

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

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

RESPONSE TO COURT ORDER

Introduction

This Court has no jurisdiction over the Circuit Attorney's improper, untimely motion for a new trial. The Attorney General represents the State's interests at the Court's request and on his own authority. Missouri law requires the Court to deny the motion for new trial.

Lamar Johnson was found guilty of first-degree murder and armed criminal action on July 11, 1995. This Court entered a judgment of conviction and sentenced Johnson to life imprisonment without the possibility of parole and a consecutive life sentence. In the twenty-four years since then, state and federal courts have reviewed Johnson's convictions and sentences in two other motions for a new trial, a motion for post-conviction relief, a consolidated appeal, on federal habeas review, federal habeas appeal, and in three state

habeas actions.¹ In those cases, Johnson raised almost all of the same claims he presents in his latest motion for new trial. Each court to review Johnson's claims has found that he failed to prove his innocence or any error that would justify reversing his convictions.

Johnson and the Circuit Attorney's Office now ask this Court to act outside its authority and overturn the jury's verdict, decades after it became final. In 1996, Johnson made a similar untimely request, asking this Court to grant him a new trial based on new evidence of his innocence. This Court found that it had no jurisdiction to grant Johnson's late new-trial motion. Twenty-three years have not changed the fact that this Court has no power to hear Johnson's motion or to grant a new trial in this case.

Argument

I. The Circuit Attorney does not have the power to file a motion for new trial, and this Court does not have jurisdiction to consider the motion.

This Court exhausted its jurisdiction over this case when it imposed sentence and entered its judgment on September 25, 1995. *State ex rel. Mertens*

¹ *State v. Johnson*, 989 S.W.2d 238, no. 69212 (Mo. App. E.D. 1999) (consolidated appeal); *Johnson v. McCondichie*, no. 4:00-CV-408 (E.D.Mo. Mar. 24, 2003) (federal habeas); *Johnson v. Dwyer*, no. 04-2265 (8th Cir. Sept. 30, 2004) (federal habeas appeal) *cert. denied*, 541 U.S. 907 (2004); *Johnson v. Dwyer*, Mississippi County no. 04CV746835 (state habeas); *Johnson v. Dwyer*, no. SD26759 (Mo. App. S.D. 2005) (state habeas-court of appeals); *State ex rel. Johnson v. Dwyer*, no. SC86666 (Mo. 2005) (state habeas-supreme court).

v. Brown, 198 S.W.3d 616, 618 (Mo. 2006); *State v. Larson*, 79 S.W.3d 891, 893 (Mo. 2002). After imposing sentence, this Court has no power to take any further action unless “expressly provided by statute or rule.” *Id.*; *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993).

This Court can hear motions for a new trial “[o]n application *of the defendant* made within fifteen days after the verdict.” Mo. Sup. Ct. R. 29.11 (emphasis added). When a defendant files a timely new-trial motion, this Court can grant a new trial “to all or any of the *defendants*.” Mo. Sup. Ct. R. 29.11 (emphasis added); *State v. Williams*, 504 S.W.3d 194, 196–97 (Mo. App. W.D. 2016). In requesting a new trial on behalf of the State, the Circuit Attorney’s motion raises procedural, constitutional, and ethical concerns. Rule 29.11 does not allow the State to file a motion for new trial.² Nor should it—double jeopardy principles prohibit the State from requesting or ordering a new trial for the defendant after jeopardy has attached. *U.S. v. Alvarez–Moreno*, 657 F.3d 896 (9th Cir. 2011). And the State cannot ethically represent Johnson and

² The amicus brief cites *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238 (Mo. 1985) as establishing that the prosecuting attorney may move for a new trial. That portion of *Norwood* was dicta. *Norwood* holds that the prosecutor does not have discretion to dismiss charges after the jury renders a verdict, and stresses that judicial rules provide a check on the prosecutor’s discretion. *Norwood*, 691 S.W.2d at 241.

file pleadings on his behalf. Mo. R. Pro. Cond. 4–1.7.³ Missouri law does not “expressly provide” this Court with authority to consider the Circuit Attorney’s new-trial motion, so this Court does not have jurisdiction to consider it. *State ex rel. Fite*, 530 S.W.3d at 510.

Even if the Circuit Attorney could seek a new trial under Rule 29.11, this Court cannot consider a motion filed outside the rule’s time limits. The Circuit Attorney filed the motion for a new trial on July 19, 2019—8,758 days out of time. This Court already found it was without jurisdiction to decide another untimely motion for new trial that Johnson filed in 1996. *Citing State v. Turnbough*, 604 S.W.2d 742, 746 (Mo. App. E.D. 1980). This Court reached the correct decision then, and should reach the same decision now. The Circuit Attorney’s untimely motion is “a nullity,” and this Court has no power to hear the motion or to grant the relief it requests. *Id.*; *State v. Young*, 943 S.W.2d 794, 799 (Mo. App. W.D. 1997).

Johnson and the Circuit Attorney ask this Court to make an exception because they allege that newly discovered evidence would show Johnson is innocent of his crimes. Missouri courts have roundly rejected such an exception. *State v. Terry*, 304 S.W.3d 105, 108–109 (Mo. 2010); *Williams*, 504

³ See also American Bar Association, *Criminal Justice Standards for the Prosecution Function*, 3.17(b) (2018) (“The prosecutor should not represent a defendant in criminal proceedings in the prosecutor’s jurisdiction.”).

S.W.3d at 196–97; *Turnbough*, 604 S.W.2d at 746. There is “no authority” that would allow a motion for new trial to be filed outside the time limits in Rule 29.11, even where the motion alleges newly discovered evidence. *Turnbough*, 604 S.W.2d at 746. Once the time limits under Rule 29.11 have expired, “Missouri rules have no provision for the granting of a new trial based on newly discovered evidence.” *Terry*, 304 S.W.3d at 109. “An untimely motion for new trial is not an appropriate means to introduce new evidence.” *Williams*, 504 S.W.3d at 197 (citations omitted).

The Circuit Attorney argues that this Court should grant a new trial after conducting independent plain error review, citing *State v. Mooney*, 670 S.W.2d 510 (Mo. App. E.D. 1984) and *State v. Williams*, 673 S.W.2d 847 (Mo. App. E.D. 1984). But *Mooney* and *Williams* were cases in which the Missouri Court of Appeals conducted plain error review on direct appeal and remanded the cases to the trial court for consideration of new evidence. The Missouri Supreme Court has expressly held that trial courts have no jurisdiction to conduct independent plain error review after sentencing. *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017). Any action this Court takes to review Johnson’s convictions for plain error would be “a nullity and void.” *Id.* (citations omitted).

The amicus brief argues that the time limits in Rule 29.11(b) are not jurisdictional and that the Circuit Attorney can waive them. Amicus Brief at

p. 21 (citing *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. 2015)). The amicus brief does not acknowledge the Missouri Supreme Court’s holding in *Zahnd v. Van Amburg*, which squarely forecloses the dicta about Rule 29.11’s time limits in *Henderson*. Because this Court exhausted its jurisdiction when it sentenced Johnson, it cannot take any action unless specifically allowed by statute or rule. *Zahnd*, 533 S.W.3d at 230. The only action this Court can take on the Circuit Attorney’s motion is to “exercise its inherent power to dismiss the motion for lack of jurisdiction.” *Id.* (cleaned up). This Court must follow *Zahnd*.

The amicus brief also cites dicta from *State v. Terry*, discussing dicta from *State v. Coffman*, 647 S.W.2d 849 (Mo. App. W.D. 1983), which suggested that a trial court could grant a motion for new trial filed outside the time limits in extraordinary circumstances. No Missouri court has held that a trial court has the power to consider an untimely motion for new trial.

In fact, neither Johnson nor the Circuit Attorney cites any case that upheld a trial court’s decision to vacate or amend a final sentence without express statutory authorization. And for good reason—Missouri’s appellate courts have routinely rejected circuit courts’ attempts to amend or vacate criminal sentences in multiple contexts. Circuit courts do not have authority to amend final sentences to be concurrent instead of consecutive. *State ex rel. Scroggins v. Kellogg*, 311 S.W.3d 293 (Mo. App. W.D. 2010). They cannot grant

credit toward an already final sentence for time spent on probation. *State ex rel. Scroggins v. Kellogg*, 335 S.W.3d 38 (Mo. App. W.D. 2011). Circuit courts cannot remedy an allegedly illegal final sentence by allowing a defendant to withdraw his guilty plea. *State ex rel. Fite*, 530 S.W.3d at 510. Nor can they overturn a final criminal sentence based on perceived manifest injustice. *State ex rel. Zahnd*, 533 S.W.3d at 230. And circuit courts have no power to hear untimely new-trial motions. *Terry*, 304 S.W.3d at 108–109; *Williams*, 504 S.W.3d at 196–97; *Turnbough*, 604 S.W.2d at 746.

The Circuit Attorney is correct that the State has an ethical duty to disclose new evidence that could aid Johnson so that he can challenge his conviction through legally available procedures. But the State cannot dispense with rules and laws designed to protect society and crime victims from the “chaos of review unlimited in time, scope, or expense.” *State ex rel. Zahnd*, 533 S.W.3d at 230. “Both the State and the victims of crime have an important interest in the timely enforcement of a sentence” and that interest cannot be set aside in favor of unending, unauthorized, and repetitive challenges to a final conviction. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133 (2019); *see also State ex rel. Strong v. Griffith*, 462 S.W.3d 732–33 (Mo. 2015).

Missouri and the federal government have “established a procedural system that provides timely review of criminal convictions.” *State ex rel. Simmons*, 866 S.W.2d at 446. Using those procedures, Johnson has already

presented numerous claims for relief including claims of trial court error, ineffective assistance of counsel, new evidence of actual innocence, and allegations that the prosecution used false testimony to convict him. Nearly all of the evidence Johnson cites has already been considered and rejected during earlier review.

Johnson has litigated post-trial motions and post-conviction review in this Court. He has had the benefit of appellate review before the Missouri Court of Appeals and had the opportunity to press his claims for federal habeas relief before a federal district court, the United States Court of Appeals, and the United States Supreme Court. Johnson has sought state habeas review in the Mississippi County Circuit Court, the Missouri Court of Appeals, and the Missouri Supreme Court. If Johnson has new, cognizable claims, he should follow the proper procedures and raise them before courts that have the power to hear them. But this Court cannot ignore the law and grant Johnson the untimely and unauthorized review he seeks.

II. The Court's inherent authority empowers the Court to seek the Attorney General's counsel.

Johnson, the Circuit Attorney, and the amicus brief also complain about the court's authority to hear argument from the Attorney General about whether the Court has jurisdiction. Just as this Court must satisfy itself of its own jurisdiction, this Court has inherent authority to supervise the attorneys that appear before it under the Missouri Constitution. *See, e.g., State v. Jones*, 306 Mo. 437, 268 S.W. 83, 85 (1924). The court's authority extends even to prosecutors. *Id.* Although that power is not absolute, it is substantial and may be exercised "to maintain the integrity of the judicial system." *Compare State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 397 (Mo. 2018), *with State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo. App. E.D. 2010). The *Gardner* case reiterates the limits on, and analysis necessary for, a circuit court's authority to disqualify a local prosecutor. That is not what happened here.

Here, the Court's order directing the Attorney General to appear and represent the State's interests was a valid exercise of the Court's inherent authority. This Court did not direct the Attorney General to relieve Circuit Attorney Gardner of her ability to appear and be heard. Nor did the Court relieve Circuit Attorney Gardner of her ongoing obligation to disclose evidence to Johnson. Instead, the Court directed the Attorney General to appear and to be heard on the issue of whether the trial court had jurisdiction to consider a

motion for new trial filed by the prosecutor and not the defendant, where such motion was also filed more than 8,000 days out of time. In the context of such an unusual event, the circuit court reasonably requested the input of the State's chief legal officer. *State v. Todd*, 433 S.W.2d 550, 554 (Mo. Div. 2, 1968).

III. The Attorney General's authority allows him to appear and offer his counsel to the Court.

Likewise, the Attorney General, who enjoys all of his common law powers unless constrained by the General Assembly, has authority to appear and be heard in this case. *See, e.g.*, Section 27.060 RSMo. ("The attorney general . . . may also appear and interplead, answer and defend, in *any* proceeding or tribunal in which the state's interests are involved.") (emphasis supplied). Under the plain language of this statute, which confirms the Attorney General's longstanding common-law powers, the Attorney General unquestionably has the authority to appear and represent the State's interests in this case. In addition to Section 27.060, RSMo., there are several general principles that inform the scope of the Attorney General's authority.

First, the Attorney General is the "chief legal officer of the State." *Todd*, 433 S.W.2d at 554. The powers of local prosecutors are "carved out of this overriding authority, with local implications." *Id.*

Second, the Attorney General does not represent the same interests as the local prosecutor; he represents a broader interest. *Dunivan v. State*, 466

S.W.3d 514, 519 (Mo. 2015). This is true even when “the state’s interests” are represented by “a local prosecuting attorney.” *Id.*

Third, the Attorney General enjoys all of his common law power, unless the General Assembly has passed a statute *for the purpose* of limiting his authority. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. 2000). In *American Tobacco*, our Missouri Supreme Court reiterated that a statute that grants “the same or other powers does not operate to deprive him of those belonging to the office under the common law” unless that is the purpose of the statute. *Id.* (quoting *State ex rel. Barrett v. Boeckeler Lumber Co.*, 302 Mo. 187, 257 S.W. 453, 456 (Mo. banc 1924)). Recently, the Missouri Supreme Court has reaffirmed that the Attorney General’s “power to represent the state” derives from “both statutory and common law.” *Dunivan*, 466 S.W.3d at 518 (quoting *Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 596 (Mo. 1982)).

And *fourth*, the General Assembly and the Missouri Supreme Court have evidenced a policy that the Attorney General should be allowed liberal participation in court proceedings. For example, the General Assembly has determined that the Attorney General shall receive notice and an opportunity to be heard when anyone seeks to have an ordinance or franchise deemed unconstitutional. Section 527.110, RSMo. The Attorney General represents the State’s interests in appellate proceedings. Section 27.050, RSMo. (the Attorney

General “shall . . . have the management of and represent the state in all appeals to which the state is a party other than misdemeanors. . .”).⁴ Likewise, the General Assembly has legislated that the Attorney General should be allowed to “appear and interplead, answer or defend, in any proceeding or tribunal in which the state’s interests are involved.” Section 27.060, RSMo. The Missouri Supreme Court has explained that Section 27.060 applies even in cases where the local prosecuting attorney is participating. *Dunivan*, 466 S.W.3d at 519. The Missouri Supreme Court has expressed its view through these decisions, and through its rules. For instance, the Attorney General may file an amicus brief in any Missouri Supreme Court case as a matter of right. Rule 84.05(f)(4).

These principles show that the Attorney General may appear and be heard in this case, even without an order from this Court. Missouri statutes would even permit the Attorney General to do more than merely appear. Section 27.060. The involvement of the Circuit Attorney’s Office presents no obstacle to the Attorney General’s ability to appear and be heard on issues that implicate the State’s interest. *Dunivan*, 466 S.W.3d at 519.

Under Missouri law, this Court’s order was not necessary for the Attorney General to appear at the status conference. But, it is the practice and

⁴ In Johnson’s case, the Attorney General has represented the State’s interests on appeal and in state and federal habeas proceedings since 1995.

tradition of the Attorney General to respect court orders directing him to file an entry of appearance and appear at proceedings. *See, e.g. Skinner v. State*, (No. 1416-CV16875) (Jackson County Cir. Ct.). The Attorney General does so even when the Attorney General believes his appointment was legally incorrect and when he presents that argument. *See, e.g., Amicus Curiae Brief, State ex rel. Peters-Baker v. Round*, (No. SC96931) (Mo.).

Although the Court has not disqualified the Circuit Attorney, that Office may have conflicts of interest in this case.⁵ Of course, the Court need not reach that issue or the issue of which authority allows the Attorney General to appear and give argument in this case. The Circuit Attorney's Office did not have the power to file its motion, and this Court does not have power to grant the motion. Any other issues are moot.

⁵ For instance, in her motion, Circuit Attorney Gardner alleges that one of her former assistant circuit attorneys presented false testimony and failed to correct it. On top of that, Circuit Attorney Gardner and the Midwest Innocence Project publicly have stated that they applied for and received a grant of \$250,000 to fund an investigator who works part time for the Circuit Attorney and part time for the Midwest Innocence Project so that they can "share our information with each other." Rachel Lippmann, Federal dollars will help St. Louis prosecutor look for wrongful convictions, Dec. 15, 2018, *available at* <https://news.stlpublicradio.org/post/federal-dollars-will-help-st-louis-prosecutor-look-wrongful-convictions#stream/0>. Though such potential conflicts need not exist for the Attorney General to appear and to be heard, they constitute another reason that the Attorney General should be permitted do so.

Conclusion

For these reasons, the Court should deny the Circuit Attorney's motion for new trial, as well as Johnson's motion to join the Circuit Attorney's motion for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed this document using the Missouri case.net system on August 15, 2019. All parties will be served electronically.

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