

*appointed.* ... The judgment below is reversed, and the case is remanded for a new trial in accordance with this opinion.

Id., 829 S.W.2d at 952 (emphasis added)

To remedy this wrong, Mr. Middleton's convictions and sentences should be set aside, and a new trial ordered.

- (2) *The prosecutor ordered the release of jewelry worth over \$18,000 to witness Mildred Anderson three days after the jury's verdict, thereby circumventing known pending probate proceedings, and creating, at best, the appearance of impropriety with a trial witness.*

Mr. Middleton was denied his right to due process of law under the Fourteenth Amendment because the prosecution failed to disclose that just three days after trial, Pat Peters directed Detective Ray Vasquez to give State's witness Mildred Anderson, (the sister-in-law of Mr. Middleton), \$18,700 worth of jewelry which was not run through Katherine Middleton's pending probate estate. Mildred Anderson's significance to this case, besides being the lead plaintiff in Mr. Peters' father's law firm's wrongful death action against Kenneth, was that Mildred provided the State with testimony of a motive for its theory that Kenneth shot Katherine. Mildred testified at trial that Kenneth had been hiding from Katherine and her family that he had significant land holdings in Arkansas. (Trial Tran. pp. 298-99)

Mr. Peters argued the next morning that the jury should convict Kenneth because, “[f]or this man to walk out of here at the end of your deliberations so that he can spend the property of Mr. and Mrs. Middleton –” (Trial Tran. p. 535) Shortly after 1:00 p.m. that afternoon the jury returned a guilty verdict and recommended life without parole and 200 years incarceration. (Trial Tran. pp. 554-55) Three days later – after the trial but well before sentencing - Peters directed Vasquez to give Anderson the jewelry worn by Katherine. (LF Vol. III pp. 424-25, Ex. 55, Vasquez deposition; LF Vol. II p. 333, Ex. 45, p. 1; see also, LF Vol. II p. 299, Ex. 38, letter from firm to Mr. Middleton refusing to provide him information about the jewelry given to Anderson) These gems were valued *in 1991 dollars* at \$18,700. (LF Vol. II p. 336, Ex. 45, p. 4)

Years later, on March 25, 1999, Mildred Anderson gave testimony in the Arkansas lawsuit against Kenneth Middleton which shows she perjured herself in February, 1991 (a class A felony in Missouri, prohibited by RSMo. 575.040(1)). Mildred testified that she and her family had indeed been fully aware of all assets belonging to Kenneth Middleton, including those properties in Arkansas, *prior to Katherine Middleton’s death.* (LF Vol. II pp. 309-10; 320-21, Ex. 44, Arkansas trial transcript; see also 311-14; Geraldine Lockhart (Mildred’s sister) at 321, 322-24, 325, including Anderson’s and Lockhart’s lists of Mr. Middleton’s Arkansas assets) Mr.

Middleton had been hiding nothing from his wife. There was no motive for him to have shot her, contrary to the State's speculative and erroneous closing argument.

There can be no doubt that the State erred unforgivably by this misconduct. First, the lead prosecutor and a detective provided a significant amount of jewelry to a prosecution trial witness just 4 days following her testimony, thereby allowing her to circumvent pending probate proceedings and avoid sharing this \$19,000.00 windfall with other family members. See Missouri Supreme Court Rules 4-3.4(b) ("Fairness to Opposing Party and Counsel"), 4-3.8 ("Special Responsibilities of a Prosecutor") and 4-8.4 ("Misconduct"); see also Boyd, 560 S.W.2d at 297 ("A prosecuting attorney is a quasi judicial officer, an arm of the state, and he has the duty not only to see that the guilty are brought to justice but also that the innocent go free. A vital concomitant in the exercise of either function is to assure a fair trial and avoid impropriety in any prosecution. Equally important is the duty to avoid any *appearance of impropriety.*")(emphasis added).

Secondly, no one disclosed any of this to the accused or his attorney despite the obligation to do so, even if Peters' influence over the civil case amounted to merely an "appearance" of impropriety.<sup>3</sup> (See 2004 "29.15" Hearing Volume II, p. 240 – testimony

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<sup>3</sup> Cutting against the idea of categorizing this as a mere "appearance" of impropriety is Mildred Anderson's strange deposition testimony wherein she actually attempted to convince Middleton's counsel that she really could not recall receiving any jewelry

of legal expert Christopher Carter, "It is basically a gift to a witness."; see also Robinson, 835 S.W.2d at 306; Trimble v. State, 693 S. W.2d 267, 274 (Mo. App. W.D. 1985)(conviction vacated where victim's mother *may* have given money to state's witnesses.)

These issues reflect so poorly on the administration of justice that they cry out for remedy. See State v. Mims, 674 S.W.2d 536, 538 (Mo. 1984)(conviction based upon perjured testimony consciously used by prosecutor must be vacated; re-trial only appropriate where State's use was without knowledge of falsity); see also State v. Clover, 924 S.W. 2d 853, 856-57 (Mo. 1996)(re-trial barred by Double Jeopardy clause of Constitution prosecutor's misconduct intentional); State v. Miner, 748 S.W.2d 692, 693-94 (Mo. App. E.D. 1988)(double jeopardy claim must be presented in same proceeding as assertion of misconduct); United States v. Wallach, 979 F.2d 912, 914 (2<sup>nd</sup> Cir. 1992)(standard for vacating conviction is not just whether prosecutor *knew* testimony was false, but also in cases where prosecutor *should have known*); *accord*, United States v. Catton, 130 F.3d 805, 808-09 (7<sup>th</sup> Cir. 1997)(following Wallach, but denying request for application of double jeopardy bar to re-trial because defendant did \_\_\_\_\_ whatsoever from the State after the verdict, that is until she was reminded that one of the rings she got that day in 1991 was the same ring she wore just 10 days later during the Chancery Court trial. Compare Anderson deposition excerpt, LF Vol. II pp. 330-32, Ex. 44 against LF Vol. II pp. 317, Ex. 44, Chancery Court excerpt)

not request hearing at which he could have shown prosecutor's wrongful use of testimony was done knowingly).

In spite of a prosecutor's unequivocal duty to safeguard the integrity of criminal proceedings, the conduct of the prosecution in the case at bar infected the trial with unfairness so as to make the resulting conviction a denial of due process. Mr. Middleton, unfortunately, is the victim of egregious prosecutorial misconduct, where his rights were subverted. The former Missouri Governor and Jackson County Prosecutor, Joseph P. Teasdale, who also served in the United States Attorney's Office, testified that he sent a letter to former Jackson County Prosecutor (now, the Honorable) Bob Beaird which stated:

I wanted to write you to thank you for meeting with Cliff Middleton and I on January 23, 2001, regarding Mr. Ken Middleton's case. My request was that you read the sixty-two (62) page brief with exhibits which corroborate Ken Middleton's allegations of gross ineffective assistance of counsel with serious prosecutorial misconduct. I also requested you to read the trial transcript which contains a 'fabricated confession' in closing argument. ... In the cases of State v. Storey, 901 S.W.2d 886 at 900 (Mo. 1995), and State v. Weiss, 24 S.W.3d 198 (Mo. App. W.D. 2000), both prosecutors in each case considered closing argument as testimony.

... In all my 41 years [as a lawyer], this is the worst violation of defendant's Constitutional Rights that I have witnessed. !

(LF Vol. II p. 294, Ex. 36, admitted into evidence at 2004 "29.15" Hearing Volume I, p. 43)

Governor Teasdale also testified at the June, 2004 hearing, and stated that if Mr. Middleton's case had been brought to his attention during his tenure in office, Governor Teasdale would have pardoned him. ! (2004 "29.15" Hearing Volume I, p. 43)

The prosecution in this case "overstepped the bounds of fairness" so crucial to our system of justice. This type of prosecutorial misconduct should not be tolerated. Because the State's misconduct was an offense to the appearance of ordered justice as well as a direct violation of Mr. Middleton's right to due process of law, his convictions and sentences should be vacated on this point alone, and he should be discharged.

### CONCLUSION

WHEREFORE, in light of the above and foregoing, Mr. Middleton respectfully requests that if this Court somehow finds error with the Circuit Court's ruling that he receive a new trial because of the cumulative ineffectiveness of his trial counsel, the Court nevertheless affirms that Mr. Middleton's convictions be vacated and set aside, and he should be discharged, or in the alternative, a new trial should be ordered for him, based on each of the grounds raised in this brief, independently and/or collectively.

Respectfully submitted,

Jonathan Laurans, MO #43105  
819 Walnut Street  
Kansas City, Missouri 64106  
(816)421-5200/(913)384-5099 FAX

### Certificate of Compliance

I hereby certify that the above and foregoing complies with all limitations and type-volume restrictions set by Missouri Supreme Court Rule 84.06(a). This brief contains 24,364 words in 2,090 lines of monospaced type. This brief was typed on a computer utilizing Microsoft Word 6.0, but the format has been saved to allow for viewing and/or modification on a computer utilizing Microsoft Word 5.0. Furthermore, the diskettes accompanying this brief, on which it is saved, have been checked for viruses by the undersigned.

Jonathan Laurans

### Certificate of Service

I hereby certify that two copies of the above and foregoing brief of Appellant were placed in the United States mail, postage pre-paid, this 11<sup>th</sup> day of October, 2005 to: Mr. Shaun Mackelprang, Assistant Attorney General, Post Office Box 899, Jefferson City, Missouri 65102.

Jonathan Laurans