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- Joyce White Vance, former United States Attorney for the Northern District of Alabama and former Assistant U.S. Attorney.

## II. Argument

While we take no position on Johnson’s claims of innocence, *amici* support the position of Jefferson County District Attorney Danny Carr that Johnson should receive a new trial “in the interest of justice.” Dkt. 326 at 2, *Johnson v. State*, Case No. CC-96-386.60 (Jefferson Co., Ala. Cir. Ct. June 12, 2020). Prosecutors, as officers of the court, have a duty of candor to the tribunal and an obligation to see justice done. In a situation like this, where a district attorney takes the unusual step of advocating for a new trial, we believe the courts should honor that request.

### A. Prosecutors are committed to uphold the Constitution and ensure both substantive and procedural fairness to all participants in the justice system.

Prosecutors and others in the law enforcement community must be committed to uphold the Constitution. “The State’s obligation is not to convict, but to see that, so far as possible, truth emerges.” *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); *see also Dowdell v. State*, 854 So. 2d 1195, 1198 (Ala. Crim. App. 2002) (Shaw, J., concurring) (quoting *Giles*). Consistent with that duty, Alabama Rule of Professional Conduct 3.8 sets forth the special responsibilities of a prosecutor, further detailed in the comment to the rule:

*A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.* This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. . . . Applicable law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Ala. R. Prof’l Conduct 3.8, Comment (emphasis added); *see also* Am. Bar Ass’n Model Rule 3.8(h) (“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.”). This is a bedrock of our system, that “[p]rosecutors have a special duty to seek justice, not merely to convict.” *Connick v. Thompson*,

563 U.S. 51, 65-66 (2011). Ordinarily, this plays out in an exercise of prosecutorial discretion—deciding whether, and what, charges to prosecute. But it also applies to conviction review, because confronting potential errors in the justice system builds public trust, upholds the prosecutor’s Constitutional role, and embraces the ethical rules set forth above. As applied in this case, that means granting the relief the Jefferson County District Attorney has requested.

**B. The willingness to review convictions where justice may not originally have been done upholds, rather than weakens, a prosecutor’s duty to seek justice.**

In its June 12, 2020 brief in support of Johnson’s Rule 32 petition, the Jefferson County District Attorney’s Office stated it was the position of that office that Johnson should be granted a new trial. Dkt. 326 at 2, *Johnson v. State*, Case No. CC-96-386.60 (Jefferson Co., Ala. Cir. Ct. June 12, 2020). The District Attorney’s Office also stated that the original line prosecutor on this case “expressed concerns about this case and supports” the decision to grant Johnson a new trial. *Id.* at 2. As the District Attorney’s Office said in its filing, “as many as five different theories” were presented in different cases concerning the murder of Deputy Hardy—a fact we find persuasive, just as the District Attorney’s Office does. *Id.* at 1. “It is as much a prosecutor’s duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Connick*, 563 U.S. at 71 (alteration removed) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Irreconcilable theories of the underlying crime are inconsistent with that admonition from the Supreme Court.

Alabama district attorneys’ obligations to the justice system do not begin and end with a criminal conviction. Ala. Code § 12-17-184. Indeed a prosecutor’s obligations extend long after the trial is completed. *See* Ala. Code § 12-17-184(9), (12), (14), (16), (17), (22). The District Attorney has taken active steps to ensure convictions obtained by his office meet the highest possible standards of justice and integrity. According to media reports, the District Attorney’s

“office spent almost nine months reviewing the case files, interviewing witnesses, and consulting with the family of [the victim,] Deputy Hardy.” Beth Shelburne, *District attorney urges new trial for man on Alabama’s death row*, WBRC available at

<https://www.wbrc.com/2020/06/12/district-attorney-urges-new-trial-man-alabamas-death-row/> (June 12, 2020) (last visited Feb. 8, 2021). As this Court knows, “[t]he integrity of the process and our society’s confidence in the outcome of capital proceedings rests on our allegiance and commitment to the highest standards of our justice system.” *McGowan v. State*, 990 So. 2d 931, 994-95 (Ala. Crim. App. 2003) (quoting and adopting *In re Amendment to Fla. Rules of Criminal Procedure-Rule 3.112*, 759 So. 2d 610, 614 (Fla. 1999)). Given that both the current Jefferson County District Attorney and the original line prosecutor recommend a new trial for Mr. Johnson, this Court should grant the requested relief.

### III. Conclusion

For the reasons stated above, *amici* former Alabama prosecutors conclude this Court should grant the relief requested by the Jefferson County District Attorney.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify this document was filed in person on this the 9th day of March 2021, and the AlaFile system will send notice to the following counsel:

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