SC98303

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Plaintiff - Respondent,

v.

LAMAR JOHNSON,

Defendant-Appellant.

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

The Attorney General does not dispute Lamar Johnson is innocent of the murder for which he was convicted. He does not dispute Mr. Johnson's conviction was the result of state-sponsored misconduct, including the use of undisclosed payments to obtain a manufactured identification and the use of perjured testimony the prosecutor knew to be false but did not correct, in violation of Mr. Johnson's constitutional rights. And he does not dispute Mr. Johnson's wrongful conviction and continued imprisonment is a manifest injustice. Instead, when presented with this extraordinary case, the Attorney General's only answer to the "undeniably important…questions fundamental to our criminal justice system" is that there is no room in our judicial process to correct this wrongful conviction. *See State v. Johnson*, No. ED 108193, 2019 WL 7157665, at *5 (Mo. App. Dec. 24, 2019). That is simply not true.

Under Missouri law, this Court *always* has jurisdiction and authority to correct a manifest injustice. Mo. Sup. Ct. R. 30.20; *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010) (this Court "has the inherent power to prevent a miscarriage of justice or manifest injustice"). The Attorney General wholly fails to address this well-established principle, and instead argues the Missouri Supreme Court is powerless to act because (1) a fifteen day-deadline for defendant's to file a Motion for New Trial somehow deprives a court of the ability to correct this miscarriage of justice, (2) that it would amount to an unconstitutional "change [in] substantive rights" to permit a prosecutor to do so, (Resp. Br. at 23), and (3) that because the Circuit Attorney was not permitted to file the new trial motion, the trial court "exhausted" its jurisdiction after sentencing. *Id.* at 30-32. Yet, the

Attorney General can point to nothing that prohibits a prosecutor from filing a motion for new trial or that deprives this Court of the jurisdiction to correct a manifest injustice. The Attorney General's distracting and inconsistent arguments should be rejected. Instead, this Court should exercise its authority to remedy the miscarriage of justice at issue here, and answer the important questions raised in this appeal.

ARGUMENT

A. Respondent Does Not Dispute That Mr. Johnson Is Innocent, That His Incarceration Is A Continued Manifest Injustice, Or That The Missouri Supreme Court Has The Power To Remand The Case For A Hearing On The Merits.

The Attorney General does not even attempt to address the merits of Mr. Johnson's fourth point on appeal—that Lamar Johnson is innocent and his conviction is manifestly unjust because it was obtained through violations of his federal and state constitutional rights. (Resp. Brief at 50). Instead, the Attorney General appears comfortable arguing that Missouri courts can ignore colorable claims of innocence and evidence that a trial was fundamentally unfair. (Resp. Br. at 50). That is not the law. The purpose of the justice system is to "convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and execute an individual who is actually innocent." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547, n.3 (Mo. banc 2003); *see also Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000). (adopting the federal standard set out in *Schlup* that a showing of either cause and prejudice or innocence meets the manifest injustice exception under Missouri law and entitles the prisoner to review of otherwise barred claims.); MO. CONST.

ART. I, § 10 (similarly provides that "no person shall be deprived of life, liberty, or property without due process of law.").

These undisputed facts end any resistance offered by the Attorney General. Respondent does not dispute that Mr. Johnson's conviction was obtained in violation of his rights guaranteed by the United States and Missouri constitutions. As detailed by the Circuit Attorney, material exculpatory and impeaching evidence was not disclosed to Mr. Johnson, including that the *only eyewitness* to the crime was never able to make an identification. D99; D100. The State made payments to and on behalf of the eyewitness and failed to disclose that material and impeaching evidence to Mr. Johnson, despite numerous requests. D114/P83-84, 94; D107/P4-5, 7; D134/P2; D111. Further, the full and extensive criminal history of the State's jailhouse informant was not disclosed, nor did the State disclose that the informant had a history of informing for the State. D141; D136

When evidence of innocence is presented that is "so strong that a court cannot have confidence in the outcome at trial," the court should hear "the merits of [the] underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Courts have consistently looked to equity to preclude rigid and unfair application of procedural rules in circumstances, like here, where "the ends of justice" require relief. *See Schlup*, 513 U.S. at 319 (citing *Sanders v. United States*, 373 U.S. 1, 12 (1963)). Missouri courts have recognized the "manifest injustice" exception and have consistently held that a manifest injustice occurs where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). Here, as meticulously shown by the Circuit Attorney (D99-142), the constitutional violations at Mr. Johnson's

trial fundamentally compromised the reliability of the verdict. The Attorney General disputes none of this.

The Attorney General further does not dispute that Mr. Johnson's continued wrongful imprisonment is itself a manifest injustice. *See Clay v. Dormire*, 37 S.W.3d at 17 (a manifest injustice occurs where "constitutional violation has probably resulted in the conviction of one who is actually innocent"). And the Attorney General's acknowledgement that appellate courts have the "inherent power to prevent a miscarriage of justice or manifest injustice" and "remand[] cases for consideration of newly discovered evidence presented for the first time on appeal" is fatal to their position.[1] (Resp. Br. at 41). It is undisputed that this Court has "inherent power" to remand this case for a new trial to remedy a manifest injustice. *State v. Terry*, 304 S.W.3d 105, 109 (Mo. banc 2010); *see also State v. Mayes*, 63 S.W. 3d 615, 624 (Mo. 2001) ("Plain errors affecting substantial rights may be considered in the discretion of the court if it appears on the face of the record that the error alleged so substantially affected defendant's rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected."); *State v. Mooney*, 670 S.W.2d 510, 516 (Mo. App. 1984) (untimely new trial motion granted based on newly discovered evidence that did not become available during trial); *State v. Williams*, 504 S.W.3d 194, 197 (Mo. App. 2016) ("an appellate court may conduct plain error review under Rule 30.20 to determine whether 'extraordinary circumstances' exist that justify

[1] Missouri courts not only clearly have the power to correct a manifest injustice, but they have a duty to do so as well. *See Amicus Curiae Br. of Legal Post-Conviction Scholars* at 10-16; Mo. Sup. Ct. R. 91.06.

remand for a new trial because of newly discovered evidence presented in a motion for new trial filed out of time."). Further, this Court has jurisdiction to correct miscarriages of justice pursuant to Mo. Sup. Ct. R. 30.20, *Dorris v. State*, 360 S.W.3d 260 (Mo. 2012), *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W. 3d 249 (Mo. 2009), and *State v. Williams*, 504 S.W.3d 194, 197 (Mo. App. 2016) (even where nothing was preserved for appeal, "an appellate court may conduct plain error review under 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").

The violations of Mr. Johnson's constitutional right to due process are offensive to the notions of fairness and justice, and they should concern the State's attorney. Instead, the Attorney General ignores the very serious and supported claims and evidence offered by the Circuit Attorney and Mr. Johnson, and suggests that this Court should simply decline to resolve these issues because Mr. Johnson tried to raise his innocence and the fundamental unfairness of his trial in prior proceedings. (Resp. Br. at 50). Respondent's dim view of the role of the Attorney General and the duties of this Court should be rejected. The circumstances of Mr. Johnson's conviction "so substantially affected [Mr. Johnson's] rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected." *Mayes*, 63 S.W. 3d at 624.

Mr. Johnson is now in front of the Supreme Court asking for relief because the Circuit Attorney moved for a new trial after her investigation showed there was clear and convincing evidence that Mr. Johnson's conviction was unreliable and obtained through constitutional violations at trial. Regardless of whether or not such a motion is explicitly

authorized by the rules or procedurally the right path to get here, no one disputes the Supreme Court has the inherent authority to remand this case for a hearing on the merits, and the Court should not avoid the opportunity to do so.

B. The Circuit Attorney Has The Duty And The Right To File A Motion For New Trial In This Case.

Generally speaking, the Circuit Attorney asserts that under the circumstances she has an obligation to correct this miscarriage of justice by filing a motion for new trial, *citing* National District Attorney's Association, *National Prosecution Standards*, *Standard 8-1.8* ("When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should…seek the release of the defendant if incarcerated."), whereas the Attorney General argues her duty is discharged through the disclosure of new exculpatory evidence to Mr. Johnson, *citing* Missouri Rule of Professional Conduct 4-3.8 (requiring 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"). But this case does not require the Court to broadly delineate a prosecutor's constitutional obligation to a wrongfully imprisoned person.

Instead, like in any other criminal matter, the Court should give deference and discretion to the elected Circuit Attorney in how she defines and discharges her constitutional obligations, on a case-by-case basis. *See, e.g., State v. Honeycutt*, 96 S.W.3d 85, 88–89 (Mo. banc 2003) (reaffirming the broad discretion vested in the prosecutor and stating that her decision on how to enforce the criminal laws are "seldom subject to judicial review"). Here, the Circuit Attorney, after more than a year of investigation, concluded (1)

Lamar Johnson was innocent of the crimes for which he was convicted, (2) Mr. Johnson's wrongful conviction was obtained through state-sponsored misconduct, and (3) in these circumstances, her duty required filing a motion to vacate Mr. Johnson's convictions and/or for a new trial. Where, as here, the Circuit Attorney has determined she has a constitutional duty to seek release of a wrongfully imprisoned person, she should be afforded a legal avenue to do so.[2] *See State ex rel. Weinstein v. St. Louis Cty.*, 451 S.W.2d 99, 101 (Mo. 1970) ("within the inherent power of the courts is the authority to do all things that are reasonably necessary for the administration of justice"); *D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 784 (Mo. 2019) (finding the court had the inherent power to create criminal procedure where there was no statute or court rule directly on point).

The Attorney General argues that it "makes no sense for a prosecutor who has formed a belief that the defendant is actually innocent" to file a Motion for New Trial (Resp. Br. at 24), but he offers no alternative. Instead, he offers a cold and regressive view that the prosecutor must always act as an adversary to preserve "the adversarial nature of the criminal justice system." (Resp. Br. at 26). But this viewpoint is inconsistent with the circuit attorney's role as a "minister of justice." Moreover, this viewpoint cannot be reconciled with other criminal statutes, including Missouri's post-conviction DNA testing procedure, which expressly gives the prosecutor (not the attorney general) the right to consent to a wrongfully imprisoned person's motion for release. *See* Mo. Rev. Stat. § 537.035.

[2] The Attorney General admits that "the appropriate action for a prosecutor will, of course, depend upon the circumstances that confront the prosecutor." (Resp. Br. at 34).

The Attorney General offers no good public policy reason to cripple the Circuit Attorney's judgment in this regard by adopting its *per se* rule that a prosecutor's obligations are always discharged by disclosure alone.[3] The Attorney General argues that allowing a prosecutor to file a new trial motion amounts to prosecutors having "unrestricted discretion" to undo criminal convictions, (Resp. Br. at 25), because a local prosecutor filing a Motion for New Trial would reverse a wrongful conviction "without any regard to *how* that determination was made and by *whom*." (Resp. Br. at 33). But this argument ignores the important role of the courts to hear the evidence and decide whether a new trial is warranted. Moreover, the Attorney General's argument ignores the reality that this case is exceptional and extremely rare. *See Schlup v. Delo*, 513 U.S. 320, 321 (1995) ("substantial claim[s] of actual innocence are extremely rare.").

Finally, and equally egregiously, the Attorney General argues that the "adversarial efforts of the Attorney General's Office" show that "the system is working and resulting

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[3] Cole County Prosecutor, Wm. Locke Thompson, submitted an amicus brief in support of the Attorney General's position that a prosecutor has no duty or authority to correct a wrongful conviction. Interestingly, the same office, in 2003, moved to vacate a number of convictions after it was learned that a Cole County Sheriff's Deputy committed perjury in several cases. *See* Stephen Foutes, *Drug convictions thrown out, inmates freed over tainted testimony by undercover cop*, Jefferson City Post-Tribune, May 9, 2003. (Cole County Prosecutor Bill Tackett said that his office has been working to identify other defendants and to end their incarceration/discharge them from probation, adding "As prosecutor's, we have a continuing ethical obligation to see that justice is done. That ethical obligation does not end after a verdict had been rendered by a jury, or a plea of guilty has been accepted."); *see also* Stephen Foutes, *Another drug conviction set aside following probe of officer*, Jefferson City-Post Tribune, June 11, 2003. (Prosecutor Bill Tackett said of the dismissals based on perjured testimony of the Sheriff's Deputy, "This is a correction in the process…there is a lack of reliability. You need a credible source."). Both articles are available in Appellant's appendix at A001 - A003.

in relief" in that Mr. Johnson "has been afforded due process by several courts." (Resp. Br. at 35). But this is untrue. Despite repeated attempts by Mr. Johnson to prove his innocence pro se, *no court* has ever held an evidentiary hearing *on any* of Mr. Johnson's claims. Instead, in each instance, the Attorney General has successfully fought to deny Mr. Johnson's release on procedural grounds. A system of justice that supports the continued incarceration of an innocent man is a failed system and the dogmatic, strained interpretation of the rules and procedure is one the chief law enforcement officer of the state should not be proudly championing, rather, the Attorney General should be looking for an avenue to insure justice is done for all Missouri citizens, including Lamar Johnson and the family of Marcus Boyd.[4]

[4] Indeed, the ethical obligation to correct a wrongful conviction extends to all prosecutors, even to this Attorney General, who himself does not dispute the facts revealing that an innocent man has been wrongfully convicted. *See* e.g., Michigan.gov, *Department of Attorney General, Conviction Integrity Unit*, https://www.michigan.gov/ag/0,4534,7-359-82917_96122---,00.html (last visited April 11, 2020). The Attorney General's claim that he and he alone may represent the State's interests does not absolve him of this duty but demands the opposite—that the Attorney General himself act to correct this miscarriage of justice. *Cf. State v. Terry*, 304 S.W.3d 105, 108 n. 5 (Mo. banc 2010) ("The ethical norm that the state's attorney's role is to see that justice is done—not necessarily to obtain or sustain a conviction—may suggest that a different course of action may have been appropriate."). Like in *Terry*, the Attorney General's reliance on misplaced and unfounded procedural arguments to uphold a manifest injustice is no less inappropriate, it is unlawful. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729-30 (2016) (When the State continues to "enforce[] a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.")).

C. No Law Or Rule Prohibits The Circuit Attorney From Filing A Motion For New Trial.

The Attorney General argues "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." (Resp. Br. at 37).[5] However, 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). In fact, *Norwood* cannot be clearer: "the prosecuting attorney or the defendant may move for a new trial based on newly discovered evidence." *Id.*

Respondent then pivots, arguing the time constraints in Rule 29.11 apply to foreclose the Circuit Attorney from filing a motion for new trial, citing to *State ex rel. v. Zahand v. Van Amburg*, 533 S.W.3d 227, 229 (Mo. 2017). (Resp. Br. at 11-15). But, Rule 29.11 does not place time limits on *the State's* ability to file new trial motions. Moreover, *Zahand* involved Rule 29.12 "plain error" review by the sentencing court, which the Court found "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.* To the contrary, with respect to a wrongful conviction obtained through perjury, both this

[5] Specifically, the Attorney General argues that the ability of a defendant to file a motion for new trial (under Mo. Rev. Stat. § 547.010) supersedes a Circuit Attorney's ability to manage and conduct all criminal cases in the City of St. Louis (under Mo. Rev. Stat. § 56.450). This is an unfounded conclusion and indeed the Attorney General provides no support for this assertion.

Court and the Court of Appeals have expressly authorized new trials even after sentence has been imposed as necessary to avoid a "miscarriage of justice." *See State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984); *State v. Mooney*, 670 S.W.2d 510, 514-15 (Mo. 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.

In any event, to the extent the Court finds the time limits in Rule 29.11 prohibit the Circuit Attorney from filing a motion for new trial, the Court should construe the motion as a petition for habeas corpus pursuant to Rule 91.05 and 91.06 and grant relief. (*See* Appellant's Substitute Br. at 77). The Attorney General cites to *State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604, 607 (Mo. 2018) for the supposition that such relief is not available, (Resp. Br. at 45), but the facts of *Midkiff* are inapplicable here. In *Midkiff*, the defendant (not the prosecutor) filed a Rule 91 petition asserting his innocence, which neither the prosecutor nor Attorney General conceded. At issue was whether the petition was properly filed in Jackson County, where the defendant had been convicted and where he was being held during the pendency of his petition requesting post-conviction DNA testing, or whether it should have been filed in DeKalb County, where the defendant was typically housed in the custody of the Department of Corrections. *Id*. Upon receiving the defendant's filing, the Attorney General in *Midkiff* did not agree to waive venue, but rather filed a writ of prohibition to stop the case from going forward in Jackson County. Thus,

the Court in *Midkiff* was not presented with the same facts as here—where a prosecutor developed evidence of and acknowledges Mr. Johnson's innocence and waives any procedural bar presented. Further, this Court did not, as the Attorney General suggests, hold "Rule 91.04(1)(a) provides a petition must include 'The name or description of the person who is restraining the person's liberty' as a bar to relief for a Rule 91 petitioner." (Resp. Br. at 45). That was the Attorney General's argument against relief, which this Court was relaying in the opinion. This Court did nothing to limit the power of a court to construe a filing as a Rule 91, but rather held that custody, for the purposes of venue, resides with the defendant's place of permanent legal custody, not temporary location. *Midkiff*, at 608.

D. This Court Has Jurisdiction To Hear The Issues In This Appeal.

1. The Court has jurisdiction because the trial court's order was a final judgment.

The trial court's Order dismissing the Circuit Attorney's Motion for New Trial on August 23, 2019 (the "Order") is a final, appealable judgment and is properly presented before this Court. Relying on *State v. Waters*, the Attorney General argues 1) "the right to appeal is purely statutory" and 2) that the right of a *defendant* to appeal in a criminal case is governed by Section 547.070, which authorizes appeals "[i]n all cases of final judgment rendered upon any indictment or information…" (Resp. Br. at 10). Yet, such arguments ignore this Court's guidance on jurisdiction as well as the holding in *Water*s itself.

First, this Court has found jurisdiction is not a matter of statute, but rather of the Constitution in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W. 3d 249, 255 (Mo. 2009). In *Webb*, this Court clarified that "subject matter jurisdiction of Missouri's courts is governed

directly by the state's constitution," not by statutes, and Missouri circuit courts have plenary jurisdiction pursuant to Article V, section 14 to hear "all cases and matters, civil and criminal." *Id.*

Similarly, the Attorney General's reliance on *Waters* is misplaced as he fails to acknowledge its key holding: that a "final judgment" is a judgment that "disposes of all disputed issues in the case and leaves nothing for future adjudication." *State v. Waters*, SC97910, slip op. at 3 (Mo. March. 17, 2020) (internal citations omitted). Although this Court found the judgment was not final in *Waters*, it was because the order as written left trial issues unresolved: although there was a final judgment in the form of sentencing on two counts, the other two counts in which the trial court had declared a mistrial remained. *Id.* at *2. Until or unless they were dismissed, the judgment was not final for the Attorney General's appeal. [6] *Id.* at *7.

Indeed, as clarified by this Court in *Waters*, the "[t]he principles governing finality of judgments, generally, apply equally in civil and criminal cases." *Waters*, at 3, n.3 (citing *Parr v. United States*, 351 U.S. 513, 518 (1956)); *Berman v. United States*, 302 U.S. 211, 212-213 (1937); *State v. Smiley*, 478 S.W.3d 411, 415 (Mo. banc 2016); *State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002); *State v. Love*, 454 S.W.3d 907, 908 (Mo. App. 2014). The distinctions between criminal and civil cases lie where there may be multiple parties in a civil case and a judgment may be final where it "disposes of all claims by or against one or

[6] The Court in *Waters* also acknowledges the distinction between an appeal filed by the defendant versus an appeal filed by the state, as exists here. *Id.* at *6.

more—but fewer than all—of the parties" or "resolves one or more claims that are distinct from those claims that remain to be resolved." *Waters*, at 4, n.3. But no such distinction applies here. Instead, the Order here is a final judgment by any standard, including that in *Waters*: the judgment precluded Mr. Johnson from maintaining the action in the forum chosen and thus it is a final, appealable judgment. *See City of Chesterfield v. DeShetler Homes, Inc.*, 938 S.W.2d 671, 673 (Mo. App. 1997) (the Court of Appeals has jurisdiction where dismissal has the practical effect of terminating the litigation in the form cast or in the plaintiff's chosen forum); *Starnes v. Aetna Casualty & Surety Company*, 503 S.W.2d 129, 131 (Mo. App. 1973) ("whether a judgment is final and appealable is determined by what is actually done according to its content, substance and effect"). "When the effect of the order is to dismiss [an] action and not merely the pleading, then the judgment is final and appealable." *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503, 506 (Mo. banc 1991); *Adams v. Inman*, 892 S.W.2d 651, 653 (Mo. App. 1994) (same). This is not, as the Attorney General argues, an untimely appeal from a sentencing order entered against Mr. Johnson on September 29, 1995,[7] (Resp. Br. at 26-31); the Circuit Attorney properly

[7] The Attorney General also attempts to argue—for the first time in this litigation—that the Motion for New Trial is a "successive appeal" and not allowed under Mo. Rev. Stat. § 547.070. (Resp. Br. at 10.). However, the Motion for New Trial was filed by the Circuit Attorney, not Mr. Johnson and thus there is nothing successive about it. The Attorney General similarly attempts to distort these filings by incorrectly calling the Motion for New Trial "Mr. Johnson's" throughout his Brief. The Motion and filing are clear; the Circuit Attorney filed the Motion for New trial, a motion that has never before been presented to the trial court.

filed a Motion for New Trial and the denial of that Motion was a final judgement properly presented before this Court.

2. This Court has jurisdiction because this case presents Constitutional issues.

This Court also has jurisdiction because the conviction of an innocent man based upon perjured and falsified testimony directly implicates the Constitution. *See J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W. 3d 249, 255 (Mo. 2009) ("subject matter jurisdiction of Missouri courts is governed directly by the state's constitution"). Yet, while the Attorney General asserts the Motion for New Trial cannot be heard because of timeliness, he fails to address this Court's constitutional basis for jurisdiction. This omission neglects this Court's broad powers to correct a manifest injustice like the one at issue here. *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984) ("Mindful though we are on the exclusivity of this Court's jurisdiction once a notice of appeal is properly filed, we are equally cognizant of the perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence.") As explained in more detail in Appellant's Substitute Brief (p. 72-81) and the *Brief for Post-Conviction Scholars as Amici Curiae* (p. 26), innocence is the ultimate equity, and therefore, this Court has jurisdiction and should address the merits of this case. *Engel v. Isaac*, 456 U.S. 107, 135 (1982); *Webb*, 275 S.W.3d at 255.

The judiciary is conferred with broad remedial powers in equity, which must be made on a case-by-case basis. *Holland v. Florida*, 560 U.S. 631, 650 (2010) ("The flexibility inherent in equitable procedure enables courts to meet new situations [that]

demand equitable intervention, and to accord all the relief necessary to correct particular injustices."); *Boumediene v. Bush*, 553 U.S. 723, 772 (2008) (permitting "departure from [procedural rules] …in exceptional circumstances."). Because of the broad equitable power of the court in extraordinary situations like Mr. Johnson's—where the very office that convicted him agrees that he is innocent – equity requires the circuit court below to hear the Circuit Attorney's Motion for New Trial.

Likewise, while the circuit court should have permitted the Circuit Attorney to satisfy her ethical duties and provide a remedy for Mr. Johnson's fundamentally unjust incarceration, this Court has jurisdiction to decide whether the circuit court erred in dismissing the action under its equitable authority. *See State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010) ("an appellate court has the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal."). The Missouri Constitution also grants this Court power to issue remedial writs and correct this manifest injustice. MO. CONST. ART. V, § 4; *See also Appellant's Substitute Brief*, at 17, 73. Yet, the Attorney General fails to address this.

3. This Court has jurisdiction to hear cases transferred from the Court of Appeals.

It is clear the Supreme Court of Missouri has constitutional jurisdiction to hear issues of statewide importance and to reexamine existing law in cases transferred to it by the Court of Appeals. MO. CONST. ART. V, § 10. Despite his assertion this Court does not have jurisdiction, the Attorney General's admits "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." (Resp. Br. at 9), citing MO. CONST., ART. V, § 10. This concession is fatal to his position.

On December 24, 2019, the Court of Appeals transferred this case to this Court pursuant to Mo. Sup. Ct. R. 83.02, holding that "[t]he issues in this case are undeniably important and include questions fundamental to our criminal justice system," "[that] [t]he resolution of these issues is of obvious import and general interest throughout this State," and "[that] resolution of these issues may require reexamination of existing law." *State v. Johnson*, No. ED 108193, 2019 WL 7157665, at *5 (Mo. App. Dec. 24, 2019). Accordingly, because transfer was accepted, this Court is vested with the authority and constitutional jurisdiction to hear and decide the issues raised. *State v. Bradshaw*, 593 S.W.2d 562, 565 (Mo. App. 1979) ("In the constitutional scheme of an ordered jurisdiction, transfer of a cause by an appellate court because of the general importance of a question vests jurisdiction in the Supreme Court for final determination as an original appeal.") (internal citations omitted); *Armstrong-Trotwood, LLC v. State Tax Comm'n*, 516 S.W.3d 830, 834–35 (Mo. 2017) ("[T]his Court can take transfer of a case before its disposition by the court of appeals if it presents a question of general interest or importance."). *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 820, n.3 (Mo. 2013) ("[The Missouri Supreme] Court can take transfer of this case before its disposition by the court of appeals because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law.").

* * * * *

The Attorney General's arguments are without merit. The trial court's dismissal of the Circuit Attorney's Motion for New Trial constituted a final appealable judgment. Further, a court has broad authority to hear cases to correct a manifest injustice, a fact the Attorney General fails to address. Regardless, the Attorney General concedes jurisdiction is vested by the Court of Appeal's transfer to this Court for review. For all of these reasons, the Court should remand this case to the circuit court for a hearing on the merits.

E. It Was Error To Appoint The Attorney General.

The Attorney General had no authority to interfere in the proceedings of the circuit court below. In her jurisdiction, the Circuit Attorney—not the Attorney General—has the ability and duty to manage all criminal cases in her circuit. Mo. Rev. Stat. § 56.450. Thus, the Attorney General's role in wrongful conviction litigation in the circuit courts directly implicates the Circuit Attorney's statutory authority. Likewise, the Attorney General's argument that its "broad authority" under Mo. Rev. Stat. § 27.060 supersedes its narrow authority in criminal cases in the trial court under Mo. Rev. Stat. § 27.030 is misguided. In fact, the Attorney General's dual statutory obligations, when read together, create a clear limitation on the Attorney General's authority in criminal cases. Mo. Rev. Stat. § 27.030, which specifically discusses an Attorney General's ability to involve himself in criminal matters, states 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). This is a far cry from the Attorney General's assertion he has "broad statutory authority to defend the State's interests," (Resp. Br. at 49), and that he is authorized to appear in "*any* proceeding" where the State has an

interest. (*Id.* at 48 n.7). In making this argument, the Attorney General relies on Section 27.060, which refers to the Attorney General's power "[t]o represent the state in other cases," and specifically discusses "all civil suits and other proceedings at law or equity," Mo. Rev. Stat. § 27.060, **not** § 27.030, which outlines his powers in relation to criminal matters. The Attorney General's position is without support.

Moreover, the Circuit Court erred when it *sua sponte* appointed the Attorney General to represent the State, an appointment all the more perplexing considering the Court stated the Circuit Attorney also remained in the case. D167/P9. The Attorney General, who should not have been a party to this case, was the only entity to oppose the Circuit Attorney's Motion. Because the Attorney General's position was heard, adopted, and relied upon by the Circuit Court in dismissing the Motion for New Trial—a position that was dispositive of the issues in this case—the Court should find the Circuit Court's appointment of the Attorney General was error and remand for a hearing.[8]

CONCLUSION

Mr. Johnson wants what every defendant is entitled to receive—a trial within the protections afforded by the United States and Missouri Constitutions—a fair trial. He has never received one. This Court should clarify Rule 29.11 time limits do not apply to prosecutors, reverse the trial court's ruling, and order a hearing on the merits of Johnson's innocence and any further judgment requested in Appellant's Substitute Brief or that this

[8] Mr. Johnson also adopts by reference and incorporates herein the reasoning and argument of the Intervenor Circuit Attorney filed in Section C of the Intervenor's Reply Brief pursuant to Missouri Supreme Court Rule 84.04(g), and 30.06(d).

Court deems just and equitable. If the Court determines Rules 29.11, 91, or 74.06 are unavailable to the Circuit Attorney, it is within the equitable power of this Court to issue the writ of habeas corpus based on the record before it, or in the alternative, this Court could consider the Motion for New Trial and accompanying exhibits (D99-D142) as a petition for a writ of habeas corpus and appoint a Special Master to hear and take evidence. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013).

Respectfully Submitted,

By: */s/ Lindsay J. Runnels*

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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 13, 2020 upon the filing of the foregoing document under Rule 103.08.

/s/ Lindsay J. Runnels
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06. The brief was completed using Microsoft Word in Times New Roman 13-point font. This brief contains 6,587 words, excluding the cover, the certifications, and the signature block, which does not exceed the words allowed for a reply brief under Sup. Ct. R. 84.06.

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