No. SC98303

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LAMAR JOHNSON,

Appellant.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Elizabeth B. Hogan, Judge

RESPONDENT'S SUBSTITUTE BRIEF

ERIC S. SCHMITT
Attorney General

CRIS STEVENS
Deputy Attorney General

JOHN SAUER
Solicitor General

SHAUN J MACKELPRANG
Chief Counsel, Criminal Appeals
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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INTRODUCTION

This Court's Rule 29.11(b) provides that, in a criminal case, "[a] motion for new trial . . . *shall* be filed within fifteen days after the return of the verdict." Rule 29.11(b) (emphasis added). This language is not ambiguous. *See, e.g., Frye v. Levy*, 440 S.W.3d 405, 408 (Mo. 2014) (" 'Shall' means 'shall.' It unambiguously indicates a command or mandate."). The circuit court exhausts its jurisdiction at sentencing, and an untimely motion for new trial is a "nullity." *State v. Berry*, 609 S.W.2d 948, 951 (Mo. 1980).

Appellant Lamar Johnson and Intervenor Kimberly Gardner ("the Circuit Attorney") contend that this Court should ignore the plain language of its own rules and transform Rule 29.11 into a novel procedure for granting claims of actual innocence many years after conviction. Yet Mr. Johnson acknowledges that Missouri and federal law already provide at least six mechanisms by which an inmate claiming actual innocence can obtain relief (App.Sub.Br. 61). Moreover, each of those preexisting mechanisms—unlike the novel alternative that Appellant and the Circuit Attorney propose here—has been carefully crafted over decades to strike a balance among competing interests in individual justice, judicial economy, finality, and the integrity of criminal judgments. To the extent that the Circuit Attorney believes she has obtained exculpatory evidence in Mr. Johnson's case, the Circuit Attorney fully discharges her obligation to seek justice for Mr. Johnson by disclosing that

evidence to Mr. Johnson, so that he can pursue relief through these preexisting procedures. Adopting the novel approach proposed by Mr. Johnson and the Circuit Attorney would generate jurisdictional confusion, undermine the integrity of criminal judgments, and "result in a chaos of review unlimited in time, scope, and expense." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017).

JURISDICTIONAL STATEMENT

Appellant Lamar Johnson appeals the dismissal of a motion for new trial that was filed on July 19, 2019—more than twenty-four years after he was found guilty by a jury and nearly twenty-four years after he was sentenced in his underlying criminal case (*see* L.F. 98:1; 99:1; L.F. 173:1-4). The trial court dismissed the motion for new trial "based on [its] lack of authority to entertain the motion" (L.F. 167:16). Because Mr. Johnson's notice of appeal in this case was not timely filed after the entry of the final judgment in his criminal case, and because the trial court's dismissal of the untimely motion for new trial was not a final appealable judgment, this Court lacks appellate jurisdiction and should dismiss Mr. Johnson's appeal.

* * *

"This Court is a court of limited jurisdiction." *State v. Ward*, 568 S.W.3d 888, 890 (Mo. 2019) (citing MO. CONST., art. V, sec. 3). Mr. Johnson's case does not fall within the categories of cases that are within this Court's exclusive jurisdiction. *See* MO. CONST., art. V, sec. 3. However, after transfer of a case from the Court of Appeals, this Court "may finally determine all causes coming to it from the court of appeals . . . the same as on original appeal." Mo. Const., art. V, sec. 10.

Whether this Court may determine a cause depends upon whether the appealing party has a right to appeal. " 'This Court has an obligation . . . to

determine its authority to hear the appeals that come before it.' " *State v. Waters*, No. SC97910, slip op. 3 (Mo. Mar. 17, 2020). " 'The right to appeal is purely statutory.' " *Id.* "If a statute does not give a right to appeal, the appeal must be dismissed." *Id.*; *see also* Rule 30.01(a) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law.").

"In a criminal case, the right of a defendant to appeal is governed by section 547.070." *Waters*, slip op. 3. "Section 547.070 authorizes appeals '[i]n all cases of *final judgment* rendered upon any indictment or information . . . .' " *Id.* (emphasis in original). This right to appeal is granted to the defendant, "provided, defendant or his attorney of record shall during the term at which the judgment is rendered file his written application for such appeal." § 547.070, RSMo 2016.

Mr. Johnson previously exercised his statutory right to appeal in 1995. *See State v. Johnson*, 989 S.W.2d 238 (Mo.App. E.D. 1999). Section 547.070 authorizes "an appeal"—it does not authorize successive appeals. § 547.070, RSMo 2016. Accordingly, Mr. Johnson's present appeal is not authorized, and the Court should dismiss it.

In addition, Mr. Johnson's notice of appeal in the present case was not timely filed. By long-standing rule, Mr. Johnson had ten days to file a notice of appeal after the entry of final judgment in his criminal case. *See* Rule 30.01(a);

Rule 81.04(a) (No such appeal shall be effective unless the notice of appeal shall be filed *not later than ten days after the judgment*, decree, or order appealed from becomes final." (emphasis added)); *see also* Rule 30.01(d) (1995) ("No such appeal shall be effective unless the notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final.").

"A judgment in a criminal case becomes final when a sentence is imposed." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017); *see also State v. Burns*, 994 S.W.2d 941, 942 (Mo. 1999) ("The most common instance in which a judgment is final in a criminal case is when sentence is entered."). Here, in the underlying criminal case, the jury found Mr. Johnson guilty of murder in the first degree and armed criminal action on July 12, 1995 (L.F. 90:14; 173:1-4). The court sentenced Mr. Johnson on September 29, 1995 (L.F. 173:1-4). Thus, the judgment in Mr. Johnson's criminal case was final on September 29, 1995.

Mr. Johnson filed his notice of appeal in the present case on September 3, 2019—nearly twenty-four years after he was sentenced. Thus, even if Mr. Johnson could twice avail himself of his right to appeal under section 547.070, his notice of appeal in the present case was not timely.

"Timely filing of a notice of appeal is jurisdictional." *Spicer v. Donald N. Spicer Revocable Living Trust*, 336 S.W.3d 466, 471 (Mo. 2011); *Fuller v. State*, 485 S.W.3d 768, 770 (Mo.App. W.D. 2016). " 'If a notice of appeal is untimely,

the appellate court is without jurisdiction and must dismiss the appeal.' " *Spicer*, 336 S.W.3d at 471. In short, because Mr. Johnson did not file his present notice of appeal within ten days of the judgment in his criminal case, his notice of appeal was not timely, and this Court must dismiss his appeal for lack of appellate jurisdiction.

Mr. Johnson or the Circuit Attorney may argue in reply that Mr. Johnson's notice of appeal was timely because it was filed within ten days of the trial court's dismissal of his most recent motion for new trial.[1] The record reflects that the trial court dismissed the untimely motion for new trial on August 23, 2019, and that Mr. Johnson filed his notice of appeal on September 3, 2019 (the day after Labor Day) (*see* L.F. 167:16; 170:1).

However, the trial court's August 23, 2019, order dismissing the motion for new trial was not a final, appealable judgment. "The most common instance in which a judgment is final in a criminal case is when sentence is entered."

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[1] In her Jurisdictional Statement, the Circuit Attorney observes that she also filed a notice of appeal on behalf of the State (Int.Sub.Br. 9). However, that appeal was dismissed by the Attorney General on behalf of the State, and the Circuit Attorney's motion to "restore" that appeal was denied. *See* § 27.050, RSMo 2016 (providing that the Attorney General "shall have the management of and represent the state in all appeals to which the state is a party").

Burns, 994 S.W.2d at 942. "Additionally in a criminal case, a judgment is final when the trial court enters an order of dismissal or discharge of the defendant prior to trial which has the effect of foreclosing any further prosecution of the defendant on a particular charge, for example, when an information is dismissed because the trial court determines that the offense charged is unconstitutional." *Id*.

The order dismissing Mr. Johnson's motion for new trial did not fall into either of these categories. Rather, the trial court dismissed the untimely motion for new trial "based on [its] lack of authority to entertain the motion" (L.F. 167:16). This dismissal—by a court that had exhausted its jurisdiction to act in the case—did not create a final, appealable judgment.

This Court has long held that "a circuit court 'exhausts its jurisdiction' over a criminal case once it imposes sentence." *Zahnd*, 533 S.W.3d at 230; *see State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017) ("[O]nce judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction."); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993). " '[The circuit court] can take no further action in that case [unless] expressly provided by statute or rule.' " *Zahnd*, 533 S.W.3d at 230. " 'To allow otherwise would result in a chaos of review unlimited in time, scope, and expense.' " *Id*. "Accordingly, any action taken by a circuit court after sentence is imposed is a 'nullity' and 'void' unless specifically authorized by law." *Id*.

Here, the circuit court was not "specifically authorized by law" to rule on the untimely motion for new trial. To the contrary, under Rule 29.11, a motion for new trial must be filed before sentencing, within fifteen days of the jury's verdict or within twenty-five days if the trial court grants the permitted ten-day extension of time. Rule 29.11(b). A motion for new trial that is filed after sentencing is not specifically authorized by rule or statute, and Missouri courts have long recognized that an untimely motion for new trial is a "nullity." *See State v. Berry*, 609 S.W.2d 948, 951 (Mo. 1980) ("The untimely motion for new trial was a nullity, preserving nothing for appellate review."); *State v. Williams*, 504 S.W.3d 194, 197 (Mo.App. W.D. 2016) (". . . an untimely motion for new trial is a nullity.").

Accordingly, because the untimely motion for new trial was not authorized by law, and because the motion was a "nullity," the motion "did not extend the jurisdiction of the circuit court after the original sentences were imposed[.]" *See Zahnd*, 533 S.W.3d at 230 (stating that Rule 29.12(b) motions did not extend the trial court's jurisdiction). And because its jurisdiction had not been extended, "[t]he only action the circuit court could take was to exercise its inherent power to dismiss the motion[] for lack of jurisdiction." *Id.*

Missouri courts have held in various contexts that "[o]rders entered in criminal cases after the judgment has become final which deny motions requesting various types of relief are not appealable." *State v. Payne*, 403

S.W.3d 606, 607 (Mo.App. S.D. 2011); *see State v. McCauley*, 496 S.W.3d 593, 595 (Mo.App. S.D. 2016) (collecting cases). Thus, in *Payne*, where a movant who pleaded guilty in 1995 asked the trial court fifteen years later to vacate his conviction based on a claim of "actual innocence," the Court of Appeals concluded that the order was not appealable, and it dismissed the appeal. *Id*. The Court of Appeals observed that there was no statutory authority for the appeal, and the court noted that the movant had not timely filed his notice of appeal after the final judgment was entered. *Id*. at 607, 607 n. 3.

Here, likewise, the Court should hold that the circuit court's order dismissing the untimely motion for new trial was not an appealable judgment. No new sentence was entered when the motion for new trial was dismissed, and, as discussed above, the untimely motion for new trial did not extend the trial court's jurisdiction to enter a judgment. Thus, it follows that the circuit court—which otherwise lacked jurisdiction to take any action—did not enter an appealable judgment when it exercised its inherent power to dismiss the untimely motion for new trial due to a lack of jurisdiction. *See Zahnd*, 533 S.W.3d at 230 n. 5 (". . . jurisdiction concerns a court's power to render *any* judgment or take *any* action in a particular case." (emphasis in original)).

The Court should dismiss Mr. Johnson's appeal.

STATEMENT OF FACTS

Mr. Johnson appeals the dismissal of a motion for new trial that was filed on his behalf by the Circuit Attorney of St. Louis City more than twenty-four years after he was found guilty by a jury and nearly twenty-four years after he was sentenced in his underlying criminal case (*see* L.F. 98:1; 99:1; L.F. 173:1-4). The circuit court dismissed the motion for new trial "based on [its] lack of authority to entertain the motion" (L.F. 167:16).[2]

* * *

In 1995, a jury found Mr. Johnson guilty of murder in the first degree

[2] In their respective Statement of Facts, Appellant and the Circuit Attorney rely heavily on factual allegations and information included in the motion for new trial (*see* App.Sub.Br. 18-49; Int.Sub.Br. 10-39). However, there has been no evidentiary hearing or fact-finding on that motion, and the allegations therein remain unproven. The Statement of Facts in each brief also contains extensive argument about the purported facts and the inferences to be drawn from those purported facts. Due to these violations of Rule 84.04(c)—which requires that "[t]he statement of facts . . . be a fair and concise statement of the facts relevant to the questions presented for determination without argument"—the Court should disregard those statements and should not take them as fair statements of established or agreed-upon facts.

and armed criminal action (*see* L.F. 173:1-4). *See State v. Johnson*, 989 S.W.2d 238 (Mo.App. E.D. 1999) (per curiam order). Mr. Johnson filed a post-conviction motion pursuant to Rule 29.15 (which motion was denied), and, on April 6, 1999, in a consolidated direct and post-conviction appeal, this Court affirmed both the judgment of the trial court and the judgment of the post-conviction motion court. *Id*.

Since then, Mr. Johnson has sought further review of his convictions in state and federal courts (*see* L.F. 167:15-16, citing *Johnson v. Dwyer*, No. 04CV746835 (Mississippi County); *State ex rel. Johnson v. Dwyer*, No. SC86666; and *Johnson v. Luebbers*, No. 4:00CV408CAS/MLM (United States District Court for the Eastern District)). Each court that has reviewed his claims—which, as the circuit court found, included "many of the same claims he raises here"—found that Mr. Johnson was not entitled to relief (*see* L.F. 167:15-16).

On July 19, 2019, the Circuit Attorney filed a motion for new trial on behalf of Mr. Johnson, and Mr. Johnson joined in the motion (*see* L.F. 98:1; 99:1). The motion contained various factual allegations, and various supporting exhibits were attached to the motion (*see* L.F. 99).

On July 29, 2019, the circuit court appointed the Attorney General to appear on behalf of the State (L.F. 146:1). On August 1, 2019, the court held a status conference (L.F. 148:1). The court then ordered the parties to brief the

issue of the circuit court's authority to entertain the motion for new trial (L.F. 148:1). The court granted the Circuit Attorney's and Mr. Johnson's requests that the court provide "written reasons for appointing the Attorney General's Office" (L.F. 148:1). The court stated that it would issue its "written reasons" after the receipt of additional filings (L.F. 148:1). Mr. Johnson later filed a "Motion for Written Order Explaining Appointment of Missouri Attorney General's Office and Memorandum in Support," and the Circuit Attorney joined in that request (L.F. 151:1; 152:1).

On August 15, 2019, the parties filed their responses (L.F. 161:1). In brief, the Circuit Attorney filed a pleading that asserted that the circuit court had jurisdiction to entertain the motion for new trial (L.F. 162:2). Mr. Johnson filed a motion to join in the Circuit Attorney's pleading (L.F. 160:1). A group of amici curiae ("43 Prosecutors") filed a separate brief in support of the Circuit Attorney's motion for new trial (L.F. 155:1). The Attorney General filed a response that asserted that the circuit court had no jurisdiction over the motion for new trial (L.F. 161:1). On August 16, 2019, the Circuit Attorney filed a "Motion to Strike Attorney General's Response to Court Ordered Briefing," and Mr. Johnson joined in that motion (L.F. 164:1; 165:1).

On August 23, 2019, the circuit court issued an order dismissing the motion for new trial (L.F. 167:1-16). In its order, the court stated its reasons for appointing the Attorney General (which included concerns about possible

improper contact of jurors and a possible conflict of interest on the part of the Circuit Attorney), and the court explained that it "believed the appointment of the Attorney General was necessary to protect the integrity of the legal process" (*see* L.F. 167:3-10). The court observed that it had not disqualified the Circuit Attorney (L.F. 167:9). The court stated that its appointment of the Attorney General was a valid exercise of the court's inherent authority and that the Attorney General had, as a matter of law, "a right to be heard in this matter, with or without a court order" (L.F. 167:9-10). However, the court also noted that "other issues may be dispositive of this case, making its reasons for the appointment [of the Attorney General] moot" (L.F. 167:3).

The circuit court then addressed its authority to entertain the motion for new trial (L.F. 167:10-16). The court first found no binding authority to support the Circuit Attorney's claimed right to file a motion for new trial (L.F. 167:10-11). The court then concluded that, even if the Circuit Attorney could file a motion for new trial, the motion for new trial was not filed within the time limits of Rule 29.11 and was, therefore, a nullity (*see* L.F. 167:11-12). The court concluded that the time limits of Rule 29.11 imposed "a limit on the Court's authority," and it rejected the Circuit Attorney's suggestions that various cases and Rule 29.12 permitted it to review for "plain error" (L.F. 167:13-14). The court cited *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017), in part for the proposition that "a trial court exhausts its jurisdiction when

sentence is imposed, and any action taken after sentence is imposed is null and void" (L.F. 167:14). The court then dismissed the motion for new trial "based on [the court's] lack of authority to entertain the motion" (L.F. 167:16).

ARGUMENT

I.

The circuit court lacked jurisdiction to grant or deny a motion for new trial filed nearly twenty-four years after Mr. Johnson was sentenced; thus, the circuit court did not err in dismissing the motion for new trial. (Responds to Points I-IV of Appellant's Brief and to Points A-C of Intervenor's Brief.)[3]

Mr. Johnson states that "[t]he office responsible for prosecuting [him] has determined, after an investigation spanning more than a year, that he is innocent by clear and convincing evidence" (App.Sub.Br. 14). He asserts that "[d]espite the overwhelming evidence showing [he] was wrongfully convicted through perjured testimony and misconduct, . . . he remains in the custody of the Missouri Department of Corrections" (App.Sub.Br. 14). He asks that the Court re-examine the law and "clarify that an elected Missouri prosecutor has the ability and authority to satisfy her ethical and constitutional obligations to seek a new trail where new evidence establishes that a person was wrongfully convicted on the basis of perjured testimony" (App.Sub.Br. 15).

The Circuit Attorney similarly states that, "[a]fter carefully reviewing

[3] This argument is made in the alternative to the argument in Respondent's Jurisdictional Statement.

[the] case, [she] came to the conclusion that Mr. Johnson had been wrongfully convicted," and that "[h]e is innocent of the crime for which he had spent the last twenty-five years behind bars" (Int.Sub.Br. 8). The Circuit Attorney asserts that this appeal "is about whether there is anything a Circuit Attorney can do to correct the injustice of a wrongful conviction," and she asserts that "the trial court held that the Circuit Attorney had no power to remedy a wrongful conviction" (Int.Sub.Br. 8). The Circuit Attorney asserts that "[t]his is not and should not be the law," and she argues that "prosecutors must be able to file new trial motions whenever the interests of justice so require" (Int.Sub.Br. 46).

However, inasmuch as the motion for new trial was dismissed due to lack of jurisdiction, the circuit court *did not* rule that the Circuit Attorney "had no power to remedy a wrongful conviction." The circuit court heard no evidence on Mr. Johnson's claim of actual innocence, and it made no finding that Mr. Johnson was wrongfully convicted. Accordingly, the relevant question is whether the circuit court erred in concluding that it had no jurisdiction (because it was not authorized) to entertain the motion for new trial. To the extent that the issues raised by Mr. Johnson and the Circuit Attorney are tangentially implicated by the circuit court's order, respondent has also addressed those arguments.

A. The standard of review

The question of whether the court erred in concluding that it had no authority to rule on the merits of the motion for new trial after its jurisdiction had been exhausted is a question of law. "This Court reviews questions of law *de novo*." *Cosby v. Treasurer of State*, 579 S.W.3d 202, 206 (Mo. 2019).

B. In a criminal case, only the defendant may file a motion for new trial

At the time of Mr. Johnson's criminal trial, the substantive right to file a motion for new trial was granted to defendants by § 547.010, RSMo 1994. The statute provided (and still provides): "Verdicts may be set aside, and new trials awarded *on the application of the defendant*" (emphasis added). *Id.*; *see also* § 547.010, RSMo 2016.

As is evident, the right to file a motion for new trial in a criminal case belongs to the defendant. Nothing in Rule 29.11 changes that substantive right: procedural rules promulgated by this Court do "not change substantive rights[.]" MO. CONST., Art. V, § 5. Accordingly, the Circuit Attorney was not authorized under Rule 29.11 to file a motion for new trial.[4]

[4] It seems apparent that the rule contemplates that a motion for new trial will be filed by the defendant, as the rule only makes provision for the defendant to seek an extension of time. *See* Rule 29.11(c).

This is a sensible conclusion, particularly under the circumstances presented in this case. As outlined above, the Circuit Attorney has reached the opinion that Mr. Johnson was "wrongfully convicted" and that he is "innocent of the crime" (Int.Sub.Br. 8). Yet, the Circuit Attorney has held out to the circuit court that she desires a *new trial* for Mr. Johnson (L.F. 99:66). Such a request makes sense for a defendant—who would undoubtedly use a second adversarial proceeding to *contest* guilt—but it makes no sense for a prosecutor who has formed a belief that the defendant is actually innocent. Indeed, for a prosecutor to request and carry out a "new trial" under such circumstances would require the prosecutor to violate Rule 4-3.8, which provides that "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]" Rule 4-3.8(a).

The Circuit Attorney asserts that "Rule 29.11 does not limit which party can file a new trial motion" (Int.Sub.Br. 51). However, as discussed above, the statute that grants the right to file such a motion does. There is no authority in any rule or statute that permits a prosecutor to file a motion for new trial after obtaining a conviction, and for the reasons outlined above, this makes sense.

The Circuit Attorney quotes from *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. 1985), and she asserts that "this Court stated unequivocally that 'the prosecuting attorney or the defendant may move for a

new trial based on newly discovered evidence' " (Int.Sub.Br. 52). However, the question addressed by the Court in *Norwood* was "whether the prosecuting attorney has the exclusive and unrestricted discretion to enter a nolle prosequi after verdict and before sentencing and judgment." *Id.* at 238. The Court held that a prosecutor does *not* have such power after a jury's verdict, and the Court concluded that "[t]he trial court acted within its jurisdiction in denying the prosecutor leave to nolle prosequi." *Id.* at 241. It was only in *dicta* that the Court addressed other avenues for seeking or obtaining relief for the defendant; the Court stated, "In addition to disclosing the reasons warranting dismissal and seeking leave to enter a nolle prosequi, the prosecuting attorney or the defendant may move for a new trial based on newly discovered evidence, seek a writ of error coram nobis, or a writ of habeas corpus based on newly discovered evidence." *Id.* at 241. This broad language was not a holding of the Court.

The Circuit Attorney asserts that, "[a]s a policy matter, it makes sense that this Court would state that a prosecutor could file a new trial motion 'based on newly discovered evidence' " because "[t]his accords directly with a prosecutor's role as a 'minister of justice' " (Int.Sub.Br. 52). But as this Court discussed in *Norwood*, there are also compelling reasons to limit the prosecutor's otherwise "unrestricted discretion" to dismiss a charge after the jury has reached a verdict. In addition to preserving the authority of the courts,

"[a] rule limiting the uncontrolled discretion of the prosecuting attorney at this stage of the proceeding also comports with considerations pertaining to the administration of justice." 691 S.W.2d at 240. In short, to grant a prosecutor "unrestricted discretion" after a verdict "ignores the role of the jury and the court in the judicial process." *Id.* "[T]he court as well as the prosecutor is under a duty to consider the public interest in the fair administration of criminal justice." *Id.* at 241. These considerations are of even greater concern decades after a verdict and sentence have been entered.

In sum, allowing a prosecutor to file a motion for new trial decades after sentencing is not consistent with Rule 29.11 or the orderly administration of the criminal justice system. The Court should not hold that a prosecutor has a right or duty to file a motion for new trial after sentencing, in cases where a prosecutor subsequently forms the opinion that a defendant is not guilty. Such a rule would undermine the adversarial nature of the criminal justice system and create conflicts of interest (by requiring a prosecutor to advocate for the defendant), or would require a prosecutor who is convinced of the defendant's innocence to seek further prosecution in violation of Rule 4-3.8(a).

C. The circuit court exhausted its jurisdiction in Mr. Johnson's criminal case when it sentenced him, and it was not specifically authorized by law to rule on an untimely motion for new trial

While the Circuit Attorney did not have statutory authority to file a

motion for new trial, the record shows that Mr. Johnson joined in the filing of the motion and adopted it in its entirety (*see* L.F. 98:1-2). Thus, ultimately, the question is whether the circuit court could—approximately twenty-five years after sentencing Mr. Johnson—entertain that motion and grant or deny that motion on the merits. In resolving that issue, the circuit court concluded that, because the motion was filed outside the time limits of Rule 29.11, it lacked "authority to entertain the motion" (L.F. 167:16).

The circuit court did not err. " 'Rule 29.11(b) provides that, in a criminal case, a motion for new trial must be filed not later than fifteen days after the verdict is returned, and for good cause shown, the court may extend the time for filing by one additional period not to exceed ten days.' " *State v. Vickers*, 560 S.W.3d 3, 23 (Mo. App. W.D. 2018); *see* Rule 29.11(b); *see also* § 547.030, RSMo 2016 (requiring the motion to be filed "before judgment and within four days after the return of the verdict; provided, on application of defendant, the court may extend the time for filing such motion for a period of thirty days; provided further, the court shall have no power to make another or further extension of the time for filing said motion.").

Here, Mr. Johnson did not file his motion for new trial within the time limits of the rule. He filed his motion more than twenty-four years after the jury returned its verdicts (*see* L.F. 98:1; 99:1; 173:1-4). As such, Mr. Johnson's motion was untimely and, as Missouri courts have repeatedly held, it was a

"nullity." *See State v. Berry*, 609 S.W.2d 948, 951 (Mo. 1980); *Vickers*, 560 S.W.3d at 23.

This court has repeatedly held that the time limits in Rule 29.11(b) are "mandatory." *See Day v. State*, 770 S.W.2d 692, 695 (Mo. 1989) (observing that the time limits of Rule 29.11(b) have been "repeatedly held mandatory"); *State v. Knicker*, 364 S.W.2d 544, 545 (Mo. 1963); *see also Vickers*, 560 S.W.3d at 23 (" 'The time limitations in Rule 29.11(b) for filing a motion for new trial in criminal cases are mandatory.' "). Moreover, the fact that claims are not known before the deadline has passed is irrelevant. " 'Rule 29.11(b) "does not make an exception extending the time to file a motion, even where the newly discovered evidence on which the motion for a new trial is predicated is not discovered until after the filing deadline has passed." ' " *Id.*

" 'In other words, a motion for new trial may not be filed or amended to allege, "as a basis for a new trial, the existence of newly discovered evidence which was not discoverable until after the filing deadline had passed." ' " *Id.* In short, " '. . . an untimely motion for new trial is not an appropriate means to introduce new evidence, preserves nothing for appeal, and is a procedural nullity.' " *Id.*

Here, not only was the motion a "nullity," but the circuit court lacked jurisdiction—twenty-four years after it imposed sentence—to rule on the merits of the motion. In *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227,

229 (Mo. 2017), a circuit court purported to grant relief to two movants under Rule 29.12(b)—some years after the court had sentenced them in their criminal cases. However, this Court held that the circuit court had no jurisdiction to grant the motions. *Id*. at 230.

The Court explained that "a circuit court 'exhausts its jurisdiction' over a criminal case once it imposes sentence." *Id*. " 'It can take no further action in that case [unless] expressly provided by statute or rule.' " *Id*. " 'To allow otherwise would result in a chaos of review unlimited in time, scope, and expense.' " *Id*.

The Court then observed that Rule 29.12(b) did not authorize the circuit court to take further action in the criminal case after imposing sentence; the Court explained: "Unlike Rule 24.035 or Rule 29.15, the plain language of Rule 29.12(b) does not provide for an independent post-sentence procedure." *Id*. The Court continued: "Instead, Rule 29.12(b) presupposes the criminal case is still pending before the circuit court and provides a mechanism for the circuit court to consider plain errors before imposing sentence, i.e., while it still retains jurisdiction over the criminal case." *Id*.

Accordingly, the Court held that the movants' "Rule 29.12(b) motions did not extend the jurisdiction of the circuit court after the original sentences were imposed, so the circuit court had no jurisdiction to adjudicate the Rule 29.12(b) motions and amend the judgments." *Id*. "Any action the circuit court took

pursuant to Rule 29.12(b) after imposing the sentences was a 'nullity' and 'void.' " *Id*. In short, "[t]he only action the circuit court could take was to exercise its inherent power to dismiss the motions for lack of jurisdiction." *Id*.

The same is true here. Like Rule 29.12(b), the language of Rule 29.11 does not authorize any independent post-sentence procedure. To the contrary, while a defendant is not required to file a motion for new trial, the rule expressly states that sentence cannot be imposed until *after* the time for filing a motion for new trial has expired or the motion has been ruled on. "No judgment shall be rendered until the time for filing a motion for new trial has expired and if such motion is filed, until it has been determined." Rule 29.11(c); *see also* § 547.030, RSMo 2016 (requiring a motion for new trial to be filed "before judgment").

Thus, inasmuch as Rule 29.11 does not authorize a trial court to take further action in the criminal case after imposing sentence, the circuit court in Mr. Johnson's case was without jurisdiction to grant or deny a motion for new trial filed outside the mandatory time limits of the rule. "The only action the circuit court could take was to exercise its inherent power to dismiss the motion[] for lack of jurisdiction." *Zahnd*, 533 S.W.3d at 230. Accordingly, this Court should affirm the circuit court's dismissal of Mr. Johnson's motion for new trial. *See State v. Wright*, 391 S.W.3d 893, 894-95 (Mo.App. E.D. 2013) (after holding that the circuit court lacked authority to rule on a motion for

new trial that had been filed eight years out of time, the Court of Appeals vacated the circuit court's purported judgment denying the motion and remanded for dismissal).

In *Wright*, the Court of Appeals addressed a similar set of circumstances. There, the defendant obtained "newly-discovered evidence" and filed a motion for new trial eight years after the mandatory deadline in Rule 29.11(b). *Id*. The circuit court denied the motion. *Id*. at 894. However, the Court of Appeals concluded that "the circuit court lacked authority to rule on the motion." *Id*. at 895. Accordingly, the Court of Appeals vacated the purported judgment of the circuit court and remanded the case with instructions to dismiss the motion for new trial. *Id*.

Here, as should have occurred in *Wright*, the circuit court correctly dismissed Mr. Johnson's untimely motion for new trial. This Court should affirm the dismissal ordered by the circuit court.

D. A prosecutor's legal and ethical obligations do not extend the jurisdiction of a circuit court

Mr. Johnson and the Circuit Attorney assert that the Circuit Attorney was "duty-bound to act to remedy [his] wrongful conviction" (App.Sub.Br. 57; *see* Int.Sub.Br. 47). They cite examples of a prosecuting attorney's obligation to ensure that criminal convictions are not improperly obtained through false or perjured testimony (App.Sub.Br. 57-59, citing, e.g., *Napue v. Illinois*, 360

U.S. 264 (1959)). They point out that a prosecutor is "a minister of justice and not simply . . . an advocate," that a prosecutor is required to bring to light known perjured testimony, and that a prosecutor must disclose information that casts doubt on the correctness of a criminal conviction (App.Sub.Br. 58-59, citing various cases and a comment to Rule 4-3.8, "Special Responsibilities of a Prosecutor"; *see* Int.Sub.Br. 47-49).

The State unequivocally agrees that a prosecutor must adhere to such principles and that a prosecutor must take appropriate corrective action when confronted with a potential injustice in a criminal case. Thus, for instance, when a prosecutor knows that false testimony has been given at trial, the prosecutor cannot stand silent and must take corrective action at trial. *See Napue*, 360 U.S. at 269-70.

However, the Circuit Attorney's legal and ethical obligations did not extend the circuit court's jurisdiction to grant or deny a motion for new trial filed outside the mandatory time limits of Rule 29.11. A prosecutor's legal and ethical obligations should not be transformed into a license to ignore other substantive and procedural laws that govern the effective and orderly administration of the criminal justice system.

Indeed, to the contrary, when a prosecutor ignores such laws, such conduct reduces public confidence in the criminal justice system. Moreover, if a prosecutor relies on a legal "nullity" to persuade a court to grant relief, it

endangers the due process rights of criminal defendants like Mr. Johnson, who must rely on the validity of any judgment purporting to grant relief. In short, when viewed through a broader lens, purporting to alleviate one perceived injustice (an allegedly wrongful conviction) with another injustice (a disregard for governing laws) is both unproductive and damaging to the integrity of the criminal justice system.

The Circuit Attorney asserts that "[i]t is hard to imagine how the public could maintain faith in our system of justice if the law was such that a prosecutor could learn that a person had been wrongfully convicted, but the prosecutor did not have the power to right that wrong" (Int.Sub.Br. 50). The Circuit Attorney further asserts that, "[i]f the State agrees that a person has been wrongfully incarcerated, then the public would expect that injustice to be swiftly corrected" (Int.Sub.Br. 50).

But these arguments oversimplify the criminal justice system and the public's potential perception of the system. First, these arguments proceed on the assumption that the incarcerated person was "wrongfully convicted," without any regard to *how* that determination was made and by *whom*. The public should be able to expect that such determinations will be made by courts (as opposed to prosecutors) that are empowered to make those determinations in a forum that is open to the public and that will test the validity of the evidence presented. Otherwise, there exists the possibility that some members

of the public will perceive partiality on the part of the prosecutor.

Second, the public does not expect that a prosecutor will "have the power to right that wrong" unilaterally. The criminal justice system relies on a separation of powers, and the public expects the various actors within the system to maintain their appointed roles and to follow the law. The system is an adversarial system, and the public expects the prosecutor to represent the interests of the State. When a prosecutor acts as advocate for the defendant, there again exists the possibility that some members of the public will perceive partiality on the part of the prosecutor.

Third, the Circuit Attorney's argument rests on the notion that, if *a prosecutor* cannot file a motion for new trial (or other motion) on behalf of the defendant, there is no way to remedy the harm of a wrongful conviction. However, there are remedies that are available to *the defendant*, and there are rules that require prosecutors to disclose exculpatory evidence, and those remedies and rules are effective in maintaining public confidence in the system.

In short, a prosecutor must take appropriate corrective action through proper legal channels. The appropriate action for a prosecutor will, of course, depend upon the circumstances that confront the prosecutor; but for the purposes of this appeal, a proper legal channel is not a motion for new trial filed by the prosecutor, on behalf of the defendant, more than twenty-four years

after sentencing, in a case where the court has exhausted its jurisdiction.

Mr. Johnson faults Respondent for pointing out that he has other potential avenues for seeking relief, and he points out that he has repeatedly sought relief by filing several petitions for a writ of habeas corpus in state and federal courts (App.Sub.Br. 60). He asserts that, "[i]n *every single action* where the Attorney General's Office . . . participated as a party or responded, it objected on procedural or jurisdictional grounds and claimed [he] was not entitled to review of his claims of innocence and constitutional violations at trial" (App.Sub.Br. 60) (emphasis in original). He also asserts that the Attorney General has opposed overturning convictions in other cases that have resulted in the "exoneration" of several defendants (App.Sub.Br. 60-61).

However, Mr. Johnson's lack of success in obtaining relief in other proceedings—and the Attorney General's efforts in those proceedings and in other, unrelated proceedings—does not compel the conclusion that Mr. Johnson or the Circuit Attorney should be permitted to file a motion for new trial outside the mandatory time limits of Rule 29.11(b). To the contrary, Mr. Johnson's argument indicates that he has been afforded due process by several courts (including this Court), and that, notwithstanding the adversarial efforts of the Attorney General's Office in the various cases cited, the system is working and resulting in relief—where such relief is found to be warranted by the courts.

Mr. Johnson asserts that the Circuit Attorney "has found that there is clear and convincing evidence that [he] is actually innocent of 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" (App.Sub.Br. 62). The Circuit Attorney's finding, however, is not sufficient to undo the lawful judgment of one of Missouri's courts. The purported "facts" in the motion for new trial have not been litigated or subject to adversarial testing since the filing of that motion; thus, the exculpatory "facts" of Mr. Johnson's allegedly wrongful conviction have neither been proved by any proper party nor found by any court to warrant relief.

In sum, no amount of investigation or fact-finding by the Circuit Attorney could grant the circuit court jurisdiction to vacate the judgment in Mr. Johnson's criminal case twenty-four years after the fact. That is not to suggest, however, that the Circuit Attorney had no avenues for fulfilling her legal and ethical obligations if she believed that she had found previously undisclosed exculpatory and impeaching information. One appropriate course of action would have been to follow the dictate of Rule 4-3.8, which requires prosecutors in criminal cases to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]" Rule 4-3.8(d). Upon such disclosure, Mr. Johnson—the party subject to the judgment in the underlying criminal

case—then would have been free to pursue relief through any available avenues.

E. The Court should not distort or amend Rule 29.11(b) to permit Mr. Johnson or the Circuit Attorney to file a motion for new trial decades after the circuit court exhausted its jurisdiction

Mr. Johnson next asserts that "the deadlines in Rule 29.11 are not applicable here" because "Rule 29.11 restricts the remedies available to a *convicted defendant* to challenge his conviction" (App.Sub.Br. 63). Thus, he asserts that, even if he cannot avail himself of Rule 29.11 at this late date, the Circuit Attorney can (App.Sub.Br. 63). He asserts that, to hold that the Circuit Attorney "must act within the deadlines of Rule 29.11 diminishes her express authority under [section] 56.450, . . . 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' " (App.Sub.Br. 63-64). The Circuit Attorney makes arguments along the same lines (Int.Sub.Br. 51-57).

However, there are multiple problems with this argument. First, by conceding that *his* remedy was restricted by the time limits of the rule, Mr. Johnson has conceded that the trial court did not err in dismissing his motion. Second, as discussed above, as a matter of substantive law, the right to file a motion for new trial has been granted to defendants; thus, the Circuit Attorney did not have the right to file a motion for new trial. *See* § 547.010, RSMo 2016.

Third, Rule 29.11—and its general requirement that any motion for new trial be filed within fifteen days of the verdict—does not restrict the Circuit Attorney's ability to manage and conduct all criminal cases; rather, it simply limits the time within which a motion for new trial must be filed. The Circuit Attorney's general statutory obligation to "manage and conduct all criminal cases" is not a license for the Circuit Attorney to ignore other substantive and procedural laws that govern criminal cases. Finally, even if a prosecutor did have the right to file a motion for new trial, the trial court's jurisdiction was exhausted when it imposed sentence; and, consequently, as discussed above, the only action the circuit court could take on the motion was to dismiss it.[5]

Mr. Johnson next asserts that, "even if the time requirements in Rule 29.11 apply here, they have been waived" (App.Sub.Br. 64). He cites *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009), for the proposition that

[5] Mr. Johnson's further concern that, if the Circuit Attorney is not permitted to file a motion for new trial, she might be prohibited "from prosecuting the actual perpetrators of a murder when new evidence surfaces regarding the true culprit" (App.Sub.Br. 64), is only speculation. In addition, it is not clear that the Circuit Attorney would be unable to bring a new charge if new evidence pointed to a different perpetrator. Such a circumstance would be further information that Mr. Johnson could rely on in seeking relief.

"the time limits function as a 'limit on remedies' " (App.Sub.Br. 64). In *Webb*, along those lines, the Court stated, "When a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant." *See* 275 S.W.3d at 255.

There are flaws in Mr. Johnson's argument. First, Mr. Johnson overlooks the fact that the Circuit Attorney filed the original motion for new trial (L.F. 99:1). No principle of waiver would permit *the moving party* to waive a deadline that applied to the moving party's motion.

Moreover, to the extent that Mr. Johnson is asserting that the Circuit Attorney waived Mr. Johnson's compliance with the deadline (and to the extent that the Circuit Attorney is asserting that she waived the deadline for herself (*see* Int.Sub.Br. 56)), the argument is still without merit. As relevant here, *Webb* simply clarified that circuit courts have subject matter jurisdiction over all civil and criminal cases, i.e., they have power to enter judgments in such cases. 275 S.W.3d at 253-54. Here, there is no question that the circuit court had the power (before sentencing) to enter a judgment in Mr. Johnson's criminal case.

The question here is whether the circuit court still had jurisdiction to act in the underlying criminal case *after* the imposition of sentence, i.e., after the circuit court's jurisdiction was exhausted. As discussed above, the circuit court

did not. *See Zahnd*, 533 S.W.3d at 230. Thus, regardless of any purported waiver of Rule 29.11's time limits, the only action the circuit court could take in Mr. Johnson's case was to dismiss the motion for new trial. *Id*. *Cf. State v. Oerly*, 446 S.W.3d 304, 307-10 (Mo.App. W.D. 2014) (in light of *Webb*, the circuit court's failure to comply with the time limits of Rule 29.11 *before* it imposed sentence did not deprive the court of jurisdiction to enter sentence); *cf. also State v. Henderson*, 468 S.W.3d 422, 424-25 (Mo.App. S.D. 2015) (because the State urged the trial court *prior to* sentencing to consider the defendant's untimely *Brady* claim, the State could not assert on appeal that the Court of Appeals should not review the issue).

Mr. Johnson asserts that this Court "recognizes a 'manifest injustice' exception to time bars in cases of newly discovered evidence" (App.Sub.Br. 64-65, citing *State v. Terry*, 304 S.W.3d 105 (Mo. 2010), and *State v. Williams*, 673 S.W.2d 847 (Mo.App. E.D. 1984)). He further asserts (in his Point II) that this 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" (App.Sub.Br. 66, citing *State v. Williams*, 504 S.W.3d 194 (Mo.App. W.D. 2016)). He then argues that his case presents the sort of "extraordinary circumstances" that would warrant a remand under cases like *Terry* (App.Sub.Br. 66-72; *see also* Int.Sub.Br. 60, 62-66).

However, none of the cases cited by Mr. Johnson or the Circuit Attorney stand for the proposition that a circuit court can—without express authorization from a higher court—grant or deny a motion for new trial many years after the circuit court has exhausted its jurisdiction. In each of the cited cases, the appellants filed their motions for new trial before review of the judgments in their criminal cases was completed on direct appeal.

Accordingly, in those cases—where the appellate court had jurisdiction to review the underlying judgment in the criminal case—it was within the appellate court's "inherent power to prevent a miscarriage of justice or manifest injustice" in that judgment. It was in that context that the appellate courts have remanded cases "for consideration of newly discovered evidence presented for the first time on appeal." *Terry*, 304 S.W.3d at 109.

In short, when an appellate court that is reviewing the judgment in a criminal case directs a circuit court to take further action in that criminal case, the time limits for filing a motion under Rule 29.11 do not prevent a circuit court from doing so. In such cases, the correctness and finality of the circuit court's judgment has been called into question by the appellate court; thus, pursuant to the appellate court's mandate ordering a remand, the circuit court has limited jurisdiction to determine whether its judgment will stand or be vacated in light of the newly discovered evidence. (This is consistent with cases applying *Webb* (cited above), which have held that non-compliance with the

time limits of Rule 29.11 does not deprive the circuit court of its jurisdiction to entertain such motions.)

That does not mean, however, that this Court has the inherent power in this case to remand for a hearing on the motion for new trial. An appellate court's power to correct a manifest injustice in a circuit court's judgment necessarily resides in the appellate court's power to review the circuit court's judgment at all, i.e., it depends on the appellate court's having jurisdiction to review that judgment. *See State v. Warden*, 753 S.W.2d 63, 65 n. 3 (Mo.App. E.D. 1988) (distinguishing cases like *Williams*, 673 S.W.2d 847, and *Mooney*, because, "In each case, after the judgment of the trial court was final *and the case was pending on direct appeal*, the defendant filed an untimely motion for new trial based on newly discovered evidence either with the trial court or with this court" (emphasis added).); *see also Ferguson v. State*, 325 S.W.3d 400, 408 (Mo.App. W.D. 2010) (observing that "*Terry* and *Mooney* were cases that were pending on *direct* appeal when the evidence in question was discovered" (emphasis in original)); *Clemmons v. State*, 795 S.W.2d 414, 418 n. 4 (Mo.App. E.D. 1990) (noting that, in *Warden*, the Court held "that *Mooney* did not apply where the direct appeal is final.").

Here, the judgment in Mr. Johnson's criminal case was entered on September 29, 1995. Thus, the notice of appeal that Mr. Johnson filed nearly twenty-four years later, on September 3, 2019, was not timely, and this Court

lacks appellate jurisdiction to review that judgment. The more recent dismissal of Mr. Johnson's untimely motion for new trial was not a new judgment that can be reviewed for manifest injustice.

Mr. Johnson points out that this Court has rule-making authority, and he asserts that the Court "could revise Rule 29.11" (App.Sub.Br. 76; *see also* Int.Sub.Br. 58-62). He asserts that "[a]mending 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" (App.Sub.Br. 76).

However, there does not appear to be any widespread "confusion" about the time limits of Rule 29.11 or the available avenues for a defendant to seek relief from a conviction. Mr. Johnson previously filed a motion for new trial when his direct appeal was pending, he sought post-conviction relief pursuant to Rule 29.15, and he has filed multiple petitions for a writ of habeas corpus. In fact, his brief acknowledges that Missouri and federal law already provide at least six processes by which defendants claiming actual innocence can seek and obtain relief. App.Sub.Br. 61. In addition, prosecutors can already fulfil their legal and ethical obligations by disclosing exculpatory evidence to the defense. There is no need to create any special provision for prosecutors to seek

relief when a defendant can already seek relief.[6]

Mr. Johnson also asserts that this Court could construe the Circuit Attorney's motion for new trial as a petition for writ of habeas corpus under Rule 91, and he urges the Court to "clarify that Rule 91.02 permits the filing of a petition for writ of habeas corpus in the jurisdiction of conviction where

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[6] In a footnote, Mr. Johnson cites a newspaper article about a prosecutor who "filed motions 'to set aside the convictions' of two Missouri men because their prior convictions 'lacked integrity' " (App.Sub.Br. 76 n. 16). The Circuit Attorney also cites the article and asserts that "it has been reported that circuit courts have allowed Prosecuting Attorneys to file new trial motions when faced with evidence of a wrongful conviction well past Rule 29.11's deadline" (Int.Sub.Br. 56). The precise circumstances of what occurred in those cases is not revealed by the article, but the article indicates that the defendants "pleaded guilty" and that the prosecutor's motions cited a rule that served to correct "manifest injustice." Thus, it appears that the court in those cases set aside the judgments "to correct manifest injustice" after a guilty plea, as permitted by Rule 29.07(d). As this Court noted in *Zahnd*, "Rule 29.07(d), unlike Rule 29.12(b), provides for an independent post-sentence procedure." 533 S.W.3d at 230 n. 5. Rule 29.07(d) would not apply here, inasmuch as Mr. Johnson did not plead guilty.

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 Rule 91.05 and 91.06" (App.Sub.Br. 77).

The Court should decline this invitation to overhaul Rule 91. Rule 91.01 grants the right to file a petition to "[a]ny person restrained of liberty within this state[.]" Rule 91.01(b). Thus, a prosecutor is not authorized to file such a motion on behalf of an inmate.

In addition, as this Court recently held, "Rule 91.04(a)(1) provides a petition must include, 'The name or description of the person who is restraining the person's liberty.' " *State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604, 607 (Mo. 2018). The Court explained, "A named respondent is necessary because the writ orders the respondent to bring 'the body of the person so detained or imprisoned, together with the time and cause of such imprisonment and detention, before the court or judge, without delay, to do and receive what shall then and there be considered concerning the person imprisoned or detained.' " *Id*. The Circuit Attorney's motion for new trial did not name the required respondent.

Moreover, as this Court further observed, *id*., Rule 91.02(a) requires "the petition in the first instance shall be to a circuit or associate circuit judge for the county in which the person is held in custody . . ., unless good cause is

shown for filing the petition in a higher court." Here, even if Mr. Johnson had been temporarily transferred to the City of St. Louis, the relevant county for filing a petition under Rule 91 was the county where he was incarcerated by the Department of Corrections. *Midkiff*, 543 S.W.3d at 607-08.

Mr. Johnson next asserts that the Court could construe the Circuit Attorney's motion for new trial as an "independent action in equity" under Rule 74.06(d) or, alternatively, under Rule 74.06(b) (which provides for relief from "void" judgments) (App.Sub.Br. 78-79).[7] However, he acknowledges that Missouri courts have held that Rule 74.06 "applies only to judgments or orders entered in civil actions" and does not provide an avenue for attacking judgments in criminal cases. *See State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. 2006); *Vicory v. State*, 117 S.W.3d 158, 160 (Mo.App. S.D. 2003); *Roath v. State*, 998 S.W.3d 590, 593 (Mo.App. W.D. 1999).

Mr. Johnson argues that he should nevertheless be able to proceed under Rule 74.06 because "the newly discovered evidence completely exonerates" him and because "the Motion for New Trial was filed *by the State*" (App.Sub.Br. 80). However, neither of these circumstances changes the nature or applicability of

[7] Mr. Johnson also asserts that he would "qualify for relief under *coram nobis* were the common law remedy still available" (App.Sub.Br. 79). The Court abolished writs of coram nobis in Rule 74.06(d).

Rule 74.06.

In sum, there are already available avenues for a defendant to seek relief from a judgment in a criminal case. It is unnecessary for the Court to distort or amend its rules as suggested by Mr. Johnson.

F. It was not error to appoint the Attorney General

Mr. Johnson asserts in his third point, and the Circuit Attorney likewise asserts, that the circuit court erred in appointing the Attorney General to represent the State (App.Sub.Br. 81; Int.Sub.Br. 67). However, the appointment of the Attorney General is not dispositive of any issues in this case, because the circuit court dismissed Mr. Johnson's motion for new trial due to the circuit court's lack of jurisdiction to grant or deny the motion. That lack of jurisdiction was not caused by, or due to, the court's appointment of the Attorney General; thus, this Court need not offer an advisory opinion on the propriety of the circuit court's appointment.

The State observes, however, that it was proper for the circuit court to appoint the Attorney General to appear, in light of the court's stated concerns about the integrity of the criminal justice system (*see* L.F. 167:3-10). The circuit court did not disqualify the Circuit Attorney or "usurp" her authority; rather, the circuit court merely displayed a prudent degree of caution in what was an unusual set of circumstances caused by the Circuit Attorney's disregard of long-standing and well-known substantive and procedural laws. In short, it

was not error for the circuit court to seek the views of the Attorney General in a case in which the circuit court perceived *potential* threats to the integrity of the criminal justice system.

Moreover, § 27.060, RSMo 2016, expressly authorizes the Attorney General to "appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."[8] Thus, here, because the State's interests were involved, the Attorney General properly appeared in the underlying criminal case—with or without a court order—and defended the State's interests. Vacating the trial court's order appointing the Attorney

[8] The Circuit Attorney's reliance on § 27.030 to assert that "the Attorney General can only appear in criminal cases in the trial court '[w]hen directed by the *governor*' to 'aid any prosecuting attorney or circuit attorney . . .' " (Int.Sub.Br. 67) is misplaced. Section 27.030 only states an instance when the Attorney General "shall" aid a prosecutor; it does not otherwise limit the Attorney General's broad authority as set forth in § 27.060. *See* § 27.030, RSMo 2016. Further, the Circuit Attorney's argument that § 27.060 is limited to *civil* proceedings (Int.Sub.Br. 67-68) contradicts the plain language of the statute. Section 27.060 authorizes the Attorney General to appear, answer, interplead, or defend "in *any* proceeding or tribunal in which the state's interests are involved," not just any *civil* proceeding. § 27.060, RSMo (emphasis added).

General would not change the fact that the Attorney General properly entered an appearance and defended the State's interests.

Mr. Johnson argues at some length that the circuit court's concerns about the integrity of the criminal justice system were not valid or warranted (App.Sub.Br. 82-86; *see also* Int.Sub.Br. 68-69). However, because the circuit court did not find or conclude that its concerns required disqualification of the Circuit Attorney, these arguments are irrelevant. To obtain the views of the Attorney General, the circuit court's concerns did not have to rise to the level of an actual conflict of interest; it was enough that the State's interests were involved.

The circuit court's appointment of the Attorney General also did not create a "constitutional crisis" (*see* App.Sub.Br. 86-88). The legislature granted the Attorney General broad statutory authority to defend the State's interests in any case. § 27.060, RSMo; *see also* § 27.050, RSMo 2016 ("The attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party other than misdemeanors and those cases in which the name of the state is used as nominal plaintiff in the trial court."). The statutory authority of the Circuit Attorney was not curtailed by the presentation of additional arguments by the Attorney General.

G. The circuit court did not err in failing to rule on the merits of the motion for new trial

In his fourth point, Mr. Johnson asserts that the trial court erred in dismissing his motion for new trial because (1) he is innocent, (2) his conviction was obtained through perjured testimony, and (3) "the conviction was obtained through repeated and prejudicial official misconduct" (App.Sub.Br. 88-89). In support of these arguments, he cites the allegations contained in the motion for new trial (App.Sub.Br. 89-90).

However, the circuit court dismissed Mr. Johnson's motion because it lacked jurisdiction (*see* L.F. 167:16). Thus, it cannot be said that the circuit court erred in denying Mr. Johnson's claims on their supposed merits. There has been no evidentiary hearing or fact-finding on Mr. Johnson's claims since the filing of his motion for new trial, and, as found by the circuit court, "many of the same claims [Mr. Johnson] raises here" have been rejected by other courts (*see* L.F. 167:15-16). To the extent that they were not already resolved in prior proceedings, this Court should decline to attempt to resolve any outstanding factual issues in the first instance.

CONCLUSION

The Court should dismiss this appeal for lack of appellate jurisdiction. In the alternative, the Court should affirm the circuit court's dismissal of the motion for new trial.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

CRIS STEVENS
Deputy Attorney General

JOHN SAUER
Solicitor General

/s/ *Shaun J Mackelprang*

SHAUN J MACKELPRANG
Chief Counsel, Criminal Appeals
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 10,421 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

ERIC S. SCHMITT
Attorney General

CRIS STEVENS
Deputy Attorney General

JOHN SAUER
Solicitor General

/s/ *Shaun J Mackelprang*

SHAUN J MACKELPRANG
Chief Counsel, Criminal Appeals
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent