IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 22941-03706A-01
	)	
LAMAR JOHNSON,	)	
	)	
Defendant.	)	

BRIEF OF *AMICI CURIAE* 43 PROSECUTORS
IN SUPPORT OF THE STATE'S MOTION FOR NEW TRIAL

OVERVIEW OF *AMICI CURIAE*

Amici curiae are current elected prosecutors in 43 jurisdictions across the United States. Like the Circuit Attorney for the City of St. Louis ("Circuit Attorney"), many *amici* oversee conviction integrity or conviction review units (collectively referred to herein as "CIUs") that investigate whether wrongful convictions have occurred within their respective jurisdictions. Other *amici*, including the St. Louis County Prosecuting Attorney, are in the midst of considering or forming CIUs within their jurisdictions.

Nationally, CIUs have grown into a recognized best practice for local prosecution offices. Today, CIUs serve as well-settled vehicles for reviewing and, when necessary and appropriate, seeking to overturn convictions when there is evidence of actual innocence, prosecutorial or law enforcement misconduct, or any other considerations that undermine the integrity of a conviction. By the end of 2018, CIUs operated in 44 jurisdictions across the country, including in many of *amici*'s own cities and counties. *See generally* National Registry of Exonerations, *Exonerations in 2018*, at 2, 12 (Apr. 9, 2019), *available at* https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf.

There is ample evidence of the need for, and value of, CIUs. Through 2018, CIUs have been responsible for producing a staggering 344 exonerations. *Id.* at 16. According to the National Registry of Exonerations, defendants exonerated over the past 30 years had collectively spent more than 21,000 years behind bars. *Id.* at 1, 7, 9. CIUs are essential to promoting justice, transparency, accountability – and avoiding claims and motions languishing in the system when a miscarriage of justice has occurred.

Elected prosecutors should not be expected to await or rely on the actions of others to correct legal wrongs; indeed, they are ethically *required* to proactively address these concerns. As the American Bar Association ("ABA") makes clear: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." ABA Model Rules of Professional Conduct, Rule 3.8 – Special Responsibilities of a Prosecutor. The ABA's standards also underscore the broad role of prosecutors in promoting and protecting the interests of justice: "The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function." ABA Standard 3-1.2(a) – Functions and Duties of the Prosecutor.

As such, court-ordered exonerations often come at the request, and with the assistance of, local prosecutors such as *amici* who ask courts to vacate, reopen, and address prior convictions in cases where an investigation has determined that the interests of justice cannot allow the conviction to stand.[1] For all of these reasons, and to protect the integrity of this well established

[1] *Amici* include elected prosecutors from states other than Missouri who have filed similar motions under their own states' laws that are comparable to, but which may differ from, Missouri law. Regardless of the jurisdiction, however, the common principle is that state procedural rules must have flexibility to allow a remedy when prosecutors seek to set aside an unjust conviction.

and growing practice, *amici* respectfully submit this brief to set forth the unique role that prosecutors must play – as ministers of justice ethically bound to correct past injustices – in rectifying wrongful convictions that have occurred within their jurisdictions. All parties have consented to, or do not oppose, the filing of this brief.[2]

INTRODUCTION

The unshakeable mandate of the criminal justice system is not finality, but rather the pursuit of justice. Although prosecutors are legal representatives of the State, they are not one-dimensional advocates charged with resisting the reversal of a wrongful conviction at all costs. "Prosecutors have a special duty to seek justice, not merely to convict." *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011).

Amici curiae, as prosecutors and as individuals elected by their communities to promote the pursuit of justice, understand and have seen firsthand the injustices inflicted upon innocent defendants, victims, and their respective families when procedural safeguards and other protections have failed. *Amici* also understand the ramifications – and responsibilities – when a representative of the State determines that the State's own errors caused those injustices. With the benefit of their shared experience, *amici* recognize that it is incumbent on prosecutors such as themselves to correct those injustices and to do everything within their power to protect the integrity of the justice system.

An uncorrected wrongful conviction is not simply in tension with the very essence of *amici*'s responsibility to do justice; it presents a greater threat to the public's faith and trust in its local government officials and the justice system. As such, addressing a wrongful conviction by

[2] No party assisted in the drafting of this brief. No party made any final contribution toward the preparation of this brief, which was prepared by the undersigned counsel pro bono. For purposes of this brief, *amici* present the facts as pleaded by the Circuit Attorney in the State's motion for new trial in light of the Circuit Attorney's unique position to assess the underlying events leading to Johnson's conviction.

seeking a remedy through the local courts is the necessary first step in restoring the public's trust in the justice system as a whole. If no remedy is available, however, trust suffers yet another blow, and the ability of *amici* to promote safer communities is eroded.

Confronting a wrongful conviction is a solemn matter for any prosecutor. But when faced with credible evidence of a defendant's innocence, prosecutors have an ethical duty to seek a remedy, most commonly through the courts. Prosecutors are quasi-judicial officials who serve the people of this State, in the words of the Supreme Court of Missouri (and others), as "ministers of justice." In this role, prosecutors have immense discretion in their lawful pursuit of criminal cases, guided by the constitutional and ethical obligations of their office. When the existence of a wrongful conviction becomes clear, an obligation arises to intervene and halt the continued incarceration of an individual previously prosecuted by that office. This prosecutorial obligation does not terminate because the jury already returned its verdict or because the judge already rendered a sentence. As a duly elected minister of justice, a prosecutor's obligation to correct a known injustice *never* terminates. And because that obligation never terminates, neither does the prosecutor's right to pursue an appropriate remedy in court, as the Circuit Attorney has done here.

Consistent with these principles, the Circuit Attorney seeks to exercise the power of her office to carry out her obligation to correct Lamar Johnson's conviction. This is a case in which the Circuit Attorney-led CIU's investigation has unearthed deeply concerning facts that call into question the integrity of his conviction and thereby render unjust his continued incarceration after two decades in State custody. According to the Circuit Attorney's motion, the CIU determined that *Brady* violations, newly discovered evidence of actual innocence and other misconduct by a homicide detectives and a former prosecutor in the office – including perjured

testimony, suppression of exculpatory and material impeachment evidence of secret payments to the sole eyewitness, and undisclosed *Brady* material related to a jailhouse informant with a history of incentivized cooperation with the State – tainted the conviction. (Motion, ¶¶ 115-73).

The Court, however, appears to have concluded that by acting to address misconduct of a prior member of the Circuit Attorney's Office – based on actions taken years ago – a "conflict of interest" has arisen. As a result of this purported conflict, the Court has appointed the Attorney General's Office as apparent co-counsel and suggested that the Circuit Attorney's conflict of interest may prevent anyone in her office from handling this matter. To the contrary, the Circuit Attorney's office is the sole legal representative of the State in Johnson's case, absent a valid appointment of a special prosecutor. There is no alleged "personal interest" that would prevent the Circuit Attorney from representing the State. Nor can there possibly be any disqualifying conflict to impute to the entire Circuit Attorney's Office based on the actions of a prosecutor over two decades ago who is no longer employed by the office.

As a practical matter, this type of disqualification based on a perceived "conflict" would strip CIUs of any ability to investigate and remedy a wide range of past cases. Indeed, such a rule would appear to apply in any case where misconduct by a prosecutor in a past case is at issue, regardless of the passage of time and changes in elected and unelected personnel. As such, the court's ruling would undermine the efficacy and operation of CIUs, and *amici* feel compelled to express their serious concerns with any such determination.

Amici are also troubled by the suggestion that the Circuit Attorney may lack the authority to remedy an unjust conviction based on procedural deadlines intended to limit *defendants'* motions for new trial. The waiver of a non-jurisdictional procedural deadline to bring a motion for a new trial falls squarely within the Circuit Attorney's discretion in handling criminal matters

and should be given deference by the courts. Moreover, the Supreme Court of Missouri recognizes a "manifest injustice" exception to the time bar of Rule 29.11 in cases of newly discovered evidence. The need for this exception first arose in the context of motions brought by defendants themselves, but the public interest in adjudicating these motions becomes only more critical when the prosecution moves for a new trial. Likewise, the Supreme Court of Missouri has indicated that any time bar should not apply in instances of material perjury, which is an affront to the justice system that taints the presentation of the evidence to the jury. Under any of these exceptions, the Circuit Attorney has the right to move for a new trial and the obligation to remedy the injustice uncovered in this case, and the Court should address this claim on the merits.

For these reasons, the Court has authority to adjudicate the Circuit Attorney's motion for a new trial and should also vacate its prior order appointing the Attorney General's Office to represent the State in this case.

IDENTITY OF *AMICI CURIAE*

Amici curiae are 43 current elected prosecutors (District Attorneys, State's Attorneys, and Prosecuting Attorneys) representing 43 jurisdictions in 23 states. *Amici* are responsible for the administration of justice and the protection of public safety in their jurisdictions. They have a strong interest in this case because addressing past injustices such as wrongful convictions is a core duty of an elected prosecutor. Any erosion of this duty impedes the work of prosecutors and undermines the public trust necessary to carry out *amici*'s mission. In particular, *amici* are the following:

Aramis Ayala, State Attorney, Ninth Judicial Circuit, Florida

Diana Becton, Contra Costa County, California

Wesley Bell, Prosecuting Attorney, St. Louis County, Missouri

Sherry Boston, District Attorney, DeKalb County, Georgia

John T. Chisholm, District Attorney, Milwaukee County, Wisconsin

John Choi, County Attorney, Ramsey County, Minnesota

Darcel Clark, District Attorney, Bronx County, New York

Scott Colom, District Attorney, Sixteenth Judicial District, Mississippi

Paul D. Connick, Jr., District Attorney, Jefferson Paris, Louisiana

John Creuzot, District Attorney, Dallas County, Texas

Satana Deberry, District Attorney, Durham County, North Carolina

Michael Dougherty, District Attorney, Twentieth Judicial District, Colorado

Mark Dupree, District Attorney, Wyandotte County, Kansas

Kim Foxx, State's Attorney, Cook County, Illinois

George Gascón, District Attorney, City and County of San Francisco, California

Sarah F. George, State's Attorney, Chittendon County, Vermont

Joe Gonzales, Bexar County, Texas

Eric Gonzalez, District Attorney, Kings County, New York

Mark Gonzalez, District Attorney, Nueces County, Texas

Christian Gossett, District Attorney, Winnebago County, Wisconsin

Andrea Harrington, District Attorney, Berkshire County, Massachusetts

Peter S. Holmes, City Attorney, Seattle, Washington

John Hummel, District Attorney, Deschutes County, Oregon

Jackie Lacey, District Attorney, Los Angeles County, California

Beth McCann, District Attorney, Second Judicial District, Colorado

Brian M. Middleton, District Attorney, Fort Bend County, Texas

Stephanie Morales, Commonwealth's Attorney, Portsmouth, Virginia

Marilyn J. Mosby, State's Attorney, Baltimore City, Maryland

Joseph Platania, Commonwealth's Attorney, City of Charlottesville, Virginia

Jeff Reisig, District Attorney, Yolo County, California

Rachael Rollins, District Attorney, Suffolk County, Massachusetts

Jeff Rosen, District Attorney, Santa Clara County, California

Dan Satterberg, Prosecuting Attorney, King County, Washington

Carol A. Siemon, Prosecuting Attorney, Ingham County, Michigan

Madeline Singas, District Attorney, Nassau County, New York

Timothy D. Sini, District Attorney, Suffolk County, New York

David Soares, District Attorney, Albany County, New York

David Sullivan, District Attorney, Northwestern District, Massachusetts

Raúl Torrez, District Attorney, Bernalillo County, New Mexico

Cyrus R. Vance, Jr., District Attorney, New York County, New York

Andrew H. Warren, State Attorney, Thirteenth Judicial Circuit, Florida

Lynneice Washington, District Attorney, Jefferson County, Bessemer Division, Alabama

Sharen Wilson, Criminal District Attorney, Tarrant County, Texas

ARGUMENT

I. As the City of St. Louis's Duly Elected Representative, the Circuit Attorney May Seek a New Trial for Johnson on the Basis of Newly Discovered Evidence, Perjury, and Constitutional Violations That Tainted a Prior Circuit Attorney's Prosecution.

Elected prosecutors such as the Circuit Attorney occupy a singular role in the local criminal justice system. The Circuit Attorney is a quasi-judicial officer elected by the citizens of the City of St. Louis to decide how to administer that system within the City. In exercising this discretion, the Circuit Attorney is both constrained and guided by ethical and constitutional principles. As a public servant elected by the people of St. Louis City, the Circuit Attorney must be empowered to rectify factual and constitutional errors that led to a wrongful conviction within this jurisdiction and resulted in a miscarriage of justice.

A. The Circuit Attorney Is a Quasi-Judicial Officer Elected by the Citizens of the City of St. Louis to Exercise Her Discretion and Judgment on All Criminal Matters Within the City, Including Wrongful Convictions.

"[A] circuit or prosecuting attorney 'is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty.'" *State ex rel. Dowd v. Nangle*, 276 S.W.2d 135, 137 (Mo. banc 1955) (quoting *State on inf. McKittrick v. Wymore*, 132 S.W.2d 979, 986 (Mo. banc 1939)). The office is described as "quasi-judicial" because Missouri law has entrusted the Circuit Attorney with "the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e., not merely ministerially] but acting as a result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any

other person." *State ex rel. Griffin v. Smith*, 358 S.W.2d 590, 593 (Mo. banc 1953) (alteration in original). As a result, the office of prosecutor is "one of consequence and responsibility," *id.*, and "must be administered with courage and independence." *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976) (quoting *Pearson v. Reed*, 6 Cal. App. 2d 277, 287 (1935)). Missouri cases, and the commentary to Missouri's ethical rules, repeatedly acknowledge the prosecutor's role as a "minister of justice." *See* Rule 4-3.8, cmt. 1; *State ex rel. Thrash v. Lamb*, 141 S.W. 665, 669 (Mo. banc 1911); *State v. Burton*, 320 S.W.3d 170, 175 n.2 (Mo. App. 2010); *State ex rel. Schultz v. Harper*, 573 S.W.2d 427, 430 (Mo. App. 1978)

A prosecutor's role depends upon independence from the influence of both members of the public and the other branches of government, to ensure that he or she operates within a separate sphere from the judiciary. Indeed, as the Supreme Court of Missouri unanimously reaffirmed last year, the Circuit Attorney "'is not a mere lackey of the court nor are [her] conclusions in the discharge of [her] official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's case.'" *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. banc 2018) (quoting *Griffin*, 258 S.W.2d at 593) (alterations in original).

As an elected official, the Circuit Attorney's lawful discretion in handling criminal cases before this Court carries with it the mandate of the citizens of the City of St. Louis. Indeed, in seeking office, the current Circuit Attorney ran on a platform of criminal justice reform. *See, e.g.*, *Former prosecutor turned state rep takes St. Louis circuit attorney primary*, St. Louis Post-Dispatch (Aug. 3, 2016). Following her election, the Circuit Attorney formed a CIU, consistent with that platform. The CIU's subsequent reinvestigation of Johnson's case have made him the first beneficiary of this widely recognized best practice. The Circuit Attorney's decision to seek

to vacate Johnson's conviction – obtained by her predecessor in office over twenty years ago – is a weighty one, but entitled to respect and deference. In making this decision, the Circuit attorney remains "accountable to the law, and to the people." *Griffin*, 258 S.W.2d at 593.

In carrying out this duty, however, a mechanism must exist for the Circuit Attorney to remedy determinations that a past conviction lacked integrity. As explained below, Rule 29.11 is such a mechanism, and the Circuit Attorney's decision to seek relief under that rule is proper. By electing the Circuit Attorney, "the people of the City of St. Louis … 'decided [her] decision-making skills – i.e., her discretion – best represent their interests.'" *Gardner*, 561 S.W.3d at 398 (quoting *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 388 (Mo. banc 2018)). It is not the role of the courts to interfere with the manner in which the Circuit Attorney chooses to exercise those powers in wrongful conviction cases.

B. The Circuit Attorney's Decision to Create the CIU and Follow Its Recommendation Is Guided by Constitutional and Ethical Obligations

The Circuit Attorney and her staff have taken an oath to support the U.S. and Missouri Constitutions. R.S. Mo. § 56.550. They are also bound by special ethical rules that do not apply to other attorneys. *See, e.g.*, Rule 4-3.8 – Special Responsibilities of a Prosecutor. The Circuit Attorney's investigation of Johnson's case and her motion for a new trial are consistent with those obligations.

Under the U.S. Constitution, "the prosecutor's role transcends that of an adversary." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). Instead of serving as a blind advocate for conviction, a prosecutor "is considered '"the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it

shall win a case, but that justice shall be done."'" *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))). As a result, "'[i]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *Connick v. Thompson*, 563 U.S. 51, 71 (2011) (quoting *Berger*, 295 U.S. at 88).

Consistent with these principles, much of the evidence recited in the Circuit Attorney's motion for new trial raises issues under *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, the Circuit Attorney alleges impropriety by prosecutors and investigators twenty-five years ago with respect to concealing exculpatory evidence, among other allegations. A prosecutor's ethical obligation to produce exculpatory evidence to a defendant is "unique." *Connick*, 563 U.S. at 66. Moreover, *Brady*'s reach is expansive, and not limited to the actions and knowledge of the prosecutor who tries the case. Rather, "*Brady* provides that 'the individual prosecutor has a duty to learn of any favorable evidence known *to the others acting on the government's behalf in the case, including the police*.'" *Engel*, 304 S.W.3d at 127 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). Although this undertaking may be immense, *Brady* teaches that it is the prosecutor who remains accountable even when an investigator, and not the prosecution itself, is less than forthcoming or even deceitful: "[W]hether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith…), the prosecution's responsibility for failing to disclose known favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 437-38 (internal citation omitted).

When a prosecutor fails to live up to this duty, the ethical obligations imposed upon that prosecutor, other prosecutors, and the office itself do not evaporate upon the conviction of the

defendant. Rather, "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler*, 424 U.S. at 427 n.25. Like the U.S. Supreme Court, the Supreme Court of Missouri has condemned prosecutorial inaction in the face of credible evidence of a wrongful conviction. In *State v. Terry*, 304 S.W.3d 105, 108 (Mo. banc 2010), the court observed that the State acknowledged at oral argument that it "has done nothing to investigate" whether post-conviction DNA testing was exculpatory. In response to this admission, the court blithely remarked that "[t]he ethical norm that the state attorney's role is to see that justice is done – not necessarily to obtain or to sustain a conviction – may suggest that a different course of action may have been appropriate." *Id.* at 108 n.5 (citing Rule 4-3.8); *see also Gardner*, 561 S.W.3d at 398 ("Under Rule 4-3.8, [the Circuit Attorney] has an obligation to 'refrain from prosecuting a charge [she] knows is not supported by probable cause,' and "[s]uch an obligation 'necessarily 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 the applicability of each to the other.'") (quoting *State on inf. McKittrick v. Wallach*, 182 S.W.2d 313, 318-19 (Mo. banc 1944)).

The Circuit Attorney's formation of the CIU is consistent with this starting point. A CIU provides prosecutors with an organized framework not only to remedy injustices, but also to investigate and address misconduct uncovered in regard to prior prosecutors. Both *Imbler* and *Terry* suggest that the obligation to correct a wrongful conviction is not limited to the discovery of *Brady* violations, but rather *any* instances in which newly discovered evidence credibly draws a conviction into serious doubt. A CIU functions to separate worthy and unworthy claims of

wrongful convictions, and to ensure that the Circuit Attorney has a full opportunity to fulfill her ethical duty to ensure that justice is done. *See* Rule 4-3.8, cmt. 1.

The CIU's report in this case found that Johnson's conviction is both unconstitutional and unsupported by any credible evidence. In her discretion, the Circuit Attorney has considered and followed the findings of the CIU. Among other reasons for seeking relief, the Circuit Attorney has evidently found documents within the Circuit Attorney's Office – dating from more than two decades ago – that detail undisclosed monetary payments to a State's witness and call the truthfulness of his testimony into question. (Motion, ¶¶ 150-58). Under these circumstances, the Circuit Attorney must have a mechanism to seek relief and fulfill her constitutional and ethical obligation to correct a wrongful conviction that occurred within her jurisdiction.

II. The Court Should Vacate Its Prior Order Appointing the Attorney General's Office to Represent the State of Missouri.

The Circuit Attorney is the representative of the citizens of the City of St. Louis for all criminal cases within this Court's jurisdiction. In appointing the Attorney General's Office as apparent "co-counsel," the Court appeared to base its ruling on the existence of a perceived conflict of interest that would disqualify the Circuit Attorney's Office from handling Johnson's case due to the past misconduct of a prosecutor in that office. That position has no support in fact or in law and would undermine the essence of CIUs.

There is also no basis in existing law for the Court to appoint the Circuit Attorney's Office and the Attorney General's Office to represent the State *simultaneously* in a criminal case.

Nor is there any basis for the appointment of the Attorney General's Office – or anyone else – as a special prosecutor.[3]

A. There Is No Conflict of Interest That Impacts the Circuit Attorney's Authority to Represent the Citizens of the City of St. Louis or That Suggests Unfairness to Johnson.

The Court appears to believe that the Circuit Attorney's office possesses some conflict of interest requiring removal. But in the absence of any articulable conflict of interest – let alone one that can be imputed to the entire Circuit Attorney's Office – the Court should be reluctant to interfere with the Circuit Attorney's authority. It "is no small intrusion" to prohibit the Circuit Attorney from representing the citizens of the City of St. Louis pursuant to her statutorily authorized duties. *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387 (Mo. banc 2018). If the Court erroneously disqualifies the Circuit Attorney's Office under these circumstances, "the harm caused … is both substantial and irreparable." *Id.* at 387 n.12.

The Supreme Court of Missouri recently reviewed the principles guiding the disqualification of the entire Circuit Attorney's Office in *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389 (Mo. banc 2018). As the Supreme Court explained, "the people of [the City of St. Louis] will be harmed if the individual elected to serve as their prosecuting attorney is not allowed to fulfill her statutorily authorized duty of representing the interests of the public…." *Id.* at 395 n.7 (quoting *Peters-Baker*, 561 S.W.3d at 385 n.5) (alteration in original).

To disqualify the entire Circuit Attorney's Office, there are specific criteria that must be met. First, the Court "must determine whether a particular attorney in the office has a conflict prohibiting *that* attorney's participation in the underlying case." *Id.* at 395 (quoting *Peters-*

[3] This brief does not take issue with the operation of the Attorney General's Office in any respect. *Amici*'s point is only that Johnson's case – and other CIU cases originating from the Circuit Attorney – are properly within the Circuit Attorney's sole jurisdiction under Missouri law.

Baker, 561 S.W.3d at 385). Second, "if (and only if) such a conflict exists, the court then must determine whether that individual attorney's conflict is to be imputed to the entire office." *Id.* (quoting *Peters-Baker*, 561 S.W.3d at 385).

The Court need not proceed past the first step. Based on the available record, *amici* are aware of no attorney in the Circuit Attorney's Office who has violated any applicable Missouri rules.[4] *See* Rule 4-1.7 – Conflict of Interest: Current Clients (regarding representation of multiple clients); Rule 4-1.8 – Conflict of Interest: Prohibited Transactions (regarding, *inter alia*, receiving consideration for services); Rule 4-1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees (regarding issues confronting attorneys transitioning between public and private life). The term "conflict of interest" cannot be used "in an imprecise manner to refer to what [the Court] might view as undesirable behavior in the underlying investigation." *Gardner*, 561 S.W.3d at 396 n.8. In the absence of a known conflict of interest, it is impossible to ascertain how that conflict can be imputed to the entire office, which is an extraordinarily high burden that is only met in rare cases.

Furthermore, the overarching concern when a court considers whether to disqualify the Circuit Attorney's Office is to protect the *defendant's* constitutional right to a fair trial. *Id.* at 396. The Court must consider whether a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial *to the defendant*. *Id.* at 396-97. That is not the case here, where the Circuit Attorney and Johnson are *aligned* in moving the Court for a new trial. *See, e.g.*, *id.* at 397 n.11 (explaining that the absence of an appearance of impropriety is "best evidenced by [the defendant's] role in this writ proceeding, i.e., he has

[4] From media reports, and in the absence of a transcript, it is not entirely clear the basis for the Court's conclusion that a conflict of interest exists. In addition to the rationale discussed above, the Court referenced concerns that an unidentified party has contacted members of the jury, while also noting the rationale for conflicts arising because this case involved *Brady* violations by a prior member of the office. *Amici* have sought to address these issues based on the best information available to them in the absence of any record of the proceeding.

intervened and joined the position of [the Circuit Attorney] requesting this Court issue a writ *prohibiting* Respondent from disqualifying the CAO"). Thus, "[a]ll considerations of fairness by the circuit court must, therefore, be made through the lens of fairness to the defendant," and the Court "does not have the authority to ensure every action taken anywhere in the CAO is done in accordance with its general notions of fairness. *Id.* The circuit court's supervising authority "extends only so far as necessary to protect the defendant's right to a fair trial." *Id.*

Any disqualification order does not benefit Johnson or grant him a greater likelihood of a fair trial. Rather, the order would only serve as yet another obstacle for Johnson in vacating his conviction – and even more tragically, he remains in custody as this protracted litigation continues.

Presuming that a conflict arises whenever the Circuit Attorney seeks to remedy past prosecutorial misconduct – as the Court appears to have concluded here – would erode the essence and functioning of CIUs. There is no allegation that any current member of the Circuit Attorney's Office engaged in wrongdoing, let alone that any individual's involvement has hampered the ability of other prosecutors to serve the interests of justice in this case. As a practical matter, the composition of the Circuit Attorney's Office is not static. Prosecutors, elected and unelected, come and go, but there is no reason to impute a perceived conflict to blameless individuals with no personal connection or knowledge of the original investigation or prosecution. Such a rule would interfere with the normal functioning of the Circuit Attorney's Office, as an arm of the State, in its ability to carry out these important duties, which are critical to the public faith in the justice system.

To remove the Circuit Attorney's Office from this case, detain Johnson as the matter is litigated, and fail to allow a prompt remedy to an unjust conviction, also erodes public trust in

the integrity of the process and thus adversely impacts public safety. Prosecutors and law enforcement officials rely on the cooperation of crime victims and witnesses in solving crimes and bringing responsible parties to justice. This cooperation depends on building trust between law enforcement and the community it seeks to protect, which in turn requires that people view the justice system as legitimate and procedurally fair.[5]

CIUs serve as vehicles for building this public trust, by demonstrating an elected prosecutor's commitment to ensuring each case is handled in an ethical manner and that each conviction was rightfully obtained. On the other hand, wrongful convictions – especially those involving prosecutorial misconduct – erode community trust in the justice system.[6] Overriding local prosecutorial determinations seeking to remedy past unethical conduct by previous prosecutors and preventing relief from past injustices undermines a public sense of fairness and confidence in consistently applied legal principles, and therefore imperils public trust and perceptions of legitimacy. When a community sees the justice system as illegitimate, members of the community are less likely to cooperate with law enforcement, to assist in investigations, or to report crimes against them.

Any disqualification order thus impacts not only Johnson, but the citizens of the City of St. Louis, because it would "prevent[] [the Circuit Attorney] and her office from exercising [the Circuit Attorney's] statutorily authorized duties" for the benefit of those citizens. *Id.* at 398.

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[5] In fact, research shows that people are more likely to obey the law when they see authority as legitimate. *See, e.g.*, Tom R. Tyler, *Why People Obey the Law* 31, 64-68 (1990) ("These studies suggest that those who view authority as legitimate are more likely to comply with legal authority…."); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. Rev. 622, 667 (2015).

[6] *Establishing Conviction Integrity Programs In Prosecutors' Offices, Center on the Administration of Criminal Law's Conviction Integrity Project*, New York University School of Law 64 (2012), *available at* http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport _ecm_pro_073583.pdf.

B. There Is No Other Basis Under Missouri Statutory Law to Appoint the Attorney General's Office to Handle Johnson's Case.

Under the Court's order, it appears that *both* the Circuit Attorney's Office and the Attorney General 's Office have been appointed to represent the State's interests in Johnson's case. The Circuit Attorney, however, is the representative of the State who is solely responsible for the handling of criminal cases within this Court's geographical territory, such as Johnson's. *See* R.S. Mo. §§ 56.450, 56.550. The Attorney General's Office, on the other hand, has no jurisdiction to prosecute Johnson. These are separate offices, voted on by different constituencies, which carry out different roles within Missouri.

There are only narrow statutory circumstances in which the Attorney General's Office may become involved in local criminal cases. None of those exceptions applies here.

First, "*[w]hen directed by the governor*, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts…." R.S. Mo. § 27.030 (emphasis added). The Governor has not directed the Attorney General's Office to become involved in Johnson's case, and therefore there is no basis for the Attorney General's Office to "aid" the Circuit Attorney's Office.[7]

Second, under R.S. Mo. § 56.110, "[i]f the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction

[7] The Court's order appointing the Attorney General's Office to represent the State's interests in this case presents a separation-of-powers quagmire beyond the mere "aid" described in § 27.030. This court-ordered dual representation could produce an intractable scenario in which the respective offices disagree about the State's factual and legal positions, as well as litigation strategy, but each believes it has the final word. For an individual client, the Court might simply ask the client in person which course he or she prefers – although that situation is hardly ideal. But the "State," on the other hand, is an abstract entity; there is no client to ask.

may appoint some other attorney to prosecute or defend the cause." Unlike § 27.030, which provides for "aid," § 56.110 requires disqualification of the Circuit Attorney in favor of "some other attorney." Furthermore, § 56.110 requires that the chief prosecutor *and* any assistants have a disqualifying conflict. By its plain terms, a single "interest" is not automatically imputed office-wide.

Either way, no disqualifying "interest" exists. "'Disqualification of a prosecutor is only called for when [s]he has a *personal* interest of a nature which might preclude [her] according the fair treatment to which [the defendant] is entitled.'" *State v. Sonka*, 893 S.W.2d 388, 389 (Mo. App. 1995) (quoting *State v. Stewart*, 869 S.W.2d 86, 90 (Mo. App. 1993)) (emphasis added). That is not the case here, where there is no "personal interest" at stake for the Circuit Attorney or anyone in her office.[8]

The notion that a prosecutor or her office may be disqualified for acknowledging the existence of a constitutional error is fundamentally at odds with the prosecutor's role as a minister of justice in this State. *See, e.g.*, *Belcher v. State*, 299 S.W.3d 294, 296 n.6 (Mo. banc 2009) (writing that "[t]he Court is most appreciative" of the State's candid briefing in favor of a prisoner's position and repeating that "the prosecutor has the responsibility of a minister of justice and not simply that of an advocate"). A local prosecutor deserves respect when he or she approaches the Court and asks the Court to correct a legal wrong for the benefit of an innocent person. This candor should be treated as a qualification for office, not as a factor disqualifying someone from representing the citizens of this State.

[8] The Court's concern may stem from the fact that this is a *Brady* case. Nevertheless, even a defendant's filing of a civil rights lawsuit against the prosecutor does not establish "hostility" of the prosecutor toward the defendant. *Sonka*, 893 S.W.2d at 389. Of course, it must be remembered that neither the Circuit Attorney herself nor any current members of the office is even implicated by the allegations in this case. Moreover, there is no civil rights case filed by Johnson, nor any reason to believe there is hostility between the parties considering that the Circuit Attorney and Johnson *agree* that a *Brady* violation occurred.

For these reasons, the Circuit Attorney should be restored to her role as the sole representative of the State in this action.

III. This Court Has Authority to Consider the Circuit Attorney's Motion for a New Trial, Which Is a Proper Mechanism for Remedying a Wrongful Conviction.

The right to move for a new trial is not limited to criminal defendants. The Supreme Court of Missouri recognizes that either "the prosecuting attorney or the defendant may move for a new trial based on newly discovered evidence…." *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. banc 1985). Under these circumstances, there must be a vehicle for the Circuit Attorney to address Johnson's wrongful conviction. A non-jurisdictional time limitation that might preclude a defendant from filing a new trial motion should not be deemed to preclude this relief, and may be waived by the Circuit Attorney. The Circuit Attorney is also presenting newly discovered evidence that would avoid a manifest injustice, as well as evidence of perjury, both of which provide alternative bases for the requested relief.

A. The Circuit Attorney's Requested Relief Cannot Be Barred by Time Limitations for Motions for a New Trial.

Under Rule 29.11(b), "[a] motion for a new trial … shall be filed within fifteen days after the return of the verdict." In addition, "[o]n application of the defendant made within fifteen days after the return of the verdict and for good cause shown the court may extend the time for filing of such motions for one additional period not to exceed ten days." *Id.*

Noncompliance with Rule 29.11(b)'s deadlines is not a jurisdictional defect. *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. 2015); *see also State v. Oerly*, 446 S.W.3d 304, 307-10 (Mo. App. 2014) (noncompliance with Rule 29.11(c) is not a jurisdictional defect). Accordingly, the Circuit Attorney may waive the deadlines. *Henderson*, 468 S.W.3d at 425.

In *Henderson*, the court found that the prosecution had waived compliance with Rule 29.11(b) when it "twice pressed the trial court to consider the untimely *Brady* claim," including by consenting on the record to the trial court's consideration of the defendant's motion and later stating that it had no objection. 468 S.W.3d at 425 & n.5. Here, of course, the Circuit Attorney has gone even further, by affirmatively bringing the motion for new trial itself.

This decision to waive the time limitation to rectify an injustice fits squarely within the Circuit attorney's "broad, almost unfettered, discretion." *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. banc 2018). As the Supreme Court of Missouri has reaffirmed, this broad discretion includes a determination of "when, if, and how criminal laws are to be enforced." *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc 2003). This deliberate waiver is the prerogative of the Circuit Attorney, and critical to the proper functioning of the CIU.

B. This Court Has the Inherent Power to Prevent a Miscarriage of Justice Based on Newly Discovered Evidence of Innocent and in Cases Involving Perjury.

Missouri courts also have "the inherent power to prevent a miscarriage of justice or manifest injustice" by considering a motion for new trial based on newly discovered evidence. *State v. Terry*, 304 S.W.3d 105, 109 (Mo. banc 2010). As the Supreme Court of Missouri has explained, it would be a "perversion of justice" for courts "to close [their] eyes to the existence of [] newly discovered evidence" presented through an otherwise-untimely motion. *Id.* (quoting *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984)). This exception remains true even when the newly discovered evidence would not "completely exonerate the defendant," *id.* at 110,

although the Circuit Attorney has taken the position that the exculpatory evidence in this case would meet any standard. (Motion, ¶¶ 199-203, 208, 210, 213, 217-18).[9]

Moreover, in addition to the manifest injustice exception, the *Terry* court instructed the trial court that the defendant "*also* may obtain his desired relief if he seeks a new trial on the ground of perjury." 304 S.W.3d at 111 (emphasis added); *see also State v. Platt*, 496 S.W.2d 878, 882 (Mo. App. 1973) ("'No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony.'") (quoting *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1949)). Namely, the trial court, "'if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned,' could grant a new trial." *Terry*, 304 S.W.3d at 111 (quoting *Donati*, 216 S.W.2d at 521) (internal footnote omitted). Therefore, for the trial court's additional consideration on remand, the *Terry* court endorsed the reasoning of *State v. Coffman*, 647 S.W.2d 849, 851 (Mo. App. 1983), that "if the court had found perjury, a new trial could have been granted even though the motion was filed out of time." *Terry*, 304 S.W.3d at 111.

As pleaded, the State's motion for new trial meets all of these criteria. (Motion, ¶¶ 199-203, 213-18, 222-40). *Terry*'s exceptions tacitly recognize that it is imperative for a mechanism to exist by which wrongful convictions may be remedied under Rule 29.11. Such a mechanism must exist for CIUs to function.

Accordingly, the Court may adjudicate the motion for a new trial on these bases as well.

[9] To obtain a new trial on the basis of newly discovered evidence, a *defendant* must show four things: (1) the facts constituting the newly discovered evidence have come to the defendant's knowledge after the end of trial; (2) the defendant's lack of prior knowledge is not owing to any want of due diligence on his part; (3) the evidence is so material that it is likely to produce a different result at a new trial; and (4) the evidence is neither cumulative only nor merely of an impeaching nature. *Terry*, 304 S.W.3d at 109 (citing *State v. Whitfield*, 9393 S.W.2d 361, 367 (Mo. banc 1997)). The standards for *the State* to obtain a new trial have not been established, although the Circuit Attorney's motion for a new trial amply indicates that all of the *Terry* factors have been satisfied.

CONCLUSION

This Court has authority to hear the Circuit Attorney's motion for a new trial on the merits. In addition, the Court should vacate its prior order appointing the Attorney General's Office to represent the State in this case and clarify that the Circuit Attorney's Office alone represents the State in this request to remedy an unjust past conviction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 15, 2019, the foregoing Brief of *Amici Curiae* 43 Prosecutors in Support of the State's Motion for New Trial was filed using the Court's electronic case filing system, which will serve notice upon all counsel of record.

/s/ Charles A. Weiss