

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

**AMICI CURIAE BRIEF OF ELECTED MISSOURI PROSECUTORS IN SUPPORT
OF THE CIRCUIT COURT'S ORDER**

WM. LOCKE THOMPSON
Cole County Prosecuting Attorney

SCOTT E. FOX
Assistant Prosecuting Attorney
Missouri Bar No. 61113

311 E. High Street
Jefferson City, Missouri 65109
(573) 634-9180
(573) 634-7797 fax
scott.fox@prosecutors.mo.gov

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE

The following elected prosecutors of the State of Missouri submit this brief in support of the circuit court's order to dismiss the Circuit Attorney of St. Louis' (CAO) motion for new trial which was subsequently joined by Lamar Johnson.

Amici are comprised of the following elected officials of the State of Missouri:

Adair County	Matt Wilson
Andrew County	Steven Stevenson
Audrain County	Jacob Shellabarger
Buchanan County	Ron Holiday
Butler County	Kacey Proctor
Cole County	Locke Thompson
Cooper County	Eric Phelps
Dallas County	Jonathan Barker
Dunklin County	Nicholas Jain
Franklin County	Matthew Becker
Gasconade County	Mary Weston
Henry County	Richard Shields
Hickory County	Michael Brown
Howard County	Deborah Riekhof
Johnson County	Robert Russell
Knox County	Corey Moon
Laclede County	Jon Morris
Miller County	Ben Winfrey
Mississippi County	Darren Cann
Monroe County	Talley Kendrick
Montgomery County	Nathan Carroz
New Madrid County	Andrew Lawson
Newton County	William Lynch
Osage County	Amanda Grellner
Pemiscot County	Jereme Lytle
Phelps County	Brendon Fox
Pike County	Alex Ellison

St. Clair County
St. Francois County
Warren County

Daniel Dysart
Melissa Gilliam
Kelly King

Amici are interested in this case as it is an attack upon the definition of the role of the prosecutor in the criminal justice system, and the constitutional and statutory allocation of appellate duties between the elected county prosecutor and the Missouri Attorney General.

Amici fully recognize and promote the role of the prosecutor and their ethical responsibilities as codified in Rule 4-3.8. This brief is provided, in part, to advocate for key tenets of our profession: the concepts of timely disclosure to opposition counsel, just litigation of the crimes committed by criminal defendants, and the honest representation of the citizens of the State of Missouri in the courts. Mostly importantly, as the role of a prosecutor has been questioned in this matter, *amici* ask this court to recognize that the local elected prosecutor is a sworn constitutional officer and an impartial minister of justice, and not solely an advocate for the political needs of their own office. The prosecutor's client is the State of Missouri, not the defendant.

The CAO and various *amici* advocate that this court should either craft a new law regarding exoneration practice in the State of Missouri or bend the current law to such an extent it is unrecognizable from its current form. The ramifications of bending existing criminal legal practice to allow unfettered

motions for new trial would break the framework of fair adjudication, the civil rights of all defendants in the State, the constitutional rights of victims, erode the Governor's pardon power, and create a whirlwind of new litigation in the criminal courts.

The State of Missouri has a long-standing, codified, legal framework which works to the benefit of its citizens by allocating to local elected prosecutors the duties of fairly prosecuting a criminal defendant in the criminal courts, and by the Missouri Attorney General representing the citizens in the appellate courts. The rights of all people are recognized by our federal and state constitutions. The Missouri Legislature further defines those rights into a unified code of laws. This Court supervises the procedure and practice of the courts in this State. This Court must intervene to stop the conduct of appellate matters, and matters of pardon and clemency, in a local circuit court under the guise of a wrongful application of a post-trial motion in a criminal case.

Amici do not desire for this court to reallocate the appellate responsibilities of the Missouri Attorney General onto their already full shoulders. Neither does *amici* desire for an injustice to be done to Mr. Johnson – they desire only that the merits of his case be brought to the proper forum by the proper litigants in the proper manner.

In conclusion, *amici* adopt the Introduction of Respondent's Substitute Brief in whole part.

Pursuant to Rule 84.05(f)(2) all parties have consented to the filing of this brief.¹

¹ No party assisted in the drafting of this brief. This brief was prepared by the Office of the Cole County Prosecuting Attorney, State of Missouri, after reviewing filings available on case.net and proposed filings in the following cases: 22941-03706a, in the Circuit Court of the City of St. Louis; ED108193, in the Missouri Court of Appeals, Eastern District; SC98303, in the Missouri Supreme Court.

JURISDICTIONAL STATEMENT

The Amici Curiae adopt the Jurisdictional Statement of Respondent's Substitute Brief in whole part. In addition, *amici* aver the following jurisdictional points.

First: the order of the circuit court filed August 23, 2019 is not an appealable order in that it is not a final appealable judgment. *State v. Payne*, 403 S.W.3d 606, 607 (Mo.App. S.D. 2011); *State v. Smiley*, 478 S.W.3d 411, 414 (Mo. 2016). An appeal of such an order should be summarily dismissed without further analysis of the underlying merits.

Second: the order of the circuit court denying the CAO's² standing to file a successive motion for new trial under Rule 29.11 is appropriate and well taken. The Circuit Attorney for the City of St. Louis has provided a motion that is out of time, and for which she does not have standing to assert. *State v. Williams*, 504 S.W.3d 194, 197 (Mo.App. W.D. 2017). § 547.010, RSMo 2016.

² Intervenor in this matter is the Office of the St. Louis Circuit Attorney (CAO); the motion for new trial at issue was filed by the CAO, however, on appeal, the CAO was dismissed as the State appellant, but permitted to file and brief as an Intervenor. As referenced in this brief, Intervenor's Brief (Interv'r.Br.) is the brief of the CAO. Mr. Johnson's substitute appellate brief is (App.Sub.Br.).

In addition, the circuit court appropriately recognized successive motions for new trial are not allowed under the Rule and un-timeliness is a total bar to the consideration of the motion for new trial. For instance, under Rule 29.11(g), ninety days is an absolute bar to new trial relief, “If the motion for new trial is not passed on within ninety days after the motion is filed, it is denied for all purposes. In computing the ninety days no day shall be counted during which the court lacks power to act.” (Emphasis added). *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491, 493 (Mo. 2004). Mr. Johnson’s Motion for New Trial was filed by the defendant on August 4, 1995. (L.F. 173:1-4). The CAO’s successive motion for new trial was filed on July 19, 2019. (L.F. 98:1; 99:1)

Third: the Rules of Professional Responsibility regarding concurrent representation of parties under Rule 4-1.7 prohibit the prosecutor from filing a successive motion for new trial. This motion filed by the CAO is not the appropriate vehicle for the consideration of exoneration facts which have come to light years after the jury’s verdict and may itself be a conflict of interest for the CAO to file on behalf of the defendant. The CAO has provided examples of three types of claims which it feels merits relief on Mr. Johnson’s behalf: 1) *Brady* violation committed by the CAO; 2) prosecutorial misconduct committed by the CAO; and 3) prejudice by perjured testimony. It would appear to be a conflict of interest for the CAO to now be the litigant regarding its own issues.

State ex rel. Horn v. Ray, 325 S.W.3d 500, 511 (Mo.App. E.D. 2010); *State v. Lemasters*, 456 S.W.3d 416, 425 (Mo. 2015).

In addition, the CAO steps out of its prosecutorial function when it successively files a motion for new trial on behalf of the defendant, who it prosecuted. This opens a Pandora's box of ethical issues. Should a prosecutor file motions on behalf of defendants when the prosecutor believes the motions should be filed or when the prosecutor believes the defense counsel improperly failed to do so? The prosecutor's ethical duties are satisfied once the State has informed the defendant of the issue. Rule 4-3.8(d) states the prosecutor in a criminal case shall, "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 and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]" (Emphasis added). The directive to disclose to the defense and the tribunal is not a directive to litigate on behalf of the defendant as the CAO did in its July 19, 2019 motion for new trial.

The CAO ethically **must** communicate potential exoneration evidentiary information to the defendant, but **must not** be the attorney for the defendant as it has done by filing a successive motion for new trial in front of the circuit court. It would appear the sole reason for the CAO to propone a successive

motion for new trial is to ultimately allow the CAO to file a dismissal with prejudice or a *nolle prosequi* after baiting the trial court to take jurisdiction under the guise of a new trial motion. This is a jurisdictional shell game which this Court should not countenance.

Fourth: the CAO's successive motion for new trial is an attempt to undermine the authority of the Missouri Attorney General regarding his duties with criminal appellate issues in the State of Missouri; unchecked this would cede to local prosecutors the authority in exoneration cases to pursue their own appellate agenda. The relevant statute, § 27.050 RSMo states, "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." (Emphasis added). The CAO should not be allowed to usurp the powers and duties of the Attorney General of Missouri for its own political purposes.

The three points of trial prejudice noted by the CAO in its July 19, 2019 successive motion for new trial are the regular substance of appellate practice: a Rule 30 direct appeal, a Rule 29.15 post-conviction relief motion, and Rule 91 habeas corpus actions. In addition to his August 4, 1995, Rule 29.11 motion for new trial in front of the circuit court, Mr. Johnson has already availed himself of each of these three appellate proceedings.

This Court should dismiss Mr. Johnson's appeal of the dismissal of the Circuit Attorney's successive motion for new trial.

STATEMENT OF FACTS

The Amici Curiae adopt the Statement of Facts of Respondent's Substitute Brief in whole part.

ARGUMENT

I.

The circuit court lacked jurisdiction to rule upon a successive motion for new trial filed by the prosecutor other than to dismiss it; thus, the circuit court did not err in dismissing the motion for new trial.

A. The standard of review is *de novo*.

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, the CAO has no authority to file on behalf of the defendant.

The substantive right to file a motion for new trial is granted to defendants by § 547.010, RSMo. The statute provides: “Verdicts may be set aside, and new trials awarded *on the application of the defendant*” (Emphasis added). § 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 CAO was not authorized

under Rule 29.11 or the statutory grant of the right to file a motion for new trial by the defendant under § 547.010 RSMo.

Petitioner and intervenor also ask this court in the alternative to consider the CAO's successive motion for new trial as an application under other appellate practice procedures: as an action in equity under Rule 74 (App.Sub.Br. 78-79), as a habeas action (App.Sub.Br. 77) under Rule 91 and therefore the substantive right to do so under § 532.010 RSMo; as a post-conviction action (Intrv'r.Br. 51) under Rule 29.15 and therefore the substantive right to do so under § 547.360 RSMo; as a direct appeal (App.Sub.Br. 66) under Rule 30 and therefore the substantive right to do so under § 547.070 RSMo. For analogous reasons, this Court does not have the authority under MO. CONST., Art. V, § 5 to alter those legislative rights granted to an incarcerated person, and to a convicted person, and convey that right to the opposing party: the CAO.

In all of appellate practice, the CAO has a statutory right to appeal in a pending criminal case only under § 547.200 RSMo. That section carves out specific instances in which an elected prosecutor for the State of Missouri may appeal a criminal order or judgment. Even if the circuit court's order were a final judgment, none of those carved out instances are in play for petitioner and intervenor in this matter.

On the matter before this Court, while petitioner and intervenor have

joined together in each other's motions, the matter is before the court as Mr. Johnson's appeal of the circuit court's order dismissing the CAO's motion for new trial, and not as the CAO's appeal. Mr. Johnson has no right to appeal the dismissal of the circuit court's order. An appeal without statutory sanction confers no authority upon an appellate court except to enter an order dismissing the appeal. *Fannie Mae v. Truong*, 361 S.W.3d 400, 405 (Mo. 2012). (quoting *Farinella v. Croft*, 922 S.W.2d 755, 756 (Mo. 1996)). This court should dismiss this appeal for lack of appellate jurisdiction.

C. The circuit court was not specifically authorized by law to rule on the merits of an untimely successive motion for new trial.

The circuit court's order correctly interpreted the rules regarding motions for new trial. In this matter CAO's motion for new trial should be considered a nullity.

Rule 29.11(b) provides that a motion for new trial shall be filed within 15 days after return of the verdict, and for good cause shown, the trial court may extend the time for filing the motion for one additional period not to exceed ten days if the defendant requests the extension within the original 15-day period. Pursuant to Rule 29.13(b), the trial court may, with the defendant's consent, order a new trial on its own initiative before the entry of judgment and imposition of sentence, but not later than 30 days after return of the verdict.

The trial court has no authority to waive or extend the time for filing a motion for new trial beyond the time authorized by Rule 29.11(b). *State v. Bartlik*, 363 S.W.3d 388, 391 (Mo.App. E.D. 2012). Missouri courts have interpreted the filing deadlines set forth in Rule 29.11(b) as absolute such that once the deadline of 15 or 25 days has passed, a defendant may not file an original or amended motion even to allege, as a basis for new trial, newly discovered evidence that was not discoverable until after the filing deadline had passed. *State v. Stephens*, 88 S.W.3d 876, 880 (Mo.App. W.D. 2002). “A motion filed after the maximum time is a nullity.” *Bartlik*, 363 S.W.3d at 391. Untimely motions are treated procedurally as though the motion were never filed. *State v. Langston*, 229 S.W.3d 289, 294 (Mo.App. S.D. 2007). Likewise, “[s]upplemental motions filed after the time the motion for new trial is due are a nullity.” *Baker*, 136 S.W.3d at 493 . The trial court lacks authority to grant an untimely motion filed pursuant to Rule 29.11(b) or to grant a new trial on its own initiative pursuant to Rule 29.13(b) more than 30 days after the verdict. *Langston*, 229 S.W.3d at 294; *Dorsey v. State*, 156 S.W.3d 825, 829 (Mo.App. W.D. 2005).

The jury verdict in this matter was announced on July 12, 1995. (L.F. 90:14). The defendant’s Rule 29.11 motion for new trial was filed August 4, 1995, twenty-three days after the announcement of the verdict. (L.F. 99:1). The sentence and judgment was entered by the circuit court on September 29, 1995.

(L.F. 173:1-4). The Circuit Attorney's Rule 29.11 motion for new trial based on newly discovered evidence of innocence was filed July 19, 2019, which is 8,773 days after the announcement of the jury verdict. (L.F. 167:2).

D. A prosecutor's legal and ethical obligations in wrongful convictions are satisfied by disclosure; a prosecutor must not litigate on behalf of a defendant.

1. There are already rules to discharge a prosecutor's duties.

Intervenor claims a motion for new trial is necessitated by her oath of office when she argues, "the law required her to act." (Interv'r.Br. 48), and "She could not consistent with her oath of office, allow clear constitutional violations committed by her office go unchecked." *Id.* Further, the Circuit Attorney claims her ethical obligations require her motion to be filed, "the Circuit Attorney, as a 'minister of justice,' was bound to right Mr. Johnson's wrongful conviction." *Id.* at 49, and further, "[a]s a duly elected minister of justice, the Circuit Attorney's obligation to correct wrongful conviction never ceases, and she had to take action in Mr. Johnson's case." *Id.* The remedy, she claims, is only one thing: "the way that she could fulfill her constitutional, statutory, and ethical obligations was to file a motion for new trial in Mr. Johnson's case pursuant to Rule 29.11." *Id.* at 50. As a minister of justice, her obligation is to turn over all evidence which would negate guilt to the defendant and or his attorney to allow defendant to file whatever motion he and his counsel deem appropriate. That

motion will be guided by the materials turned over by the prosecutor or CAO. The CAO is not the attorney for the defendant and is in fact the attorney for the opposing party.

Amici face such ethical, statutory and constitutional issues throughout the performance of their daily jobs. Creating a constitutional conundrum by usurping the role of the defense attorney with a non-statutory use of a Supreme Court Rule is not an option an ethical prosecutor chooses. The proper choice of an ethical prosecutor is to use the legal procedures **already in place** to allow the parties to decide for themselves which motions to file and not usurp the defense attorney's role in deciding what legal vehicle to use to litigate actual innocence or prosecutorial abuse.

The Missouri Rules of Professional Conduct already provide for a sufficient ethical response to the exonerating evidence the Circuit Attorney claims to have uncovered. Rule 4-3.8(d) states the prosecutor in a criminal case shall, "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 and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor [.]" (Emphasis added).

Likewise Rules 25.03(g) and 25.08 provides for a continuing duty of disclosure for the prosecutor to the defendant. That duty to disclose does not

cease at the conviction of the defendant. *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. 2010). The Circuit Attorney has an ongoing duty to report any discoverable information. Rule 25.08. The State's ongoing obligation to disclose is not a trivial matter, but one which discharges the constitutional obligation of the prosecutor and allows the defendant the opportunity to defend himself in other appellate actions.

Intervenor's brief argues by false dilemma – this court must either allow a prosecuting attorney the authority to file a motion for new trial out of time on behalf of the defendant, or a prosecuting attorney has no avenue to correct injustices, “That interpretation of Rule 29.11 would mean that a prosecutor has no role in remedying a wrongful conviction.” (Interv’r.Br. 56). This court should recognize that argument is a false choice since the law already mandates a substantial ethical and legal imperative that a prosecutor must disclose information to the defendant which may exonerate him if the prosecutor discovers such. Under current law the prosecutor has a weighty and essential role in remedying a wrongful conviction by providing the defendant and his counsel the evidentiary facts which can form the basis of further appellate scrutiny. The Circuit Attorney is fictitiously stating a prosecutor has “no role in remedying a wrongful conviction.” The law does not need this court to carve out a new niche to allow a prosecutor to discharge his or her ethical obligations.

The court action intervenor seeks is already provided to her – the same as every other elected prosecutor in the State of Missouri – to do justice with respect to the rights of defendants and comport herself by the Constitutions, Statutes and Rules as currently promulgated. The action intervenor seeks in her attempt to bend Rule 29.11 to her will as the Circuit Attorney, is to be Mr. Johnson’s attorney – and that is a role that she cannot, must not, occupy while she represents the citizens of the State of Missouri.

The CAO claims Mr. Johnson’s plight is a novel and unique circumstance which requires the courts of Missouri to upend the normal order of business in order to accommodate him. (Interv’r.Br. 72-81). There is nothing novel or unique to this situation. *Amici* recognize the criminal justice system is not perfect. It is part of the regular news cycle that a convicted defendant is exonerated, pardoned or receives clemency. The legal system proceeds at a deliberate pace which allows these results to occur according to procedures in place. It may not be the most expedient system, but any additional delay is being caused by the CAO and its new trial motion on behalf of the defendant.

Allowing a newly elected prosecutor, a long term prosecutor, or any prosecutor, to assume the roles of prosecutor, advocate for the defendant, and the jurist on the validity of all convictions, adds incompatible duties to the role of a prosecutor. It also vests in one person the decision on the finality of every conviction which occurred in the entire history of the office.

If this court were to allow the CAO to litigate on behalf of current defendants it would have the appearance of allowing the politics of the partisan prosecutorial election process to direct and control the finality of any criminal case without judicial oversight. This remarkable judicial action would place the courts in an untenable position. A jury verdict and court judgment and sentence cannot be discarded at the whim of the prosecutor.

The rules of legal procedure should be based on the fair and just adjudication of all matters across the State of Missouri regardless of the depredations of partisan politics. Fairness, constancy, justice and due process are the mandates of our court system. It must be so.

2. The CAO may have a conflict of interest.

The circuit court in its order does not find that the CAO has a conflict of interest³. (L.F. 167:8). However, the circuit court identifies several areas of concern raised by this proceeding regarding, “threats to the integrity of the legal process.” (L.F. 167:3-5). Among those threats identified by the circuit court are: 1) a violation of a local court rule regarding unapproved contact with

³ However, the circuit court does not make a finding on the conflict of interest issue either way: “The Court declines to address concerns raised regarding disqualification of the circuit attorney’s office as the Court has not disqualified the circuit attorney.” (L.F. 167:8).

jurors; 2) claims of prosecutorial misconduct made by the CAO which are unsupported on the record; 3) claims of prosecutorial misconduct on evidence investigated by the CAO itself; 4) the formation of the Conviction Integrity Unit (CIU) which includes line prosecutors currently actively prosecuting cases while investigating the conduct of their own office. *Id.*

Additionally, Rule 4-3.7 is implicated by this motion. Members of the CAO will be called as witnesses by counsel for Mr. Johnson. Rule 4.3.7(b) is implicated when the Circuit Attorney herself is a likely witness along with the members of her CIU. The ethical rules dictate Mr. Johnson's innocence should be litigated vis-à-vis cross-examined witness testimony instead of the shortcut of granting a motion for new trial which allows a summary *nolle prosequi*.

Amici state it is inappropriate for the CAO to file a successive motion for new trial for the purpose of benefiting Mr. Johnson, even in equity, while fulfilling its ethical duties as a prosecutor, and while making factual findings in its own CIU.

The record available to *amici* thus far does not include sufficient information for *amici* to state they believe a conflict of interest has occurred. Rules 4–1.7 (“a lawyer shall not represent a client if the representation involves a concurrent conflict of interest”) and 4–1.10 (“none of [the lawyers in a private firm] shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so”) seem to be implicated. It

is likely impossible to ethically reconcile the concurrent representation of Mr. Johnson's liberty interests while undertaking the ethical duties of a prosecuting authority investigating itself who then files a motion for new trial in its own criminal case with the purpose to overturn a jury's guilty verdict, and a court's judgment and sentence.

The CAO has provided examples of three types of claims which it feels merits relief on Mr. Johnson's behalf: 1) *Brady* violation committed by the CAO; 2) prosecutorial misconduct committed by the CAO; and 3) prejudice by perjured testimony. The CAO appears to now have a strong desire to make factual findings in the defendant's favor perhaps in a zeal to correct its own perceived past injustices. It would appear to be a conflict of interest for the CAO to now be the litigant regarding these issues. *Horn*, 325 S.W.3d at 511; *Lemasters*, 456 S.W.3d at 425.

Amici do not, however, state that the creation and maintenance of a CIU or the just desire to make right on past prosecutorial malfeasance would place the diligent, ethical prosecutor into the possible realm of a conflict of interest; rather, it is the State as litigant and proponent of a motion for new trial under Rule 29.11 (and thus under § 547.010 RSMo) which may raise this activity to a conflict of interest.

3. The CAO inaccurately cites to ethical rules which are not adopted in Missouri.

The CAO cites as to its ethical obligations notes from the American Bar Association rules which have not been adopted by this Court. (Intrv'r.Br.59). In an effort to find even a persuasive authority promoting a necessity to act beyond its duty to disclose, the CAO quotes ABA Model Rule 3.8 committee note [8]. Id. However, the CAO does not provide to this Court the full note which specifically discusses discharging its duty by disclosure, nor does the CAO clearly set forth in its brief that such note has not been adopted by this Court.

The full committee note states as follows:

“[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.” (Emphasis added). ABA Model Rules of Professional Conduct, Rule 3.8 – Special Responsibilities of a Prosecutor, committee note [8].

As can be seen by the full text of this advisory ethical note, and other adjacent notes from the ABA Model Rules of Professional Conduct, nowhere in these rules is it advised by that organization that once exoneration evidence is uncovered that the prosecutor uncovering such evidence should file motions on behalf of the defendant, nor litigate on behalf of the defendant. A prosecutor discharges his ethical duties by disclosing to the defendant and the tribunal the existence of exonerative evidence.

4. Prosecutors provide a voice for victims of crimes.

The State of Missouri has codified the representation of the interests of victims into its Constitution and Revised Statutes through victim contact with the local prosecutor. Victims have a right to the speedy disposition and appellate review of their cases. § 595.209.1(16) RSMo. In matters of appellate review, the attorney general shall provide victims, upon their written request, case status information throughout the appellate process of their cases. Id.

A prosecuting attorney litigating on behalf of the defendant in areas of appellate practice at the trial level create a number of conflicts and confusions regarding victim advocacy in the criminal justice system. The relationship between the victim and prosecuting attorney's office would be strained by the simultaneous representation by the prosecutor of the defendant. Which State agency is responsible for victim contact would likewise be cast into doubt. In

our current system of criminal laws, the legislature recognized that victims need a voice and a contact person inside the justice system. The prosecutor is the victim's voice – she cannot simultaneously be the voice of the criminal defendant.

E. The Court should not distort or amend Rules 29.11 & 29.13 to permit Mr. Johnson to file a motion for new trial decades after the circuit court exhausted its jurisdiction.

Rule 29.11 procedurally describes the right of a defendant to request of the trial court for a new trial to be granted under § 547.010 RSMo. That legislative grant of right states, “[v]erdicts may be set aside, and new trials awarded on the application of the defendant. A new trial is a reexamination of the issue in the same court; the former verdict shall not be used or referred to on the subsequent trial, either in the evidence or argument.” § 547.010 RSMo.

The “reexamination of the issue in the same court” is the jury trial which has just been conducted including evidence, witnesses and decisions of the trial judge in regards to the receiving of that evidence and in light of the testimony of the witnesses and arguments of counsel. More drastic than even the declaration of a mistrial during the conduct of trial, the granting of a new trial sets aside the verdict and concludes it is a nullity. However, a subsequent trial has all the pitfalls associated with successive presentations of evidence

including impeachment of witnesses with former testimony, and the representation of evidence and witnesses – but only if they are available. The more time that has passed, the less likely witnesses and evidence will be available.

In this matter, the application for new trial is twenty-four years after the jury verdict. *Amici* observe that retrials conducted under such conditions are almost impossible to conduct. The CAO’s motion for new trial was not made in good faith of a retrial – it was done for the sole purpose of the circuit court reacquiring jurisdiction over the defendant so that the CAO could dismiss the case.

Amici would discourage altering the timing constraints of the defendant’s motion new trial. Such an alteration would make the rare retrial even more difficult, and litigants would make the argument for new trial without a fresh memory to the crucible just endured.

The circuit court also recognized the overall time constraints of Rule 29.11(g), in that ninety days is an absolute bar to new trial relief, “If the motion for new trial is not passed on within ninety days after the motion is filed, it is denied for all purposes. In computing the ninety days no day shall be counted during which the court lacks power to act.” (Emphasis added). *Baker*, 136 S.W.3d at 493 .

The State’s motion for new trial being out of time is not the only failing

of the CAO's novel application to the trial court to consider new evidence of Mr. Johnson's innocence. The trial court also dismissed the motion because it recognized the trial court is not the appropriate judicial authority to raise newly discovered evidence of actual innocence. "The purpose of a motion for new trial 'is to allow the trial court the opportunity to reflect on its action during the trial.' " *Bartlik*, 363 S.W.3d at 391. A habeas court, on the other hand, tests the very constitutionality of the evidence used at trial. "Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.' " *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. 2003) (quoting *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)).

The twenty-five day timing of Rule 29.11, and the fact that a court may not consider even an amended motion for new trial outside of the expressed time limits of Rule 29.11 are all indicators that the CAO's motion cannot be considered by the trial court as an actual motion for new trial twenty-four years after it should have been filed. The motion for new trial was filed by the CAO merely as a vehicle for a dismissal of Mr. Johnson's case after the circuit court had lost jurisdiction over it.

In summary, the circuit court observed, "[t]he conclusion that this Court has no authority to entertain this new trial motion does not mean persons raising claims such as defendant's here are without a remedy." (L.F.167:16).

The appropriate judicial authority for these matters with Mr. Johnson's procedural history is a habeas court.

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,

WM. LOCKE THOMPSON
Cole County Prosecuting Attorney

/s/ SCOTT E. FOX

SCOTT E. FOX
Assistant Prosecuting Attorney
Missouri Bar No. 61113

311 E. High Street
Jefferson City, Missouri 65109
(573) 634-9180
(573) 634-7797 fax
scott.fox@prosecutors.mo.gov

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 5,515 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.

WM. LOCKE THOMPSON
Cole County Prosecuting Attorney

/s/ SCOTT E. FOX

SCOTT E. FOX
Assistant Prosecuting Attorney
Missouri Bar No. 61113

311 E. High Street
Jefferson City, Missouri 65109
(573) 634-9180
(573) 634-7797 fax
scott.fox@prosecutors.mo.gov

Attorneys for Amici Curia