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ED 108193 (consolidated with ED108223)

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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

BRIEF OF APPELLANT STATE OF MISSOURI

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INTRODUCTION

Lamar Johnson is innocent. This sobering fact is undisputed by the State. Even so, Johnson remains in the custody of the Missouri Department of Corrections. Indeed, November 3 will mark his twenty-fifth year in prison for a crime that he did not commit. Despite the staggering amount of unrefuted evidence showing Johnson is actually innocent and his conviction was obtained solely through perjured testimony, this appeal is not about the merits of Johnson's innocence—but rather whether there is anything the Circuit Attorney can do to correct this injustice. The trial court determined the Circuit Attorney is powerless to correct a wrongful conviction in her jurisdiction. The Circuit Attorney disagrees and believes it is a "perversion of justice" for her "to close [her] eyes to the existence of [] newly discovered evidence" of innocence, *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010), and that, under the circumstances, she must file and the trial court must hear the State's Motion for New Trial. The misguided trial court's unsupported appointment of the Attorney General and its dismissal of the State's Motion for New Trial without a hearing effectively thwarted the Circuit Attorney's attempts to fulfil her constitutional and ethical obligations. This appeal follows.

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JURISDICTIONAL STATEMENT

This is an appeal from the trial court's August 23, 2019 Order (the "Order") dismissing the "State's Motion for New Trial Based on Newly Discovered Evidence of Innocence, Perjury, and False Testimony and Misconduct So Prejudicial that the Outcome of the Trial is Unreliable, or in the Alternative, Motion for a Hearing on the Newly Discovered Evidence" (the State's "Motion for New Trial") after concluding it had "lack of authority to entertain the motion." D167/P16. This Appeal implicates the Court's Jurisdiction in at least two ways.

First, the Court has jurisdiction to determine whether the trial court errored in concluding it has no authority to hear the State's Motion for New Trial. As set forth in *Dorris v. State*, 360 S.W.3d 260 (Mo. 2012):

> This Court is obliged to determine whether it has jurisdiction to review this matter. *Smith v. State*, 63 S.W.3d 218, 219 (Mo. banc 2001). Subject matter jurisdiction of the circuit court is governed by the Missouri Constitution. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). The Missouri Constitution provides circuit courts "original jurisdiction over all cases and matters, civil and criminal." Mo. Const. art. V, sec. 14. When a statute, or court rule, speaks in jurisdictional terms, or can be read in such terms, it is proper to read it "as merely setting . . . limits on remedies or elements of claims for relief that courts may grant." *Webb*, 275 S.W.3d at 255.
>
> The motion court had subject matter jurisdiction over Movants' post-conviction relief motions because they were filed in a circuit court. This Court has subject matter jurisdiction to determine whether the motion court correctly or incorrectly exercised its authority. Mo. Const. art. V, sec. 3.

Id. at 265.

Second, the Court has jurisdiction to remand the case for a new trial if it finds "extraordinary circumstances." *See State v. Williams*, 504 S.W.3d 194, 197 (Mo. App.

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2016) ("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").

For instance, in *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984), the Court determined that Williams was entitled to file a motion for a new trial and receive a hearing on the motion where Williams' evidence was "detailed" and "if believed, the newly discovered evidence would completely exonerate the defendant of any complicity in the crime for which he was convicted." *Id.* In *Williams*, like here, the prosecutor agreed that the "information contained" in the motion "is true and accurate" and further agreed that the motion should be heard in the trial court:

> Under the unique circumstances of this case, we are willing to overlook the time constraints of Rule 29.11 as they relate to the newly discovered evidence. The basis of the granting of relief for such reason is that it was not known, or could not reasonably have been discovered earlier. That this evidence was not discovered before the expiration of the time for the filing of a motion for new trial should not defeat the laudable concept of a new trial based on such evidence. This ruling may be subject to future limitation, ***but we see no reason for limitation where the State joins in the request for release***. Mindful though we are of the exclusivity of this Court's jurisdiction once a notice of appeal has been 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…[I]in light of the State's concession that the evidence exists, it should be heard***."

Id. at 848. (emphasis added).

Another guiding case is *State v. Mooney*, 670 S.W.2d 510, 514-15 (Mo. App. 1984), where a new trial was granted because perjured testimony related directly to the defendant's innocence:

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> We believe this is a "proper case" [for a new trial even out of time] because the recantation, if such it is, came too late for the defendant to file a timely motion for new trial on the grounds of newly-discovered evidence. Although the judgment of the trial court is final for purposes of appellate review, and the trial court is without jurisdiction to entertain appellant's motion because the case is on appeal, we believe upon remand a motion for new trial should be permitted to be filed where the appellate process has not been completed, there is no evidence connecting the appellant with the crime other than the testimony of the victim who has allegedly recanted, and whose testimony is uncorroborated by any other evidence, where said newly discovered evidence did not become available during trial, and the recanting occurred under circumstances reasonably free from suspicion of undue influence or pressure from any source.

Id. at 516. The court remanded with instructions that Mooney be permitted to file a motion for new trial. The *Mooney* opinion recognized, as here, "[t]he victim whose testimony was the only evidence to establish the crime of which appellant was convicted has allegedly recanted." *Id*. at 514-515. The Court reaffirmed a trial court's authority and duty to correct a manifest injustice when one is presented through a motion for new trial:

> It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which the accused was found guilty of a crime on the basis of false testimony, and the court "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned," . . . would be under a duty to grant a new trial. That is to say "[w]here it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."

Id. at 515 (quoting *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1983)).

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PROCEDURAL HISTORY

In 1995, Lamar Johnson was convicted of First Degree Murder and Armed Criminal Action for the October 30, 1994 shooting death of Marcus Boyd and was sentenced to life in prison without the possibility of parole. D101/P3; TR.Vol.I/P162, 220; D107/P1.1 Since the date of his arrest, Johnson has maintained his innocence. In 2017, elected Circuit Attorney Kimberly Gardner established a Conviction Integrity Unity ("CIU") tasked with reviewing old cases where credible claims of a wrongful conviction have surfaced.[2] In 2018, the CIU began its review of Johnson's case and identified constitutional errors presenting clear and convincing evidence of Johnson's innocence. *See* D100; *State v. Lamar Johnson*, Case No. 22941-03706A-01.

On July 19, 2019, the State filed a 66-page Motion for New Trial for Johnson, setting forth therein its findings of fact and ultimately concluding as follows:

> The conviction against Lamar Johnson was obtained through 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. The violation of Johnson's constitutional rights enabled the State of Missouri to obtain a conviction and sentence of life without the possibility of parole against Johnson despite overwhelming evidence of innocence. The undisclosed secret payments to the sole eyewitness in a case that was undeniably thin fatally undermines the reliability of the verdict.

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1 The Legal File will be cited by system-generated document number (D) and system-generated page number (P), *e.g.*, D101/P3. The consecutively paginated transcript (TR) will be cited by Volume and page number, *e.g.*, TR.Vol.I.

2 Extensive studies have concluded that "conviction integrity" units or programs are critical to ensure that the public has confidence that criminal convictions are of the guilty, not the innocent. *See, e.g.*, http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf (last visited Oct. 22, 2019).

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> Based on the record now known and the professional, ethical, and constitutional duties of a prosecutor to seek justice, the Circuit Attorney moves this Court to grant her motion for a new trial.

D99/P1. On July 29, 2019, the trial court *sua sponte* appointed the Missouri Attorney General to appear without providing any findings of fact or conclusions of law supporting this appointment. On August 1, 2019, the Court ordered that the parties brief the issue "of the court's authority to entertain" the Motion for New Trial. D146.

On August 15, 2019, the Circuit Attorney filed the "State's Brief in Support of Court's Authority to Entertain the Motion for New Trial" arguing, *inter alia*, that the trial court has jurisdiction to entertain the Motion for New Trial, that the Circuit Attorney is duty-bound to move for a new trial, and that the trial court has a corresponding duty to entertain the Motion. D162. On the same day, the Attorney General filed a Response (the "Attorney General's Response") arguing that the Circuit Attorney does not have the power to file a motion for new trial and that the trial court had no jurisdiction to consider the Motion. D161. An August 16, 2019, the Circuit Attorney filed a Motion to strike the Attorney General's Response arguing that the trial court had failed to explain the appointment and that the Attorney General's filing infringed upon the Circuit Attorney's statutory and Constitutional powers. D164.

On August 23, 2019, the trial court issued its Order from which the Circuit Attorney now appeals. D167. In its Order, the trial court began by addressing its *sua sponte* appointment of the Attorney General. First, the trial court found that Johnson's counsel had improperly contacted jurors without the Court's authority. D167/P3. Second, the trial

court found that it "appeared there may be a conflict on the part of the Circuit Attorney in that the assistant circuit attorney accused by the Circuit Attorney of prosecutorial misconduct worked for this same Circuit Attorney office" and that the allegation of prosecutorial misconduct "should have been referred out for an independent investigation" pursuant to the Innocence Project's best practices. D167/P5. However, the trial court ultimately acknowledged the appointment was moot. D167/P3 ("[O]ther issues may be dispositive of this case, making its reasons for the appointment moot.").

Ultimately, the trial court held that it lacked authority to even hear the State's Motion for New Trial and dismissed the Motion without a hearing or any fact-finding. In so ruling, the trial court found that the 15-day time limit in Rule 29.11 governed the filing of a new trial motion by the State and, as such, the Circuit Attorney had no power to act after that time limit expired. D167/P13 ("While it may be true that the time limits are no longer jurisdictional, they are a limit on the Court's authority.").

Finally, the trial court did acknowledge that the Court of Appeals could "conduct plain error review and in extraordinary circumstances may remand the case to a trial court." D167/P12. Following the Order, the Circuit Attorney timely filed a notice of appeal.

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STATEMENT OF FACTS

The Crime

On October 30, 1994, Marcus Boyd was sitting on the front porch of his apartment with Greg Elking, a co-worker. TR.Vol.I/P162, 220; D107/P1. Elking had come by to repay a debt he owed Boyd for drugs and to purchase some crack. TR.Vol.I/P157; D107/P1). The porch was lit by a single light bulb at the top of the stairs on the inside of the upstairs apartment's screen door; the exterior porch light was broken. TR.Vol.I/P189-90; D109/P9-10; D107/P2; D110/P6. At the time of the shooting, Leslie Williams, Boyd's girlfriend, was inside their upstairs apartment tending to their baby. TR.Vol.I/P158, 220-21; D110/P6. As Boyd spoke with Elking on the dimly lit porch, two masked men ran from the side of the house without warning. TR.Vol.I/P159; D116/P2; D118/P2; D107/P2.

The masked assailants wore dark clothing and ski masks, attire that concealed every physical feature but their eyes. TR.Vol.I/P159, 222; D116/P2; D118/P2; D107/P2. According to affidavits by Campbell, Howard, Elking, and the trial testimony, the masks worn by the assailants looked like this:

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Id.

Elking was able to see the skin of the perpetrators and described one of them as "practically as black as the hood covering his face." D107/P3. Each was armed with a gun. TR.Vol.I/P159; D116/P2; D118/P2; D107/P2. Both masked men opened fire on Boyd. *Id.* Elking focused on the gun pointed at him and was "in shock" and "feared for [his] own life." D114/P48-49; D123/P1; D114. Elking fled the scene on foot and went home, a few blocks away. TR.Vol.I/P165-66; D107/P2.

The Police Investigation[3]

Boyd's girlfriend, Leslie Williams, who was inside the upstairs apartment when the shooting occurred, called 911 at 9:07 p.m. D101/P62, 67. Boyd was pronounced dead at 9:55 p.m. *Id.* at 1, 62.

Responding officers questioned Leslie and neighbors living in the vicinity. One neighbor saw two men running through the alleyway between the houses. *Id.* at 65. Leslie informed the officers that that a white man named "Greg" was on the porch when Boyd was shot. *Id.* at 66. Leslie knew "Greg" as a customer of Boyd's crack business. TR.Vol.II/P225. No witness reported seeing a car arrive or flee the scene.

Leslie informed Detectives Ronald Jackson and Clyde Bailey that she could not see the face of either shooter, both of whom wore some type of mask over their faces. D101/P66. Even though Leslie was within feet of the gunmen, she could not make out any

[3] Post-trial investigation indicates that critical aspects of the following account are largely false. However, for the purpose of summarizing the complete record, the law enforcement investigation as it existed in 1994-1995 is summarized in this section.

identifying characteristics because the masks concealed their faces. *Id*.; D110/P15-16. Even so, according to the police report, Leslie suspected Johnson was involved in the shooting. D101/P35-36.

In a report dated the night of the homicide, police stated that Johnson was the primary suspect at the scene, *before* a single witness had been substantively interviewed and before the only eyewitness, "Greg," had even been identified or located. D101/P1.

Johnson learned of the shooting sometime between 9:00 p.m. and 10:00 p.m. on the night of Boyd's murder. *Id.*; D119/P30-32. During that time, Johnson and his girlfriend, Erika Barrow, were at their friend Anita Farrow's house with Farrow and her boyfriend, Robert Williams. Farrow's house was located at 3907 Lafayette, at least 10 minutes by car from the scene at 3910 Louisiana. D120/P1; D119/P30; TR.Vol.II/P312-13; D121/P1.

Johnson had previously arranged to meet a customer in the parking lot next to Farrow's house to make a drug sale. TR.Vol.II/P312; D119/P31; D121/P1. Johnson, Barrow, and their child arrived at Farrow's house around 9:00 p.m. D119/P30-31; D120/P1. Shortly after their arrival, Johnson saw the customer arrive in the parking lot, got into the customer's car, and drove around the block to make the sale. D119/P31. Within minutes, Johnson was back inside Farrow's house where the four continued to socialize until around 10:00 p.m. TR.Vol.II/P313; D119/P31-32; D120/P1; D121/P1.

Shortly after Boyd was killed, Pamela Williams (the mother of Johnson's child and the cousin of Leslie—Boyd's girlfriend) paged Johnson. D101/P68; TR.Vol.II/P325; D119/P31-32; D120/P1; D121/P1. Johnson returned Pamela's page from Farrow's house.

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Id. On that call, Pamela told Johnson that Boyd had been killed and that Leslie wondered if Johnson was involved. D101/P68; TR.Vol.II/P314, 327; D119/P32; D120/P1; D121/P2.

Johnson asked Pamela to add Leslie into the call via three-way calling, which she did. D101/P68; D119/P32; D110/P14. The three spoke for a short time and Johnson told Leslie and Pamela that he was on Lafayette Avenue and that he was not involved in Boyd's death. Johnson became angry, asking Leslie "Why would you think that?" *Id.*; D120/P1; D121/P2. After the call from Pamela, Johnson and Barrow went home with their baby where they remained for the rest of the evening. TR.Vol.II/P315; D119/P32-33; D120/P1.

On October 31, 1994, Detective Joseph Nickerson began his investigation into Boyd's homicide D101/P32. Nickerson interviewed Ed Neiger, who had purchased drugs from both Boyd and Johnson. *Id*. Nickerson claimed that Neiger told him of a feud between the two and that the feud might be a reason Johnson would kill Boyd. *Id.* at 33. Neiger disputed this account in his June 21, 1995 pretrial deposition, wherein he stated that he knew of no fights between Boyd and Johnson and he did not know of anyone who would want to kill Boyd. D122/P6.

Nickerson interviewed Dawn Byrd and Kristine Herrman on November 1, 1994. D101/P36. According to the report, Byrd reported that she purchased drugs from both Johnson and Boyd and that she heard rumors that Johnson was selling bad drugs. *Id*. The report states that Byrd said she confronted Johnson on October 29, 1994, and that Johnson said he was going to see Boyd about the bad drugs. *Id.* at 37. According to the report, Byrd said she was worried about what was going to happen between Boyd and Johnson. *Id*. In

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the report, Nickerson wrote that Byrd reported seeing Boyd on the evening of October 30, 1994, and had given him a ride home *Id.* at 38. While there, Boyd told Byrd that he had noticed Johnson's car around his house recently and on the drive to Boyd's home, Boyd thought he saw Johnson's car. *Id.*

In her June 21, 1995, pretrial deposition, Byrd testified that she knew of no disagreement between Boyd and Johnson and that the disagreement she had with Johnson on October 29, 1994 had "nothing to do with Marcus," directly contradicting the contents of Nickerson's report. D125/P5-6.

Nickerson interviewed Kristine Herrman on November 1, 1994. The report indicates Herrman confirmed that she had been present for the October 29 conversation between Byrd and Johnson about bad drugs and that she had gone to visit Leslie on October 30. D101/P38.

On November 1, 1994, Nickerson interviewed Leslie again. *Id.* at 35. The police report states that Leslie told Nickerson she believed Johnson was responsible for Boyd's murder and that there had been a dispute between them about missing drugs and stolen money. *Id.* at 35-36. On June 21, 1995, Leslie gave a pretrial deposition, wherein she testified that Boyd and Johnson were once very close and that they had drifted apart, but she could think of no reason that Johnson would want to kill Boyd. D110/P6, 12.

Leslie further testified during that pretrial deposition that Boyd and Johnson had spoken about a week prior to the homicide when Johnson stopped by their apartment, and

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that there was no animosity between them nor words exchanged and there had never been any threats between them. *Id.* at 10-12. This contradicted Nickerson's report.

From October 31-November 3, 1994, Nickerson attempted to locate Elking, the only witness to the homicide. D101/P34-35, 39. Nickerson spoke with Elking's sister and his wife and asked them to persuade Elking to contact police and give a statement. *Id.*at 39. Nickerson attempted to locate Elking through his employer. *Id.* at 34.

Finally, on November 3, 1994, Elking called Nickerson and confirmed that he was present on the porch when Boyd was killed. *Id.* at 39. Elking stated that each of the masked perpetrators was armed, one subject was "about 5'9" and the other was "taller," and both were wearing dark clothing and masks. *Id.* at 40. *Elking gave no additional information about the suspects. Id.* At around 2:00 p.m. on November 3, 1994, Elking and his wife Kelly met e Nickerson at a local diner. *Id.*

According to the police narrative about that meeting, Elking told Nickerson that he had gone to Boyd's apartment on the evening of October 30, to pay a small drug debt. *Id.* Elking stated that as he and Boyd talked on the porch, two men, dressed in dark clothing and wearing masks ran onto the porch from the alleyway between the houses. *Id.* at 41. One subject appeared to be about 5'9" with a slim build, and the second was about 6'0" tall. *Id.* Elking gave no further description of the suspects. One of the gunmen grabbed Elking and told him to "Get the fuck up!" *Id.* The gunmen fired several shots into Boyd and then fled the scene on foot, leaving Elking unharmed. *Id.* at 41-42. Elking then ran home where he told his wife about the shooting. *Id.* at 42.

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Nickerson brought five department photographs with him to the meeting at the diner. Johnson and Phillip Campbell were among the photographs in the array. *Id*. Elking stated that the eyes in the photo of Johnson looked "similar" to the eyes of one of the gunmen. D107/P3-4; D114/P77-79. According to the report, Elking identified Johnson as one of the shooters from the five-photo array but refused to sign the back of Johnson's photograph. D101/P42-43.

At the diner, Nickerson told Elking and his wife that the State would help them with money and expenses if he became a witness in the case. D114/P83-84; D107/P4-5. After interviewing Elking at the diner on November 3, 1994, Nickerson told Assistant Circuit Attorney (ACA) Dwight Warren that Elking had identified Johnson as one of the shooters. D101/P43. At approximately 5:45 p.m. on November 3, 1994, Johnson and Campbell were arrested and taken to the station for questioning. *Id.* at 44-45. Approximately thirty minutes later, Nickerson informed Johnson that he was a suspect in Boyd's homicide. *Id.* at 45.

Johnson denied involvement in the shooting and told Nickerson that Boyd was his friend and that "he had been with his girlfriend on Lafayette" when the shooting occurred. *Id*. The police did not attempt to investigate Johnson's alibi, even though he told Nickerson immediately upon questioning that he had "been with his girlfriend on Lafayette" and even though Leslie told detectives she had spoken to Johnson on the phone shortly after the homicide. *Id.* at 45, 68; D110/P14; TR.Vol.II/P224-25. The police made no attempt to collect pager or telephone records, nor does the police report reflect contact with a single alibi witness.

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At approximately 8:00 p.m. Detective Ralph Campbell arrived for his shift, and according to the report, asked Nickerson if he could speak with Johnson about an unrelated matter. D101/P46. According to Campbell's narrative, Johnson—unprompted and after just stating that he was not involved in Boyd's homicide and offering his alibi evidence to Nickerson—made incriminating statements about the Boyd homicide including that he "let the white guy live." *Id.* at 47. According to the police report, Johnson then refused to make a recorded statement about what Campbell claimed he had said. *Id.*; TR.Vol.II/P233.

From approximately 6:00-8:30 p.m. on November 3, 1994, Nickerson attempted to locate Elking so that he could come to the station to view a lineup. D101/P46. Around 9:00 p.m., Elking contacted Nickerson, who picked Elking up and transported Elking to the station. *Id.* at 47-48. During the drive to Police Headquarters, Nickerson told Elking that Johnson was responsible for a number of unsolved homicides and that Elking's cooperation was critical to providing justice for Boyd and his family. D114/P84-85, 88; D107/P7.

Upon arriving at Police Headquarters, Elking viewed Lineup #1 containing Johnson at least three times. D101/P48-49. Elking was unable to make an identification after the first two viewings. *Id.* at 49. On the third viewing, Elking identified a filler from the jail holdover as the shooter. *Id.* at 18-19, 49; D105/P1.

Elking was then shown Lineup #2, which contained Campbell. D101/P49. Elking was unable to make an identification in Lineup #2. *Id.* at 20-21, 49; D105/2. After Elking was unable to make an identification in either lineup, he and Nickerson got into the elevator to go to a higher floor of police headquarters. D101/P49. According to the police narrative,

during that elevator ride Elking told Nickerson that he "wanted to do the right thing" but he was "scared" and "needed time to think about what [he] should do." *Id.*

Once they reached the homicide offices, according to the report, Elking told detectives that he lied when he did not make an identification, and that he recognized the shooters but that he was afraid. *Id.* at 50. Elking then told Nickerson that the shooters were in position #3 (Johnson) in Lineup #1 and position #4 (Campbell) in Lineup #2. *Id*. Nickerson's narrative states that Elking said he recognized the gunmen in the lineup because one had a lazy eye and the other had a scar on his forehead. *Id*. This is the first reference to these identifying features in the police report, and was not mentioned or recorded in any of the three earlier interviews Nickerson had with Elking.

After this alleged identification, detectives then assisted in crafting a statement for Elking indicating that he was afraid, that he knew who the shooters were all along, and that he was sorry he had lied. *Id*.; D107/P6. On the morning of November 4, Nickerson drove Elking to the Circuit Attorney's Office where Elking met with ACA Warren. D101/P50; D114/P104. Warren then issued warrants for Johnson and Campbell charging them with Murder First Degree and Armed Criminal Action. D101/P24, 51. ACA Warren offered witness payments to Elking and set him up with the witness protection program. D114/P105.

On November 4, 1994, Johnson and Campbell were booked into the City Jail and placed in the holdover unit, a crowded unit with cells that hold a number of inmates.

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D101/P50; D128. William Mock, an informant with an extensive criminal history, was also in the City Jail holdover unit. D101/P25, 51.

On November 5, Mock claimed to have overhead an incriminating conversation between three inmates regarding a murder. He spoke with Detective Jackson, but this conversation was not recorded. *Id*. On November 6, Mock claimed to have heard another conversation regarding Boyd's homicide, namely that Johnson and Campbell discussed "taking care of the white boy," interpreted as referring to Elking. *Id.* at 26, 51-52. Mock repeated this statement to Jackson on November 7, which was recorded. *Id.* at 26, 52-53.

The Evidence at Trial

Johnson's trial was held on July 11-12, 1995 before the Honorable Booker T. Shaw. During the State's opening statement, ACA Warren told the jury that Mock did not "want any special consideration" for his testimony against Johnson and just wanted to "tell the police what he heard." TR.Vol.I/P 153.

Elking testified that it was "dark" outside at the time of the shooting and that the only light was coming from inside the house. *Id.* at 189-90. He testified that two men with solid black "pullover" masks came from the side of the apartment, each holding a gun, *Id.* at 159, and that one of the shooters had a lazy eye. Elking identified Johnson in the courtroom as the man with the lazy eye and as one of the shooters. *Id.* at 160-61.

According to Elking's trial testimony, Elking "didn't want to commit" to making any positive identification of the shooters during his first meeting with Nickerson at the diner, *Id.* at 179, and that he walked away from Lineup #1 (containing Johnson) twice,

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unable to make an identification. *Id.* at 183. Elking testified that after leaving the lineup, however, he revealed to Nickerson that he had identified the wrong person because "he was intimidated." *Id.* at 170-71.

Leslie testified at trial that at the time of the murder, she was in the upstairs apartment drawing a bath for her daughter when she heard a series of pops that she believed were fireworks. TR.Vol.II/P220-21. After hearing the pops, she ran downstairs and saw someone in all black firing a gun. *Id.* at 221-22. She could not see the face of either shooter because the black masks covered their faces. *Id.* at 222. She did not recognize the shooters. D110/P8-9. Leslie testified that she knew Johnson because he was the father of her cousin's child, that he had a lazy eye, TR.Vol.II/P222-23, and that Boyd and Johnson had been close friends and roommates. D110/P5-6. She testified that she was on a three-way call between Johnson, herself, and her cousin Pamela shortly after Boyd was killed. TR.Vol.II/P224-25.

Campbell testified that he interviewed Johnson on November 3, and that the interview was not about Boyd's murder. *Id.* at 228. According to Campbell, Johnson "turned the interview in that direction" and unprompted stated that he "let the white guy live." *Id.* at 229.

Mock testified that he overheard someone who identified himself as Johnson shouting from another cell and saying, "They didn't have the gun" or "the white boy." *Id.* at 246-47. Mock testified that he contacted the homicide detectives and was interviewed. *Id.* at 247-48. Mock testified that he overheard the man identified as Johnson also talking

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about committing another murder on the south side involving the robbery of a white boy. *Id.* at 249. After investigation, however, the police could find no record of any robbery on the Southside resulting in the murder of a "white boy." *Id.* at 307.

Mock testified that the only thing he asked for in exchange for his testimony was a letter from ACA Warren to the parole board, which Warren provided. *Id.* at 249-50. On cross-examination, Mock stated he was not in the same cell as either Johnson or Campbell and he could not say how far away they were from him in the unit. *Id.* at 251-52. Mock testified that he had three felony convictions for burglary, tampering, and carrying a concealed weapon. *Id.* at 244, 261-62.

The defense called one witness, Erika Barrow, Johnson's girlfriend, who testified that Johnson was with her on the night Boyd was killed. *Id.* at 309, 315. They were socializing with friends at the house shared by Anita Farrow and Robert Williams, located at 3907 Lafayette. *Id.* at 311-12. Barrow testified that Johnson was with her from approximately 7:00 p.m. through the rest of the night with the exception of about five minutes when Johnson left Farrow and William's house at 3907 Lafayette. *Id.* at 315. On cross examination, Barrow stated that it may have been "seven minutes" but nonetheless, that Johnson "wasn't gone long enough to go anywhere." *Id.*

Barrow testified that they learned Boyd was killed when Pamela spoke with Johnson on the telephone sometime after 9:00 p.m. *Id.* at 314, 325. During that call, Pamela added Leslie Williams via a three-way call. *Id.* at 224-25; D121/P1-2. Evidence corroborating Johnson's alibi was not presented to the jury, including the testimony of Pamela, Leslie,

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Farrow and Robert Williams and pager and telephone records. It was undisputed at trial that Johnson was at Farrow's between 9:00 and 10:00 p.m. It was undisputed at trial that Johnson left Farrow's and returned within minutes.

In rebuttal, the State presented evidence from Nickerson, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes." TR.Vol.II/P329. During closing argument, ACA Dwight Warren stated that Mock had no motive to lie:

> What motive does Mock have? What is he gonna get of this a letter to the parole board? For that—and remember, he didn't have anything in the beginning. He came and said to the police I just got to go back there on this CCW. I'm not asking for anything. I'm tellin' you what happened because of some terrible event that's happened in his life. The man may be a burglar, he may be someone who carries a gun, I think he had another charge there too but he's a man that draws the line. This was a terrible waste of a life. It was cold-blooded murder and you draw the line. Even criminals, people in jail have got some morals say you know, enough is enough on this murder stuff. There's just too much murder. I can't keep my mouth shut and turn my face because of what has happened. Mock stood up and was counting, counting as a honest, God-fearing man to tell you the truth.

Id. at. 352-53.

On July 12, 1995, a jury found Johnson guilty of murder in the first degree and armed criminal action. The judgment was entered on July 12, 1995, and Johnson was sentenced to life without the possibility of parole on September 29, 1995. D103/P2-3.

THE POST-TRIAL INVESTIGATION EVIDENCE OF INNOCENCE

James "BA" Howard and Phillip Campbell Confess to Killing Boyd

As a result of investigation conducted after Johnson's trial, the State believes that the evidence presented against Johnson was false and perjured. The police investigation was irreparably tainted and therefore is unreliable.

Campbell and Howard confessed to shooting Boyd in sworn affidavits stating that they killed Boyd and that Johnson was not involved. D142; D117; D116/P3; D118/P4. After Johnson's trial in July of 1995, but before sentencing on September 29, 1995, Campbell wrote letters to Johnson while both were in the City Jail. The letters were seized by jail officials pursuant to a search warrant and were the subject of an unsuccessful defense motion for new trial that was filed out of time. D103. The letters explain what happened on the night Boyd was killed, that Johnson was not involved, and that Campbell and Howard committed the murder.

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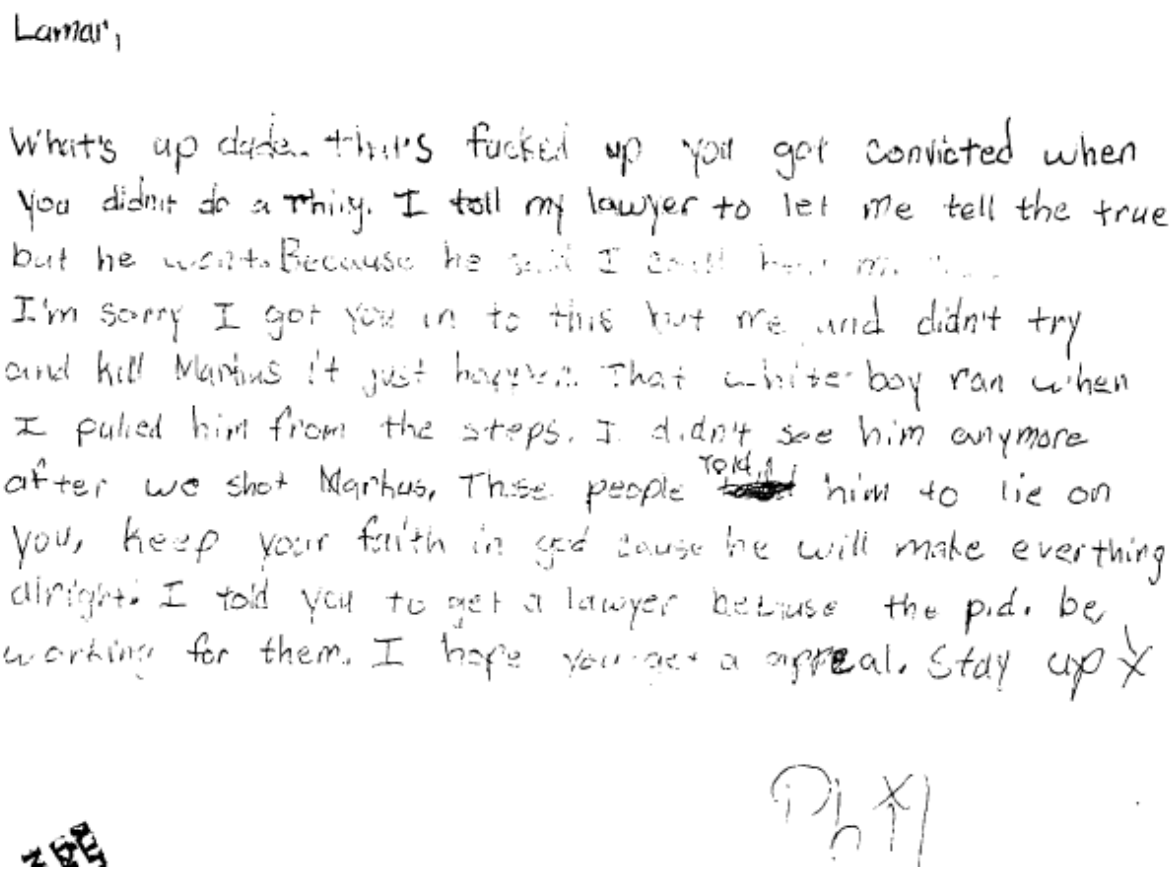

Lamar,

What's up dude. that's fucked up you got convicted when you didn't do a thing. I tell my lawyer to let me tell the true but he won't. Because he said I could [illegible]
I'm sorry I got you in to this but me and didn't try and kill Markus it just happen. That white boy ran when I pulled him from the steps. I didn't see him anymore after we shot Markus, These people told him to lie on you, keep your faith in god cause he will make everything alright. I told you to get a lawyer because the pd. be working for them. I hope you get a appeal. Stay up

D129.

In addition to the letters Campbell wrote in 1995, Campbell signed an affidavit in 1996, just one year after Johnson was convicted. D117. Campbell signed another sworn statement in 2009, again stating he was responsible for Boyd's death and that Johnson was not involved. D118/P4.

James "BA" Howard signed affidavits in 2002, 2005 and 2009 stating Johnson was not involved. D142; D115/P1; D116/P3. Howard and Campbell stated in their affidavits that on October 30, 1994, they were socializing at Howard's house located at 3944

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Louisiana Avenue. D116/P1; D118/P1. Howard's house was less than 400 feet from Boyd's house at 3910 Louisiana Avenue.

Howard told Campbell about a disagreement between Howard's friend, Sirone Spates and Boyd about a business transaction involving the "crumbs" from drug sales. D116/P1. Boyd and Spates agreed that Boyd could keep the crumbs and when the crumbs accumulated, Boyd could either give them to Spates or pay him for their value. *Id.* Spates asked Boyd about the crumbs and Boyd continued to "put him off." *Id*. Because Spates was injured, Howard agreed to go to Boyd's house on the night of October 30, 1994 "to teach Marcus a lesson, and also rob him, so that I could get the money Marcus owed [] Puffy." *Id.* at 2.

The two put on dark clothing and masks that "were the 'Ninja' style masks, which covered the entire head, and had one large hole in the face for the two eyes." *Id; See also* D118/P2 ("The masks could be pulled up over the nose, revealing not much more than our eyes."). Howard explained that "[he] had no intention of killing Marcus []" but things happened quickly and during the struggle, Campbell discharged his gun. *Id*. Campbell, "t[ook] a few steps up the porch and pointed [his] gun at the white guy sitting to the left of Boyd and [] grabbed the man's shoulder." *Id.* at 3.

After fleeing the scene, Campbell and Howard "ran down the gangway between houses and then jumped fences through back yards all the way back to my mom's back door." D116/P3; *see also* D118/P3. ("After the shooting, James and I ran back down the gangway to the alley and back to James' house.")). Each of the affidavits unequivocally

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state that Howard and Campbell killed Boyd and provide details about the motive, and other information that is corroborated as summarized above. Howard states succinctly that "Lamar Johnson was not involved in the death of Marcus Boyd. I know Lamar Johnson is innocent of that crime because I was there and Lamar Johnson was not there." D116/P3.

In 2009, Anthony Cooper, an associate of Campbell and Howard signed a notarized affidavit:

> Soon afterwards [the shooting of Boyd] I began receiving letters from Phillip Campbell and James Howard referring to their involvement in the murder of Marcus Boyd, and discussing their concern that Lamar Johnson was being accused by the police of committing this crime. Both Campbell and Howard told me in their letters that Lamar Johnson had no involvement in Marcus Boyd's death.
>
> The day after I was released from prison in November 1995, I spoke to James Howard about the death of Marcus Boyd. Howard said that his cousin 'Puffy,' or someone he knew, had had a disagreement with Marcus Boyd. Howard told me that he and Campbell went over to pistol whip Marcus Boyd or rough him up and it got out of hand and Marcus got shot.

D130/P1.

In 2009, Lamont McClain, an associate of Campbell, Howard, and Johnson, signed a notarized affidavit:

> On Oct 30, 1994, the night Marcus Boyd was shot and killed outside his house at 3910 Louisiana, I was locked up in St Louis City Jail. About a week later, I saw Phillip Campbell in City Jail…. Campbell told me that he and James Howard had gone to rob Marcus Boyd, but Boyd didn't cooperate. Boyd put up a fight and BA shot Marcus…
>
> At the time Campbell was telling me what happened to Marcus Boyd, Lamar Johnson was also in jail, suspected of killing Marcus Boyd. Campbell told me that Lamar Johnson was not there at Boyd's that night, and that Lamar had nothing to do with the killing of Marcus Boyd.

D131/P1-2.

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Campbell and Howard's affidavits clearly state that they killed Boyd. Both Campbell and Howard offered motive evidence that is independently corroborated by the statements of other witnesses including Lamont McClain and Anthony Cooper regarding a dispute over crumbs between Boyd and Howard's friend, Spates. Campbell and Howard's accounts are consistent in the way the masks were worn, the clothing they wore, the route they took to Boyd's house and the route they travelled when they fled the scene. The evidence corroborating that Campbell and Howard killed Boyd is extensive and credible:

(1) Campbell wrote letters in July of 1995 while in the City Jail before he was convicted describing his role and Johnson's innocence in Boyd's murder. D129.

(2) Campbell signed affidavits in 1996 and 2009 that he killed Boyd with Howard and that Johnson was not present or involved in the crime. D117; D118.

(3) Howard signed affidavits in 2002, 2005 and 2009 swearing that he killed Boyd with Campbell and that Johnson was not present or involved in the crime. D142; D115; D116

(4) Howard and Campbell's affidavits provide details that are corroborated by the physical evidence including the type of masks worn, motive, types of guns used, the clothing they wore during the crime, the route they travelled to and from the scene, and the location of Howard's house where they fled after the crime. D116/P1-3; D118/P1-4.

(5) The accounts of Howard and Campbell are corroborated by Elking and Leslies who were present at the scene.

(6) The CIU interviewed Howard regarding his role in the homicide. The CIU found him credible and his version of events is corroborated by Elking, Leslie, Campbell and the physical evidence, including the type of masks and clothing worn, the firearms used, how the shooters arrived on the porch at 3910 Louisiana, and how they left the scene.

(7) Anthony Cooper and Lamont McClain signed affidavits in 2009 corroborating Campbell and Howard regarding the motive evidence and statements that Howard and Campbell made to them that Johnson was not involved in the crime. D130/P1; D131/P1-2.

After Johnson's trial, Campbell's counsel uncovered additional, undisclosed criminal history for Mock and Elking stopped cooperating with the Circuit Attorney's Office. Without Elking, the State offered Campbell a deal which Campbell accepted. Campbell plead guilty in a one-count indictment to voluntary manslaughter for his role in Boyd's homicide and was sentenced to seven years in custody. D141.

Johnson's Alibi Evidence Proves He Did Not Kill Boyd

Erika Barrow, Johnson's girlfriend, testified that Johnson was with her on the night Boyd was killed. TR.Vol.II/P309, 315. The summary of her testimony is included above, including where she and Johnson were when Boyd was killed, who they were with, and that Johnson spoke on the phone with Leslie and Pamela shortly after Boyd was killed and that the conversation was in the presence Barrow, Robert Williams, and Anita Farrow. *Id.*

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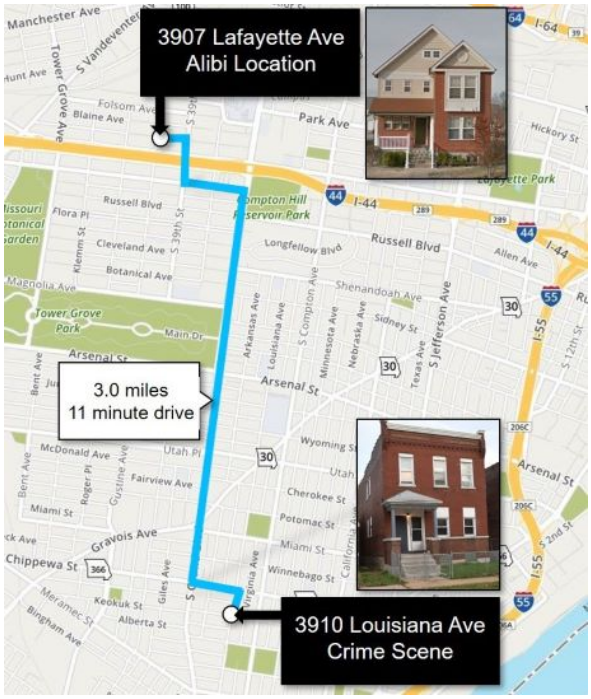
Although it was undisputed at trial that Johnson was at Farrow and Robert's' house between 9:00 and 10:00 p.m. and that Johnson left the house and returned within minutes, the State presented false evidence in rebuttal, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes." TR.Vol.II/P334. This is false testimony and the State knew it was false. This false testimony offered by the State ignored undisputed evidence in the record: the witnesses testified the assailants arrived on foot and no witness testified to seeing a car arrive or flee the scene; and, Campbell was not with Johnson at Farrow's.

Simple time and distance calculations contradict the State's testimony in rebuttal of Johnson's undisputed alibi location. The one-way drive alone is approximately 11 minutes.



D99/P23.

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The testimony offered by the State that Johnson could have travelled to the scene, picked up Campbell, killed Boyd, dropped off Campbell, and returned to 3707 Lafayette in a matter of minutes was false and the State knew or should have known it was false.

The Motive Evidence was False and Manufactured

The State's theory was that Johnson killed Boyd because of a drug feud between them. The police report attempted to establish this motive, but subsequent investigation indicates that the motive evidence was false and fabricated.

Neiger was contacted by Nickerson on October 31, 1994. The police report indicates that Neiger told Nickerson that Johnson and Boyd's drug business had severed as a result of Johnson selling bad drugs and that Johnson "was not happy about the split." D101/P33. After reviewing the police narrative attributed to him, Neiger signed a notarized affidavit swearing that he never told Nickerson of any split between Johnson and Boyd because he had no knowledge of their relationship. D106/P1-2.

Byrd was interviewed by Nickerson on November 1, 1994 and motive evidence was attributed to her as described above. D101/P36.

Byrd reviewed the police narrative attributed to her and signed a sworn affidavit stating that Boyd never told her that Johnson had been hanging around his house in the days leading up to the homicide and that she and Boyd had not seen Johnson's car on the evening of October 30, 1994. D112/P4-5. Byrd was never worried about what was going to happen between Boyd and Johnson because she knew of no animosity between them and that the above statements attributed to her in the police report are false. *Id*. Byrd's

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sworn affidavit also states that she never called Boyd and Leslie the day before Boyd was killed in attempt to warn him that Johnson would be visiting. *Id.* at 3. Byrd credibly claims that the entire police narrative that claims her as a source of the information relating to Johnson's motive to kill Boyd is false. *Id.* at 3-5.

The police narrative indicates that Herrman confirmed that she had been present for the October 29, 1994 conversation between Byrd and Johnson about bad drugs and that she had gone to visit Leslie on October 30, 1994. D101/P38. In a sworn statement, Herrman stated that the account attributed to her in the police report is largely false: she was not present for any conversation between Johnson and Byrd about bad drugs. D113/P2-4. She had never met Johnson, and consequently had never heard Johnson say he was going to see Boyd about the bad drugs. *Id.*

On November 1, 1994, Nickerson interviewed Leslie and the summary of what Nickerson claims she said is summarized above. D101/P35. Leslie's' pretrial deposition on June 21, 1995, however, contradicts the police account during which she stated she could think of no reason that Johnson would want to kill Boyd. D110/P5-6, 12.

In two interviews, Leslie viewed the police report and the statements attributed to her. D132/P1. She told the investigator that information within the reports suggesting a severed drug business between Boyd and Johnson as the motive for the murder was false. *Id.* at 2-4. All four witnesses the State claimed offered evidence of motive—Neiger, Leslie, Herrman, and Byrd— reviewed the statements attributed to them all four credibly claim

that the motive statements attributed to them are false. D106/P1-3; D132/P2-4; D113/P2-4; D112/P2-5.

Greg Elking's Identification of Johnson was Manufactured and False

Even with the information known to the State at trial, Elking's identification was unreliable. Elking stated on numerous occasions during the trial period that he did not know Johnson and had never met him. D109/P4-5; TR.Vol.I/P191; D126/P3; D123/P2; D107/P3; D114/P16, 21. The crime was committed at night by two black men wearing full ski-type masks that covered their heads, including their ears, necks, eyebrows, foreheads, cheeks, mouths, chins, and most of their noses. D114/P50-52; TR.Vol.I/P190.

Elking testified at his 1995 deposition that the porch light was not on and that "it was dark." D109/P9-10; TR.Vol.I/P189-90. Elking told Nickerson that he did not know Boyd's associates, that he did not socialize with any of Boyd's friends, and that he did not recognize or know the gunmen. D104/P5; D126/P3; D123/P2; D107/P3-4; D114/P15-16, 74-75.

The circumstances of the crime make a reliable and accurate identification of a person unknown to the witness implausible. *See Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

When Elking and his wife met with Nickerson at the diner on November 3, 1994, Nickerson told Elking that the State could help him with money and expenses if he became a witness in the case. D114/P83-84; D107/P4-5.

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Prior to viewing the lineups, Nickerson told Elking that the police had apprehended Johnson and that Johnson was responsible for Boyd's death. D114/P85-87. Nickerson further told Elking that Johnson was responsible for a number of unsolved homicides and that the police needed Elking's testimony. *Id.* at 88; D107/P7. Elking viewed the lineup containing Johnson at least three times and was unable to make an identification. D101/P48-49.

In 2019, Elking testified that at the time of the lineup, he felt like "had to pick" someone and chose position #4, the position of Donald Shaw, because he looked *most like* one of the photographs in the array shown to him by Nickerson. D114/P95.

Elking testified that he "did not recognize anyone" in the lineups and wanted badly to help but he simply was unable to make an identification because he did not see the gunmen's faces or other identifying features. D114/P91-92; D109/P5. Elking felt "pressured" and "intimidated" by the police during the lineup. D126/P3; D123/P2; D107/P6; D114/P93. Elking was worried that he would be charged if he did not make the identifications that Nickerson wanted him to make. D126/P4; D123/P3; D114/P103. Elking believed Nickerson knew who was responsible and he trusted Nickerson. D114/P99-100. He wanted justice for Boyd and needed the money and assistance promised to him. D114/P100-01; D107/P5.

When Elking was unable to identify Johnson, Nickerson's "mood changed" and was in a "foul" mood. D114/P93, 96. Elking felt like he "let everyone down." *Id.* at 94, 96; D107/P5. When Elking and Nickerson got into the elevator after Elking was unable to

make an identification, Elking asked Nickerson to tell him the lineup position numbers of the men that Nickerson believed killed Boyd. D107/P6; D114/P98, 127-28. Nickerson then told Elking the men were in position #3 and position #4. D104/P6; D126/P4; D123/P2-3; D107/P6; D114/P98, 127-28.

In 2019, Elking reiterated that he did not recognize anyone and that he had "no idea" who the shooters were:

Q. Did he indicate that he knew that you knew them?
A. Yeah. I -- it gets so -- it gets somewhere right as soon as we get on the elevator that hey, look, I don't -- I was scared that -- you know, that's -- that's -- I think that's what it came out as like I'm scared. I'm -- I was scared. I didn't -- I didn't feel comfortable, you know, down there.
And him going -- he goes yeah, so do you know who they were? And I'm like well, you tell me the numbers in the line-up and I'll tell you if you're right. And he then said three and four. And I said that's who they were.
Q. If he would have said one and two, would you have said yes, that's who they were?
A. Oh, yeah.
Q. So you were -- had no idea who they were?
A. I had no idea.

D114/P98-99.

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After this conversation in the elevator, detectives assisted in crafting a statement that Elking said he lied when he did not identify anyone during the lineups because he was scared. D101/P50; D107/P6.

Elking succumbed to the impermissible pressure and the undisclosed promise of funds to "help him get back on his feet" and ultimately testified against Johnson despite having no opportunity to see or identify the shooters. D114/P94; D107/P5.

As early as 2003, the State's key witness, Elking, recanted his identification and trial testimony in a letter to Reverend Rice of St. Louis. The letter was found years later after Elking told Johnson that he had been trying to tell the truth about his false testimony. In part, Elking's 2003 letter to Reverend Rice states:

> When they [police] talked to me they showed me some photos of suspects, but could not identify no one, because I did not know them or seen [sic] their faces. Then when they [police] showed me a line-up in City Jail, I still could not pick out the suspects. Then the detectives and me had a meeting with the Prosecutor Dwight Warren and convinced me, that they could help me financially and move me & my family out of our apartment & and relocate use [sic] in the County out of harms [sic] way. They also convinced me who they said they knew who murdered Marcus Boyd.
>
> They [police] had me say the suspects numbers in the lineup, and told me to say the reason I didn't pick them out while the lineup was going on, was because I was scared & terrified. The reason I'm telling you this now is my consiance [sic]. I regret not coming to you or anyone else sooner. I don't believe it was [the] right thing to do then & more so now.

D104/P5-6.

This 2003 account by Elking is corroborated by the record. On December 6, 1996, at Johnson's 29.15 PCR hearing Nickerson testified:

> [T]he witness [Elking] had known Mr. Johnson prior to this incident…I felt at the time Mr. Elking knew who we were looking for. *We knew who was*

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> *responsible.* Anything even by name anything more was -- at that time it wasn't necessary. It might have been done. It might not have been done, but *he knew who we wanted. There was no question in my mind who was responsible*.

D119/P23-24 (emphasis added).

The State Paid Greg Elking to Identify Johnson

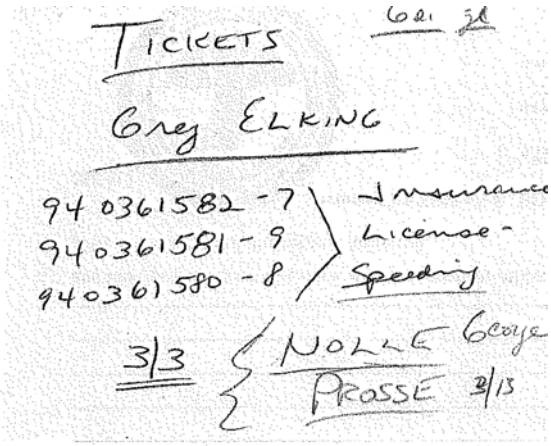
During the November 4, 1994, meeting at the diner, Nickerson told Elking and his wife that the State could help them with housing and expenses. D114/P83-84; D107/P4-5. Elking's financial situation was unstable and he needed the money. D114/P100-01.

In 2010, Elking and his ex-wife both signed affidavits indicating that they received several monetary payments from the State. D107/P4-5, 7; D134/P2. After the Elkings revealed that they had been paid by the State, Johnson repeatedly requested documentation of the payments to Elking from various entities, including the Circuit Attorney's Office, but the documentation was never disclosed. In fact, the documents were not only withheld, their existence was denied in writing. D111/P8; D135.

As part of the joint investigation between the CIU and Johnson's counsel, the CIU searched for and located 63 pages of documents related to payments to and on behalf of Elking. D111. The concealed payments, totaling at least $4,241.08, began on November 4, 1994, included cash payments, payment of back utilities, moving and living expenses, and rent. *Id.* at 7. These payments continued for months leading up to Johnson's trial. *Id.* The documents discovered by the CIU include copies of cancelled checks, correspondence with movers and successful efforts to locate and pay for Elking's housing. D111. Just as Elking claimed, the payments began on the day Nickerson presented Elking to ACA Warren and

continued for months thereafter, including undocumented cash payments before Elking testified. *Id.*

In addition to secret payments to the only witness to the crime, the Circuit Attorney's Office "took care of" a number of traffic violations for Elking in exchange for his testimony. D114/P119-123; D139. In July of 2019, as the CIU's investigation continued, documentation corroborating Elking's claim that ACA Warren "took care of" traffic violations for him was discovered. Located in the State's file, was a handwritten note corroborating what Elking had been saying all along:



D139. This assistance provided to Elking was concealed from Johnson.

The trial court in its Order states that the State did not provide documentation that the prosecutor knew of the payments to Elking. This is contradicted by the record before the trial court. In 2003, Elking wrote to Reverend Rice: "Then the detectives and me had a meeting with the Prosecutor Dwight Warren and convinced me, that they could help me financially and move me & my family out of our apartment & and relocate use [sic] in the County out of harms [sic] way." D104/P5-6. In 2010, Elking described the first meeting

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with ACA Warren: "During this discussion with the prosecutor, I asked about witness protection money. Dwight [Warren] set me up with his witness protection lady." D107/P7.

Documentation in the State's file describes Elking as an "essential witness" and there can be no doubt that he was—without Elking there was no case against Johnson. D111/P53. The trial court did not acknowledge the clear and undisputed record before it and that failure was in error. This Court should vacate the order dismissing the Motion for New Trial and remand for a fair hearing on the merits.

Mock's Criminal and Informant History Was Not Disclosed

Mock, a man with an extensive criminal history and history of cooperating as a jailhouse informant, was incarcerated in the City Jail holdover unit at the same time Johnson and Campbell were housed there though Mock was never celled with Johnson or Campbell. D101/P25, 51. Nonetheless, Mock testified he heard incriminating conversations involving three inmates about a murder. *Id.* at 26, 51-52.

Mock, a material witness, testified falsely in a number of instances. The State argued at trial that Mock had no motive to lie and that he expected little for his testimony against Johnson. TR.Vol.II/P352-53. That testimony was false, and ACA Warren knew or should have known it was false.

Mock expected much in return for his testimony. In an undisclosed letter from Mock to ACA Warren dated June 3, 1994, Mock wrote:

> I don't believe that anyone in the legal system will disagree with the value of my testimony in this trial as opposed to the conviction that I am now serving. I am willing to testify as long as I don't have to return to the Department of Corrections once I testify. I can't I won't live in protective custody or any

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> institution after I testify. I am serving a five year sentence for CCW, which I have been serving since 1993. I feel my testimony is worth a pardon by Mr. Carnahan or a reduction in my sentence…I will uphold my end of the situation as I am certain you will fulfill your obligations to me.

D136/P1-2.

In a series of undisclosed and impeaching correspondence between Mock and ACA Warren, several letters were written by the Circuit Attorney's Office on Mock's behalf: to remedy disciplinary incidents involving Mock, to request transfers within the DOC to preferred prisons, and to make recommendations for release to the parole board. D136.

In one of the undisclosed letters to ACA Warren, Mock referred to Johnson as a "two-bit nigger," a clear indication of witness bias, prejudice, and racial animus that bears directly on Mock's credibility and motivation to testify against Johnson. *Id.*

Mock testified falsely about his criminal history and the State did not correct the false record. In truth, Mock's criminal history included a number of arrests and convictions, both felony and misdemeanor, that were concealed. Among them: forgery, fraud, burglary, assault, multiple DUIs, larceny, escape, and stealing. D133.

Finally, the State did not disclose that Mock was an incentivized jailhouse informant for the State in 1992 in the prosecution of Joseph Smith. Mock testified, in exchange for a reduction in sentence, that he overheard a jailhouse murder confession while housed in the Jackson County jail. D137. When Mock was specifically asked whether he had been a witness or testified in a criminal case he lied - and the State did not correct the record:

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Q. Have you ever testified before?

A. No, I haven't.

Q. Have you ever given a deposition?

A. No, I haven't.

Q. Have you ever been a witness in a criminal case before?

A. No, I haven't.

D124/P5.

The post-trial investigation uncovered facts that render Johnson's conviction fundamentally unjust. No credible evidence to support the verdict remains. *See State ex rel. Amrine v. Rope*r, 102 S.W.3d 541, 547 (Mo. 2003).

It is within this factual context that the State's appeal should be considered. Under these exceptional circumstances, the Circuit Attorney is duty-bound to move for a new trial. The U.S. Supreme Court held 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).

When a prosecutor becomes aware of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of a crime they did not commit—the position in which the Circuit Attorney now finds herself—the prosecutor is obligated to seek to remedy the conviction. Model Rules of Prof'l Conduct r. 3.8(h). Prosecutors must not only "promptly disclose that evidence to an appropriate court," Model Rules of Prof'l Conduct r. 3.8(g), but "must seek to remedy the conviction." Model Rules

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of Prof'l Conduct r. 3.8 cmt. 8. Where there is a clear duty, there must be a mechanism to fulfil that duty. The trial court found the Circuit Attorney powerless to remedy a wrongful conviction. The State disagrees.

POINTS RELIED ON

I. The trial court erred in dismissing the Motion for New Trial based on Rule 29.11 deadlines because the trial court has authority to hear, and the Circuit Attorney has authority to file the Motion in that the Circuit Attorney must have a vehicle to fulfil her constitutional duty and ethical and professional obligations to correct an unjust conviction within her jurisdiction.

Napue v. Illinois, 360 U.S. 264 (1959)

State v. Henderson, 468 S.W.3d 422 (Mo. App. 2015);

State v. Terry, 304 S.W.3d 105 (Mo. banc 2010)

State ex rel. Weinstein v. St. Louis Cty., 451 S.W.2d 99 (Mo. 1970)

MO. CONST. ART. I, § 10

Mo. Rev. Stat. § 56.550

Mo. Rev. Stat. § 56.450

Mo. Rev. Stat. § 556.036

Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1

ABA Model Rules of Professional Conduct, Rule 3.8 – Special Responsibilities of a Prosecutor

MO. SUP. CT. R. 29.11(b)

MO. SUP. CT. R. 19.03

Mo. Sup. Ct. R. 19.04

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Mo. Const. Art. V, § 5

II. In the alternative, the Trial Court denied the requested relief subject to the inherent authority of the Court of Appeals to conduct plain error review and remand the case for a new trial, and the Court of Appeals should do so here because "extraordinary circumstances" exist in that Johnson is actually innocent and his conviction was obtained through perjured testimony.

State v. Williams, 673 S.W.2d 847 (Mo. App. 1984)

State v. Mooney, 670 S.W.2d 510 (Mo. App. 1984)

March v. Midwest St. Louis, L.L.C., 417 S.W.3d 248 (Mo. 2014)

Mo. Sup. Ct. R. 30.20

III. The Trial Court Erred In *Sua Sponte* Appointing The Attorney General To Represent the State Because the Circuit Attorney is the Recognized Representative Of The State in that No Legally Supported Basis Exists for the Appointment Of The Attorney General, and, Further, the Appointment Created a Constitutional Crisis by Giving Rise to the State Taking Contradictory Positions, when in Fact there is No Conflict that Prevents the Circuit Attorney from Moving for a New Trial

State v. Cooper, 336 S.W.3d 212 (Mo. App. 2011)

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003)

Mo. 22nd Cir. R. 53.3

MO. CONST. ART. II, § 1

Mo. Rev. Stat. § 56.450

Mo. Rev. Stat. § 27.030

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ARGUMENT

I. The trial court erred in dismissing the Motion for New Trial based on Rule 29.11 deadlines because the trial court has authority to hear, and the Circuit Attorney has authority to file the Motion in that the Circuit Attorney must have a vehicle to fulfil her constitutional duty and ethical and professional obligations to correct an unjust conviction within her jurisdiction.

The trial court's holding that it has no authority to hear the State's Motion for New Trial means that the Circuit Attorney has no procedural vehicle to fulfil her ethical, professional, statutory, and constitutional obligations to correct the wrongful conviction of an actually innocent person. This is not and should not be the law.

The issue of the court's authority presents a question of law, which is reviewed *de novo*. *Amsden v. State*, 567 S.W.3d 241, 244 (Mo. App. 2018). The Circuit Attorney preserved the arguments presented herein in her "Brief in Support of Court's Authority to Entertain the Motion for New Trial." D162.

A. The Circuit Attorney is duty-bound to act to remedy Johnson's wrongful conviction

The Circuit Attorney is constitutionally, statutorily, and ethically required to act to correct the legal wrong that is a wrongful conviction of an innocent man secured by perjured testimony.

The starting point for this analysis is the Missouri Constitution which protects the liberty of its citizens and promises "[t]hat no person shall be deprived of life, liberty or property without due process of law." MO. CONST. ART. I, § 10. Johnson's conviction

based on perjured testimony known to the State—and his continued unconstitutional imprisonment—is a clear violation of his rights under the Constitution. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (a conviction obtained through use of false testimony, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears); *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1948) ("No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony. The trial court had the duty to grant a new trial if satisfied that perjury has been committed and that an improper verdict or finding was thereby occasioned.").

Once this constitutional violation has been identified, the Circuit Attorney is duty-bound to act to remedy it. Indeed, she is required by Missouri statute to so act because she swore an oath to uphold both the United States and Missouri Constitutions. Mo. Rev. Stat. § 56.550, **Circuit attorneys and assistants — oaths — duties** ("Before entering upon the duties of their office, the circuit attorney and said assistants shall be severally sworn to support the Constitution of the United States and the Constitution of Missouri, and to faithfully demean themselves in office."). This duty is also express in Mo. Rev. Stat. § 56.450. **Circuit Attorney — duties (St. Louis City)**, which obligates the circuit attorney to "manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction."

Additionally, the Circuit Attorney is a prosecutor, elected by the individuals of St. Louis. As an elected prosecutor, the Rules of Professional Conduct obligate the Circuit

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Attorney to remedy constitutional violations like those in Johnson's case. Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1 ("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."). 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.

Further, fundamental Constitutional law makes clear the Circuit Attorney is ethically *required* to act where she has identified the conviction of an innocent person based on perjured testimony. *Napue v. People of State of Ill.*, 360 U.S. 264, 269–70 (1959) ("[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."); *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) ("Prosecutors have a special duty to seek justice, not merely to convict."); *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"); *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010) (prosecutor's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction."). As a duly elected minister of justice, a prosecutor's obligation to correct such a known injustice never terminates.

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Finally, an uncorrected wrongful conviction is not simply in tension with the Circuit Attorney's statutory mandates and her ethical responsibility to do justice, but it presents a great threat to the public's faith and trust in her office and the justice system itself. The prosecutorial obligation to maintain the public's faith in the justice system does not terminate simply because the jury already returned its verdict or because the judge already rendered a sentence.

Here, the Circuit Attorney has found that there is clear and convincing evidence Johnson is actually innocent of murder and armed criminal action, for which he was convicted in her jurisdiction, and that his conviction was solely obtained through perjured testimony. These facts and the State's findings are unrefuted. This implicates Johnson's constitutional rights and, correspondingly, the Circuit Attorney is duty-bound to act to remedy the wrongful conviction.

B. The Circuit Attorney's duty to act gives her authority to act

Because the Circuit Attorney is duty-bound to act, she must have the power to pursue an appropriate remedy in court, as she has done here. *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"); *see also D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 784 (Mo. 2019) (finding that the court had the inherent power to create criminal procedure where there was no statute or court rule directly on point). This power cannot be circumscribed by the 15-day deadline in Rule 29.11.

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As a threshold issue, the deadlines in Rule 29.11 are not applicable here. Rule 29.11 restricts the remedies available to a *convicted defendant* to challenge his conviction. *See, e.g.*, MO. SUP. CT. R. 29.11(b) ("A motion for a new trial or a motion authorized by Rule 27.07(c) [governing application of a ***defendant*** for a new trial] shall be filed within fifteen days after the return of the verdict. On 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."). The purpose of Rule 29.11 is "to allow the trial court the opportunity to reflect on its action during the trial" and "be given an opportunity to review and correct its own errors before the aid of an appellate court can justly be involved." *State v. Bartlik*, 363 S.W.3d 388, 391 (Mo. App. 2012). Accordingly, the 15-day time limitations cannot justly be read to restrict the remedies available to the Circuit Attorney. *See* MO. SUP. CT. R. 19.03 ("Rules 19 to 36, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every criminal proceedings.").

Indeed, finding that the Circuit Attorney must act within the deadlines of Rule 29.11 hugely diminishes her express authority under Mo. Rev. Stat. § 56.450, **Circuit Attorney — duties (St. Louis City)**, which empowers her to "manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction." Such a rule would also contravene Mo. Rev. Stat. § 556.036 which provides that "[a] prosecution for murder . . .may be commenced at any time," in that it would prohibit her from prosecuting the actual perpetrators of a murder when new evidence

surfaces regarding the true culprit. In these ways, the trial court's Order limiting the Circuit Attorney to the Rule 29.11 deadlines is inconsistent with Mo. Sup. Ct. R. 19.04 which provides that "[i]f no procedure is specially provided by rule, the court having jurisdiction shall proceed in a manner consistent with judicial decisions or ***applicable statutes***." (Emphasis added.) In fact, it is questionable whether the trial court's construction of Rule 29.11 is Constitutional. Mo. Const. art. V, § 5 ("The rules [of criminal procedure] shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.").

Alternatively, even if the time requirements in Rule 29.11 apply here, they have been waived. As established in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. 2009), the time limits function as a "limit on remedies." Since noncompliance with Rule 29.11 deadlines "is not a jurisdictional defect," the Circuit Attorney may waive any applicable deadlines, which she has expressly done here. *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); *Henderson*, 468 S.W.3d at 425, n.5 (the prosecution waived compliance with Rule 29.11(b) when it "twice pressed the trial court to consider the untimely Brady claim.")

Finally, the Supreme Court of Missouri recognizes a "manifest injustice" exception to time bars in cases of newly discovered evidence. *State v. Terry*, 304 S.W.3d 105, 109 (Mo. banc 2010). The exception is clearly implicated here, particularly when the Motion for New Trial was filed by the State and joined by Johnson. *State v. Williams*, 673 S.W.2d

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847, 848 (Mo. App. 1984) ("[W]e see no reason for limitation where the State joins in the request for release. Mindful though we are of the exclusivity of this Court's jurisdiction once a notice of appeal has been 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 .... [I]n light of the State's concession that the evidence exists, it should be heard.").

For these reasons, the trial court erred in holding that it had no authority to entertain the State's Motion for a New Trial.

II. In the alternative, the Trial Court denied the requested relief subject to the inherent authority of the Court of Appeals to conduct plain error review and remand the case for a new trial, and the Court of Appeals should do so here because "extraordinary circumstances" exist in that Johnson is actually innocent and his conviction was obtained through perjured testimony.

Even if a motion for new trial is filed out of time, 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. *State v. Williams*, 504 S.W.3d 194, 197 (Mo. App. 2016). "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20. "Plain error review is used sparingly and is

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limited to those cases where there is a clear demonstration of manifest injustice or miscarriage of justice." *Id.*

Here, "extraordinary circumstances" exist because the Circuit Attorney has shown clear and convincing evidence establishing Johnson is actually innocent and that his conviction was secured through false testimony.

A. Newly discovered evidence of actual innocence renders the verdict improper and unjust

First, "extraordinary circumstances" exist because newly discovered evidence completely exonerates Johnson. *See Williams*, 673 S.W.2d at 848 (finding that Williams was entitled to file a motion for a new trial and receive a hearing on the motion where Williams' evidence was "detailed" and "if believed, the newly discovered evidence would completely exonerate the defendant of any complicity in the crime for which he was convicted"). Because the evidence fully exonerates Johnson, "extraordinary circumstances" exist that warrant remanding the case to the trial court for a new trial.

Initially, it should be made known that the newly-discovered evidence could not have been procured by Johnson at the time of trial. Through the course of the CIU investigation, the Circuit Attorney uncovered new evidence documenting witness payments to Elking that was not available to the defense at trial and was undiscoverable by Johnson that prove Johnson is innocent. The affidavits of Campbell, Howard, McClain, Cooper, and Elking, as well as the personal writings of Campbell and Elking, could not have been known to Johnson at trial. When Johnson attempted to collect newly-discovered evidence in the years after his trial, the State concealed and failed to disclose any

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exculpatory evidence sought at every opportunity. Finally, the evidence of innocence was unavailable to Johnson because the State failed in its duty to investigate the crime, presented an identification that was manufactured, false, and incentivized, presented false testimony relating to the alibi, and failed to disclose exculpatory evidence in violation of *Brady* and its progeny.

Additionally, the evidence is precisely the type of "extraordinary circumstances" recognized by Missouri courts. *See, e.g.*, *State v. Parker*, 208 S.W.3d 331, 334 (Mo. App. 2006) ("extraordinary circumstances" exist for remanding for a new trial "where the newly discovered evidence would have completely exonerated the defendant"). The Circuit Court has found that newly-discovered evidence clearly and convincingly exonerates Johnson. D99/P17-38. For these reasons, the Court should remand the case for a new trial.

B. Perjury by material witnesses renders the verdict improper and manifestly unjust

In addition to the newly-discovered evidence, "extraordinary circumstances" exist because clear and convincing evidence shows that State witnesses deliberately perjured themselves and, without this false testimony, Johnson would not have been convicted. "The starting point in any analysis of post-conviction relief based on perjury is the general rule that a conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated." *State v. Mims*, 674 S.W.2d 536, 538 (Mo. 1984) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (conviction reversed); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976); *Miller v. Pate*, 386 U.S. 1, 7 (1967); *State v. Moore*, 435 S.W.2d 8, 16 (Mo. 1968); *Coles v. State*, 495 S.W.2d

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685, 687 (Mo. App. 1973). "The granting of a new trial on perjury grounds requires a showing that the witness willfully and deliberately testified falsely." *March v. Midwest St. Louis, L.L.C.*, 417 S.W.3d 248, 255 (Mo. 2014) (citation omitted). "Even when a witness has provided false testimony, a trial court may grant a new trial only when it is satisfied that the perjury was material in character as to render an improper verdict." *Id.* at 256; *see also State v. Mooney*, 670 S.W.2d 510, 516 (Mo. App. 1984) ("Where it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."). "[T]he determination of the materiality of alleged false testimony is a question of law for the determination of the court." *March*, 417 S.W.3d at 256. There are multiple instances of perjury that occurred during Johnson's trial that were unknown to Johnson or his defense counsel at trial.

The evidence establishes that on multiple occasions, the State's star witness at trial, Elking, perjured himself at Johnson's trial. Elking recanted his initial identification – an identification that was both manufactured and false, admitted in personal writings, affidavits, and deposition testimony that he was never able to make an identification because the gunmen wore masks that covered nearly all of their faces, and told Nickerson that he could not identify the gunmen. TR.Vol.I/P159. Throughout the investigation, Elking continued to tell the police that he did not know any of Boyd's associates and did not recognize or know the gunmen. D104/P5; D126/P3; D123/P2; D107/P3-4; D114/P15-16, 74-76.

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To compel Elking to testify, Nickerson promised Elking money if he agreed to be a witness against Johnson, knowing that Elking could not identify the perpetrators. Elking finally succumbed to the pressure, intimidation, and promise of money and agreed to a statement identifying Johnson crafted by Detectives Nickerson, Stittum, and Bailey. D101/P50; D107/P6. At trial, Elking knowingly provided false testimony against Johnson at the time he testified. The newly-discovered evidence that Elking committed perjury when he identified Johnson is overwhelming:

(1) In 2003, Elking wrote a letter to Reverend Rice admitting that he testified falsely against Johnson. D104/P5-6.

(2) In a series of letters to Johnson, Elking admitted that his identification was coerced and false. D126.

(3) In 2003, Elking signed an affidavit stating that he testified falsely. D123.

(4) In 2010, Elking signed an affidavit stating that he testified falsely. D107.

(5) In 2019, Elking met with the CIU and admitted that he could not see the assailants, never had any ability to identify the assailants, and testified falsely when he identified Johnson.

(6) In 2019, Elking testified under oath that his identification of Johnson was false and manufactured. D114.

(7) Receipts of payment from the State to Elking, never disclosed to the defense, corroborate Elking's account. D111.

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Without Elking's identification of Johnson, there would have been no case against Johnson. Elking was the sole witness to the murder, and accordingly was an essential, material witness for the State. Undoubtedly, Elking's perjury and false identification prejudiced Johnson.

In another instance of prejudicial perjured testimony, Nickerson testified falsely regarding Johnson's alibi. It was undisputed that at the time the murder occurred, Johnson was at an apartment with friends located at 3907 Lafayette Avenue with the exception of about five minutes. TR.Vol.II/P313; D119/P31; D121/P1; D120/P1. Nonetheless, the State presented perjured testimony, through Nickerson, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes," and that he had personally driven the route anywhere from "20-50 times." (TR.Vol.II/P334-35). The undisputed evidence proves that the assailants arrived on foot, and simple distance calculations contradict Nickerson's false testimony regarding Johnson's alibi. Without Nickerson's testimony, Johnson's alibi evidence would have proven his innocence.

In addition to the knowingly perjured testimony from Elking and Nickerson, the State put on testimony from William Mock, a man with an extensive criminal history and history of cooperating as a jailhouse informant, and misrepresented that Mock had no motive to lie. In a series of undisclosed, exculpatory, and impeaching correspondence between Mock and ACA Dwight Warren, several letters were written by Warren on Mock's behalf for varying purposes including to remedy disciplinary incidents involving Mock, to request transfers for Mock within the DOC to preferred prisons, and to make

recommendations for Mock's release to the parole board. None of these favors were disclosed to the defense, and Mock lied to the jury about his expectation of receiving beneficial treatment in exchange for his testimony. Mock further testified falsely about his criminal history, and the State did not correct the false record offered to the jury. (D101/P25, 51).

As the State has shown with credible and overwhelming evidence, Elking, Nickerson, and Mock knowingly testified falsely at Johnson's trial. These "extraordinary circumstances" warrant remand to the trial court for a hearing on the State's Motion for New Trial.

III. The Trial Court Erred In *Sua Sponte* Appointing The Attorney General Because the Circuit Attorney is the Recognized Representative Of The State in that No Legally Supported Basis Exists for the Appointment, and, Further, the Appointment Created a Constitutional Crisis by Giving Rise to the State Taking Contradictory Positions, when in Fact there is No Conflict that Prevents the Circuit Attorney from Moving for a New Trial

The trial court did not disqualify the Circuit Attorney, but instead appointed the Attorney General *sua sponte* to simultaneously represent the State and invited the Attorney General to file a brief diametrically opposed to the Circuit Attorney's position on the issue of authority. D161. The trial court justified the appointment as protecting the "integrity of the legal process" in two respects: first, Johnson's counsel may have violated a court rule in contacting jurors, and second there was no "independent" review of the "allegations of

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non-conclusory prosecutorial misconduct." D167/P8-9. Neither are factually or legally valid bases for appointment of the Attorney General, and in doing so, the trial court has forced a Constitutional crisis. The Court of Appeals should remedy this error by reversing the *sua sponte* appointment of the Attorney General.

This Court reviews the appointment of the Attorney General for an abuse of discretion. *State v. Eckelkamp*, 133 S.W.3d 72, 74 (Mo. App. 2004). The Circuit Attorney preserved this argument in its Motion to Strike the Attorney General's Response. D164.

A. An alleged violation of Local Rule 53.3 is not a basis to usurp the Circuit Attorney's authority and appoint the Attorney General

The Twenty-Second Judicial Circuit's Local *Trial* Rule 53.3 **Post-Trial Juror Contact**, states, that "no attorney…shall contact any member of a jury which has heard evidence in any cause in this circuit" unless permission is granted by the court. R. 53.3. There is no allegation that the Circuit Attorney contacted jurors in violation of Local Rule 53, a fact that the Order recognizes. D167. The Order took issue with juror contact more than two decades after the verdict by Johnson's counsel, not the Circuit Attorney. Further, Judge Booker Shaw told Johnson's jury: "And the admonition that I previously gave you about not discussing the case is removed and you can freely discuss the case if you wish to or if you don't want to, you don't have to talk about it." TR.Vol.II/P380. Johnson's counsel interviewed willing jurors to learn whether newly discovered evidence may have been important in order to make an informed decision on Johnson's guilt. Such interviews are typical in innocence cases as the burden of proof is high in showing that "no reasonable

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juror" would convict based on the newly discovered evidence. *See Schlup v. Delo*, 513 U.S. 298 (1995); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003).

While the juror's statements were given to the Conviction Integrity Unit ("CIU") to aid in its fact-finding mission, their incorporation into the CIU's report is not a basis for disqualifying the Circuit Attorney or appointing the Attorney General. Neither is the trial court's unreasonable fear that statements from jurors who were presented false and perjured testimony is a "threat to the integrity of the legal process" owed to Johnson. D167/P3-5, 9.

In fact, no Missouri court has denied a Motion for New, or usurped the Circuit Attorney's authority on this basis, and there is no valid support to take such drastic measures where an innocent person's liberty is at stake. This is particularly true where the alleged violation was made by *an attorney other than the one filing the motion.* At most, the violation of a post-trial juror contact rule may result in the inability to rely on the juror's statements to impeach the verdict. *State v. Cooper,* 336 S.W.3d 212, 216 (Mo. App. 2011) ("The jurors' statements, upon which Defendant relies, related to the decision-making processes that transpired during jury deliberations and therefore cannot be used by Defendant to impeach the verdict.")

The violation, if one exists, has no bearing on the State's duty and discretion to bring the Motion for New Trial, is unrelated to the State's finding that the newly discovered evidence of innocence, perjury, and misconduct exonerates Johnson, and is not a valid basis

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for the appointment of the Attorney General. Accordingly, the Court should vacate the trial court's order appointing the Attorney General.

B. The CIU's independent investigation into prosecutorial misconduct in its own office is not a basis to usurp the Circuit Attorney's authority

There is no conflict in the St. Louis Circuit Attorney's CIU reviewing Johnson's case for prosecutorial misconduct within its own office that happened nearly 25 years ago. Indeed, the very purpose of CIU's is to "ensure the accuracy, and therefore the legitimacy – that is, the integrity – of all criminal convictions secured by the Office." *See* John Holloway, *Conviction Review Units: A National Perspective, Quattrone Center for the Fair Administration of Justice,* April 2016, available at https://www.law.upenn.edu/live/files/5522-cru-final (emphasis added). Because a CIU is reviewing cases within its jurisdiction, a "[CIU] must be open to the possibility that mistakes have been made in the Office over time, and it must have the support of the [prosecuting attorney] and Office leadership to conduct full investigations that may dredge up unpleasant facts for the [prosecuting attorney] or his or her colleagues." *Id.* at 23.

Here, the trial court erred in concluding a conflict exists based on allegations of prosecutorial misconduct in the Circuit Attorney's office 25 year ago. D167/P5. This is precisely why CIUs exist—to review the integrity of convictions obtained by the office previously, which includes reviewing the work of former attorneys employed by that office.

Prosecuting attorneys, like the Circuit Attorney here, are aware of this purpose and have taken steps to ensure that CIUs have a degree of independence, although decisions

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must ultimately be made by the Circuit Attorney. Since individuals independent from those who sought the convictions in the first place are important in CIU's, the Innocence Project released its "Conviction Integrity Best Practices" recommending, among other things, that CIUs should "either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority…" Innocence Project, *Conviction Integrity Unit Best Practices*, October 2015, at 3, available at https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf. Contrary to the trial court's conclusion that the CIU did not follow these practices, which is still not a valid reason to usurp the Circuit Attorney's authority and appoint the attorney general, the Circuit Attorney hired former public defender, Jeffrey Estes, to review CIU cases as part of his duties. His review of Johnson's case was clearly "independent" as he was not a part of the office or team that wrongfully convicted Johnson 25 years ago.

For similar reasons, the trial court misunderstood the "best practices" guidelines by suggesting the CIU should have referred the case to some other "independent authority" to investigate prosecutorial misconduct. D167/P6. The CIU *is* an independent authority with respect to Johnson's case and Estes prosecution of other cases is only relevant if he were reviewing those same cases as part of the CIU. *See Conviction Review Units: A National Perspective.* The Circuit Attorney's CIU satisfies all elements for independence.

Additionally, both the CIU and the Midwest Innocence Project conducted independent and joint investigations, concluding in a July 18, 2019 CIU Report, 70 pages long, outlining the clear and convincing violations of Johnson's constitutional rights,

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Johnson's actual innocence, and the prosecutorial misconduct and perjury that plagued his criminal trial. None of those findings are in dispute, and it is difficult to imagine what additional "independent review" would be necessary, at the very least for the trial court to conduct a hearing on the evidence therein. Indeed, the trial court's reasoning, if adopted by other courts, would essentially render every CIU around the country useless. Since 2014, most exonerations in the United States have resulted from the work of full-time "professional exonerators," including both CIUs and innocence organizations. National Registry of Exonerations, *Exonerations in 2018*, April 9th, 2019, available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf. In 2018 alone, 58 individuals were exonerated by the work of CIUs—work that was done by the very offices that convicted the defendants they exonerated. *Id.*

Similarly, the purposes of the Best Practices guidelines is to ensure that each defendant has a fair and thorough review of their cases unbiased by prior relationships a prosecutor may have had with the actors in the case, not to prevent an innocent individual from being freed.

C. The trial court's *sua sponte* appointment of the Attorney General violates the separation of powers doctrine and creates a constitutional crisis

The trial court's appointment of the Attorney General created an avoidable and unnecessary constitutional crisis. Both the Circuit Attorney (a quasi-judicial officer and member of the judicial branch) and the Attorney General (a member of the executive branch) now purport to represent the State of Missouri and have taken diametrically

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opposed viewpoints in this matter. This is a crisis that implicates the separation of powers clause in the Missouri Constitution:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. art. II, § 1.

The Circuit Attorney speaks for the State in this matter, not the Attorney General. As succinctly stated in the *Amicus Curie* Brief filed in Support of the Circuit Attorney's Motion for New Trial:

> There is [*sic*] 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.
>
> ***
>
> The Circuit Attorney [*sic*] 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.

D155/P14-15, 19. Indeed, the Missouri legislature makes clear that the Circuit Attorney has the duty to "manage and conduct all criminal cases," Mo. Rev. Stat. § 56.450, whereas the Attorney General's role is to "aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts …." Mo. Rev. Stat. § 27.030 (emphasis added); Mo. Rev. Stat. § 27.060 (the Attorney General "may also appear and interplead, answer or

defend, in any proceeding or tribunal in which the State's interest are involved."). The Attorney General's dual statutory obligations, when read together, create a clear limitation on the Attorney General's authority in those cases when a prosecuting attorney "discharge[s] their duties in the trial courts." Indeed, the Attorney General was not appointed to "aid" the Circuit Attorney here, but to oppose the elected prosecutor's assessment of a criminal case in her own jurisdiction.

In appointing the Missouri Attorney General on behalf of the State of Missouri, the trial court created an avoidable constitutional crisis. While the trial court recognized it has "the inherent power to do what is reasonably necessary for the administration of justice," D167/P3, the trial court abused its authority by appointing the executive branch (the Attorney General) to usurp the Circuit Attorney's essential judicial powers and functions. This result cannot stand.

For these reasons, the Court of Appeals should remedy the trial court's error by reversing the *sua sponte* appointment of the Attorney General and remanding the case for further proceeding.

CONCLUSION

For one or more reasons stated in Points I and II, this Court should reverse the trial court's ruling and remand the case for a new trial or, at a minimum, for a hearing on the evidence. For the reasons set forth in Point III, the Court should reverse the trial court's *sua sponte* appointment of 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 October 23, 2019 upon the filing of the foregoing document.

/s/ Jeff Estes
Jeff Estes

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CERTIFICATE OF COMPLIANCE

I, Jeff Estes, hereby certify that this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and with the Eastern District Special Rule 360. The brief was completed using Microsoft Word in Times New Roman 13 point font. This brief, *in toto*, contains 14,453 words, which does not exceed the 15,500 words allowed for an appellant's initial brief under Special Rule 360.

/s/ Jeff Estes
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