



**IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT  
 JEFFERSON COUNTY, ALABAMA  
 CRIMINAL DIVISION**

TOFOREST O. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-96-386.61
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

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**BRIEF OF FORMER MEMBERS OF THE ALABAMA SUPREME COURT AND  
 ALABAMA COURT OF CRIMINAL APPEALS AND FORMER ALABAMA BAR  
 ASSOCIATION PRESIDENTS AS *AMICI CURIAE* IN SUPPORT OF  
 PETITIONER JOHNSON'S REQUEST FOR A NEW TRIAL**

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### **IDENTITY OF *AMICI CURIAE***

*Amici Curiae* are former members of the Alabama Supreme Court and Alabama Court of Criminal Appeals and former Presidents of the Alabama State Bar. The *amici* have decades of experience with the administration of justice in criminal cases in Alabama, as described in more detail in the appendix.<sup>1</sup>

*Amici* submit this brief because they have a deep and abiding interest in improving “the administration of justice through the guiding values of trust, integrity, and service.”<sup>2</sup> As former Judges and Presidents of the Alabama State Bar elected by their peers, *amici* have seen the catastrophic effect wrongful convictions have on victims, innocent defendants, and their respective families when the criminal justice system fails to adequately protect the rights of defendants. *Amici* also recognize the importance of the State’s role in correcting these injustices and protecting the integrity of the justice system.

*Amici* view it as their professional responsibility to promote equal justice and fairness for all citizens under the law, including preserving an accused’s constitutional rights and minimizing the risk of an innocent person’s execution. With these fundamental principles as a guiding force, *amici* urge the Court to grant Mr. Johnson’s pending Rule 32 petition. *Amici* share a common belief in the competence of Alabama trial courts to administer justice and implore this Court to do justice by vacating Mr. Johnson’s conviction and granting him a new trial—a result that is not only urged by *amici* but also by Jefferson County’s District Attorney and the very attorney who prosecuted Mr. Johnson’s original case.

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<sup>1</sup> The Appendix contains more detailed biographies of the *amici*.

<sup>2</sup> Christy Crow, *A Message from Alabama State Bar President Christy Crow*, Alabama State Bar (June 17, 2020) <https://www.alabar.org/news/an-important-message-from-the-alabama-state-bar-condemning-racial-injustice/>.

William M. Bowen, Jr. served as a judge in the Court of Criminal Appeals of Alabama from 1977 to 1995. Judge Bowen served as the court's presiding judge from 1983 to 1988 and 1993 to 1995.

William Clark served as President of both the Birmingham Bar and the Alabama State Bar Associations.

Ralph Cook has been a trial judge, district court judge, circuit court judge, and a family court judge. Furthermore, Judge Cook served as a justice of the Alabama Supreme Court from 1993 to 2001.

Drayton Nabers, Jr. served as Chief Justice of the Alabama Supreme Court from 2004 to 2006.

Ernest Hornsby served as Chief Justice of the Alabama Supreme Court from 1989 to 1995. Prior to that, he served as President of the Elmore County Bar Association from 1968 to 1969, President of the Alabama Trial Lawyers Association from 1972 to 1973, and President of the Alabama State Bar from 1977 to 1978.

Robert ("Bobby") Segall served as President of the Montgomery County Trial Lawyers Association and the Montgomery County Bar Association. On the state level, he served as a bar commissioner for nine years, and in 2005-2006 served as President of the Alabama State Bar.

### **SUMMARY OF ARGUMENT**

As detailed in the underlying Rule 32 petition, overwhelming evidence casts serious doubts over Mr. Johnson's conviction. To prevent a reprehensible miscarriage of justice that may otherwise lead to the execution of a likely innocent man, this Court should defer to District Attorney Carr's recommendation and grant Mr. Johnson's Rule 32 petition.

Following a thorough and extensive nine-month evaluation of the case, including consulting with the victim's family, Jefferson County's District Attorney Danny Carr determined that the "interest of justice" requires that Mr. Johnson receive a new trial. In congruence with District Attorney Carr, the prosecutor who tried Mr. Johnson's original case nearly twenty years ago also recognizes the deep flaws in Mr. Johnson's conviction and believes that he should get a new trial.

Granting the Rule 32 petition falls squarely with Supreme Court precedent. The United States Supreme Court has long recognized that protecting innocent persons from a wrongful conviction is essential to the American criminal justice system. Based on this fundamental principle that the innocent should not be executed, courts have implemented additional safeguards to avoid such a miscarriage of justice. These safeguards include ensuring that prosecutors take the actions necessary to remedy convictions when there is clear and convincing evidence highlighting severe problems with the conviction.

Our criminal justice system can only function when the community is confident that prosecutors pursue criminal cases based on legitimate merit and evidence. To ignore both the District Attorney and former prosecutors would severely undermine their efforts to improve the administration of justice, including the opportunity to rectify past mistakes.

Based on the substantial evidence supporting Mr. Johnson's innocence and right to a new trial, it would be unconscionable not to grant a new trial. This Court should grant Mr. Johnson's Rule 32 petition.

## ARGUMENT

**I. The Court should give significant weight to the Jefferson County District Attorney’s request for a new trial on Mr. Johnson’s behalf after a nine-month investigation revealed serious defects in the trial process and presented compelling evidence of actual innocence.**

Jefferson County’s duly-elected District Attorney, Danny Carr, conducted a thorough and extensive nine-month investigation into Mr. Johnson’s trial and subsequent conviction and concluded Mr. Johnson should be granted a new trial. This Court should give significant weight to the District Attorney’s investigation and subsequent recommendation, and grant Mr. Johnson’s Rule 32 petition.

As this Court is well aware, Alabama’s government functions as a democracy where citizens actively participate in the decision-making process. Electing public officers (like district attorneys) is an opportunity for an individual’s vision of how elected officials can serve the community to materialize through palpable means. The selection of the District Attorney (“DA”), an individual responsible for presenting cases and directing criminal investigations, is one of those tangible means.

As the local government’s chief prosecutor, the DA has special duties to his area’s citizens—duties that may not be carried out arbitrarily or motivated by personal political ambitions but rather duties that must be based on legitimate and informed judgment regarding questions of justice and legal merit.<sup>3</sup> As a 2006 American Bar Association report evaluating Alabama’s death penalty system observed, the broad authority given to Alabama prosecutors means that their actions have an extraordinary impact on the quality of justice provided in a capital case.

Because prosecutors are decision makers on a broad policy level and preside over a wide range of cases, they are sometimes described as “administrators of justice.” Each prosecutor has responsibility for deciding whether to bring charges and, if so,

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<sup>3</sup> See ALA. CODE § 12-17-184 (1975).

what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous additional discretion deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.<sup>4</sup>

Elected prosecutors cannot await or rely on another's actions to correct legal wrongs. The American Bar Association ("ABA") makes clear that when a prosecutor knows of clear and convincing evidence highlighting severe problems with the defendant's conviction, the prosecutor shall seek to remedy the conviction.<sup>5</sup> To better perform this obligation (especially when it comes to death-penalty convictions), prosecutors around the country are launching "Conviction Integrity Units (CIU)," also known as "Conviction Review Units (CRU)."<sup>6</sup> These select units arose out of public awareness of wrongful convictions; our society has recognized that convicting an innocent person is a severe miscarriage of justice that requires immediate remedial action through government intervention. At least eighty CIUs and CRUs have been established nationwide to review claims of innocence and rectify these severe and potentially fatal miscarriages of justice.<sup>7</sup>

The problem of correcting wrongful convictions is especially pressing in Alabama. According to the National Registry of Exonerations, over 2,700 people have been exonerated since 1989—only 28 of these exonerations have occurred in Alabama.<sup>8</sup> According to the Equal Justice

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<sup>4</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) at 75, available at: [https://www.prisonpolicy.org/scans/aba/AL\\_report\\_%20authcheckdam.pdf](https://www.prisonpolicy.org/scans/aba/AL_report_%20authcheckdam.pdf).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009) (emphasis added).

<sup>6</sup> List of jurisdictions available at: *Conviction Integrity Units*, THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Feb. 10, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> Database listing all exonerations since 1989 available at: THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (last visited Feb. 26, 2021).

Initiative (“EJI”), at least 170 death sentences in Alabama have been overturned with an exoneration, lesser conviction, or reduced sentence.<sup>9</sup> Further illustrating the injustices still casting a shadow over Alabama, the ABA sent a team to Alabama to conduct a comprehensive review of its capital punishment system.<sup>10</sup> The assessment team released a June 2006 report study recommending that Alabama institute a moratorium on executions because the State had failed to provide fair and accurate procedures to capital defendants.<sup>11</sup>

This year, Jefferson County recognized the demand within the community to investigate and overturn wrongful convictions and became one of the newest active CRUs in the country. Indeed, while seeking office, Danny Carr committed to examining post-conviction cases and identifying wrongful prosecutions as DA.<sup>12</sup> Following his election in 2018,<sup>13</sup> District Attorney Carr launched a CRU in January 2021.<sup>14</sup>

Prior to the official launch of the Jefferson County CRU, District Attorney Carr began fulfilling his campaign promises by investigating Mr. Johnson’s case. After a thorough and extensive nine-month evaluation of the case, including consulting with the victim’s family, he

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<sup>9</sup> *Alabama’s Death Penalty*, EQUAL JUSTICE INITIATIVE, <https://eji.org/issues/alabama-death-penalty/> (last visited Feb. 10, 2021).

<sup>10</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006); available at: [https://www.prisonpolicy.org/scans/aba/AL\\_report\\_%20authcheckdam.pdf](https://www.prisonpolicy.org/scans/aba/AL_report_%20authcheckdam.pdf). Amici William Clark was a member of the ABA’s Alabama Death Penalty Assessment Team.

<sup>11</sup> David Person, Editorial, *No Justice in the Death Penalty*, HUNTSVILLE TIMES, Nov. 2, 2007, at 8A.

<sup>12</sup> *Birmingham D.A. Files Brief Supporting New Trial for Death-Row Prisoner Toforest Johnson*, DEATH PENALTY INFORMATION CENTER (June 15, 2020), available at <https://deathpenaltyinfo.org/news/birmingham-d-a-files-brief-supporting-new-trial-for-death-row-prisoner-toforest-johnson>.

<sup>13</sup> The DA, Danny Carr, was elected in 2018 after serving as Interim DA in the Birmingham Division for a year. Ivana Hrynskiw, *Danny Carr wins Jefferson County District Attorney Race*, AL.COM (Nov. 6, 2018, updated Nov 7, 2018), available at <https://www.al.com/news/birmingham/2018/11/jefferson-county-district-attorney-race-live-updates.html>.

<sup>14</sup> *Conviction Review Unit*, DISTRICT ATTORNEY 10<sup>TH</sup> CIRCUIT, <https://www.jeffcoda.org/cru/index.php> (last visited Feb. 10, 2021).

determined that the “interest of justice” requires that Mr. Johnson receive a new trial. This decision was based primarily on five specific concerns: (1) the State never settled on a theory as to who shot the victim; (2) the investigation was based on inconsistent statements from a 15-year-old girl who admitted to lying “hundreds” of times; (3) the State’s main witness received a \$5,000 reward that was never disclosed to the defense; (4) numerous alibi witnesses saw Mr. Johnson across town at the time of the murder; and (5) the lead trial prosecutor has expressed concerns about the case and supports a new trial.<sup>15</sup> Viewing all of the factors on which the DA’s decision was based, Mr. Johnson’s need for relief is highly compelling.

The DA’s decision to request that the Court vacate Mr. Johnson’s conviction is a heavy one made after an exhaustive investigation of the surrounding circumstances and irregularities leading to his conviction; this weighty decision should be given significant deference by the Court. To disregard District Attorney Carr’s decision would frustrate the exact duties he was elected to perform and further undermine public confidence in our criminal justice system.<sup>16</sup> The judicial system will fail to provide true justice if courts, cognizant of the significant authority given to prosecutors, deny a DA’s decision to use that authority to review and investigate a potentially wrongful conviction.

Administration of capital punishment has diminished public confidence in the criminal justice system.<sup>17</sup> By establishing a CRU, District Attorney Carr took a substantial step towards

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<sup>15</sup> See Brief for Toforest O. Johnson as Amici Curiae Supporting Petitioner, Doc. 326 at ¶¶ 1-5, No. 01-CC-1996-00386.60 (June 12, 2020).

<sup>16</sup> *Sprinkle v. State*, 368 So. 2d 554, 560 (Ala. Crim. App. 1978) (“The primary duties of the office of the District Attorney are to see that justice is done, and to see that the state’s case [is] properly presented to the court and jury as made by the evidence . . .”).

<sup>17</sup> Ivana Hrynkiw, *Research Group Releases Report on Death Penalty, Cites Alabama Cases*, AL.COM (Dec. 14, 2018), available at <https://www.al.com/news/birmingham/2018/12/research-group-releases-report-on-death-penalty-cites-alabama-cases.html>; see also Death Penalty Information Center, *The Death Penalty in 2018: Year End Report* (Dec.



restoring public trust in the criminal justice system and preventing future failures of the system.<sup>18</sup> Confidence in our criminal justice system must be restored, and rejecting the thorough review done by District Attorney Carr, which was based on legitimate merit and evidence, would severely undermine that effort. This Court should therefore defer to District Attorney Carr's recommendation and grant Mr. Johnson's Rule 32 petition.

**II. The Court must give significant weight to the Prosecutor's support for a new trial based on his ethical and legal obligations to ensure the administration of justice by expressing grave concerns with the evidence presented at Mr. Johnson's trial.**

Not only does Jefferson County's District Attorney support a new trial, but so does the lawyer who prosecuted Mr. Johnson's original case. Clearly, this effectively turns away any argument in the name of finality that may exist to resist calls for a new trial brought by a subsequently elected DA. While not necessary, the participation of the trial prosecutor in seeking this relief insulates against any argument that the Court would be going down a slippery slope leading to new trials every time there is a change in DA. To the contrary, the slippery slope would be to assume for the sake of finality that a criminal defendant is properly guilty after former and current prosecutors have identified numerous reasons supporting a new trial.

Prosecutors in Alabama have a moral and ethical obligation to uphold justice. As a practicing attorney, each lawyer has an ethical responsibility to "improve the administration of justice through the guiding values of trust, integrity, and service."<sup>19</sup> As a prosecutor, this obligation

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14, 2018), available at <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2018-year-end-report>.

<sup>18</sup> See Daniel Kroepsch, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 GEO. J. LEGAL ETHICS 1095, 1098-99 (2016) ("Rather than be caught in the nexus of public and legislative disapproval that could leave them subject to external reforms—which would likely come from non-local politicians or a politician-appointed task force—some prosecutors' offices around the country have decided to react and get ahead of the curve by instituting their own internal changes.").

<sup>19</sup> Christy Crow, *A Message from Alabama State Bar President Christy Crow*, Alabama State Bar (June 17, 2020) <https://www.alabar.org/news/an-important-message-from-the-alabama-state-bar-condemning-racial-injustice/>

is not limited to securing convictions, but instead extends to ensuring that justice prevails.<sup>20</sup> The same principle has been affirmed by the United States Supreme Court<sup>21</sup> and adopted and codified into the ABA Model Rules of Professional Conduct.<sup>22</sup>

Prosecutors also have a broad role 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.”<sup>23</sup> The most recent editions of the Model Rules of Professional Conduct deem prosecutors as “ministers of justice,” paralleling their roles as public officers entrusted with seeking truth and fairness. As such, the prosecutor serves the public interest and must act with “integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.”<sup>24</sup> As “ministers of justice,” prosecutors’ duties are driven by the ultimate objective “[t]hat guilt shall not escape or innocence suffer.”<sup>25</sup> Ultimately, a prosecutor’s aim is not to win a trial at any cost but to serve justice for the people.<sup>26</sup>

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<sup>20</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The [prosecutor’s] interest... is not that he shall win a case, but that justice shall be done.”).

<sup>21</sup> *Berger*, 295 U.S. at 88; *see also Strickler v. Greene*, 527 U.S. 263, 281 (1999) (underscoring the prosecutor’s unique position in ensuring that justice is done even at the expense of the legitimate prosecutorial interest in securing convictions).

<sup>22</sup> MODEL RULES OF PROF’L CONDUCT R. 3-1.2 (2017).

<sup>23</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8 n. 1 (2020) Prosecutor.

<sup>24</sup> MODEL RULES OF PROF’L CONDUCT R. 3-1.2(b) (2017).

<sup>25</sup> *Berger*, 295 U.S. at 88.

<sup>26</sup> *Foute v. State*, 4 Tenn. (3 Hayw.) 98, 99 (1816), *quoted in* John Jay Douglas, *Ethical Issues in Prosecution*, (2d ed. 1993) (“[a]lthough the government technically loses its case, it has really won if justice has been done”).

Prosecutors are required to turn over exculpatory evidence under the *Brady* doctrine.<sup>27</sup> And a prosecutor's ethical obligation does not end upon the jury's verdict; rather, it "extends beyond a defendant's criminal conviction."<sup>28</sup> In *Imbler v. Pachtman*, the United States Supreme Court noted that *Brady*'s principles apply whenever the evidence is discovered, including when evidence is discovered *after* a conviction.<sup>29</sup> Realizing that a person may have been wrongfully incarcerated for over two decades is a grave matter for any legal advocate. Nonetheless, when faced with the possibility that their efforts may have led to a wrongful conviction, it is a prosecutor's ethical duty to seek immediate remedial action through the courts.

Equally important to the public's confidence in the criminal justice system is a prosecutor's ability to administer that system fairly. Prosecutors carry an incredible amount of power—they decide whether to prosecute individuals for criminal offenses, whether to bring specific charges against them or dismiss them, and what punishment to seek. Alexander Pope observed, "to err is human"<sup>30</sup> and attorneys are obviously fallible. As a result, prosecutors are, and must be, given power to rectify past mistakes—including the power to urge for a new trial for those they believe were wrongfully convicted.

After nearly twenty years, the prosecutor of Mr. Johnson's original case (charged with these fundamental duties of carrying out justice) recognizes the deep flaws in Mr. Johnson's

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<sup>27</sup> In *Brady v. Maryland*, the Supreme Court held that a conviction must be reversed when the prosecutor fails to disclose evidence that tends to contradict the defendant's guilt, is material to the defendant's guilt or subsequent punishment, or would mitigate the defendant's punishment. 373 U.S. 83 (1963).

<sup>28</sup> Brian T. Kohn, *Brady Behind Bars: the Prosecutor's Disclosure Obligations Regarding DNA in the Post-Conviction Arena*, 1 CARDOZO PUB. L. POLY & ETHICS 35, 38 (2003) (arguing that prosecutors have ethical obligations turn over exculpatory evidence extends beyond a defendant's criminal conviction).

<sup>29</sup> 424 U.S. 409, 427 n.25 (1976).

<sup>30</sup> THE YALE BOOK OF QUOTATIONS 599 (Fred R. Shapiro ed., 2006) (quoting *An Essay on Criticism* by Alexander Pope).

conviction and believes that he should get a new trial. This Court should thus grant Mr. Johnson's Rule 32 petition.

**III. The Court has the authority to grant a Rule 32 petition vital to safeguarding liberty, remedying miscarriages of justice, and upholding the notions of fairness.**

The petition before the Court is an extraordinary and rare situation in which the evidence of constitutional violations and Mr. Johnson's innocence is genuinely overwhelming. So much so that after Mr. Johnson has spent over two decades on Alabama's death row, the lead prosecutor who tried his case over twenty years ago, along with the current DA, is requesting a new trial.<sup>31</sup>

The United States Supreme Court has long recognized that protecting innocent persons from a wrongful conviction is essential to the American criminal justice system.<sup>32</sup> Granting the Rule 32 petition at issue is imperative to prevent a serious miscarriage of justice, especially because Mr. Johnson (a likely innocent defendant) is facing execution.<sup>33</sup> The United States Supreme Court has repeatedly recognized this. For example, in *Herrera*, Justice Blackmun wrote in his dissent, "[j]ust as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder."<sup>34</sup> Based on this basic and

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<sup>31</sup> Because a prosecutor who learns of exculpatory evidence does not have the authority to release a convicted defendant *sua sponte*, the proper vehicle is by filing a motion to vacate the judgment and for a new trial as presented before the court. See ALA. R. CRIM. P. 32.1 ("Subject to limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that (a) The constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief . . . [or] (e) Newly discovered material facts exist which requires that the conviction or sentence be vacated by the court . . .").

<sup>32</sup> *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."); see also *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

<sup>33</sup> *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring, joined by Kennedy, J.) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.").

<sup>34</sup> 506 U.S. at 419.

fundamental principle that the innocent should not be executed, courts, including the Eleventh Circuit, have implemented additional safeguards to avoid such miscarriage of justice.<sup>35</sup> To be sure, these safeguards sometimes fail. According to Alabama Arise, Alabama has a shocking error rate with one of the nation's higher per capita execution rates: for every ten people executed, one has been exonerated.<sup>36</sup> These inequities cannot stand. We must constantly strive towards justice, including with Mr. Johnson's case. The heartbreaking stories of wrongful convictions showcased by media reports have cast doubt in the criminal justice system by people on all sides of the political spectrum and parties on both sides of the courtroom.<sup>37</sup>

Almost one hundred years ago, a North Alabama circuit judge ordered a new trial for a defendant whose verdict rested on testimony that was not corroborated by physical evidence or other witnesses.<sup>38</sup> The circuit judge wrote, "Social order is based on law, and its perpetuity on its fair and impartial administration."<sup>39</sup> The circuit judge's action was supported by the incoming President of the Alabama Bar Association for 1933-34, Leo Oberdorfer.<sup>40</sup>

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<sup>35</sup> See *Mize v. Hall*, 532 F.3d 1184, 1196 n.9 (11th. Cir. 2008) ("[I]f a petitioner in fact has a freestanding innocence claim, he would be entitled to have all his procedural defaults excused as a matter of course under the fundamental miscarriage of justice exception.").

<sup>36</sup> Since 1976, there have been a total of 67 executions in Alabama. Death Penalty Information Center, *Execution Database* (last visited March 7, 2021), available at <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Alabama>. During that time, seven individuals on death row have been exonerated. Death Penalty Information Center, *Innocence Database* (last visited March 7, 2021), available at <https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Bstate%5D=Alabama>.

<sup>37</sup> A study published in 2019 revealed how wrongful convictions significantly affect the public's opinion overall, including reducing support for capital punishment, eroding trust in the criminal justice system, and increasing support for police reform. See Norris, R.J., Mullinix, K.J., *Framing Innocence: An Experimental Test of the Effects of Wrongful Convictions on Public Opinion*, J. EXP. CRIMINOL. 16, 311-334 (2020).

<sup>38</sup> Dan T. Carter, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 268-69 (rev. ed. 1995).

<sup>39</sup> *Id.* at 265.

<sup>40</sup> *Id.* at 270.

For a time, the circuit judge even hoped that his actions “proving [the defendant’s] innocence as conclusively as possible with human logic” would put an end to the controversial cases that had brought international scorn upon the State of Alabama.<sup>41</sup> Alas, it was not to be. The Alabama Attorney General, Thomas E. Knight, held aspirations of becoming Governor, and foregoing continued prosecution was deemed to be “political suicide.”<sup>42</sup> The tragic saga of the “Scottsboro Boys” continued, and became one of our nation’s most famous examples of the miscarriage of justice.

Judge James Edwin Horton, Jr. was removed from the case and defeated in his next, and final, election. And yet, this trial judge’s courageous decision to administer the law in a “fair and impartial” manner provides us with a shining example of how the justice system should function no matter the intensity of external headwinds. In the words of the Latin phrase Judge Horton viewed as emblematic of his family’s tradition: “*fiat justitia ruat coelum* – let justice be done though the heavens may fall.”<sup>43</sup>

Since this horrific time in our nation’s history, society’s values have changed and progressed forward. Alabama’s legal system is a testament to such progress as its values reflect a commitment to justice, equity, and fairness. It is a state where the elected District Attorney, the representative of this community, asks this Court to correct an egregious wrong and order a new trial. This Court can be confident that the community it serves recognizes its past mistakes and strives to reinforce a system based on justice, equity, and fairness.

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<sup>41</sup> *Id.* at 267.

<sup>42</sup> *Id.* at 264.

<sup>43</sup> *Id.* at 267.

Given the hurdles individuals face post-conviction, this may be the last substantive chance for Mr. Johnson’s meritorious claim to be heard. It would be unconscionable to proceed with Mr. Johnson’s conviction when there is *substantial* evidence supporting his innocence and right to a new trial. Our adversarial criminal justice system “is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.”<sup>44</sup> With both the prosecution and defense counsel in agreement, this Court should grant Mr. Johnson’s petition.

### **CONCLUSION**

For the foregoing reasons, *amici curiae* respectfully urge the Court to grant Mr. Johnson’s Rule 32 petition requesting that his conviction be vacated, and a new trial be ordered.

Respectfully submitted March 9, 2021.

/s/ Kevin R. Garrison  
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<sup>44</sup> *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

## APPENDIX

Set forth below is a listing of the *Amici Curiae* and their respective interests in the filing of this brief:

### WILLIAM M. BOWEN, JR.

William M. Bowen, Jr. received his baccalaureate degree (cum laude) in history and political science from Samford University in 1969. He earned his law degree from Cumberland School of Law and was admitted to the bar in 1973.

Judge Bowen's legal career began at the Office of the Attorney General where he worked from 1973 to 1976, when he was elected to the Court of Criminal Appeals. At that time, he was the youngest appellate judge in the nation. He served as presiding judge from 1983 to 1988 and 1993 to 1995. Judge Bowen also served as chairman of the Judicial Inquiry Commission from 1989 to 1995. In addition, he was an instructor at the Alabama State Trooper's Academy and the Alabama Peace Officers' Standards and Training Center in Selma from 1982-1995. Throughout his judicial career Judge Bowen taught numerous continuing education courses for clerks, magistrates, lawyers, and judges. In 1989, he was made a Knight of St. Gregory, a papal honor extended by Pope John Paul II. After leaving the court, Judge Bowen pursued his love of criminal law in private practice.

### WILLIAM CLARK

William (Bill) Clark holds a B.S. from the United States Military Academy at West Point and a J.D. from The University of Alabama. While in law school he served as Managing Editor of the Alabama Law Review and upon graduation he served as Law Clerk to the Honorable Walter P. Gewin, United States Court of Appeals for the Fifth Circuit. Mr. Clark is engaged in trial and appellate, white collar criminal defense, criminal defense, domestic relations, civil litigation, and professional licensing practice.



He has served as President of both the Birmingham Bar and the Alabama State Bar Associations. He has been awarded the Alabama State Bar Award of Merit for his service as Chair of the State Bar Committee on Indigent Defense, the Walter P. Gewin Award given by the ABICLE for service in the area of continuing legal education, and the Roderick Beddow, Sr. Award by the Alabama Criminal Defense Lawyers' Association for distinguished service in the field of criminal law. He was presented the L. Burton Barnes III Award for Public Service by the Birmingham Bar Association. He is an elected member of the American Law Institute, and a Fellow in the American College of Trial Lawyers.

Mr. Clark served on the Advisory Committee of the Alabama Supreme Court which drafted the Alabama Rules of Criminal Procedure and was an ex-officio member of the Advisory Committee which drafted the Alabama Rules of Evidence. He also served as a member of the American Bar Association team which studied and reported on significant deficiencies in the death penalty process in Alabama and served as a member of the Alabama Law Institute (ALI) committee which reviewed and made recommendations regarding the Alabama Criminal Code. He also serves on the ALI Executive Committee. Mr. Clark has served as an Adjunct Professor at The University of Alabama School of Law teaching evidence, criminal procedure and business crimes.

Active in the community, Mr. Clark served as Chair of the Birmingham Metropolitan YMCA Board, Chair of the Vulcan District of the Boy Scouts of America, and as a member of the Board of the Boys and Girls Club of Central Alabama.

Mr. Clark served on active duty in the Army as an Infantry Officer in Germany, the U.S. and South Vietnam. After leaving the Active Army, and upon graduation from law school, he

continued his military service in the Army Reserve, culminating as Commanding General, 87th Division (Ex). He retired from the Army as a Major General.

#### RALPH COOK

Ralph Cook has been a trial lawyer for over 50 years. Throughout 24 years of his career, he served as a trial judge, district court judge, circuit court judge, and as a family court judge. He has extensive experience in just about all areas of the law. Judge Cook was later appointed as an associate justice of the Supreme Court for the State of Alabama in 1993, and became an elected justice of the Alabama Supreme Court in 1994, serving until January of 2001. His role as a Supreme Court Justice was to review all areas of the law. Justice Cook now practices law at the firm of Hare, Wynn, Newell & Newton, where he has been Of Counsel since 2001.

#### ERNEST HORNSBY

Ernest “Sonny” Hornsby graduated from Auburn University and earned his Juris Doctor from the University of Alabama School of Law. Following his graduation from law school in 1960, Hornsby launched a 28-year career as a successful lawyer and businessman in the Tallassee area and served in all three branches of government. He was Assistant Superintendent of Insurance under Governor John Patterson, state senator for Tallapoosa and Elmore counties, and City Judge for the City of Tallassee. Hornsby is a past president of the Elmore County Bar Association, the Alabama Trial Lawyers Association, and the Alabama State Bar. In 1978-79, he was a member of the American Bar Association’s House of Delegates. He is also a member of the International Society of Barristers and a member and past President of the Alabama Chapter of the American Board of Trial Advocates.

In the 1988 general election, Hornsby was elected chief justice of the Supreme Court and assumed office from 1989 until 1995. Highlights of his tenure as head of Alabama’s judicial system

include the construction of the new judicial building, adoption of new rules of criminal procedure and of evidence, trial and appellate court automation, and implementation of time standards, putting Alabama in the lead nationally in the timely disposition of cases on all levels.

DRAYTON NABERS, JR.

Drayton Nabers Jr. has a notable record of community and professional service. He was appointed Alabama State Finance Director in 2003 and served in that capacity until becoming Chief Justice of the Alabama Supreme Court in 2004 serving until 2006. In December 2018, Chief Justice Nabers retired as the director of the Frances Marlin Mann Center for Ethics and Leadership at Samford University after leading the Center for four years. He has practiced law with the Birmingham firms of Cabaniss, Johnston, Gardner, Dumas & O'Neal and Maynard, Cooper & Gale. He served as the general counsel and chief executive officer of Protective Life Corporation, retiring in 2002 after serving the company in various roles since 1979.

Nabers has served as board chair for Cornerstone School of Alabama, President of the Kiwanis Club of Birmingham, and board chair for United Way of Central Alabama and Leadership Birmingham. He has been inducted into both the Alabama and Birmingham Business Halls of Fame. In 2011, he received the Birmingham Bar Association's L. Burton Barnes Public Service Award.

A 1962 graduate of Princeton University, Nabers earned his law degree from Yale University in 1965. Before returning to Birmingham to practice law, he was a law clerk to Justice Hugo Black on the U.S. Supreme Court. Nabers is the author of two books on ethics and leadership, *The Case for Character* and *The Hidden Key to Happiness*.

ROBERT SEGALL

Robert “Bobby” Segall attended college at Vanderbilt University, and law school at the University of Alabama, where he finished first in his graduating class. One of the foremost highlights in Segall’s career was clerking for a year with Judge Johnson. That year produced a lifetime of memories and a lasting relationship with the judge.

Following his clerkship, Segall attended Harvard Law School, where he received an LLM degree in 1973 and met his wife, Sandy. At the end of that year, Segall joined Copeland Franco (then called Hobbs Copeland). He is admitted to practice before all state and federal courts in Alabama, the United States 11th Circuit Court of Appeals, and the United States Supreme Court.

Segall’s litigation skills have been recognized through his selection as a Fellow of the American College of Trial Lawyers, and as a member of the American Board of Trial Advocates. He has been included in the publication “Best Lawyers in America” for more than 20 years, and he has been named an Alabama Super Lawyer, having been listed among Alabama’s top ten lawyers for the year 2008. His appellate litigation skills have been recognized through his selection as a Fellow of the American Academy of Appellate Lawyers. In addition to his busy law practice, Segall has served as President of the Montgomery County Trial Lawyers Association and the Montgomery County Bar Association. He has also served as President of the Hugh Maddox Chapter of the American Inns of Court. Bobby presently serves as President of the board of the Federal Defender’s program for the United States Middle District of Alabama. On the state level, Segall served as a bar commissioner for nine years, and in 2005-2006 served as President of the Alabama State Bar. He also served as President of Legal Services Corporation Alabama for six years. Segall served on the Chief Justice’s Commission on Professionalism, and presently serves

as Secretary of Alabama's Commission on Access to Justice. Segall is a Life Fellow of the American Bar Foundation and of the Alabama Law Foundation.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 2021, the forgoing document was filed electronically with the Clerk using the Alafile system and served via email on the following counsel:

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