

IN THE CIRCUIT OF JACKSON COUNTY, MISSOURI

KENNETH G. MIDDLETON, )  
 )  
 Movant, )  
 )  
 v. ) Case No. CV91-23437  
 )  
 STATE OF MISSOURI, ) Division No. 12  
 )  
 Respondent. )

**MOTION TO REOPEN PREVIOUS RULE 29.15 PROCEEDING DUE TO  
ABANDONMENT OF APPOINTED COUNSEL, TRIAL AND  
APPELLATE COUNSEL'S CONFLICT OF INTEREST, AND FOR FRAUD  
AGAINST THE COURT**

COMES NOW movant, Kenneth G. Middleton, by and through counsel, and pursuant to Rules 74.06(d) and 75.01, *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), *Dudley v. State*, 254 S.W.3d 109 (Mo. App. W.D. 2008), *State v. Taylor*, 1 S.W.3d 610 (Mo. App. W.D. 1991), *State v. Griddine*, 75 S.W.3d 741 (Mo. App. W.D. 2003), and in the interest of justice, moves this Court to reopen the above-captioned motion for post-conviction relief pursuant to Rule 29.15 due to the abandonment of appointed counsel from the public defender's office, Robert G. Duncan's conflict of interest, and for fraud upon the court perpetrated by retained 29.15 counsel Gerald Handley. Movant further moves that, after due consideration, this Court reinstate the portion of its findings of fact, conclusions of law, and judgment issued May 26, 2005, vacating movant's convictions for first degree murder

and armed criminal action because he received ineffective assistance of counsel and order a new trial. In support of this motion, movant states the following grounds:

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

This Court is well aware of the long and torturous procedural history of this case over the past two decades. Movant will not rehash all of these details here except to the extent relevant to the present grounds for reopening this motion.

On May 26, 2005, this Court issued findings of fact and conclusions of law and issued judgment, after holding a hearing, allowing movant to reopen his original 1991 29.15 action on the grounds that retained 29.15 counsel Gerald Handley had abandoned movant under *Luleff v. State, supra.*, and its progeny. (May 26, 2005 judgment at 1-7). This Court also held a two-day evidentiary hearing to address the merits of movant's claims for relief. Thereafter, this Court's judgment also granted movant a new trial and vacated his convictions for the offenses of first degree murder and armed criminal action and ordered a new trial. (*Id.* at 7-38). The State of Missouri appealed this Court's judgment. The Missouri Court of Appeals reversed the portion of this Court's order and judgment reopening movant's Rule 29.15 motion, finding that Mr. Handley's conduct did not constitute abandonment under *Luleff* and; therefore, this Court lacked jurisdiction under Rule 75.01 to reopen movant's 29.15 proceeding. *Middleton v. State*, 200 S.W.3d 140 (Mo. App. W.D.

2006). The Court of Appeals did not address that merits of movant's underlying ineffective assistance of counsel claims that this Court determined had sufficient merit to warrant a new trial. *Id.*

The Court of Appeals also did not address alternative arguments advanced by movant before this Court, that were not addressed on mootness grounds in light of the court's findings regarding Mr. Handley, to reopen the motion due to the abandonment by appointed counsel from the public defender's office and Robert Duncan's conflict of interest. (*See* May 26, 2005 judgment at p. 6 n. 3, 37-38). In light of the substance of the Court of Appeals' decision, these issues are no longer moot. Therefore, movant respectfully requests that this Court, based upon the arguments and evidence previously presented and the grounds presented in the present motion, reopen this post-conviction case and issue amended findings of fact and conclusions of law finding that there are legally sufficient grounds to reopen the matter and reissue the portion of its 2005 judgment finding trial counsel ineffective, vacate movant's convictions, and order a new trial.

## **II. GROUNDS FOR REOPENING THE PRESENT PROCEEDING**

### **A. Abandonment by appointed counsel.**

As noted earlier, this Court, *in dicta*, that movant was abandoned by appointed counsel from the public defenders office, who failed to file a timely amended motion

by November 25, 1991. Since the Court of Appeals opinion did not address this issue in any manner whatsoever and reversed this Court's decision to reopen on other grounds, this issue is now ripe for consideration by this Court.

Based upon prior filings and the court record in this case,<sup>1</sup> it is beyond dispute that appointed counsel from public defender's office took no steps whatsoever to file a timely amended motion on movant's behalf despite the fact that they were appointed counsel of record until November 26, 1991, the day after a timely amended motion was due to be filed. (*Id.*; *See also* Exh's. 1-5 to movant's 2001 Motion to Reopen Proceedings). Since this Court has already found that the public defender, in light of these facts and circumstances, abandoned movant under *Luleff*, there is no need for movant to rehash those arguments at great length here. (*See* May 26, 2005 judgment at p. 6, n. 3). In light of the Court's prior ruling, movant respectfully requests that this Court find appointed counsel's abandonment in failing to file a timely amended motion provides a sufficient ground to reopen this matter pursuant to Rule 75.01.

An additional ground for reopening this action, arising from Mr. Handley's performance, is presented here that was not addressed either by this Court or the Court of Appeals during previous proceedings. Based upon intervening case law, the

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<sup>1</sup> Movant asks this Court to take judicial notice of all prior pleadings, transcripts, exhibits, and orders previously issued in this case.

courts of this State have recognized that abandonment of counsel may occur when counsel files an amended motion that is so patently defective that it amounts to a nullity. *See Dudley v. State*, 254 S.W.3d 109 (Mo. App. W.D. 2008). Due to the eleventh hour actions of Mr. Handley, the three page amended 29.15 motion that he filed on movant's behalf meets this definition. As the aforementioned exhibits to the initial motion to the 2001 motion to reopen indicate, Mr. Handley's motion, due to the lack of investigation and preparation and the haste in which it was drafted, was clearly deficient and omitted compelling claims for relief.

**B. Movant's 29.15 should be reopened because trial and appellate counsel Robert G. Duncan labored under a conflict of interest.**

This Court also sidestepped movant's argument, advanced in his 2001 motion to reopen, that a new 29.15 action was necessary because trial and appellate counsel Robert Duncan labored under an actual conflict of interest by continuing to represent movant on his direct appeal, which thereby compromised movant's ability to litigate claims of Mr. Duncan's ineffectiveness as trial counsel. (May 26, 2005 judgment p. 37-38). The facts of this case are virtually indistinguishable from those addressed in *State v. Taylor, supra.* and *State v. Griddine, supra.*, where the court held that, under the prior consolidated appeal system that was abolished in 1996, trial/direct appeal counsel's conflict of interest in a similar situation required a new 29.15 proceeding

be held. In those cases, the appropriate remedy granted by the Court of Appeals was to recall its mandate, vacate the judgment of conviction, and order re-sentencing so that the defendant could pursue a new round of direct and post-conviction review with conflict-free counsel. *Id.* In light of the procedural history and posture of this case, that relief is neither warranted nor appropriate. Instead, movant respectfully requests that this Court address this issue as an additional ground to reopen the Rule 29.15 action and, thereafter, reissue the portion of its judgment granting movant a new trial.

**C. This action should be reopened because Mr. Handley's actions constituted a fraud upon the Court.**

It cannot be seriously disputed that the actions of Mr. Handley, in filing an amended petition with a verification signed by movant that falsely indicated that movant had read the amended motion, constituted an egregious falsehood that is sufficient to allow this Court to reopen its judgment under Rule 74.06(d). That rule allows this Court, in its discretion, to set aside a judgment for fraud upon the court.

Under Rule 74.06(d), a circuit court has the power to treat a motion filed in an underlying case as an independent action in equity and set aside a judgment under extraordinary circumstances involving fraud upon the court. *See e.g., State ex rel. Division of Child Support Enforcement v. Hill*, 53 S.W.3d 137, 144 (Mo. App. W.D.

2001). Ironically, this Court recently allowed a criminal defendant, in the context of a post-conviction action, to withdraw his guilty plea due to a knowing fraud perpetrated upon the court by the prosecuting attorney involving egregious discovery violations. *Davis v. State*, No. 0616-CV00545 (findings of fact, conclusions of law and judgment of February 10, 2009, pp. 10-14). Like Mr. Handley's conduct, the prosecutor, apart from withholding discovery, deceived this Court by falsely stating in a brief that they had not received any exculpatory evidence. (*Id.* pp. 12-14). The same equitable considerations are present here in light of Mr. Handley's perpetration of a fraud upon the court by filing a 29.15 that included a verification that he knew was false.

Under case law from the federal courts, it is clear that Mr. Handley's actions permit this Court to reopen the case under the federal equivalent to Rule 74.06(d) because such relief can be granted where there is an intentional fraud made by an officer of the court which deceives the court. *See Herring v. United States*, 424 F.3d 384, 389 (3<sup>rd</sup> Cir. 2005). Federal courts have uniformly held that an independent action to overturn and reopen a final judgment is appropriate where a fraud on the court constitutes egregious misconduct that is supported by clear, unequivocal and convincing evidence. *In re: Coordinated Pretrial Proceedings and Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8<sup>th</sup> Cir. 1976). Granting such relief is

appropriate when the fraud perpetrated on the court seriously affects the integrity of the normal process of adjudication. *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2<sup>nd</sup> Cir.1988). The Eighth Circuit has defined fraud on the court as egregious misconduct “such as bribery of a judge or jury or fabrication of evidence by counsel.” 538 F.2d at 195.

By filing a fraudulent and false verification that told the court that Mr. Middleton had read and verified the contents of his amended motion when he clearly had not done so, this is an intentional fabrication that deceived the court and undermined the integrity of the proceedings to a sufficient extent to invoke this extraordinary remedy. Thus, in the unlikely event this Court determines that the aforementioned two grounds are insufficient to reopen the judgment, movant respectfully requests relief pursuant to Rule 74.06(d).

### **CONCLUSION**

For all of the foregoing reasons, movant Kenneth G. Middleton respectfully requests that this Court reopen its 1992 judgment on the grounds enumerated above and, thereafter, reissue the portion of its 2005 judgment granting movant a new trial on grounds of ineffective assistance of counsel.

Respectfully submitted,

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ATTORNEY FOR MOVANT

**CERTIFICATE OF SERVICE**

I hereby certify that on July \_\_\_\_, 2009, a true and correct copy of the foregoing was sent via U.S. Mail to: James Kanatzar, Prosecuting Attorney, Jackson County Courthouse, 11<sup>th</sup> Floor, 415 East 12<sup>th</sup> Street, Kansas City, Missouri 64106.

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Kent E. Gipson, Attorney for Movant