IN THE SUPREME COURT OF MISSOURI

No. SC98303

STATE OF MISSOURI,

Respondent,

v.

LAMAR JOHNSON,

Appellant.

Appeal from the Circuit Court of St. Louis City
Hon. Elizabeth Hogan
Cause No. 22941-03706A-01

BRIEF OF *AMICI CURIAE* 45 PROSECUTORS IN SUPPORT OF THE CIRCUIT ATTORNEY'S MOTION FOR NEW TRIAL

BRYAN CAVE LEIGHTON PAISNER LLP

Charles A. Weiss, #20299
Jonathan B. Potts, #64091
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)
caweiss@bclplaw.com
jonathan.potts@bclplaw.com

***Attorneys for* Amici Curiae**
45 Prosecutors

***Of counsel*:**

Michael A. Wolff, #27633
St. Louis University School of Law
100 N. Tucker Blvd.
St. Louis, MO 63101
(314) 691-4377

***Attorney for* Amicus Curiae**
Wesley Bell, St. Louis County Prosecuting Attorney

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IDENTITY OF *AMICI CURIAE*

Amici curiae are current elected prosecutors (District Attorneys, State's Attorneys, and Prosecuting Attorneys) in 45 jurisdictions in 25 states across the United States, including St. Louis County, Missouri. Collectively, *amici* serve a population of approximately 40,000,000 people throughout the United States. In particular, *amici* are the following:

Aramis Ayala, State Attorney, Ninth Judicial Circuit, Florida

Diana Becton, District Attorney, Contra Costa County, California

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

Chesa Boudin, District Attorney, City and County of San Francisco, California

Aisha Braveboy, State's Attorney, Prince George's County, Maryland

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

John Choi, County Attorney, Ramsey County, Minnesota

Darcel Clark, District Attorney, Bronx County, New York

David Clegg, District Attorney, Ulster County, New York

Shameca Collins, District Attorney, Sixth Judicial District, Mississippi

Scott Colom, District Attorney, Sixteenth Judicial District, Mississippi

John Creuzot, District Attorney, Dallas County, Texas

Satana Deberry, District Attorney, Durham County, North Carolina

Parisa Dehghani-Tafti, Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia

Steve Descano, Commonwealth's Attorney, Fairfax County, Virginia

Michael Dougherty, District Attorney, Twentieth Judicial District, Colorado

Mark Dupree, District Attorney, Wyandotte County, Kansas

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

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

Joe Gonzales, District Attorney, Bexar County, Texas

Eric Gonzalez, District Attorney, Kings County, New York

Mark Gonzalez, District Attorney, Nueces County, Texas

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Andrea Harrington, District Attorney, Berkshire County, Massachusetts

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Natasha Irving, District Attorney, Prosecutorial District Six, Maine

Justin F. Kollar, Prosecuting Attorney, County of Kauaʻi, Hawaiʻi

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David Sullivan, District Attorney, Northwestern District, Massachusetts

Raúl Torrez, District Attorney, Bernalillo County, New Mexico

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

Andrew Warren, State Attorney, Thirteenth Judicial Circuit, Florida

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

Sharen Wilson, Criminal District Attorney, Tarrant County, Texas

Amici are responsible for the administration of justice and the protection of public safety in their jurisdictions. They have a strong interest in this case because addressing past injustices such as wrongful convictions is a core duty of an elected prosecutor. Any erosion of this duty impedes the work of prosecutors and undermines the public trust necessary to carry out *amici*'s mission.

Like the Circuit Attorney for the City of St. Louis ("Circuit Attorney"), many *amici* oversee conviction integrity or conviction review units (collectively referred to herein as "CIUs") that investigate whether wrongful convictions have occurred within their respective jurisdictions. Other *amici*, including the St. Louis County Prosecuting Attorney, have formed or are considering forming CIUs within their jurisdictions.

Nationally, CIUs have grown into a recognized benchmark for local prosecution offices to best serve their communities. Today, CIUs serve as well-settled vehicles for reviewing and, when necessary and appropriate, seeking to overturn convictions when

there is evidence of actual innocence, prosecutorial or law enforcement misconduct, or any other considerations that undermine the integrity of a conviction. By the end of 2018, CIUs operated in 44 jurisdictions across the country, including in many of *amici*'s own cities and counties. *See generally* National Registry of Exonerations, *Exonerations in 2018*, at 2, 12 (Apr. 9, 2019), *available at* https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf (last visited Feb. 10, 2020).

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

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

performance of the prosecution function." ABA Standard 3-1.2(a) – Functions and Duties of the Prosecutor.

As such, court-ordered exonerations often come at the request, and with the assistance of, local prosecutors such as *amici* who ask courts to vacate, reopen, and address prior convictions in cases where an investigation has determined that the interests of justice cannot allow the conviction to stand.[1] For all of these reasons, and to protect the integrity of this well established and growing practice, *amici* respectfully submit this brief to set forth the unique role that prosecutors must play – as ministers of justice ethically bound to correct past injustices – in rectifying wrongful convictions that have occurred within their jurisdictions. All parties have consented to the filing of this brief.[2]

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

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

SUMMARY OF ARGUMENT

As the Court of Appeals recognized, the issues raised by Lamar Johnson's case "are undeniably important and include questions fundamental to our criminal justice system." (Opinion, p. 10). *Amici* agree. The incarceration of an innocent person at the hands of his own government is an intolerable event. The public's trust in its appointed prosecutors and judges rests on a bright-line understanding that "the purpose of the criminal justice system is to convict the guilty and free the innocent." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 n.3 (Mo. banc 2003).

With this understanding, in every election cycle the voting public entrusts a small group of stewards with the solemn power to prosecute criminal cases that deprive citizens of their liberty and, in some cases, their lives. When an innocent person becomes enmeshed in the gears of that system, the officials empowered by the public to turn on the machinery are not powerless to turn it off. It would be a perverse system indeed if elected representatives may ask the courts to imprison innocent citizens but not to free them.

In this respect, although prosecutors serve as legal representatives of the State, they are not one-dimensional advocates charged with obtaining convictions and resisting the reversal of a wrongful conviction at all costs. "Prosecutors have a special duty to seek justice, not merely to convict." *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011). Consistent with that duty, prosecutors are not hapless bystanders to the wrongful convictions they identify under their watch.

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

An uncorrected wrongful conviction is not simply in tension with the very essence of *amici*'s responsibility to do justice; it presents a greater threat to the public's faith and trust in its local government officials and the justice system itself. As such, addressing a wrongful conviction by seeking a remedy through the local courts is the necessary first step in restoring the public's trust in the justice system as a whole. If no remedy is available, however, trust suffers yet another blow, and the ability of *amici* to promote safer communities is eroded.

Confronting a wrongful conviction is a grave matter for any prosecutor. But when faced with credible evidence of a defendant's innocence, prosecutors have an ethical duty to seek a remedy, most commonly through the courts. Prosecutors are quasi-judicial officials who serve the people of this State, in the words of this Court (and others), as "ministers of justice." In this role, prosecutors have immense discretion in their lawful pursuit of criminal cases, guided by the constitutional and ethical obligations of their office. When the existence of a wrongful conviction becomes clear, an obligation arises

to intervene and halt the continued incarceration of an individual previously prosecuted by that office. This prosecutorial obligation does not terminate whenthe jury returns its verdict or the judge renders a sentence. As a duly elected minister of justice, a prosecutor's obligation to correct a known injustice *never* terminates. And because that obligation never terminates, neither does the prosecutor's right to pursue an appropriate remedy in court, as the Circuit Attorney has done here.

Consistent with these principles, the Circuit Attorney seeks to exercise the power of her office to carry out her obligation to correct Johnson's conviction. This is a case in which the Circuit Attorney-led CIU's investigation has unearthed deeply concerning facts that call into question the integrity of Johnson's conviction and thereby render unjust his continued incarceration after two decades in State custody. According to the Circuit Attorney's motion, the CIU determined that *Brady* violations, newly discovered evidence of actual innocence, and other misconduct by a homicide detectives and a former prosecutor in the office – including perjured testimony, suppression of exculpatory and material impeachment evidence of secret payments to the sole eyewitness, and undisclosed *Brady* material related to a jailhouse informant with a history of incentivized cooperation with the State – tainted the conviction. (D99, ¶¶ 115–173). On its face, Johnson's need for relief is highly compelling.

Therefore, *amici* are deeply troubled by the trial court's conclusion that the Circuit Attorney lacks the ability and authority to remedy an unjust conviction based on procedural deadlines intended to limit *defendants'* motions for new trial. The waiver of a non-jurisdictional procedural deadline to bring a motion for a new trial falls squarely

within the Circuit Attorney's discretion in handling criminal matters and should be given deference by the courts. Moreover, this Court 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 need for this exception first arose in the context of motions brought by defendants themselves, but the public interest in adjudicating these motions becomes only more critical when the prosecution moves for a new trial. Likewise, this Court has indicated that any time bar should not apply in instances of material perjury, *id.* at 111, which is an affront to the justice system that taints the presentation of the evidence to the jury. Under any of these exceptions, the Circuit Attorney has the right to move for a new trial and the obligation to remedy the injustice uncovered in this case.

As another obstacle to the Circuit Attorney's proper exercise of her authority, the trial court *sua sponte* appointed the Attorney General to appear on behalf of the State by suggesting that the Circuit Attorney, by acting to address misconduct of a prior employee of the Circuit Attorney's Office, might threaten the integrity of the judicial process. Under well-established conflict rules, there is no alleged "personal interest" that would prevent the Circuit Attorney from representing the State in Johnson's case. Nor can there possibly be any disqualifying conflict to impute to the entire fleet of attorneys in the Circuit Attorney's Office based on the actions of a prosecutor over two decades ago who is no longer employed by the office. The absence of a disqualifying conflict is self-evident, considering that the CIU has *recommended* Johnson's exoneration, and the Circuit Attorney has *adopted* the CIU's recommendation.

Nevertheless, based on the trial court's professed "concerns" over this perceived conflict (D167, p. 9), the trial court appointed the Attorney General as something resembling co-counsel without finding any basis to disqualify the Circuit Attorney's Office. That appointment has resulted in an unprecedented tug-of-war between two political offices who both claim to speak on behalf of the State. Johnson, in the meantime, remains stuck in the middle.

Because there was no disqualifying conflict, the trial court sought to justify its appointment by citing "best practices" that propose independent review for cases involving allegations of prosecutorial misconduct within the local office. But those recommended "best practices" are a moot point where, as here, the CIU and the Circuit Attorney have already *agreed* that the prior prosecutor committed misconduct. Thus, the trial court's appointment of the Attorney General was a solution in search of a problem.

Endorsing the trial court's rulings will undermine the efficacy and operation of local prosecutors' offices and CIUs, and *amici* feel compelled to express their serious concern with the process owed to Johnson. In the absence of a disqualifying conflict, the Circuit Attorney was and is the sole legal representative of the State in Johnson's case. The trial court's invitation for prosecutorial turf wars over phantom conflicts will not only strip CIUs of any ability to remedy a wide range of past cases, but result in grave consequences for local prosecutors' offices seeking to prosecute even routine criminal matters.

For these reasons, the trial court erred in concluding that it lacked authority to adjudicate the Circuit Attorney's motion for a new trial. The trial court also erred in

refusing to vacate its order appointing the Attorney General to represent the State in this case. This Court should reverse and hold that the Circuit Attorney has not only the authority to seek a new trial for Johnson, but also the sole authority to represent the State's interests within the Circuit Court of St. Louis City in connection with this matter.

ARGUMENT

I. The Trial Court Erred in Dismissing the Circuit Attorney's Motion for New Trial Because the Trial Court Had Authority to Entertain the Motion, in That, as the City of St. Louis's Duly Elected Representative, the Circuit Attorney Must Have a Mechanism to Discharge Her Constitutional and Ethical Obligations to Seek a New Trial for Johnson on the Basis of Newly Discovered Evidence, Perjury, and Constitutional Violations That Tainted a Prior Circuit Attorney's Prosecution.

Elected prosecutors such as the Circuit Attorney occupy a singular role in the local criminal justice system. The Circuit Attorney is a quasi-judicial officer elected by the citizens of the City of St. Louis to decide how to administer that system within the City. In exercising this discretion, the Circuit Attorney is both constrained and guided by ethical and constitutional principles.

As a public servant elected by the people of St. Louis City, the Circuit Attorney must be empowered to rectify factual and constitutional errors that led to a wrongful conviction within that jurisdiction and resulted in a miscarriage of justice. The recognized mechanism is a motion for a new trial. The right to bring such a motion is not limited to criminal defendants. Rather, this Court recognizes that either "the prosecuting attorney or the defendant may move for a new trial based on newly discovered evidence…." *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. banc 1985).

Consistent with the discharge of the Circuit Attorney's own constitutional and ethical obligation, the Circuit Attorney may waive non-jurisdictional time limitations that might otherwise preclude a criminal defendant from filing a new trial motion. *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. 2015). The Circuit Attorney may also present newly discovered evidence that would avoid a manifest injustice, as well as

evidence of perjury, both of which provide alternative bases for the requested relief. *State v. Terry*, 304 S.W.3d 105, 109, 111 (Mo. banc 2010).

Therefore, the trial court erred in holding that it lacked authority to entertain the Circuit Attorney's motion for a new trial.

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

"[A] circuit or prosecuting attorney 'is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty.'" *State ex rel. Dowd v. Nangle*, 276 S.W.2d 135, 137 (Mo. banc 1955) (quoting *State on inf. McKittrick v. Wymore*, 132 S.W.2d 979, 986 (Mo. banc 1939)). The office is described as "quasi-judicial" because Missouri law has entrusted the Circuit Attorney with "the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e., not merely ministerially] but acting as a result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person." *State ex rel. Griffin v. Smith*, 358 S.W.2d 590, 593 (Mo. banc 1953) (alteration in original). As a result, the office of prosecutor is "one of consequence and responsibility," *id.*, and "must be administered with courage and independence." *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976) (quoting *Pearson v. Reed*, 6 Cal. App. 2d 277, 287 (1935)). Missouri cases, and the commentary to Missouri's ethical rules, repeatedly

acknowledge the prosecutor's role as a "minister of justice." *See* Rule 4-3.8, cmt. 1; *State ex rel. Thrash v. Lamb*, 141 S.W. 665, 669 (Mo. banc 1911); *State v. Burton*, 320 S.W.3d 170, 175 n.2 (Mo. App. 2010); *State ex rel. Schultz v. Harper*, 573 S.W.2d 427, 430 (Mo. App. 1978).

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

As an elected official, the Circuit Attorney's lawful discretion in handling criminal cases carries with it the mandate of the citizens of the City of St. Louis. Indeed, in seeking office, the current Circuit Attorney ran on a platform of criminal justice reform. *See, e.g.*, *Former prosecutor turned state rep takes St. Louis circuit attorney primary*, St. Louis Post-Dispatch (Aug. 3, 2016). Following her election, the Circuit Attorney formed a CIU, consistent with that platform. The CIU's subsequent reinvestigation of Johnson's case has made him the first beneficiary of this widely recognized best practice. The Circuit Attorney's decision to seek to vacate Johnson's conviction – obtained by her predecessor in office over twenty years ago – is a weighty one, but entitled to respect and

deference. In making this decision, the Circuit attorney remains "accountable to the law, and to the people." *Griffin*, 258 S.W.2d at 593.

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

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

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

Under the U.S. Constitution, "the prosecutor's role transcends that of an adversary." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). Instead of serving as a blind advocate for conviction, a prosecutor "is considered '"the representative not of an

ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."'" *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))); *accord State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 343 n.9 (Mo. banc 2013); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 78 (Mo. banc 2011). As a result, "'[i]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *Connick v. Thompson*, 563 U.S. 51, 71 (2011) (quoting *Berger*, 295 U.S. at 88); *accord State v. Walter*, 479 S.W.3d 118, 127 (Mo. banc 2016).

Consistent with these principles, much of the evidence recited in the Circuit Attorney's motion for new trial raises issues under *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, the Circuit Attorney alleges impropriety by prosecutors and investigators twenty-five years ago with respect to concealing exculpatory evidence, among other allegations. A prosecutor's ethical obligation to produce exculpatory evidence to a defendant is "unique." *Connick*, 563 U.S. at 66. Moreover, *Brady*'s reach is expansive, and not limited to the actions and knowledge of the prosecutor who tries the case. Rather, "*Brady* provides that 'the individual prosecutor has a duty to learn of any favorable evidence known *to the others acting on the government's behalf in the case, including the police*.'" *Engel*, 304 S.W.3d at 127 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). Although this undertaking may be immense, *Brady* teaches that it is

the prosecutor who remains accountable even when an investigator, and not the prosecution itself, is less than forthcoming or even deceitful: "[W]hether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith…), the prosecution's responsibility for failing to disclose known favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 437–38 (internal citation omitted).

When a prosecutor fails to live up to this duty, the ethical obligations imposed upon that prosecutor, other prosecutors, and the office itself do not evaporate upon the conviction of the defendant. Rather, "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler*, 424 U.S. at 427 n.25.

Like the U.S. Supreme Court, this Court has condemned prosecutorial inaction in the face of credible evidence of a wrongful conviction. In *State v. Terry*, 304 S.W.3d 105, 108 (Mo. banc 2010), the Court observed that the State acknowledged at oral argument that it "has done nothing to investigate" whether post-conviction DNA testing was exculpatory. In response to this admission, the Court blithely remarked that "[t]he ethical norm that the state attorney's role is to see that justice is done – not necessarily to obtain or to sustain a conviction – may suggest that a different course of action may have been appropriate." *Id.* at 108 n.5 (citing Rule 4-3.8); *see also Gardner*, 561 S.W.3d at 398 ("Under Rule 4-3.8, [the Circuit Attorney] has an obligation to 'refrain from prosecuting a charge [she] knows is not supported by probable cause,' and "[s]uch an

obligation 'necessarily requires that [s]he investigate, i.e., inquire into the matter with care and accuracy, that in each case [s]he examine the available evidence, the law and the facts, and the applicability of each to the other.'") (quoting *State on inf. McKittrick v. Wallach*, 182 S.W.2d 313, 318-19 (Mo. banc 1944)).

The Circuit Attorney's formation of the CIU is consistent with this starting point. A CIU provides prosecutors with an organized framework not only to remedy injustices, but also to investigate and address misconduct uncovered in regard to prior prosecutors. Both *Imbler* and *Terry* suggest that the obligation to correct a wrongful conviction is not limited to the discovery of *Brady* violations, but rather *any* instances in which newly discovered evidence credibly draws a conviction into serious doubt. A CIU functions to separate worthy and unworthy claims of wrongful convictions, and to ensure that the Circuit Attorney has a full opportunity to fulfill her ethical duty to ensure that justice is done. *See* Rule 4-3.8, cmt. 1.

The CIU's report in this case found that Johnson's conviction is both unconstitutional and unsupported by any credible evidence. In her discretion, the Circuit Attorney has considered and followed the findings of the CIU. Among other reasons for seeking relief, the Circuit Attorney has evidently found documents within the Circuit Attorney's Office – dating from more than two decades ago – that detail undisclosed monetary payments to a State's witness and call the truthfulness of his testimony into question. (D99, ¶¶ 150–158).

But the CIU cannot exist in a vacuum; the Circuit Attorney must have a mechanism to seek relief and fulfill her constitutional and ethical obligation to correct a

wrongful conviction that occurred within her jurisdiction. Accordingly, the Circuit Attorney filed a motion for a new trial under Rule 29.11, and filed that motion in the circuit court within her geographical jurisdiction. *See Norwood*, 691 S.W.2d at 241.

C. The Circuit Attorney May Request Relief by Waiving Standard Time Limitations for Motions for a New Trial.

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

Noncompliance with Rule 29.11(b)'s deadlines is not a jurisdictional defect. *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. 2015); *see also State v. Oerly*, 446 S.W.3d 304, 307–310 (Mo. App. 2014) (noncompliance with Rule 29.11(c) is not a jurisdictional defect). Accordingly, the Circuit Attorney may waive the deadlines. *Henderson*, 468 S.W.3d at 425.

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

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

D. Trial Courts Have the Inherent Power to Entertain Motions for New Trials to Prevent a Miscarriage of Justice Based on Newly Discovered Evidence of Innocence and in Cases Involving Perjury.

Missouri courts also have "the inherent power to prevent a miscarriage of justice or manifest injustice" by considering a motion for new trial based on newly discovered evidence. *Terry*, 304 S.W.3d at 109. As the Supreme Court has explained, it would be a "perversion of justice" for courts "to close [their] eyes to the existence of [] newly discovered evidence" presented through an otherwise-untimely motion. *Id.* (quoting *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984)). This exception remains true even when the newly discovered evidence would not "completely exonerate the defendant," *id.* at 110, although the Circuit Attorney has taken the position that the exculpatory evidence in this case would meet any standard. (D99, ¶¶ 199–203, 208, 210, 213, 217–218).[3]

[3] To obtain a new trial on the basis of newly discovered evidence, a *defendant* must show four things: (1) the facts constituting the newly discovered evidence have come to the defendant's knowledge after the end of trial; (2) the defendant's lack of prior knowledge is not owing to any want of due diligence on his part; (3) the evidence is so material that

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

As pleaded, the State's motion for new trial meets all of these criteria. (D99, ¶¶ 199–203, 213–218, 222–240). *Terry*'s exceptions tacitly recognize that it is imperative for a mechanism to exist by which wrongful convictions may be remedied under Rule 29.11. Such a mechanism must exist for CIUs to function.[4]

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it is likely to produce a different result at a new trial; and (4) the evidence is neither cumulative only nor merely of an impeaching nature. *Terry*, 304 S.W.3d at 109 (citing *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. banc 1997)). The standards for *the State* to obtain a new trial have not been established, although the Circuit Attorney's motion for a new trial amply indicates that all of the *Terry* factors have been satisfied.

[4] In addition, a writ of error coram nobis "provides the machinery for righting conceivable wrongs which otherwise would stand uncorrected." *State v. Stodulski*, 298

In sum, the Circuit Attorney properly brought this motion for a new trial, and the trial court had authority to entertain that motion. Therefore, the Court should reverse.[5]

II. The Trial Court Erred in Declining to Vacate Its Order Appointing the Attorney General to Represent the State Because the Circuit Attorney Is the Only Authorized Representative of the State Before the Trial Court, in That There Is No Disqualifying Conflict That Bars the Circuit Attorney's Office From Handling Johnson's Case and No Special Basis to Appoint the Attorney General to Represent the State in This Case.

In the absence of a disqualifying conflict, the Circuit Attorney is the sole representative of the citizens of the City of St. Louis for all criminal cases within the jurisdiction of the Circuit Court of the City of St. Louis. And, as the trial court implicitly acknowledged in its order dated August 23, 2019, the court found no basis to disqualify the Circuit Attorney or any attorney entered on behalf of the Circuit Attorney's Office. (*See* D167, p. 9). Nevertheless, the trial court sought to justify the *sua sponte* appointment of the Attorney General as pseudo-co-counsel on behalf of the State based on non-disqualifying "concerns," such as Johnson's alleged violation of a local rule, and the CIU's failure to adopt an innocence organization's recommended "best practices" for allegations of prosecutorial misconduct. The shortsighted appointment creates far more problems than it resolves. For good reason, there is no basis in existing law for a trial

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S.W.2d 420, 424 (Mo. 1957); *see also United States v. Morgan*, 346 U.S. 502, 506 n.4 (1954) (holding that amendments to rules of civil procedure did not abolish writs of error coram nobis in *criminal* cases).

[5] In the event the Court determines that no procedure exists under current provisions and processes, *amici* urge the Court to invoke its rulemaking authority to create a mechanism that avoids a miscarriage of justice from going unaddressed. Mo. Const., art. V, § 5.

court to appoint the Attorney General to represent the State *simultaneously* with the Circuit Attorney in a criminal case.[6]

A. Johnson's Alleged Violation of Local Rule 53.3 Is Not a Basis for Interfering With the Authority of the Circuit Attorney.

As the trial court's August 23 order recognizes, there is no allegation or evidence that anyone in the Circuit Attorney's Office contacted any jurors in violation of Local Rule 53.3, which generally prohibits parties and attorneys from contacting jurors after the return of a verdict (subject to certain exceptions). (D167, pp. 4–5). As alleged, only Johnson's counsel made contact with jurors. The Circuit Attorney merely noted the substance of those conversations in the motion to demonstrate that the new evidence likely would have swayed the jury.

The trial court criticized the Circuit Attorney for "including" this information in the motion for a new trial and even went so far as suggesting that reciting the conversations with jurors in the motion was a threat to "the integrity of the legal process." (D167, p. 9). In levying this criticism, the trial court wrongly assumed that verdicts may never be impeached based on the content of jury deliberation. (D167, pp. 4-5). To the contrary, rules like Local Rule 53.3 may bow to greater constitutional concerns about the fundamental right to a fair trial. *See, e.g.*, *Tharpe v. Sellers*, 138 S. Ct. 545 (2018); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (the Sixth Amendment overrode state "no-impeachment" rule for jury verdicts, allowing court to consider allegations of racial bias

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

or animosity during deliberations); *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 88–90 (Mo. banc 2010). Moreover, the evidence was not cited to demonstrate juror misconduct as the basis for overturning Johnson's conviction, but rather to demonstrate the likely impact of newly discovered evidence.

Either way, the terms of Local Rule 53.3 do not raise questions about the conduct of the Circuit Attorney's Office. The rule does not prohibit the citation or use of evidence procured by another party. The trial court nevertheless wrote, after the fact, that the appointment of the Attorney General was meant "to insure *the defendant* presently gets whatever process he is due." (D167, p. 9) (emphasis added). To characterize the *Circuit Attorney's* use of this evidence as a threat to the "integrity of the legal process" owed to *Johnson* is hard to understand. The evidence was procured by Johnson's own attorney and then cited for Johnson's own benefit.

Finally, the alleged violation of Local Rule 53.3 – designed to protect jurors from unwanted badgering and to limit the ability of criminal defendants to challenge their convictions based on alleged juror misconduct – does not bear on Johnson's actual innocence. Even if the trial court believed that *Johnson's* attorney had violated this rule and felt that some additional action or oversight was appropriate, the proper remedy certainly was not to appoint the Attorney General and undermine the authority of the Circuit Attorney.

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

The trial court questioned, but specifically did not hold, that the Circuit Attorney's Office might possess some conflict of interest based on the allegations of prosecutorial misconduct committed by an employee during a prior administration. (D167, p. 5–9). The trial court nevertheless took the extraordinary step of injecting the Attorney General into the case to represent the State, creating an unheard-of system of joint prosecutorial representation of the State's purported interests. That unheard-of system now persists on appeal.

This was error. In the absence of a disqualifying conflict of interest – let alone one that can be imputed to the entire Circuit Attorney's Office – the trial court should not have interfered with the Circuit Attorney's authority, let alone by inviting the Attorney General to carry out some unexplained paternalistic role in Johnson's case. It "is no small intrusion" to prohibit the Circuit Attorney from representing the citizens of the City of St. Louis pursuant to her statutorily authorized duties. *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387 (Mo. banc 2018). When a court erroneously disqualifies the Circuit Attorney, "the harm caused … is both substantial and irreparable." *Id.* at 387 n.12. That harm also occurs when a court finds other, inventive ways to hobble the Circuit Attorney's authority to carry out those duties.

The Supreme Court recently reviewed the principles guiding the disqualification of the entire Circuit Attorney's Office in *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389 (Mo. banc 2018). As the Supreme Court explained, "the people of [the City of St. Louis]

will be harmed if the individual elected to serve as their prosecuting attorney is not allowed to fulfill her statutorily authorized duty of representing the interests of the public…." *Id.* at 395 n.7 (quoting *Peters-Baker*, 561 S.W.3d at 385 n.5) (alteration in original).

To disqualify the entire Circuit Attorney's Office, there are specific criteria that must be met. First, the Court "must determine whether a particular attorney in the office has a conflict prohibiting *that* attorney's participation in the underlying case." *Id.* at 395 (quoting *Peters-Baker*, 561 S.W.3d at 385). Second, "if (and only if) such a conflict exists, the court then must determine whether that individual attorney's conflict is to be imputed to the entire office." *Id.* (quoting *Peters-Baker*, 561 S.W.3d at 385).

The trial court correctly found no basis for disqualification under these principles, and, indeed, no disqualification occurred. Nevertheless, the trial court appointed the Attorney General based on the court's purported "inherent authority" and purported "concerns" over the 'integrity of the legal process." (D167, p. 9). Those concerns were unfounded, and the "remedy" was both unprecedented and unwarranted.

Requesting paternalistic intervention from the Attorney General whenever the Circuit Attorney seeks to remedy past prosecutorial misconduct would erode the essence and functioning of the CIU. There is no allegation that any current member of the Circuit Attorney's Office engaged in wrongdoing, let alone that any individual's involvement has hampered the ability of other prosecutors in that office to serve the interests of justice in this case. As a practical matter, the composition of the Circuit Attorney's Office is not static. Prosecutors, elected and unelected, come and go, but there is no reason to impute

a perceived conflict to blameless individuals with no personal connection or knowledge of the original investigation or prosecution twenty-five years ago.

CIUs serve as vehicles for building this public trust, by demonstrating an elected prosecutor's commitment to ensuring each case is handled in an ethical manner and that each conviction was rightfully obtained. On the other hand, wrongful convictions – especially those involving prosecutorial misconduct – erode community trust in the justice system.[7] Overriding local prosecutorial determinations seeking to remedy past unethical conduct by previous prosecutors, questioning the judgment of current prosecutors, and preventing relief from past injustices undermines a public sense of fairness and confidence in consistently applied legal principles, and therefore imperils public trust and perceptions of legitimacy. The notion that a prosecutor or her office can be hamstrung in carrying out her duties by accepting a predecessor's constitutional error is fundamentally at odds with the prosecutor's role as a minister of justice in this State. *See, e.g., Belcher v. State*, 299 S.W.3d 294, 296 n.6 (Mo. banc 2009) (writing that "[t]he Court is most appreciative" of the State's candid briefing in favor of a prisoner's position and repeating that "the prosecutor has the responsibility of a minister of justice and not simply that of an advocate"). As *amici* have seen, when a community sees the justice system as illegitimate, members of the community are less likely to cooperate with law enforcement, to assist in investigations, or to report crimes against them.

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[7] *Establishing Conviction Integrity Programs in Prosecutors' Offices: A Report of the Center on the Administration of Criminal Law's Conviction Integrity Project*, New York University School of Law 64 (2012), *available at* http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf (last visited Feb. 10, 2020).

Furthermore, the appointment of the Attorney General as a pseudo-remedy was not even consistent with the basic principles underlying conflicts and disqualification. The overarching concern when a court considers whether to disqualify the Circuit Attorney's Office is the protection of the *defendant's* constitutional right to a fair trial. *Gardner*, 561 S.W.3d at 396. Courts must consider whether a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial *to the defendant*. *Id.* at 396–397.

That is not the case here, where the Circuit Attorney and Johnson are *aligned* in moving the Court for a new trial. *See, e.g.*, *id.* at 397 n.11 (explaining that the absence of an appearance of impropriety is "best evidenced by [the defendant's] role in this writ proceeding, i.e., he has intervened and joined the position of [the Circuit Attorney] requesting this Court issue a writ *prohibiting* Respondent from disqualifying the CAO"). Thus, "[a]ll considerations of fairness by the circuit court must, therefore, be made through the lens of fairness to the defendant," and a trial court "does not have the authority to ensure every action taken anywhere in the CAO is done in accordance with its general notions of fairness." *Id.* The trial court's supervising authority "extends only so far as necessary to protect the defendant's right to a fair trial." *Id.*

The trial court cited no governing law to justify its appointment. Instead, the trial court pointed to one of the Innocence Project's recommended "best practices" for CIUs. (D167, pp. 5-6). In particular, the Innocence Project has proposed that it might be wise for CIUs to engage independent investigators to review wrongful conviction cases involving prosecutorial misconduct within the CIU's office. In raising this issue, the trial

court evidently relied upon its own research of secondary sources and did not request the benefit of briefing by the parties.

Critically, the obvious motivation behind the Innocence Project's recommended "best practice" is to eliminate any perception or possibility of bias that would prejudice the wrongfully convicted defendant before the CIU begins an investigation. But this "best" practice is not the only way to skin a cat. The prospect of bias is not an issue in Johnson's case – because the CIU already concluded that prosecutorial misconduct occurred before the Circuit Attorney filed the motion. Therefore, the trial court had no basis to cite an innocence organization's non-authoritative recommendation as a basis for appointing the Attorney General to interfere with the authority of the Circuit Attorney. Again, the parties' positions are aligned, and the trial court's appointment was not designed to protect Johnson or grant him a greater likelihood of a fair trial. Rather, the trial court only inserted yet another obstacle for Johnson to vacate his wrongful conviction.

The trial court's actions in this case – hobbling the Circuit Attorney's Office, detaining Johnson while the matter is litigated, and failing to allow a prompt remedy to an unjust conviction – erode public trust in the integrity of the judicial process and adversely impact public safety. Prosecutors and law enforcement officials rely on the cooperation of crime victims and witnesses in solving crimes and bringing responsible parties to justice. This cooperation depends on building trust between law enforcement and the community it seeks to protect, which in turn requires that people view the justice

system as legitimate and procedurally fair.[8] Johnson's case, however, has become a public symbol of increasing unfairness.

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

The trial court's *sua sponte* order indicates that *both* the Circuit Attorney and the Attorney General were appointed to represent the State's interests in Johnson's case, without distinguishing between their roles.[9] The Circuit Attorney, however, is the representative of the State who is solely responsible for the handling of criminal cases within the circuit court's geographical territory, such as Johnson's. *See* R.S. Mo. §§ 56.450, 56.550. The Attorney General, on the other hand, has no jurisdiction to prosecute Johnson. These are separate offices, voted on by different constituencies, which carry out different roles within Missouri.

There are only narrow statutory circumstances in which the Attorney General may become involved in local criminal cases. Those exceptions do not apply here.

First, "*[w]hen directed by the governor*, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective

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

[9] The trial court later contended that it had merely "directed the Attorney General to appear and to be heard on the issue of whether the trial court has the authority to consider a motion for new trial filed by the prosecutor and not the defendant, where such motion was filed approximately 24 years out of time." (D167, p. 9). This distinction appears nowhere in the order, which provides: "The Court appoints the Attorney General to appear on behalf of the State of Missouri in the above referenced matter." (D146).

duties in the trial courts…." R.S. Mo. § 27.030 (emphasis added). The Governor has not directed anyone in the Attorney General's Office to become involved in Johnson's case, and therefore there is no basis for the Attorney General's Office to "aid" the Circuit Attorney.

Second, under R.S. Mo. § 56.110, "[i]f the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause." Unlike § 27.030, which provides for "aid," § 56.110 requires disqualification of the Circuit Attorney in favor of "some other attorney." Furthermore, § 56.110 requires that the chief prosecutor *and* any assistants have a disqualifying conflict. By its plain terms, a single "interest" is not automatically imputed office-wide.

Either way, no "interest" exists to justify the appointment of the Attorney General. "'Disqualification of a prosecutor is only called for when he has a *personal* interest of a nature which might preclude his according the fair treatment to which [the defendant] is entitled.'" *State v. Sonka*, 893 S.W.2d 388, 389 (Mo. App. 1995) (quoting *State v. Stewart*, 869 S.W.2d 86, 90 (Mo. App. 1993)) (emphasis added). That is not the case here, where there is no "personal interest" at stake for the Circuit Attorney or anyone in her office.[10]

[10] Even a defendant's filing of a civil rights lawsuit against the prosecutor does not establish "hostility" of the prosecutor toward the defendant. *Sonka*, 893 S.W.2d at 389.

The trial court's August 23 order cited neither of these controlling statutes. Rather, the trial court purported to rely upon its "inherent authority" to make the appointment – with no citation to any legal source. (D167, p. 9). The court's authority was not so unfettered. The appointment of the Attorney General to represent the State's interests in this case presents a separation-of-powers quagmire that far exceeds the "aid" allowed under § 27.030. This appointment has already created a tug-of-war in which each prosecutorial office has gripped one of Johnson's arms and kept pulling. Thus, the trial court's invocation of a desire to "protect the integrity of the judicial process" for Johnson has resulted in the exact opposite. Nothing about this process has been just for the person whose rights are meant to be protected.

Without any analysis, the trial court's August 23 order also appears to agree with the Attorney General's position that he was empowered to appear and be heard in Johnson's case under R.S. Mo. § 27.060. (*See* D167, p. 10). Indeed, the trial court opines that the Attorney General has "a right to be heard in this matter, with or without a court order." (D167, p. 10). The Attorney General, however, cited no case law for this remarkable proposition. That is because § 27.060 is the statute that governs the Attorney General's right to appear in *civil* cases for the purpose of "answer[ing] and defend[ing]" the State's interests – not prosecuting them. It would be grave error to twist these words into a mandate for the Attorney General to intervene in any local prosecution it pleases.

Of course, it must be remembered that neither the Circuit Attorney herself nor any current members of her office is even implicated by the allegations in this case. Moreover, there is no civil rights case filed by Johnson, nor any reason to believe there is hostility between the parties considering that the Circuit Attorney and Johnson *agree* that a *Brady* violation occurred.

The implications of the trial court's dual appointment extend far beyond the facts of Johnson's case. Today there is apparently a disagreement between the views of a judge sitting in the Circuit Court of St. Louis City and the views of the current Circuit Attorney, but new disagreements will inevitably arise between other judges and prosecutors throughout the 46 circuits and 114 counties in this State. It would be a grave mistake to write a free ticket for all future Attorney General administrations to intervene in the daily caseload of duly elected prosecutors throughout this State. Such a system is inconsistent with the basic structure of prosecutorial authority in this State. *See* R.S. Mo. §§ 56.450, 56.550.

As the Court has already seen, this system of dual representation produces an intractable scenario in which the respective offices disagree about the State's factual and legal positions, as well as litigation strategy, yet each believes it has the final word. One can only expect worse problems in other cases. The simple takeaway is that the authority of these two offices is not meant to overlap.

The solution, however, is straightforward. The Court should affirm that, in the absence of an actual disqualifying issue, the Circuit Attorney has sole authority over criminal matters within the Circuit Court of St. Louis City. R.S. Mo. § 56.450. Trial courts cannot use phantom "concerns" that fall short of disqualifying conflicts as a pretense to hale the Attorney General's Office into the courtroom because those courts disagree with the philosophies and methods of the local prosecutor.

Paternalism is not the answer. A local prosecutor deserves respect when he or she approaches a trial court and asks that court to correct a legal wrong for the benefit of an

innocent person. This candor should be treated as a qualification for office, not as a factor disqualifying a prosecutor from representing the citizens of this State to the full extent of her constitutional duties.

For these reasons, the Circuit Attorney should be restored to her role as the sole representative of the State before the trial court.

CONCLUSION

The Court should reverse the trial court's order dated August 23, 2019, and remand for further proceedings in the Circuit Court of St. Louis City because the trial court has authority to hear the Circuit Attorney's motion for a new trial on the merits.

In addition, the Court should vacate the trial court's order appointing the Attorney General to represent the State and direct that only the Circuit Attorney represents the State in the trial court in connection with this request to remedy an unjust past conviction.

Dated: February 10, 2020

Respectfully submitted,

BRYAN CAVE
LEIGHTON PAISNER LLP

By: /s/ Charles A. Weiss
Charles A. Weiss, #20299
Jonathan B. Potts, #64091
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)
caweiss@bclplaw.com
jonathan.potts@bclplaw.com

Attorneys for Amici Curiae *45 Prosecutors*

Of counsel:

Michael A. Wolff, #27633
St. Louis University School of Law
100 N. Tucker Blvd.
St. Louis, MO 63101
(314) 691-4377

Attorney for Amicus Curiae *Wesley Bell,*
St. Louis County Prosecuting Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the Brief of *Amici Curiae* 45 Prosecutors in Support of the Circuit Attorney's Motion for New Trial includes the information required by Rule 55.03, was served through the electronic filing system in compliance with Rule 103.08 and 43.01(c), and complies with the limitations contained in Rule 84.06(b). I further certify that this brief contains 10,009 words, excluding the cover page, certificates required by Rule 84.06(c), and signature block as directed by Rule 84.06(c), as determined by the Microsoft Word 2010 word-counting system.

/s/ Charles A. Weiss

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, I electronically filed the foregoing Brief of *Amici Curiae* 45 Prosecutors in Support of the Circuit Attorney's Motion for New Trial with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Charles A. Weiss