

2  
A

Mr. Cliff Middleton  
4439 Meadow View Dr.  
Shawnee Ks. 66226

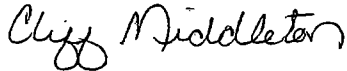
August 1 2009

Mr Jim Kanatzar  
Jackson County Prosecutor  
Jackson County Courthouse  
415 East 12th street  
Kansas City, Missouri 64106  
CERTIFIED MAIL

Dear Mr Kanatzar:

I want to thank you again for meeting with me in June 2008 and again with Mr. Alvin Brooks on November 5, 2008. Please find enclosed DRAFT of Ken Middleton's motion to reopen his Rule 29.15. He will be 65yrs old on the 11th day of August 2009. I hope we can get justice for my Dad as soon as possible ! Thank you in advance for your consideration in this matter.

Sincerely, Cliff Middleton



cc: file

MR. ALVIN BROOKS

IN THE CIRCUIT OF JACKSON COUNTY, MISSOURI

KENNETH G. MIDDLETON, )

Movant, )

v. )

STATE OF MISSOURI, )

Respondent. )

Case No. CV91-23437

Division No. 12

**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

---

<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,

---

Kent E. Gipson, Mo. Bar No. 34524  
LAW OFFICE OF KENT GIPSON, LLC  
301 East 63rd Street  
Kansas City, Missouri 64113  
Tel: 816.363.4400 • Fax: 816.363.4300  
[kent.gipson@kentgipsonlaw.com](mailto:kent.gipson@kentgipsonlaw.com)

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.

---

Kent E. Gipson, Attorney for Movant

Code Comparison

With regard to Rule 8.2(a), DR 8-102(A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

Rule 8.2(b) is substantially identical to DR 8-103.

**RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT**

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is

governed by the rules applicable to the client-lawyer relationship.

Code Comparison

DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of a Disciplinary Rule shall report such knowledge to ... authority empowered to investigate or act upon such violation."

**RULE 8.4 MISCONDUCT**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse

of  
ad  
ma  
  
V  
tha  
"  
"  
ano  
"  
"  
ceit,  
"  
trati  
"  
on h  
Rt  
Th  
Disci  
that  
loan  
Code  
shoul  
in the  
  
R  
As  
Condu  
follow  
"Be  
involv  
true.  
cumst:  
"Con  
tion of  
the cli  
ter in  
"Firi  
yers in  
depart  
and lav  
tion; S  
"Fra  
a purpc  
represe  
vant in  
"Kno  
al know  
knowlec

# Justice is delayed for family members

**Shortly before trial began, county prosecutors dropped case in favor of federal charges against accused.**

By TONY RIZZO  
The Kansas City Star

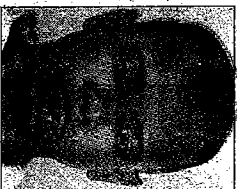
Two people entered the bedroom of a central Kansas City house that night last November. Only one of them walked out alive.

A year later, the family of the person who died is waiting for justice.

Alphonso Tunley emerged that night wearing bloody clothes and gave police a phony story about how Dacia Wright ended up with a fatal .45-caliber bullet wound in her face.



Wright



Tunley

Physical evidence didn't support Tunley's story, Jackson County prosecutors charged the ex-convict with second-degree murder in the death of Wright, a mother of three who worked as a railroad yard master. Devastated by their loss, Wright's

loved ones at least felt comforted thinking that the man responsible for her death would be brought to justice.

But this summer, shortly before Tunley's trial was to begin, prosecutors told Wright's family that they were dropping the case.

For the first time, the family learned that Tunley was claiming that he acted in self-defense when he shot Wright in his home. It was shocking and unexpected news.

"In my opinion, prosecutors are absolutely failing Dacia Wright's family and the citizens of Missouri," said Wright's uncle, Melvin Coe. Jackson County Prosecutor Jim Ka-

natzar said the decision was based on a number of factors, including information that arose after the charges were filed. He said he couldn't be more specific because the case could be re-filed.

For now, Kanatzar said, prosecutors will wait until a federal charge filed against Tunley for being a felon in possession of a firearm is resolved. Tunley, 33, remains in federal custody pending a scheduled February trial. The charge typically carries a maximum 10-year sentence, but the sentence can be increased if the defendant has three or more prior violent fe-

## CASE: Blood found on man's shirt when police arrived

FROM A4

lony convictions.

"We felt it was best that the federal case go forward first," Kanatzar said.

It was just after 4:30 a.m. on Nov. 16, 2008, when a 911 call summoned Kansas City police officers to the 4300 block of Bellefontaine Avenue.

When they arrived they saw Tunley walking in a driveway between houses. Blood was visible on his white shirt and pants. A .45-caliber handgun lay on the ground nearby.

Tunley told police that two men he didn't recognize had attacked him and his girlfriend as

they entered his home. He said he had been "beat up" and his girlfriend shot. According to Tunley, he had grabbed his gun. While he struggled with one of the men, several shots were fired.

The assailants ran off. Tunley called 911.

Inside the house, police found Wright's body on the bedroom floor.

"From the location of the blood spatter it appeared the victim had been shot in the bed, then pulled to the floor," a detective wrote in an affidavit later filed in court.

Bloody water partially filled a metal pot next to her body.

Investigators also found blood in the bathroom sink and on a kitchen faucet, suggesting that efforts had been made to clean up the scene.

Scratches on Tunley's chest and cheek were the only signs of injury, according to the court documents. After making his initial statement to officers at the scene, Tunley declined to answer any further questions.

But as defense attorney Patrick Peters began preparing to defend Tunley, he told prosecutors about the party that Wright and Tunley, who previously had dated, had attended earlier that night. Witnesses from the party described

Wright as being angry and assaulting Tunley. According to Peters, she had to be restrained and attempted to call Tunley numerous times after he left.

Shortly after Tunley arrived home, she came to his house. During an altercation, she allegedly began choking him. That's when Tunley retrieved a gun. He fired one shot. She was killed.

Peters said that under Missouri law, a person has the right to use force to defend himself from physical assault in his own home.

For members of Wright's family, the source of that scenario — Tunley — is dubious at

best. And they said the witnesses who said Wright attacked Tunley were his relatives and friends.

They question why prosecutors believe his version, now when they know he lied about intruders.

"I find it disheartening that the prosecutors took on the theory of the defense and Tunley's family and friends," said Wright's aunt, Debra Floyd.

Wright's family will continue to fight for justice, she said.

"We are not going away," she said.

To reach Tony Rizzo, call 816-234-4435 or send e-mail to trizzo@kcstar.com.