**IN THE MISSOURI COURT OF APPEALS**
**EASTERN DISTRICT**

**Nos. ED108193, ED108223**

**STATE OF MISSOURI,**

**Plaintiff/Appellant/Respondent,**

**v.**

**LAMAR JOHNSON,**

**Defendant/Appellant.**

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

# BRIEF OF LEGAL POST-CONVICTION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE STATE'S MOTION FOR NEW TRIAL

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## IDENTITY OF AMICI CURIAE

*Amici* are legal scholars whose scholarship and teaching focus on habeas corpus jurisprudence and post-conviction remedies. We believe that the history and landscape of the American system of justice, including the quasi-judicial powers and duties of elected prosecuting attorneys and the judicial obligation to serve the ends of justice, demand that prosecuting attorneys have a procedural vehicle by which to fulfill their obligation to seek justice for innocent persons convicted after unfair trials. Our experience uniquely situates us to offer this important perspective.

**Eric M. Freedman** is the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at the Maurice A. Dean School of Law at Hofstra University. Professor Freedman is the author of *Habeas Corpus: Rethinking the Great Writ of Liberty* (2003) and of *Making Habeas Work: A Legal History* (2018), both publications of New York University Press. He was named the Distinguished Faculty Lecturer for Fall 2017 for his death penalty scholarship and has been designated the John DeWitt Gregory Scholar for 2018-19 to pursue his habeas research. Professor Freedman serves as the Reporter for the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, which were released at Hofstra and are regularly relied upon by courts at all levels. He is a member of the American Law Institute, a fellow of the American Bar Foundation, and is actively involved in the continuing professional education of lawyers and judges.

**Randy Hertz** is a professor at NYU School of Law, where he teaches the Juvenile Defender Clinic, Criminal Law, and Criminal Litigation. Professor Hertz is the co-author of a two-volume treatise on habeas corpus that is regularly used by practicing lawyers and routinely cited by judges. Professor Hertz is an editor-in-chief of NYU Law's *Clinical Law Review*, the first scholarly journal to focus on clinical legal education and one of the few peer-edited law reviews in the country. He played a central role in producing the MacCrate Report on legal education for the American Bar Association's Section on Legal Education, a major two-year study which has formed the basis of a national discussion on legal education and pedagogy. He regularly works on a pro bono basis on briefs in criminal appeals, including capital appeals and habeas corpus proceedings. He is a co-author with University Professor Anthony Amsterdam of a trial manual for criminal defense lawyers, and, with Professor Amsterdam and Law School Professor Martin Guggenheim, of a trial manual for defense lawyers in juvenile delinquency cases.

**Lee Kovarsky** is a professor at the University of Maryland Francis King Carey School of Law, where he teaches Criminal Procedure, Civil Procedure, Federal Jurisdiction, Capital Punishment, and Habeas Corpus. He has co-written, with Professor Brandon L. Garrett, a book on the death penalty (Concepts and Insights series 2018) and the Foundation Press case book on Habeas Corpus (2013). His most recent articles are forthcoming or have been published in the *California Law Review*, the *Cornell Law Review*, the *Duke Law Journal*, the *Notre Dame Law Review*, the *Stanford Law Review*, the *Vanderbilt Law Review*, and the *Virginia Law Review*. His

shorter, more recent essays appear in online formats for the *Chicago Law Review*, the *Cornell Law Review*, and the *Minnesota Law Review*. He also has extensive capital litigation experience, having served as the Post-Conviction Director for Texas Defender Service and the Managing Director of the Powell Project. Most recently, in the fall of 2017, he argued *Ayestas v. Davis* in the United States Supreme Court.

**James S. Liebman** is the Simon H. Rifkind Professor of Law and director of the Columbia Center for Public Research and Leadership (CPRL) at Columbia Law School. In the criminal justice context, Professor Liebman's work has focused on the death penalty, habeas corpus, and structures for improving the accuracy of guilt determinations. He has coauthored *Federal Habeas Corpus Practice & Procedure*; *A Modern Approach to Evidence*; *A Broken System: Error Rates in Capital Cases*, 1973-1995 (2000); *A Broken System, Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It (2002)*; and *Los Tocayos Carlos* (2012). He has argued five cases in front of the United States Supreme Court in those areas and many others in lower federal and state courts. He has received the Norman Redlich Capital Defense Distinguished Service and Pro Bono award, the National Association of Criminal Defense Lawyers Champion of Justice award, and a Soros Senior Justice Fellowship. Liebman served as law clerk to Judge Carl McGowan of the U.S. Circuit Court of Appeals for the District of Columbia from 1977 to 1978, and to Supreme Court Justice John Paul Stevens the following year. He was assistant counsel for the NAACP Legal Defense and Educational Fund from 1979 to 1985.

**Sean O'Brien** is a professor at the University of Missouri-Kansas City School of Law, where he teaches Criminal Law, Criminal Procedure and Postconviction Remedies. He has litigated landmark cases involving issues of innocence and habeas corpus jurisdiction, including *Schlup v. Delo*, 513 U.S. 298 (1995), *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); and *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (en banc). He is the National Association of Criminal Defense Lawyers representative on the ABA Task Force to revise ABA Criminal Justice Standards, Postconviction Remedies, and he lectures nationally on habeas corpus standards and postconviction litigation. He was a founding member of the Midwest Innocence Project Board of Directors, but presently has no affiliation or involvement with that organization.

**Eve Brensike Primus** is the Yale Kamisar Collegiate Professor of Law at University of Michigan Law School. She teaches Criminal Law, Criminal Procedure, Evidence, and Habeas Corpus, and writes about structural reform in the criminal justice system. She has authored numerous publications focused on habeas corpus and constitutional law, including *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State Court Criminal Convictions*, 2019; *Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time,* 2018; *A Structural Vision of Habeas Corpus*, 2010. Her scholarship has been cited by the U.S. Supreme Court as well as lower appellate courts. She also has won the L. Hart Wright Award for Excellence in Teaching on more than one occasion. Before joining the Michigan Law faculty, she was an attorney in the Maryland Office of the Public Defender. In that office, Professor Primus worked both as a trial attorney and as an appellate litigator, appearing several times before the

state's highest court. Professor Primus also has participated in the lawmaking process, giving legislative testimony and helping to draft proposed legislation on criminal justice issues.

**Ira Robbins** is the Barnard T. Welsh Scholar and Professor of Law at American University's Washington College of Law. He was Acting Director of the Federal Judicial Center's Education and Training Division and served as the reporter for the American Bar Association's Task Force on Death Penalty Habeas Corpus and its Task Force on Privatization of Corrections. Professor Robbins also served as a Supreme Court Fellow and as a special consultant to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States. In 2008, Professor Robbins was named a member of the American Bar Association Task Force on Post-Conviction Remedies. Professor Robbins is a founding member of the WCL Criminal Justice Practice & Policy Institute. His recent books include *Habeas Corpus Checklists* (2019) and *Prisoners and the Law* (six vols., 2019).

**Stephen I. Vladeck** is the A. Dalton Cross Professor in Law at the University of Texas School of Law. His teaching and research focus on federal jurisdiction and constitutional law. He has argued before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces, frequently represents parties or amici across a range of other litigation matters, and has authored reports on related topics for a wide range of organizations—including the First Amendment Center, the Constitution Project, and the ABA's Standing Committee on Law and National Security. Professor Vladeck's prolific and widely cited scholarship has appeared in an array of legal publications — including

the *Harvard Law Review* and the *Yale Law Journal*. He has written extensively on constitutional law and habeas including *Constitutional Remedies in Federalism's Forgotten Shadow*, 2018; *The Constitutional Right to Collateral Post-Conviction Review, 2016; The D.C. Circuit After Boumediene*, 2011; *The New Habeas Revisionism,* 2010; *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers,* 2009; *The Suspension Clause as a Structural Right*, 2008; and *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 2007.

**Larry Yackle** is a Professor of Law Emeritus at Boston University Law School. He teaches Constitutional Law and Federal Courts. His special interest is federal habeas corpus for state prisoners. He has written a number of articles on that subject, the most recent of which are *The New Habeas Corpus in Death Penalty Cases*, 2014 and *AEDPA Mea Culpa*, 2012. He has written seven books: *Federal Courts: The Current Questions* (Carolina Academic Press, 2017); *Federal Courts* (Carolina Academic Press, 3d ed. 2009); *Regulatory Rights: Supreme Court Activism, the Public Interest, and the Making of Constitutional Law* (University of Chicago Press, 2007); *Federal Courts: Habeas Corpus* (Foundation Press, 2003); *Reclaiming the Federal Courts* (Harvard University Press, 1994); *Reform and Regret* (Oxford University Press, 1989); and *Postconviction Remedies* (Lawyers Coop, 1981). Professor Yackle has written amicus briefs (on behalf of the ACLU) in many of the habeas corpus cases the Supreme Court has considered in the last twenty years.

## SUMMARY OF THE ARGUMENT

The Circuit Attorney of St. Louis City filed a Motion for New Trial in the case of Lamar Johnson after uncovering newly discovered evidence exonerating him, including *Brady* violations committed by her own office. The Circuit Court for the Circuit of St. Louis City dismissed the motion on the grounds that it did not have the authority to hear the motion. Undersigned *amici* respectfully disagree. Because Mr. Johnson is actually innocent and his trial was rife with constitutional error, equities demand the courts provide a procedure by which the Circuit Attorney may fulfill her ethically and constitutionally mandated obligation to seek justice. A system of justice may not elevate form over fairness, where an innocent man is knowingly kept in prison, despite constitutional violations. The Circuit Court should exercise its equitable authority under Missouri law to review the Circuit Attorney's motion.

## ARGUMENT

### I. In cases of actual innocence involving constitutional violations at trial, courts must provide the trial prosecutor with a forum to fulfill constitutional and ethical obligations to seek justice.

The core function of America's system of criminal justice is to bring guilty offenders to justice, while protecting the innocent. The prosecuting attorney is uniquely situated as

> 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

*Berger v. United States,* 295 U.S. 78, 88 (1935). The controversy in this matter arises from the Circuit Court's order thwarting Circuit Attorney Kimberly Gardner's attempt to do what the law and her ethics oblige her to do: relieve the suffering of Lamar Johnson, an innocent person unjustly condemned to die in prison.

The Circuit Court's ruling is also at odds with its own obligation to correct the manifest injustice that Circuit Attorney Gardner moved to correct. Procedural technicalities designed to serve principles of finality "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engel v. Isaac*, 456 U.S. 107, 135 (1982). While the law contemplates that victims of injustice will be protected by exceptions to procedural finality doctrines, "we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas

court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier,* 477 U.S. 478, 495-96 (1986). Thus, innocence is the ultimate equity; the prosecution and the judiciary have a shared responsibility to free actually innocent prisoners.

### A. The St. Louis Circuit Attorney is an elected, quasi-judicial officer with the power and duty to free the innocent.

As the elected Circuit Attorney of St. Louis City, Circuit Attorney Gardner has a universally recognized obligation to correct a miscarriage of justice that has resulted in the incarceration of an innocent person. "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." Model Rules of Prof'l Conduct R. 3.8(h); *see also* National District Attorneys Association, National Prosecution Standards, Standard 8-1.8 ("When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should . . . seek the release of the defendant if incarcerated"); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The ABA Model Rules of Professional Conduct unequivocally support the actions taken by Circuit Attorney Gardner in Mr. Johnson's case. The ABA rules require a prosecutor who has uncovered "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" to "promptly disclose that evidence to an appropriate court or authority." Model Rules of Prof'l Conduct R. 3.8(g). Circuit

Attorney Gardner's motion is perfectly consistent with the ethical obligations of her office.

Thus, by denying the motion for new trial, the Circuit Court's order not only shirked its own duty to correct a manifest injustice, it frustrated the prosecuting attorney's lawful duty to correct unjust convictions. "Judicial aversion to compelling prosecutions" is based on the separation of powers doctrine. *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973).

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that *the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions*.

*Id*. at 379-80 (internal citations omitted) (emphasis added). The Circuit Court's ruling gives insufficient respect to the quasi-judicial powers and duties of the prosecuting attorney and fails in its own duty to accommodate her good-faith efforts to fulfill the justice-seeking function of her office.

### B. The Circuit Court is equally obliged to correct a fundamental miscarriage of justice.

It would be the exceptional holding that a court has no power to act on behalf of a prisoner who is stipulated to be innocent by the prosecuting attorney whose office obtained his conviction. The deadline relied upon by the Circuit Court to conclude that it had no authority in the matter does not foreclose judicial action in the face of truly

persuasive evidence of innocence. The Missouri courts have held that in such cases, individuals "must have some forum in the judicial system to present" their evidence. *State v. Mooney*, 670 S.W. 2d 510, 515 (Mo. App. 1984).

This Court in *Mooney* recognized that it would be "unjust to deprive an appellant of an opportunity to present [recantation evidence] to the trial court because he did not learn of the fact that the victim's testimony was false until after the time for filing a motion for new trial has expired." *Id*. In *State v. Williams*, this Court "overlook[ed] the time constraints of Rule 29.11" because of the "perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence," which "was not discovered before the expiration of the time for the filing of a motion for new trial." *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984). The en banc Missouri Supreme Court followed the *Mooney* and *Williams* example in *State v. Terry*, exercising its "inherent power to prevent a miscarriage of justice or manifest injustice" by remanding the case to the trial court to permit the filing of a new trial motion based on newly discovered evidence. *State v. Terry,* 304 S.W.3d 105, 108-09, 111-112 (Mo. Banc 2010). *Terry* is consistent with the overwhelming weight of precedent making clear that Missouri courts always have the power and duty to remedy a manifest injustice.

The judiciary is conferred with "broad remedial powers" to check the legality of confinement. *Boumediene v. Bush*, 553 U.S. 723, 776 (2008). As *Boumediene* recognized, these powers are not dependent on statute but inhere in the very definition of a common law court. *See* Eric M. Freedman, MAKING HABEAS WORK: A LEGAL HISTORY 107 (2018). The habeas remedy is equitable, meaning, it is "not a static, narrow,

formalistic remedy; its scope has grown to achieve its grand purpose.'" *Boumediene*, 553 U.S. at 780 (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)); *McIntosh v. Haynes*, 545 S.W.2d 647 (Mo. 1977). The "exercise of a court's equity powers must be made on a case-by-case basis," *Holland v. Florida*, 560 U.S. 631, 649-650 (2010) (internal quotations and alterations omitted), permitting "departure from [procedural] rule[s] . . . in exceptional circumstances." *Boumediene*, 553 U.S. at 772.

> In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity. The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct particular injustices.

*Holland*, 560 U.S. at 650 (internal citations, quotations, and alterations omitted). "'The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.'" *McIntosh,* 545 S.W.2d at 652 (quoting *Harris v. Nelson*, 394 U.S. 286 (1969)).

In Missouri, the Constitution confers upon the Circuit Courts broad plenary jurisdiction and the power to "issue and determine original remedial writs." MO. CONST. ART. V, § 14; *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009) (Missouri courts have subject matter jurisdiction "over *all* cases and matters, civil and criminal") (emphasis in original). Recognizing the inherent flexibility of this remedial authority, the Missouri Supreme Court has held that procedural rules placing limits on the court's ability to grant relief are not absolute; they are "subject to the right recognized by

article I, section 14 [of Missouri's Constitution] to have a remedy for a legal wrong." *Webb*, 275 S.W.3d at 255.

A court's equitable authority is at its apex when constitutional errors at trial result in conviction of an innocent person. Criminal judgments are always open to collateral attack to remedy this miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. banc 2003); *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000) (adopting *Schlup* miscarriage of justice standard). "[T]he injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325; *see also In Re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); 4 William Blackstone, Commentaries 358 (1765) ("[b]etter that ten guilty persons escape than one innocent suffer"). Given this core value, it is "constitutionally required" that a defendant have "an opportunity . . . to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings." *Boumediene*, 553 U.S. at 789.

Such claims must be heard even if their timing fails to comply with a court's procedural rules. Procedural bars to relief—such as time limits and bars on successive motions—were erected to protect interests in finality of judgments and stem the costs flowing from repetitive postconviction filings. *Schlup*, 513 U.S. at 318-19. Interests in finality are grounded in the assumption that the court of record provided a fair adversary proceeding. *Boumediene*, 553 U.S. at 782 (observing that federal court deference to state

court judgments is "justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding"). But the State has no finality interest in the continued confinement of an innocent person whose conviction was the result of constitutional violations at trial. *Sanders v. United States*, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."). "[A]utomatic application of . . . technical rules" may not therefore function to foreclose a court's jurisdiction to correct a miscarriage of justice. *Id.* at 24 (Harlan, J., dissenting); *Schlup*, 513 U.S. at 319. Because "habeas corpus is, at its core, an equitable remedy," a court "must adjudicate even a successive habeas claim when required to do so by the ends of justice." *Schlup*, 513 U.S. at 319. The ends of justice require adjudication when a "proper showing of actual innocence" is made. *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

Thus, where a constitutional violation has probably resulted in the conviction of one who is innocent, a court has jurisdiction to consider that claim even if there is no excusable cause for having not brought the claim in a timely manner. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The Circuit Court's Order dismissing the Circuit Attorney's Motion for New Trial is incompatible with this fundamental equitable principle. In refusing to hear the motion, the Circuit Court relied on "hard and fast adherence to [an] absolute legal rule" without recognizing its inherent authority over the "extraordinary circumstances" of this case. *Holland*, 560 U.S. at 650.

It is not that the Circuit Court was unaware of its equitable authority. In *sua sponte* appointing the Attorney General to appear on behalf of the State of Missouri, the Circuit

Court recognized that it "has the inherent power to do what is reasonably necessary for the administration of justice."[1] Order 3. Yet when it came to entertaining the prosecutor's motion relating to the "arbitrary and unlawful restraint" of Mr. Johnson, the Circuit Court was inexplicably "bound . . . by the rules of criminal procedure promulgated by the Supreme Court." Order 12.

In this way the Circuit Court ignored a clear constitutional mandate: Missouri courts may not let a manifest injustice stand. When a prosecutor becomes aware of a constitutional violation that resulted in the conviction of an innocent person, the continued confinement of that person is the quintessential definition of a manifest injustice. "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States,* 401 U.S. 667, 692-93 (1963) (Harlan, J., concurring in part and dissenting in part).

New evidence of innocence, withheld at trial in violation of the federal Constitution, "eliminate[s] [the] state's power to proscribe the defendant's conduct or impose a given punishment" on that innocent defendant. *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016). When a State continues to "enforce[] a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition,

[1] The Attorney General's role, like the Circuit Attorney's, is to uphold justice, not adherence to procedural rules. In *State v. Terry*, the State of Missouri opposed the petitioner's motion on procedural grounds. In ruling for the petitioner, the Missouri Supreme Court noted, "The 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." *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. banc 2010). *Amici* respectfully suggest that here, as in *Terry*, the Attorney General should take a different course of action, and work to "see that justice is done" rather than to "sustain a conviction."

unlawful." *Id.* at 729-30. In such a case, it is immaterial that constitutional violations leading to the conviction of an innocent person were not presented in time to comply with a procedural rule:

> A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids.

*Id*. at 731. Conviction of an innocent person pursuant to constitutional violations "is no less void" because the time to file a motion has expired. *Id*. "[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced" *Id.* at 731. Indeed, under the Supremacy Clause, the state court "has a duty to grant the relief that federal law requires." *Id*.

> The very meaning of the Clause is that state courts have the duty as well as the
>
> power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.

*Mooney v. Holohan*, 294 U.S. 103, 113 (1935); *see also Robb v. Connolly*, 111 U.S. 624, 635-39 (1884) (emphasizing duty of state courts to enforce federal rights through habeas); *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991) ("[S]tate's failure to cure conviction after credible recantation of material testimony violates due process if recantation 'would most likely affect the verdict.'") (quoting *Sanders v. Sullivan*, 863 F.2d 218, 224-25 (2d Cir. 1988)).

## II. Missouri law provides the procedural mechanisms by which the Circuit Court can exercise its equitable authority.

In finding that it was without the authority to hear the Circuit Attorney's new evidence, the Circuit Court distinguished between Missouri and other states where legislatures have created procedural vehicles to obtain relief for wrongfully convicted defendants. Order 14. However, Missouri provides several procedural mechanisms by which the Circuit Court could have exercised its equitable authority and the Circuit Attorney discharged her ethical duty. For the reasons set forth below, Amici argue that Rule 29.11 did provide an appropriate mechanism; however, other procedural mechanisms exist, and the Circuit Court had the obligation to construe the Circuit Attorney's motion so "as to do substantial justice." Mo. Rev. Stat. § 509.250; *see also Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000) ("A pleading is judged by its subject matter—not its caption."); *Payne v. Markeson*, 414 S.W.3d 530, 538 (Mo. App. 2013) ("Missouri law requires the circuit court to treat motions based upon the allegations contained in the motion regardless of the motion's style or form.").

### A. Missouri Supreme Court Rule 29.11

The Circuit Court's sole reason for rejecting the Circuit Attorney's Motion was its untimeliness. *See* Order 12-16. Though the court recognized that Rule 29.11's time limit was not jurisdictional, and did not affect its subject matter jurisdiction over the matter, it nonetheless treated the limit as jurisdictional, finding that untimeliness alone created an absolute limit to its authority. The court declined to engage in any discussion or analysis of the equities, holding fast to the time limit in Rule 29.11. It rejected the Circuit

Attorney's assertion that the equitable arguments under *State v. Mooney*, 670 S.W.2d 510 (Mo. App. 1984), and *State v. Williams*, 673 S.W.2d 847 (Mo. App. 1984), supported the new trial motion, suggesting that the posture of those cases on direct review made them inapplicable. Order 12. In elevating strict adherence to procedural rules over its inherent equitable authority, the court abandoned its duty to right "the injustice that results from the conviction of an innocent person." *Schlup v. Delo*, 513 U.S. 320, 325 (1995).

In *State v. Terry*, the Missouri Supreme Court found that the "unusual circumstances" present allowed the Court to exercise its discretion in permitting an out of time motion for new trial. 304 S.W.3d at 111. The "unusual circumstances" in that case involved a conviction for statutory rape, in which the visibly pregnant accuser testified that the defendant was the only possible father of her child. *Id*. at 106. After the child was born, however, a DNA test revealed he was not. *Id*. at 107. Despite the untimeliness of the motion, the court analyzed the newly discovered evidence under the relevant test for obtaining a new trial:

> 1. The facts constituting the newly discovered evidence have come to the movant's knowledge after the end of the trial;
> 2. Movant's lack of prior knowledge is not owing to any want of due diligence on his part;
> 3. The evidence is so material that it is likely to produce a different result at a new trial; and
> 4. The evidence is neither cumulative only nor merely of an impeaching nature.

*Id*. at 109. Finding that the motion "appears to satisfy each element," the court exercised its "inherent power to prevent a miscarriage of justice or manifest injustice." *Id*. This inherent equitable power rests with the circuit courts as well, conferred as they are with

plenary subject matter jurisdiction. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009).

This Court has also recognized that "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 evidenced presented in a motion for new trial filed out of time." *State v. Williams* 504 S.W.3d 194, 197 (Mo. App. 2016); *accord State v. Garner*, 976 S.W.2d 57, 60 (Mo. App. 1998) (citing *State v. Young*, 943 S.W.2d 794, 799 (Mo. App. 1997)). Such an extraordinary circumstance exists where new evidence would "completely exonerate[]" the defendant. *Garner*, 976 S.W.2d at 60; *see also Williams*, 673 S.W.2d at 847-48. In such cases, this Court has "the inherent power to prevent miscarriages of justice in a proper case by remanding the case to the trial court with instructions that the appellant be permitted to file a motion for new trial upon the grounds of newly discovered evidence." *Mooney*, 670 S.W.2d at 515-16. This power emanates from this Court's responsibility to avoid the "perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence." *Williams*, 673 S.W.2d at 848.

In the present case, each element for a new trial based upon newly discovered evidence has been satisfied. Mr. Johnson could not have reasonably discovered the new evidence that completely exonerates him prior to the expiration of the time for filing a motion for new trial. Yet, the court below failed to engage in any analysis of the substantive issues, or apply the requisite test to the newly discovered evidence. That evidence includes signed affidavits from James Howard and Philip Campbell confessing

to the murder of Marcus Boyd on October 30, 1994. It also includes evidence that the State's key witness at trial, Greg Elking, recanted his identification of Mr. Johnson after the conclusion of the trial and after the time for filing a motion for new trial had passed, and received undisclosed secret payments in exchange for his testimony.[2] Mot. New Trial at 29-31.

In *State v. Mooney*, this court held "patently unjust" the notion that a defendant be refused a new trial where he did not learn of the victim's recantation of false testimony until after the time for filing a motion for new trial passed. 670 S.W.2d at 515. If the new evidence presented by the Circuit Attorney were taken as true, it would "completely exonerate defendant of any complicity in the crime of which he was convicted." *State v. Williams*, 673 S.W.2d at 847. Here, in these extraordinary circumstances, the Circuit Attorney properly brought a motion for new trial under Rule 29.11.[3]

**B. Missouri Supreme Court Rule 91**

The Circuit Court could have construed the Circuit Attorney's motion as a petition for writ of habeas corpus pursuant to Missouri Supreme Court Rule 91. As the Circuit

[2] Relatedly, the *Terry* Court recognized that "Terry also may obtain his desired relief if he seeks a new trial on the ground of perjury." *Terry*, 304 S.W.3d at 111; *id*. at 110 ("*Mooney* shows that there are exceptional circumstances in which impeachment is reason to remand to the trial court to grant a new trial at the appellate court's discretion.").

[3] The court's inherent equitable authority to remedy the miscarriage of justice in this case does not render the Rule 29.11 time limits meaningless. As the Court pointed out in *Schlup*, the miscarriage of justice exception rests in part on the fact that "substantial claim[s] of actual innocence are extremely rare." *Schlup v. Delo*, 513 U.S. 320, 321 (1995). The deadline remains a limit on the court's authority except in the extraordinary case.

Court observed, habeas relief is a remedy available to Mr. Johnson. Order 15. In Missouri, habeas relief is available to a prisoner pursuant to Rule 91, which provides that "[a]ny person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint." Mo. Sup. Ct. R. 91.01(b). A Rule 91 petition may be brought by Mr. Johnson, or by someone acting in his behalf. Mo. Sup. Ct. 91.03, Petition – By Whom Made ("The petition for a writ of habeas corpus shall be signed by the person for whose relief it is intended or by some person acting in such person's behalf."); *see also State v. Carroll,* 817 S.W.2d 289 (Mo. App. 1991). The Circuit Attorney's ethical obligations, having been presented with clear and convincing evidence of Mr. Johnson's innocence, as well as her obligation to remedy a fundamental miscarriage of justice, require that she take action in his behalf.

The St. Louis Circuit Court could have heard a Rule 91 petition brought by the Circuit Attorney in Mr. Johnson's behalf. Rule 91.02's requirement that the petition be brought in the county of incarceration or, "for good cause," in a higher court is a restriction on venue, not jurisdiction. Mo. Sup. Ct. R. 91.02; *State ex rel. Heartland Title Servs. v. Harrell,* 500 S.W.3d 239 (Mo. 2016). Venue requirements are purposed with providing "a convenient, logical and orderly forum for the resolution of disputes, not to limit or control the types of parties and actions that can appear before Missouri courts." *State ex rel. Neville v. Grate* 443 S.W.3d 688, 693 (Mo. App. 2014). As the Missouri Supreme Court has recognized, Rule 91 "envisions successive filings, and directs only the first place to file, *not the only place to file*, a petition for writ of habeas corpus." *Ferguson v. Dormire*, 413 S.W.3d 40, 51 (Mo. App. 2013) (emphasis added). In

the present case, where the Circuit Attorney is bringing a habeas petition in Mr. Johnson's behalf, both parties can waive venue and file the petition in St. Louis City. *Hitchinson v. Steinke*, 353 S.W.2d 137, 139 (Mo. App. 1962)) (finding that a statute "fixing venue in the county of the defendant's domicile, confers a mere personal privilege which may be waived by the person entitled to assert it").

Where, as here, a petitioner has pled constitutional violations and proffered clear and convincing evidence of innocence, the court is required to act. Critically, Rule 91.05 *requires* that

> A court to which a petition for a writ of habeas corpus is presented *shall* forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the petition that the person restrained is not entitled thereto.

Mo. Sup. Ct. R. 91.05. The Missouri Supreme Court and courts of appeal have regularly issued writs of habeas corpus, often successive writs, when the State has violated a defendant's due process rights by withholding exculpatory and impeaching evidence.[4] *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337, 347 (Mo. banc 2013) (in successive habeas petition, court issued writ of habeas under Rule 91 based on two separate *Brady* violations, which in light of other newly discovered exculpatory evidence, was prejudicial); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 129 (Mo. banc 2010) (vacating conviction in successive habeas petition because petitioner "has shown that his due process

[4] This Court has the authority to appoint a magistrate to review the evidence of Mr. Johnson's innocence. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013).

rights were violated because the prosecutor's failure to disclose the Mammolito impeachment evidence . . . was prejudicial for *Brady* purposes, [and] he also has established the 'cause and prejudice' necessary to overcome the procedural bar to granting him habeas relief"); *Ferguson v. Dormire*, 413 S.W.3d 40, 53 (Mo. App. 2013) (granting habeas relief on *Brady* claim presented in successive petition, finding that petitioner "has met his burden by establishing the gateway of cause and prejudice and by establishing that the State committed a *Brady* violation in connection with an undisclosed interview" of a key witness); *State ex rel. Koster v. Green*, 388 S.W.3d 603, 633 (Mo. App. 2012) (refusing to quash circuit court's grant of habeas relief because petitioner had "established the gateway of cause and prejudice, thus permitting the habeas court to consider his otherwise procedurally defaulted *Brady* claim," and had "established the essential elements of a *Brady* claim, and in the process, demonstrated a violation of his Due Process right to a fair trial"); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 258 (Mo. App. 2011) (upholding circuit court's habeas relief, concluding that petitioner "established a fundamental miscarriage of justice that justifies habeas corpus relief," by showing that the state suppressed exculpatory evidence—victim's reports of abuse by estranged husband and nondisclosure of a key witness).[5]

[5] The United States Supreme Court has often reiterated that at common law, res judicata did not apply to a denial of relief and that "a renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." *Schlup v. Delo*, 513 U.S. 298, 317 (1995) (quoting *McCleskey v. Zant*, 499 U.S. 467, 479 (1991) and its quotation

In *State ex rel. Amrine v. Delo*, the Missouri Supreme Court recognized the right to raise a freestanding claim of innocence in a Rule 91 petition if a prisoner can show clear and convincing evidence of his innocence. 102 S.W.3d at 548. In *Amrine,* as in the present case, "there was significant evidence indicating [] innocence." *Id.* Petitioners in both cases presented alibi testimony. There was no physical evidence linking Mr. Johnson to the murder and, like Amrine, Mr. Johnson was primarily convicted on the basis of the testimony of an informant who has now recanted. As in *Amrine,* "[g]iven the weakness of the evidence and the long delay since the original trial, during which time [petitioner] has been imprisoned . . . an expeditious and final resolution of this case is imperative." *Id*. at 549.

As discussed, *supra* in Section I, "[t]he writ of habeas corpus is the fundamental instrument safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment."); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003) ("Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.'") (quoting *Engle v. Isaac*, 456 U.S. 107 (1982)). "The very nature of the writ

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from WILLIAM SMITHERS CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. 1893)).

demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. at 291. "[T]he central mission of the Great Writ should be the substance of 'justice,' not the form of procedure." *Murray v. Carrier*, 477 U.S. 478, 500 (1986) (Stevens, J., concurring).

Even if Rule 29.11 was not available to the Circuit Attorney, the Circuit Court should have permitted her to proceed in the County of St. Louis City under Rule 91. It should have done what this Court must do now: vindicate the principle that "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank v. Magnum* 237 U.S. 309, 346 (1915) (Holmes, J., dissenting from denial of habeas corpus in case of petitioner now universally acknowledged to have been innocent).

### C. Missouri Supreme Court Rule 74.06

Finally, if Rules 29.11 and 91 are deemed to be unavailable to the Circuit Attorney, her motion can and should nonetheless be reviewed as an independent action in equity. "[A] trial court should look to the substance of a motion seeking relief to see if it invokes the equitable powers of the court and, thus, may be considered an independent suit in equity." *Cozart v. Mazda Distribs. (Gulf), Inc.*, 861 S.W.2d 347, 352 (Mo. App. 1993); *see also In the Interest of R.R.R. M.C. v. R.J.R. and R.R.*, 236 S.W.3d 103 (Mo.

App. 2007) (suggesting that a court has the authority *sua sponte* to consider a motion to vacate as a motion under Rule 74.06).

Missouri Rule 74.06 specifically contemplates an independent action:

> (d) Power of Court to Entertain Independent Action--Certain Writs Abolished. *This Rule 74.06 does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order or to set aside a judgment for fraud upon the court.* Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

Mo. Sup. Ct. R. 74.06(d) (emphasis added). A motion to set aside a judgment filed in the original matter is considered an independent action in equity for purposes of Rule 74. *Mathers v. Allstate Ins. Co*., 265 S.W.3d 387, 389 (Mo. App. 2008). "Circuit courts 'have broad discretion in deciding whether to grant a motion to set aside a final judgment.'" *In the Interest of D.C.C.*, 971 S.W.2d 843, 846 (Mo. App. 1998) (quoting *Cotleur v. Danziger*, 870 S.W.2d 234, 238 (Mo. banc 1994)).

Critically, Rule 74.06 subsumed The Writ of Error Coram Nobis. Rule 74.06(d). Under common law, an application for coram nobis was

> made to the trial court to correct errors of fact, not appearing on the face of the record, affecting the validity of proceedings which errors of fact were unknown to the party now seeking relief and to the court at the time of the disposition of the particular case, and which errors of fact, had they been known, would have prevented the rendition of the judgment. The motion or application is considered a new action—is in the nature of an independent and direct attack upon a judgment—with the purpose of revoking or annulling the judgment.

*State v. Harrison*, 276 S.W. 2d 222, 223 (Mo. 1955). Coram nobis was appropriate where "the circumstances [were] so compelling to achieve justice" or where an alleged error

was "of such fundamental character so as to compel relief." *Arnold v. State*, 552 S.W.2d 289, 293 (Mo. App. 1977). *See, e.g., Korematsu v. United States*, 384 F.Supp. 1406 (N.D. Cal. 1984); *State v. Scott*, 492 S.W. 2d 168, 170 (Mo. App. 1973) (granting writ of coram nobis after court denied without a hearing movant's motion to determine whether counsel prevented movant from perfecting an appeal of his conviction); *Dearing v. State*, No. WD31642, LEXIS 3677 (Mo. App. 1981) (granting writ for trial court's refusal to appoint counsel for indigent defendant). Coram nobis acts as, "the machinery for righting conceivable wrongs which otherwise would stand uncorrected." *State v. Stodulski*, 298 S.W. 2d 420, 424 (Mo. Div. 1 1957). A hornbook example is a situation in which a supposed murder victim eventually turns up alive. *See, e.g.,* Edwin Montefiore Borchard, Convicting the Innocent: Errors of Criminal Justice 19 (1932); Paul S. Gillies, *The Trials of Jesse and Stephen Boorn,* 38 Vt. B.J. 8 (2012). Thus, in this case, clear evidence of innocence, stipulated by the State, plainly constitutes an error of such a fundamental character as to compel relief under coram nobis, were the common law remedy still available. In this rare situation, 74.06(d) should apply.

Alternatively, Rule 74.06(b)(4) provides that a "court may relieve a party or his legal representative from a final judgment or order" where "the judgment is void." *Kerth v. Polestar Entertainment*, 325 S.W.3d 373, 386 (Mo. App. 2010). A "judgment that is void from its inception" is not held to the same "reasonable-time requirements" under Rule 74.06(c). *Id*. at 387 (internal quotations omitted) (citing *State ex rel. Houston v. Malen,* 864 S.W.2d 427, 430 (Mo. App. 1993)); *Williams v. Williams,* 932 S.W.2d 904, 906 (Mo. App. 1996). A judgment is considered void when it is:

> [o]ne which has no legal force or effect, the invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. One which, from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree. Judgment is a "void judgment" if the court that rendered judgment lacked jurisdiction of the subject matter, *or of the parties, or acted in a manner inconsistent with due process.*

*K & K Investments, Inc. v. McCoy,* 875 S.W.2d 593, 596 (Mo. App. 1994) (quoting Black's Law Dictionary 1574 (6th ed. 1990)) (emphasis added); *see also Platt v. Platt,* 815 S.W.2d 82, 83 (Mo. App. 1991) (holding "a Rule 74.06(b) motion to declare a judgment void is only appropriate when the court that rendered the judgment lacked jurisdiction over the subject matter or the parties, or acted in a manner inconsistent with due process of law").

While relief for a void judgment under 74.06 is "narrowly restricted" due to a strong public policy interest in the finality of judgments, *Smith v. Smith*, 524 S.W. 3d 95, 99 (Mo. App. 2017), the State has no finality interest in the continued confinement of an innocent person, *Sanders*, 373 U.S. at 8. The judgment entered against Mr. Johnson was based on due process violations and the withholding of evidence that "completely exonerate[s]" him. *Williams*, 673 S.W.2d at 847.

Courts in Missouri have found that Rule 74.06 does not provide a means for criminal defendants to appeal their convictions. However, the present case can be distinguished in two critical respects. First, those rulings did not involve cases presenting new evidence that completely exonerated a defendant. As this Court has held

> it is not the province of this feature of equitable jurisdiction to afford the losing party a retrial of matters either tried or concluded by the original proceeding, but instead relief is limited to those instances where the fraud was of such a character as to have forestalled an opportunity for the fair submission of the controversy.

*Jones v. Jones*, 254 S.W.2d 260, 261 (Mo. App. 1953). The Circuit Attorney's motion relied upon exonerating evidence that was withheld from Mr. Johnson at the time of his trial, including multiple confessions, which the State deemed to be credible. The motion also included newly discovered evidence involving "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." Mot. New Trial at 1.

Second, those rulings rest on the premise that the defendants could have brought actions pursuant to Rules 29.15, 24.035, or 91. *See State ex rel. Nixon v. Daugherty,* 186 S.W.3d 253 (Mo. banc 2006) (permitting a capital defendant to attack his guilty plea under 74.06 would "conflict[] with the purposes of Rule 24.035" and "frustrate[] the purpose of Rule 91.02(b)"); *Vicory v. State,* 117 S.W.3d 158, 160 (Mo. App. 2003) (defendant cannot use 74.06 to relitigate issues of ineffective assistance of trial and postconviction counsel); *Roath v. State*, 998 S.W.2d 590, 592 (1999) (petitioner "like any criminal defendant attacking his judgment of conviction and sentence, is limited to relief pursuant to a direct appeal, Rule 29.15, or a writ of habeas corpus."). If this Court holds that Rules 29.11 and 91 are not available to the Circuit Attorney in Mr. Johnson's behalf,

Rule 74.06 must be available to her. Otherwise, she will be left without a legal remedy to discharge her duty.[6]

To create a situation where the prosecutor is unable to right an injustice in her own jurisdiction, involving constitutional violations committed by her own office "would be to place the petitioner in the medieval position of having a right without any remedy to secure that right." *McIntosh v. Haynes*, 545 S.W. 2d 647, 653 (Mo. banc 1977) (discussing the improper limiting of habeas actions). Such circumstances, which would keep in prison a man who the prosecutor agrees is innocent, cannot stand under the Constitution of Missouri, which demands "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." MO. CONST. ART. V, § 14.

## III. Regardless of the procedural vehicle invoked, Missouri courts have historically accommodated prosecutors' ethical responsibility to free the innocent.

> *"When I as a prosecutor have reason to believe that a conviction lacks integrity, I have a responsibility to make it right."*
> -- Tim Lohmar, St. Charles County prosecutor

The court's authority to inquire into the legality of detention was heightened when the prosecutor conceded that constitutional errors at trial resulted in the conviction of an innocent person. The prosecutor is duty-bound to seek justice and remedy wrongful

[6] Because Rule 74.06 subsumed the Writ of Coram Nobis, it would be fundamentally unfair to restrict it only to civil cases, because of the rare situation, present here, where the movant does not have another procedural mechanism to discharge her duty.

convictions. When the prosecutor learns of clear and convincing evidence that a defendant was convicted of an offense that he did not commit, she is required to seek to remedy that wrongful conviction. Model Rules of Prof'l Conduct R. 3.8(h); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The prosecutor's oath to seek justice also gives the evidence of innocence in this case—in particular, the affidavits from the men who actually committed the murder—a credibility that courts do not afford to evidence offered by the defense. When newly discovered evidence consists of affidavits submitted by the defendant, courts treat them "with a fair degree of skepticism." *Herrera v. Collins*, 506 U.S. 390, 423 (O'Connor, J., concurring).

It is no answer to state, as the Circuit Court does, that its inability to entertain the Circuit Attorney's motion does not leave Lamar Johnson without a remedy because habeas relief is available to him. Order 15. The Circuit Attorney must be permitted to remedy the injustice caused by her office in the jurisdiction in which it occurred. The trial prosecutor is uniquely positioned to bring the violations of her office to the attention of the court. Contrary to the Circuit Court's Order (Order 2, 5, 9), the Circuit Attorney is not conflicted from bringing to its attention such violations. The prosecutor has no duty to protect her personnel; instead her loyalty is to justice for the people of St. Louis.

Missouri trial courts have long granted prosecutors the opportunity to exercise this duty, and Missouri's history is replete with such examples.[7] Last year, the St. Charles

[7] The citations in this section are to newspaper articles. Because these cases were vacated and they have been sealed and/or expunged, there are no court records of the proceedings. Additionally, where possible, undersigned counsel have verified the details of the cases with the individual attorneys involved.

County Circuit Attorney initiated an action in the St. Charles County Circuit Court to exonerate two defendants who had been convicted of rape two years prior. Lauren Trager, *Convictions reversed for two St. Charles County men formerly convicted of rape*, KMOV 4 (August 17, 2018). The men had been convicted of a 2015 rape of a woman in Wentzville, Missouri, sentenced to a year in prison, and required to register as sex offenders. *Id.* According to a statement from the St. Charles County Circuit Attorney's Office, the office determined that the convictions "lacked integrity" after a "detective re-interviewed the victim . . . and [] came away with convincing evidence that the victim was untruthful in her original story." Denise Hollinshed, *Two rape convictions set aside in St. Charles County after police find evidence 'victim was untruthful'*, St. Louis Post-Dispatch, Aug. 22, 2018. Armed with this new evidence, the prosecutor and the court had a duty to see that justice prevailed. "When I as a prosecutor have reason to believe that a conviction lacks integrity, I have a responsibility to make it right," said St. Charles County Prosecutor, Tim Lohmar. "That's why it was important for us to take these steps to have these men exonerated." *Id*.

In 2000, Jackson County prosecutor Bob Beaird moved in the Jackson County Court to vacate the 1987 convictions of Donald Dixon and James "Eddie" Bowman after the conviction of their co-defendant, Jon Keith Smith, was overturned by the Eighth Circuit Court of Appeals. That court held that the prosecutor's use of inconsistent theories at the codefendants' trials – resting on inconsistent statements from the same witness – violated Smith's right to a fair trial. *Smith v. Groose*, 205 F.3d 1045, 1051 (8th Cir. 2000). Based on the court's decision, the Jackson County Prosecutor reversed its

position on the guilt of Smith's co-defendants, determining the convictions of Dixon and Smith to be "improper." Joe Lambe, *Inmate in notorious case goes free; conviction voided*, December 16, 2000.

In 1983, St. Joseph prosecutor Michael Insco "initiated" the release of Melvin Lee Reynolds, who had been convicted four years earlier of the rape and murder of a child. *Innocent Man is Set Free*, United Press International (Oct. 15, 1983). Reynolds had confessed to the murder after twelve hours of police questioning, which involved hypnosis and injection of a "truth serum." Richard A. Leo & Richard J. Ofshe, *Criminal Law: the Consequence of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,* 88 J. Crim. L. & Criminology 429 (Winter 1998). In 1983, after being arrested for a similar rape-murder of another child, Charles Hatcher confessed to the crime for which Reynolds had been convicted. *Id.* The day after Hatcher entered a plea of guilty, Reynolds was released from prison at dawn and driven to the courthouse where he was released on his own recognizance. Prosecutor Insco called Reynolds's conviction a "terrible tragedy" and "an excruciating strain" on him. Jacob H. Wolf, Melvin Lee Reynolds, *Convicted of Murder and Sentenced to…,* United Press International Archives (Oct. 18, 1983). "I feel fortunate," he told reporters, "that I've had the opportunity to straighten out my own mistake. Not everyone gets the opportunity, at the end when it's all over with, to say, 'We did it right--finally.'" Richard E. Meyer, *A Tragic Conviction: How Justice System Can Go Wrong*, Los Angeles Times (March 17, 1985).

In the early 1980's, Jackson County Prosecutor Albert Riederer "was instrumental" in securing the release of Shae Lamont Jackson, an "obviously innocent man" who had been wrongfully convicted of murder.[8] *See* Michelle Pekarsky and Rob Low, *Albert Riederer, Former Jackson Co. Prosecutor, Dies After Cancer Battle*, Fox4KC (December 12, 2017).

In each of these cases the county prosecutors adhered to their ethical and constitutional duties to seek to redress innocent men convicted by their offices. This was so regardless of any wrongdoing on the part of their offices, time delays, or procedural hurdles. These men were permitted the opportunity to fix the mistakes of their offices—an opportunity the St. Louis City Circuit Attorney deserves as well.

## CONCLUSION

Lamar Johnson is innocent; the Circuit Attorney's office now knows this. The State's violation of Mr. Johnson's constitutional rights at trial through the use of perjured testimony and the suppression of exculpatory evidence enabled the State to secure Mr. Johnson's conviction in spite of his innocence. That conviction is unlawful and the State must remedy it. Given the prosecutor's clear mandate to do justice and the court's

[8] In a similar case in 1991, Patricia Stallings was exonerated in the murder of her son, after the trial prosecutor discovered the child had actually died of a rare disease, and not ethyl poisoning as he had initially thought. Jefferson County prosecutor Charles McElroy filed a motion in the trial court acknowledging that trial counsel, who had failed to call an expert, was ineffective. Rhonda Riglesberger, *How the Legal and Medical Systems failed Patricia and Ryan Stallings*, Justice: Denied, Volume 2, Issue 8. "My charge as a prosecutor is to seek justice," said McElroy, "and justice for Patricia Stallings required that I seek a dismissal." *Id*.

equitable authority to uphold the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free," the court has a corresponding duty to provide a forum to correct the miscarriage of justice in this case. Accordingly, this court should remand to the Circuit Court or appoint a magistrate to consider the Circuit Attorney's motion for new trial.

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## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) and Local Rule 360, that the Brief of *Amici Curiae* Legal Post-Conviction Scholars in Support of the State's Motion for New Trial complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) and Local Rule 360. I further certify that this brief contains 10,696 words, excluding the cover page, table of contents, table of authorities, certificates required by Rule 84.06(c), and signature block as directed by Rule 84.06(c) and Local Rule 360, and as determined by the Microsoft Word 2011 word-counting system.

*/s/ Jennifer Merrigan* ___

## CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing Brief of *Amici Curiae* Legal Post-Conviction Scholars in Support of the State'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/ Jennifer Merrigan* ___