Circuit Judge of the 17th Judicial Circuit.
- (h) Judge Jay Daugherty—retired Circuit Judge for the 16th Judicial Circuit.
- (i) Judge Jon R. Gray—retired Circuit Judge for the 16th Judicial Circuit.
- (j) Judge Michael Manners—retired Circuit Judge for the 16th Judicial Circuit.
- (k) Judge Robert Schieber—retired Circuit Judge for the 16th Judicial Circuit.

B. The Amici Curiae have an interest in this case for the following reasons:

(1) the case presents an issue under the Missouri Canon of Judicial Conduct, 2-2.2, “A judge shall uphold and apply the law” and “a Judge may make reasonable efforts, consistent with the law and Court rules, to facilitate all litigants, ... being fairly heard;”

(2) the case presents an issue under the Missouri Canon of Judicial Conduct 2-2.6(A): “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law;” (3) under the Mo. Sup. Ct. R. 19.03 (Rules 19-36, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every criminal proceeding), there should be judicial remedy in this case; (4) under Mo. Sup. Ct. R. 19.04 (if no procedure is specifically provided by rule, the Court having jurisdiction shall proceed in a manner consistent with judicial decisions or applicable statutes), there should be a judicial remedy in this case; and (5) under the facts of the case there are compelling reasons why there should be a judicial remedy in this case. All parties to this appeal have consented to the filing of this Brief.

III. STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts as set forth in Appellant’s Brief

IV. ARGUMENT

A. **The Facts Alleged in the Prosecutor’s Motion for New Trial Require the Trial Court to Hold a Hearing and Render a Decision on the Merits of Appellant’s Motion – “Motion”**

1. *Both the Missouri Canons of Judicial Conduct and the Missouri Rules of Criminal Procedure Require a Hearing and a Decision on the “Motion”*

The Missouri Code of Judicial Conduct states in Canon §2-2.2(A) and (B), “A judge shall uphold and apply the law” and “a Judge may make reasonable efforts, consistent with the law and court rules, to facilitate all litigants, ... being fairly heard.” The Code of Judicial Conduct in Canon 2-2.6(A) also provides: “A judge shall accord to

every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”

Mo. Sup. Ct. R. 19.03 states: “Rules 19 to 36, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every criminal proceeding.”

Mo. Sup. Ct. R. 19.04 states: “if no procedure is specifically provided by rule, the court having jurisdiction should proceed in manner consistent with judicial decisions or applicable statutes.”

As this Court has said, it is the Court’s duty to “not only dispense justice, but equally important, to maintain the integrity of the judicial system.” *In re Carey*, 89 S.W.3d 477, 496 (Mo. 2002). Indeed, this Court has explained that “[s]ociety’s confidence in the judicial system—and, in particular, the criminal justice system—depends on society’s perception that the system is fair and its results are worthy of reliance. For that reason, it is essential that trials be fair and appear to be fair.” *State v. Lemasters*, 456 S.W.3d 416, 422–423 (Mo. 2015).

This Court has stated that court procedures which “appear[] to be unfair can jeopardize society’s confidence in the judicial system as a whole” and, in particular, in the criminal justice system. *Lemasters*, 456 S.W.3d at 422; *see also State v. Terry*, 304 S.W.3d 105, 110 (Mo. 2010).

Attached to this Brief (Appendix A) is the Affidavit of retired Amici Judge Atwell who sets forth how other previous innocence cases were resolved by the court, the prosecutor and defense counsel. This Affidavit provides evidence of how cases of the kind presently before this Court should be adjudicated in the courts.

(a) *Since this Case Presents the Issue of Perjured Testimony to Convict Appellant, the Trial Court Was Required to Hear and Decide the Motion*

This Court has recognized that “[t]he starting point in any analysis of post-conviction relief based on perjury is the general rule that a conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated.” *State v. Mims*, 674 S.W.2d 536, 538 (Mo. 1984). This Court also reaffirmed only recently that, while it is normally not appropriate to use Missouri’s post-conviction relief rules (*i.e.*, Rule 29.15) to examine newly discovered evidence, an exception is made “when it is later discovered that ‘the state knowingly used perjured testimony’ to obtain a conviction.” *Williams v. State*, 497 S.W.3d 395, 398 (Mo.App. E.D. 2016); *State v. Cummings*, 838 S.W.2d 4, 7 (Mo.App. W.D. 1992); *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1968); *State v. Davis*, 698 S.W.2d 600, 603 (Mo.App. E.D. 1985).

(b) *The Trial Court Had Inherent Authority to Hear and Decide the Motion Even if the Motion for New Trial Was Not Timely Filed*

This Court has affirmed that “an appellate court has the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence.” *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010) (emphasis added); *see also State v. Starnes*, 318 S.W.3d 208, 215–16 (Mo.App. W.D. 2010) (“[W]e note that the failure to timely file a motion for new trial does not preclude this Court’s review of any alleged error.”); *State v. Cook*, 307 S.W.3d 189, 190–91 (Mo.App. E.D. 2010) (remanding to allow defendant to file motion for new trial after

untimely Rule 29.11 motion was filed based on newly-discovered evidence of a victim's recantation that would have exonerated the defendant); *State v. Williams*, 673 S.W.2d 847, 848 (Mo.App. E.D. 1984); *see also State v. Hill*, 884 S.W.2d 69, 76 (Mo.App. S.D. 1994); *State v. Dorsey*, 156 S.W.3d 791, 797–98 (Mo.App. S.D. 2005); *State v. Mooney*, 670 S.W.2d 510, 515 (Mo.App. E.D. 1984).

In order to obtain a new trial on the basis of newly discovered evidence, the movant must show that (1) the new evidence was discovered after the end of the trial; (2) movant's lack of prior knowledge is not owing to any want of due diligence on his part; (3) the evidence is so material that it is likely to produce a difference result at a new trial; and (4) the evidence is neither cumulative only nor merely of an impeaching nature. *Terry*, 304 S.W.3d at 109. All of those elements are met under the facts of this case.

(c) *The Circuit Attorney's Determination that the Duties of Her Office Require Her to Pursue a Remedy to Set Aside the Unlawful Conviction Reinforces the Court's Duty to Address the Motion Which Sets Forth Evidence Which Casts Doubt on the Conviction*

The Circuit Attorney plays an important role in Missouri's criminal justice system. Prosecutors such as the Circuit Attorney are “not [] mere lackey[s] of the [C]ourt.” *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. 2018). County prosecutors are duly elected officials with ethical and legal obligations that they are required to follow. *See, e.g.*, RSMo § 56.550, 56.450 (West); Model Rules of Prof'l Conduct r. 3.8(h). One of those obligations includes taking appropriate action when the prosecutor obtains evidence—even after a conviction is final—that casts doubt on the conviction. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427 n.25, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Indeed, Mo. Sup. Ct. R. 25.03 requires the prosecutor to produce “any material or information” which tends to negate the guilt of the defendant. This rule has no limit on the time in which this material or information must be disclosed. *See e.g., State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. 2010). The duty of the prosecutor to do justice—not just seek convictions—supports the Circuit Attorney’s right to waive the non-jurisdictional time limits in Rule 29.11. *See State v. Henderson*, 468 S.W.3d 422, 425 (Mo.App. S.D. 2015) (time limit on motion for new trial is not jurisdictional and was waived by the State).

In carrying out this duty, however, a mechanism must exist for the Circuit Attorney to remedy determinations that a past conviction lacked integrity. Mo. Sup. Ct. R. 29.11 is such a mechanism, and the Circuit Attorney’s decision to seek relief under that rule is proper.

(d) *This Court Has Held That a Prosecuting Attorney May File a Motion for New Trial*

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. 1985).

(e) *The Time Requirements of Mo. Sup. Ct. R. 29.11 Have Been Waived.*

Alternatively, even if the time requirements in Mo. Sup. Ct. R. 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 Mo. Sup. Ct. R. 29.11 deadlines “is not a jurisdictional defect,” the

Circuit Attorney may waive any applicable deadlines, which she has expressly done here. *Henderson*, 468 S.W.3d at 425; *see also State v. Oerly*, 446 S.W.3d 304, 307–10 (Mo.App. W.D. 2014) (noncompliance with Mo. Sup. Ct. R. 29.11(c) is not a jurisdictional defect); *Henderson*, 468 S.W.3d at 425 (the prosecution waived compliance with Mo. Sup. Ct. R. 29.11(b) when it “twice pressed the trial court to consider the untimely Brady claim.”)

(f) *The Trial Court Abused Its Discretion When It Did Not Hear and Decide This Case Under the Plain Error Provisions of Mo. Sup. Ct. R. 29.12(b). In the Alternative, This Court May Grant review and Decide This Case Under the Plain Error Provisions of Mo. Sup. Ct. R. 30.20*

The trial court abused this discretion in not conducting a “plain error” review under Mo. Sup. Ct. R. 29.12(b) because there were facts showing that there was “manifest” injustice or “miscarriage of justice” under the facts of the case which required that relief be granted to Appellant. In the alternative, this Court should grant review under Mo. Sup. Ct. R. 30.20 which may be considered by the court when the “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.” *State v. Williams*, 504 S.W.3d 194, 197 (Mo.App. W.D. 2016).

Here, the Circuit Attorney has set forth in the Motion clear and convincing facts establishing Johnson is actually innocent and that his conviction was secured through false testimony—evidence which establishes there was or is manifest injustice or miscarriage of justice.

B. This Court Can Promulgate a Rule Which Would Permit the Prosecuting Attorney to File a Motion for New Trial in Cases of Manifest Injustice or Wrongful Conviction

This Court, some years ago, requested the Missouri Supreme Court Committee on Criminal Procedure to draft a rule relating to the discovery of DNA evidence. Amici Judge Atwell and Jim Wyrsh, counsel for Amici Curiae, served on the Missouri Supreme Court Committee on Criminal Procedure when the Court made that request of the Committee. However, the Missouri legislature, before a Rule could be approved by this Court, passed statutes, RSMo § 547.035 (West), permitting the discovery of DNA evidence in certain cases. Similarly, this Court could enact a rule if necessary to permit prosecutors to file a Motion for New Trial when evidence comes to light regarding manifest injustice or wrongful conviction. In the event this Court determined that the trial court in this case did not have the authority to hear and decide Johnson’s Motion, it could in this case promulgate a rule which would apply to this case permitting the trial court to hear and decide the case. The rule would specifically permit the prosecuting attorney in cases wherein there has been discovered exculpatory evidence to file a Motion for a New Trial. The Rule can be limited to these types of cases so as not to “open the floodgates” to motions not within the purview of the rule.

Because the Circuit Attorney is duty-bound to act, she must have the power to pursue an appropriate remedy in court. *See State ex rel. Weinstein v. St. Louis County*, 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 County Juvenile Office*, 578 S.W.3d 776, 784 (Mo. 2019) (finding

that the court had the inherent power to create a criminal procedure where there was no statute or court rule directly on point).

V. CONCLUSION

For the reasons stated in Lamar Johnson's Brief, in the Intervenor's Brief, in the Briefs of the other Amici, and in the Brief of these Amici Curiae, this Court should reverse the trial court's ruling and remand the case for a new trial and/or for a hearing on the evidence and for such other and further relief as the Court may seem just and proper in the premises.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 55.03(a), the undersigned hereby verifies that the foregoing have been signed by counsel. Counsel will retain such original, signed copies for a period not less than the maximum allowable time to complete the appellate process. The brief complies with the limitations in Rule 84.06(b) and contains no more than 2,370 words.

CERTIFICATE OF SERVICE

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

/s/ James R. Wyrsh