IN THE

Supreme Court of Missouri

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC98303
	)	
LAMAR JOHNSON,	)	
	)	
Appellant.	)	

STATE OF MISSOURI'S RESPONSE TO INTERVENOR'S MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY

Intervenor Circuit Attorney Kimberly S. Gardner seeks leave to file a "supplemental authority," arguing that the Missouri Attorney General's Office has taken inconsistent positions on prosecutorial authority in this case and in an amicus brief filed in an unrelated federal case pending the U.S. District Court for the District of Columbia, *United States v. Michael Flynn*. *See* Intervenor's Motion to File Supplemental Authority (May 21, 2020) ("Int. Mot."). This motion should be denied because the supposed "supplemental authority" has no bearing on the issues in dispute in this appeal. Intervenor's Motion mischaracterizes the Attorney General's arguments, conflates distinct legal concepts, and lacks merit for at least four reasons.

First, the "supplemental authority" Intervenor provides is not a statute or court case, but an amicus brief joined by the Attorney General that addresses *federal* constitutional issues, especially the separation of powers between the federal Executive

Branch and Article III courts. This case involves no questions of federal constitutional law, or even federal criminal procedure; rather, it involves questions of state law—the interpretation of Missouri's Rules of Criminal Procedure and issues of Missouri appellate jurisdiction. *See* Resp. Sub. Br., at 9-16, 21-50. The amicus brief that Intervenor cites thus has no direct bearing on the issues in this appeal.

Second, Intervenor's argument overlooks a fundamental difference in the procedural posture of the two cases. Mr. Flynn has pled guilty but has not been sentenced yet. By contrast, Mr. Johnson was convicted by a jury and was sentenced almost 24 years ago. This Court has often held the trial court exhausts its jurisdiction at *sentencing*. "[A] circuit court 'exhausts its jurisdiction' over a criminal case *once it imposes sentence*." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017) (emphasis added); *see State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017) ("[O]nce judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction."); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993).

In the State's substitute brief, the Attorney General repeatedly argued that "a motion for new trial must be filed before *sentencing*," and "a motion for new trial that is filed after *sentencing* is not specifically authorized by statute or rule." Resp. Sub. Br. 14 (emphasis added); *see also id.* at 7, 13, 14, 26, 27, 34-35. The Attorney General did not dispute, and in fact affirmatively pointed out, that a motion for new trial could be filed by the defendant *before* sentencing, within the time limits set forth in Rule 29.11(b). *Id.* at

14. Intervenor's Motion disregards these manifest distinctions.

Third, Intervenor's Motion contends that, in this case, the Attorney General "argued that a prosecutor must always fight to sustain a conviction, and that a prosecutor cannot take action that benefits a defendant." Int. Mot., at 2. This argument clearly mischaracterizes the Attorney General's arguments. In the State's substitute brief, the Attorney General argued only that "[t]he Court should not hold that a prosecutor has a right or duty to file a motion for new trial after sentencing, in cases where a prosecutor subsequently forms the opinion that a defendant is not guilty." Resp. Sub. Br., at 26. In fact, the Attorney General emphasized that a prosecutor *must* take steps that would "benefit a defendant" in many cases, including the prompt disclosure of exculpatory evidence to cure apparent *Brady* violations. Resp. Sub. Br. 7-8. The Attorney General explicitly argued that, in such cases, "a prosecutor *must take appropriate corrective action* through proper legal channels." Resp. Sub. Br. 34 (emphasis added). But "a proper legal channel is not a motion for new trial filed by the prosecutor, on behalf of the defendant, more than twenty-four years after sentencing, in a case where the court has exhausted its jurisdiction." Resp. Sub. Br. at 34-35.

Fourth, Intervenor overlooks fundamental differences in executive authority between Missouri and federal law. The U.S. Constitution establishes a unitary executive, *see* U.S. CONST. art. II, but Missouri law divides executive authority among different elected officials. As relevant here, Missouri law confers authority on elected prosecutors

to handle criminal prosecutions through final judgment, but Missouri law allocates to the Attorney General the authority to handle criminal appeals and many aspects of post-conviction review. *See, e.g.,* § 27.050, RSMo. Intervenor's attempt to transform the *defendant's* procedural right to file a motion for new trial into a novel procedure for raising claims of actual innocence decades after conviction—when, as Mr. Johnson concedes, numerous procedures to raise such claims already exist—violates Missouri's separation of powers by encroaching on the Attorney General's traditional responsibility to protect the public safety and defend the integrity of final criminal judgments.

CONCLUSION

For the reasons stated, the Court should deny Intervenor's Motion for Leave to Submit Supplemental Authority.

Respectfully submitted,

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