No. SC98303

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

LAMAR JOHNSON,

Appellant.

Appeal from the Circuit Court of St. Louis City, Missouri
The Honorable Elizabeth Hogan
Case No. 22941-03706A-01

INTERVENOR'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

In the words of the Court of Appeals, this case implicates "questions fundamental to our criminal justice system: whether and to what extent an elected prosecutor has a duty to correct wrongful convictions in her jurisdiction [and] whether and to what extent there should be a mechanism for her to exercise that duty." *State v. Johnson*, No. ED 108193, 2019 WL 7157665, at *5 (Mo. Ct. App. Dec. 24, 2019). This Court has described prosecutors as "minister[s] of justice." *State v. Banks*, 215 S.W.3d 118, 119 (Mo. 2007). According to this Court, prosecutors cannot "close [their] eyes" to evidence that proves an incarcerated person's innocence. *State v. Terry*, 304 S.W.3d 105, 110 (Mo. 2010). Indeed, this Court has declared that a prosecutor's ultimate obligation is to "seek justice," *State v. Harrington*, 534 S.W.2d 44, 50 (Mo. 1976), which means not necessarily working "to obtain or sustain a conviction." *Terry*, 304 S.W.3d at 108 n.5.

The Circuit Attorney investigated Lamar Johnson's case and concluded that he had been wrongfully convicted and that he was innocent. Therefore, consistent with her duty to seek justice, the Circuit Attorney sought to bring this evidence before a court, and filed a motion to vacate Mr. Johnson's convictions and for a new trial pursuant to Rule 29.11. Nothing in the law prohibited the Circuit Attorney from taking this action. By its text, Rule 29.11 does not prohibit a prosecutor from filing a new trial motion, and to the extent Rule 29.11 contains a 15-day deadline, it is clear that the deadline was meant to limit defendants, *not* prosecutors. And even if this Court finds that Rule 29.11 as currently written does not permit prosecutors to file new trial motions, or if it decides prosecutors are bound by the Rule's 15-day deadline, this Court now has the power to amend the rule to ensure that

prosecutors are *always* able to seek justice, and justice requires prosecutors to take swift action whenever evidence of a wrongful conviction comes to light. It is truly an extraordinary event when a prosecutor files a new trial motion after she discovers a person has been wrongfully convicted. All the Circuit Attorney is asking is for a court to hear the motion on its merits.

Taking an overly formalistic approach, the Attorney General argues against justice. He does not challenge the evidence of Mr. Johnson's innocence, nor does he contest that Mr. Johnson's trial violated due process. Instead, he argues that the Circuit Attorney cannot file a new trial motion because the statute governing new trial motions discusses only a defendant's ability to file such a motion, and if this Court were to allow prosecutors to file new trial motions, it would amount to an unconstitutional "change [in] substantive rights." Resp't's Br. at 23. Moreover, asserts the Attorney General, a prosecutor does not need to be able to file a new trial motion because she "fully discharges her obligation to seek justice" by turning evidence of a wrongful conviction over to the defendant. *Id.* at 7-8. The Attorney General goes on to say that because the Circuit Attorney was not permitted to file the new trial motion, the trial court "exhausted" its jurisdiction after sentencing. *Id.* at 29-31. Finally, the Attorney General maintains that it was right for him to get involved in the trial court because he has "broad statutory authority to defend the State's interests." *Id.* at 49.

The Attorney General's arguments should be rejected. First, Rule 29.11 is a procedural rule and under the Constitution, this Court's procedural rules trump an inconsistent statute, Mo. Const., Art. V, § 5; and, in any event, a construction of Rule 29.11 that permits

prosecutors to file new trial motions does not alter "substantive rights," as the statute governing new trial motions is silent as to prosecutors. Second, a prosecutor's obligations extend beyond disclosing evidence of a wrongful conviction to the defendant; she also has an obligation to inform the court. *See* Rule 4-3.3 ("If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, *disclosure to the tribunal*. (Emphasis added)); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (prosecutors are "bound by the ethics of [their] office to *inform the appropriate authority* of after-acquired or other information that casts doubt upon the correctness of the conviction" (Emphasis added)). Third, Rule 29.11 does not limit a prosecutor's ability to file a new trial motion or state that a prosecutor cannot file a new trial motion after a conviction, and to the extent the rule could be read that way, this Court has the power to clarify or amend the rule to ensure a prosecutor is always able to fulfill her role as a minister of justice. *See, e.g., Fields v.* State, 572 S.W.2d 477, 482-83 (Mo. 1978) (changing a rule when it was not being interpreted as "intended"). Finally, Missouri law is clear that the Circuit Attorney represents the State in criminal matters before the circuit court, *see* Mo. Rev. Stat. § 56.450; the Attorney General had no role there.

At bottom, the Attorney General argues that allowing a prosecutor to file a new trial motion when faced with evidence of a wrongful conviction is inconsistent with "the orderly administration of the criminal justice system." Resp't's Br. at 26. However, it is not contrary to the "orderly administration" of justice for a prosecutor to file a new trial motion if

she believes someone has been wrongfully convicted. Rather, it is consonant with the bedrock notion that it is *unjust* for a person to be incarcerated for a crime he did not commit. It is the antithesis of justice to think that a prosecutor's role upon learning an innocent person may be in prison is to simply turn over the information to an incarcerated defendant and then walk away. Every single day a possibly innocent person spends in prison is a grave injustice and all actors in the criminal legal system, in particular prosecutors, must have an obligation to do all that they can to bring the situation to the attention of a court. This Court must reverse the trial court's decision and allow the Circuit Attorney's new trial motion to be heard on its merits.

ARGUMENT

Before proceeding any further, it's important to clear away any possible confusion generated by the Attorney General's brief. The Attorney General asserts more than once that the Circuit Attorney filed the new trial motion on behalf of Mr. Johnson, insisting that when a prosecutor files a new trial motion in the face of a wrongful conviction, she acts as "an advocate for the defendant," which in turn creates a "conflict of interest." *See* Resp't's Br. at 19, 26, 34.

The Attorney General fundamentally misunderstands the role of the prosecutor. The State has no interest in keeping an innocent person incarcerated. *See Engle v. Isaac*, 456 U.S. 107, 135 (1982) ("principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration"). Thus, when a prosecutor uncovers evidence that an innocent person is in prison, and takes steps to right that wrong, that prosecutor is acting with the *State's* interests at heart, and pursuant to the *State's* overarching

obligation to ensure that justice is done. That's why the Supreme Court has said "[p]rosecutors have a special duty to seek justice, not merely convict." *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011). This Court has made the very same point, explaining that a prosecutor's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction." *Terry*, 304 S.W.3d 108 n.5.[1] It is completely within the role of the prosecutor as a "minister of justice" to seek to undo a wrongful conviction. The Attorney General's argument otherwise is not only wrong, it's alarming.

Equally wrong is the Attorney General's assertion that allowing a prosecutor to file a new trial motion amounts to prosecutors having "unrestricted discretion" to undo criminal convictions. Resp't's Br. at 25. The trial court is still the gatekeeper, and has the power to grant or deny the motion. In that way, what the Circuit Attorney did here is similar to what prosecutors do every day. The job of the prosecutor "requires that [s]he investigate, i.e., inquire into the matter with care and accuracy, that in each case [s]he examine the available evidence, the law and the facts, and applicability of each to the other." *State of inf.*

[1] If the Attorney General were correct—that taking actions that may benefit a person accused or convicted of a crime creates a conflict of interest—then no prosecutor would have an obligation to disclose exculpatory evidence or correct false or misleading testimony. The Supreme Court has clearly stated otherwise—that in either situation a prosecutor must act, even if it would benefit an accused or a convicted person. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

McKittrick v. Wallach, 182 S.W.2d 313, 322 (Mo. 1944). Sometimes, a prosecutor's investigation points to a person's guilt and therefore she pursues a conviction. When that occurs, a prosecutor does not have unfettered discretion, as it remains up to a fact-finder, a court or a jury, to determine if the prosecutor's position was indeed correct.

On the other hand, if a prosecutor's investigation points to an incarcerated person's innocence, she should be equally able to pursue release. The trial court can then determine whether the conviction should be overturned, akin to the decisions trial courts routinely make regarding guilt. To be clear, all the Circuit Attorney is asking for is a *hearing* on the new trial motion to permit a court—the fact finder—to decide if her position is correct. She is not asking for a pass to "unilaterally" free Mr. Johnson from prison. *See* Resp't's Br. at 34.[2] The Attorney General's argument that a *hearing* on the new trial motion would somehow upend the justice system is confounding.

A. The Circuit Attorney was obligated to act when she discovered Mr. Johnson had been wrongfully convicted, and Rule 29.11 was the proper vehicle through which the Circuit Attorney could fulfill her obligation.

With the confusion cleared away, it is clear that the Circuit Attorney was obliged to take action in Mr. Johnson's case. As her opening brief describes, the Circuit Attorney's investigation revealed that Mr. Johnson had been wrongfully convicted because at his trial,

[2] That's why the Attorney General's complaint that the facts "in the motion for new trial have not been litigated or subject to adversarial testing" is disingenuous, Resp't's Br. at 36, when the Circuit Attorney is simply asking for the facts to be heard.

the State presented perjured testimony, made false statements, and withheld critical exculpatory evidence. In addition, the Circuit Attorney found credible evidence of Mr. Johnson's innocence. The introduction of perjured testimony and the withholding of exculpatory evidence violates the Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. 2001). And both this Court and the Supreme Court have made clear that convictions based on perjured or false testimony cannot stand. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1948).

The Circuit Attorney took an oath to uphold the Constitution. *See* Mo. Rev. Stat. § 56.500. When faced with flagrant constitutional violations previously perpetrated by her office, the Circuit Attorney had a constitutional duty to act. Moreover, the ethical rule that governs prosecutors also required the Circuit Attorney to act, as the rule underscores that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 4-3.8 cmt. 1. When the Circuit Attorney realized that Mr. Johnson's due process rights had been violated and there was insufficient evidence supporting his guilt, she needed to do something. The action that the Circuit Attorney took to fulfill her obligations was to file a motion for a new trial.

The Attorney General purportedly agrees with the idea that a prosecutor is obliged to act when she uncovers evidence of a wrongful conviction. *See* Resp't's Br. at 32. However, the Attorney General asserts that a prosecutor "fully discharges her obligation . . . by

disclosing that evidence [to the defendant] so that he can pursue relief through [ ] preexisting measures." *Id.* at 7-8; *see also id.* at 36 ("One appropriate course of action would have been to follow the dictates of Rule 4-3.8, which requires prosecutors in criminal cases to 'make time disclosures 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.'").

Disclosure to an incarcerated defendant (who is likely unrepresented) is insufficient. First, the ethical rules require candor to the tribunal. *See* Rule 4-3.3. Rule 4-3.3 mandates: "If a lawyer . . . or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, *disclosure to the tribunal*." Here, after the Circuit Attorney discovered that her office introduced materially false evidence at Mr. Johnson's trial, she took the very step contemplated by the ethical rules by informing the court. Indeed, the Supreme Court has contemplated the course of action taken by the Circuit Attorney, as it has opined that prosecutors are "bound by the ethics of [their] office to *inform the appropriate authority* of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (emphasis added). To be sure, it was imperative for the Circuit Attorney to bring that information to the court, because as the Attorney General repeatedly points out, *see*, *e.g.*, Resp't's Br. at 27-28, the time for Mr. Johnson to file a new trial motion under Rule 29.11 had expired.

Second, this Court has explained that the "locally elected status of [ ] prosecuting attorneys provides them with an independent source of power and is the reason they enjoy discretionary privilege unmatched in the world." *State ex rel. Gardner v. Boyer*, 561

S.W.3d 389, 398 (Mo. 2018) (quotation marks omitted). If a prosecutor uses the power of her office derived from the local electorate to commit an injustice, then the prosecutor owes it to her electorate to use her office to try to remedy that injustice. Turning evidence over to a defendant does not fulfill the broader obligation the prosecutor owes to the public. Nor does it account for the fact that the prosecutor used her office to commit a wrong, and therefore her office should have a reciprocal obligation to undo that wrong. Prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935). When a prosecutor abuses her power to obtain a wrongful conviction, a prosecutor must also be to use her power to help make it right. Turning information over to the incarcerated defendant is wholly inadequate considering a prosecutor's "unparalleled authority" in the justice system. *Gardner*, 561 S.W.3d at 398.[3]

The way for a prosecutor to fulfill her obligations in the face of a wrongful conviction is to file a new trial motion. Rule 29.11 does not prevent prosecutors from filing new trial motions, and this Court has said that prosecutors *and* defendants can file new trial motions based on newly discovered evidence. *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. 1985).

[3] For the same reason, that Mr. Johnson may have other avenues of relief says nothing about the Circuit Attorney fulfilling her unique obligations.

Even though Rule 29.11 does not prohibit prosecutors from filing new trial motions, and despite this Court's statement in *Norwood* condoning prosecutors filing new trial motions, the Attorney General argues that what the Circuit Attorney did here was not allowed. He cites Mo. Rev. Stat. § 547.010, which provides: "Verdicts may be set aside, and new trials awarded on the application of the defendant." *See* Resp't's Br. at 23. He then cites the constitutional provision that provides that this Court's rules "shall not change substantive rights." Mo. Const., Art. V, § 5. Putting the two together, the Attorney General says that because § 547.010 does not mention Circuit or Prosecuting Attorneys filing new trial motions, the Circuit Attorney "was not authorized under Rule 29.11 to file a motion for new trial." Resp't's Br. at 23.

The Attorney General has it wrong. "Rules 19 through 36, inclusive govern the *procedures* in all courts of this state having jurisdiction of criminal proceedings." Rule 19.01 (emphasis added). This Court's procedural rules "*supersede* all statutes and court rules inconsistent therewith," unless the legislature passes a targeted statute amending or annulling the rule. Mo. Const., Art. V, § 5 (emphasis added); *see State ex rel. Ferguson v. Corrigan*, 959 S.W.2d 113, 115 (Mo. 1997) ("Our procedural rules supersede an inconsistent statute unless the rule has been annulled or amended by later statutory enactment."). Therefore, to the extent Rule 29.11 is inconsistent with § 547.010, Rule 29.11 controls. And it would not change a "substantive" right to interpret Rule 29.11 to allow prosecutors to file new trial motions, as § 547.010 does not discuss prosecutors' rights.

The Attorney General then asserts that allowing prosecutors to file new trial motions is "not consistent" with "the orderly administration of justice." Resp't's Br. at 26. He first

claims that allowing a prosecutor to file a new trial motion would "undermine the adversarial nature of the criminal justice system." *Id.* The Attorney General seems to forget this Court's recent admonition that "a prosecutor is not an advocate in the ordinary sense of the word, but is the *people's representative*, and the prosecutor's primary duty is not to convict but to see that justice is done." *In re Schessler*, 578 S.W.3d 762, 773 (Mo. 2019) (brackets and quotation marks omitted, emphasis added). Next, the Attorney General posits that allowing prosecutors to file new trial motions would "create conflicts of interest by requiring a prosecutor to advocate for the defendant." Resp't's Br. at 26. Again, the prosecutor is not advocating for the defendant, but for justice. Finally, the Attorney General worries that allowing prosecutors to file new trial motions "would require a prosecutor who is convinced of the defendant's innocence to seek further prosecution in violation of Rule 4-3.8(a)." *Id.* But once a new trial is granted and the conviction is vacated, nothing in the law *requires* a prosecutor to re-try the defendant; no prosecutor should re-try a person she believes is innocent.

In short, the Attorney General does not provide a single compelling reason for this Court to read into Rule 29.11 a prohibition against prosecutors filing new trial motions. *Cf. Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 355 (Mo. 2016) ("This Court will not add words to a statute under the auspice of statutory construction."). Consistent with its language, this Court should hold that Rule 29.11 permits prosecutors to file new trial motions when they uncover evidence of a wrongful conviction.

B. The trial court had jurisdiction to hear the Circuit Attorney's new trial motion.

The Attorney General alternatively argues that "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 . . . the only action the circuit court could take on the motion was to dismiss it." Resp't's Br. at 38.[4] The true impact of the Attorney General's position is that after a sentence is imposed, there becomes essentially no meaningful opportunity for a prosecutor to correct the injustice of a wrongful conviction. Considering that we all know that wrongful convictions happen, the Attorney General's position is deeply troubling.[5]

The Attorney General cites this Court's decision in *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227 (Mo. 2017) in support. There, this Court held that a "circuit court exhausts its jurisdiction over a criminal case once it imposes sentence and it can take no

[4] The trial court ruled that the Circuit Attorney could not file the new trial motion outside of the 15-day window provided by Rule 29.11. D167/P13. The Attorney General does not make this argument as it relates to the Circuit Attorney's new trial motion. For the reasons explained in the opening brief, the trial court's conclusion was erroneous, or if correct, this Court should amend the rule.

[5] Our criminal justice system is not perfect. Mistakes are made and wrongful convictions occur, even in the absence of malfeasance. Given that reality, it is important to embrace the notion that prosecutors have a role in remedying wrongful convictions.

further action in that case unless expressly provided by statute *or rule*." *Id.* at 230 (emphasis added). The *Zahnd* Court reached this conclusion because "[t]o allow otherwise would result in a chaos of review unlimited in time, scope, and expense." *Id.*

Zahnd is of limited use. This Court made these statements when interpreting Rule 29.12, which concerns "plain errors" made during trial. As *Zahnd* explained, Rule 29.12 "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." *Id.* Rule 29.11 does not have the same presuppositions, and in fact, this Court and the Court of Appeals have countenanced trial courts ruling on new trial motions after a sentence has been imposed if necessary to avoid a "miscarriage of justice." *See State v. Williams*, 673 S.W.2d 847, 848 (Mo. Ct. App. 1984); *State v. Mooney*, 670 S.W.2d 510, 515-16 (Mo. Ct. App. 1984) (both cited with approval in *Terry*). As this Court explained in *Terry*, sometimes "extraordinary circumstances" require courts to consider new trial motions after sentencing, specifically where "newly discovered evidence will exonerate the accused" or

newly discovered evidence reveals the conviction was based on "false testimony." *Terry*, 304 S.W.3d at 110. These extraordinary circumstances are present here.[6]

Moreover, as explained in the opening brief, Rule 29.11 does not place time limits on *the State's* ability to file new trial motions, and therefore Rule 29.11 is the "express" "rule" empowering the trial court to act that was lacking in *Zahnd*. To the extent this Court finds Rule 29.11 ambiguous as to when a prosecutor is permitted to file a new trial motion, this Court should clarify that Rule 29.11 permits a prosecutor to file a new trial motion *whenever* she discovers evidence of a wrongful conviction, including after sentencing. The Attorney General maintains that a "prosecutor's legal and ethical obligations do not extend the jurisdiction of a circuit court." Resp't's Br. at 31. They should. If a prosecutor knows a person is innocent, she must be able to bring that to the attention of a tribunal. Otherwise, the prosecutor's obligation to seek justice would be meaningless. To that point, this argument only highlights why this Court needs to clarify or amend Rule 29.11. A prosecutor should *always* have the ability to fulfill her "legal and ethical obligations"; to the extent

[6] While the Attorney General correctly notes that the new trial motions in those cases were filed during direct appeal, Resp't's Br. at 41, the principles undergirding *Terry*, *Mooney*, and *Williams* still apply with equal force. It is an "extraordinary circumstance" when a prosecutor files a new trial motion based on a wrongful conviction. And it would be a "miscarriage of justice" if a trial court refuses to hear the State's new trial motion after a prosecutor uncovered evidence proving a conviction was based on perjured testimony and has in her possession credible evidence that exonerates the defendant.

the current rendition of Rule 29.11 prevents her from doing so, this Court should use its power to amend the rule. Permitting a court to hear a new trial motion when filed by the prosecutor will ensure that a prosecutor's ability to fulfill her duties is not limited by arbitrary deadlines.

Contrary to what the Attorney General says, clarifying Rule 29.11 in this way would not result in "chaos of review unlimited in time, scope, and expense." *Id.* at 29. New trial motions filed by prosecutors will be rare. Prosecutors are ministers of justice and seekers of truth. It will not be often that a prosecutor learns that evidence presented to a jury was false and led to an innocent man going to prison. This is therefore not a situation like that which confronted the Court in *Zahnd*, which will lead to a flood of motions and backlog courts. And to the extent allowing prosecutors to file new trial motions in the case of a wrongful conviction will cause a slight uptick in work, "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is [a] statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013) (holding credible claims of innocence overcome statutory procedural bars).

C. It was error for the trial court to appoint the Attorney General to represent the State.

The Circuit Attorney had the sole power to represent the State before the trial court. The law is unambiguous: the Circuit Attorney "*shall* manage and conduct all criminal cases . . . of which the circuit court of the city of St. Louis shall have jurisdiction." Mo. Rev. Stat. § 56.450. The "word 'shall' connotes a mandatory duty." *Bauer v. Transitional Sch. Dist. of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. 2003). Thus, while the Attorney General is

"the chief legal officer of the State," the power of the Circuit Attorney to conduct criminal cases in the trial court is "'carved out' of this overriding authority." *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968).

Citing Mo. Rev. Stat. § 27.060, the Attorney General maintains that he has "broad statutory authority to defend the State's interests," Resp't's Br. at 49, and goes on to assert that he is authorized to appear in "*any* proceeding" where the State has an interest. *Id.* at 48 n.7. To the Attorney General, this statute permits him not only to represent the State, but to take a contrary position from a Circuit or Prosecuting Attorney, who also represents the State. *See id.* at 48-49. Thus, under the Attorney General's view of the law, he can involve himself in *any* criminal proceeding at any time, and take a contrary position to the locally elected prosecutor.

That's not the law. Statutes must be construed in their broader context. "It is well settled that statutes relating to the same or similar subject matter . . . must be considered together when such statutes shed light on the statute being construed." *State v. Kraus*, 530 S.W.2d 684, 686–87 (Mo. 1975). The title of § 27.060 refers to the Attorney General's power "[t]o represent the state in other cases," and then opens with discussing "all civil suits and other proceedings at law or equity." Mo. Rev. Stat. § 27.060. It is in that context that the legislature has said that the Attorney General may involve himself in "any proceeding." By contrast, § 27.030 specifically discusses an Attorney General's ability to involve himself in criminal matters, and that statute declares that the Attorney General "shall *aid* any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examination before grand juries." Mo. Rev. Stat. § 27.030 (emphasis added).

Reading the two statutes together, the legislature did not intend for the Attorney General to insert himself in criminal matters in the trial court to take opposite positions of the local prosecutor.

Taking a step back, the implications of the Attorney General's argument are breath-taking. Under his view, if he did not like a Circuit or Prosecuting Attorney's charging decision, nothing stops him from going to court and arguing that the charges should be dismissed. If the Attorney General did not like a prosecutor's sentencing recommendation, he believes he is free to come to court to advocate a different sentence. The Attorney General concludes that he is able to involve himself at any stage of a local prosecution. But the Attorney General should not be able to "interfere with the democratic process and override the voters' choice as to who is best suited to present the interests of the people as prosecuting attorney." *Gardner*, 561 S.W.3d at 398. There should only be one official acting on behalf of the State in the circuit court when it comes to criminal matters, and the law grants that power to the Circuit Attorney.

The Attorney General's argument also smacks of hypocrisy. When the Attorney General moved to dismiss the Circuit Attorney's appeal of the trial court's ruling, he argued that the "designation of multiple individuals as the State's representative could lead to confusion and a subtle undermining of public confidence in well-established criminal procedures . . . ." *State v. Johnson*, ED 108193, Motion to Strike the "Brief of Appellant State

of Missouri" Filed by the Circuit Attorney, at 3 (Oct. 31, 2019). His words speak for themselves.[7] And the Attorney Generals is trying to have it both ways. On one hand, he argues that the Circuit Attorney should not be able to file a new trial motion because it "would undermine the adversarial nature of the criminal justice system," Resp't's Br. at 26, but on the other, he is arguing that he has the unfettered power to come to court and be her adversary. The Attorney General's arguments are inherently inconsistent.

The trial court erred in appointing the Attorney General to represent the State when the Circuit Attorney was already representing the State as was her statutory right.

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It would undermine public confidence in the justice system if this Court were to hold that once a prosecutor learns that her office obtained a wrongful conviction and that an innocent person is in person, that her office has no official role in making that wrong right. The Attorney General counters that when a prosecutor "ignores" procedural rules, "such conduct reduces public confidence in the criminal justice system." Resp't's Br. at 32. This is a false equivalency. Everyone would agree that keeping an innocent person in prison violates the most fundamental notions of justice; there should be no expiration date

[7] To the extent this Court finds that the Attorney General successfully dismissed the Circuit Attorney's appeal, it should construe her appeal as a writ of error filed pursuant to Mo. Rev. Stat. § 547.230 (providing: "The prosecuting attorney may apply for and prosecute a writ of error in the supreme court, in the like manner and with like effect as such writ may be prosecuted by the defendant").

on justice in this situation. "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995).

Further, the Attorney General has not pointed to a single rule that the Circuit Attorney "ignored." Nothing in Rule 29.11, the Missouri Code, the Rules of Professional Conduct, or this Court's cases expressly prohibited the Circuit Attorney from filing a new trial motion. In fact, given the repeated admonition that prosecutors must uphold the Constitution, seek justice above all else, be candid with the courts, and ensure defendants receive a fair shake, the Circuit Attorney did exactly what one would expect a "minister of justice" to do in this egregiously unjust situation.

One final point that should not get lost is that there's a life at stake. Lamar Johnson has been behind bars for over half his life. After carefully considering Mr. Johnson's case, the Circuit Attorney believes he is innocent. Ruling for the Circuit Attorney does nothing more than give her the chance to present her findings in court. Ruling against the Circuit Attorney slams the door of justice in Mr. Johnson's face, which means an innocent man would continue to languish in prison, costing taxpayers thousands of dollars. In the end, ruling against the Circuit Attorney would mean that deciding whether Mr. Johnson is actually innocent matters less than what are, at most, procedural technicalities.

"It is this Court's duty to not only dispense justice, but equally important, to maintain the integrity of the judicial system." *In re Carey*, 89 S.W.3d 477, 496 (Mo. 2002). Justice and the integrity of the judicial system require the Circuit Attorney's new trial motion to be heard on its merits.

CONCLUSION

For these reasons, this Court should reverse the trial court's ruling and remand for further proceedings. This Court should also hold that the trial court erred by appointing the Attorney General.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my understanding that all counsel are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on April 10, 2020, upon the filing of the foregoing document.

/s/Daniel S. Harawa
Daniel S. Harawa

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word in Times New Roman, 13-point font. And it contains 5,949 words, excluding the Signature Block and Certificates, which does not exceed the 7,750 words allowed for an Appellant's initial brief under Rule 84.06.

/s/Daniel S. Harawa
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