

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

RYAN FERGUSON,)	
)	
Appellant,)	
)	
v.)	WD71264
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**MOTION FOR REHEARING OR IN THE ALTERNATIVE
FOR TRANSFER TO THE SUPREME COURT OF MISSOURI**

COMES NOW Appellant, Ryan Ferguson, by and through his counsel, and pursuant to Rule 84.17, moves for a rehearing of this Court’s order of August 31, 2010, which affirmed the denial of his motion for post-conviction relief. In the alternative, Appellant requests that this Court transfer this cause, due to the questions of general interest or importance presented, to the Supreme Court of Missouri pursuant to Rule 83.02. In support of this motion Appellant states as follows:

1. In denying Ferguson’s Motion for Remand, this Court declared that the issues presented in this case give it “pause.” The Court referenced the testimony of Erickson and the identification of Trump as the sole evidence “tying Ferguson to the crime.” That was incorrect because Trump’s “identification” tied Ferguson to the parking lot, not any crime.

This Court correctly has “pause” because now that Erickson’s testimony no longer implicates Ferguson, Ferguson is obviously, actually innocent. His life is in danger as long as he remains incarcerated. At any time, he could be the victim of an attack as a

result of the prison environment. He could be killed because this Court has elevated form over substance.

Despite the danger and perversion of justice that continues to occur, this Court has simply concluded that Ferguson can simply explore “other legal avenues.” But this Court is aware of all of the circumstances necessary to grant an evidentiary hearing. The State’s case was weak and suspect from the beginning. Erickson’s new statement establishes Ferguson’s innocence. Principles of judicial economy demand that an evidentiary hearing be held without further delay.

After Ferguson filed his Motion to Remand, this Court could have denied the motion. Instead, the Court accepted the motion, indicating it had the power to grant the relief requested. Had the issue been so clear cut, the motion should have been denied immediately. That is, there was no dispute that the case was not on direct appeal at the time the motion was filed. If that procedural posture alone was dispositive, there was no reason to accept the motion and rule several months later.

Accepting that the motion to remand precluded state habeas corpus review, had Ferguson filed a state habeas corpus petition while the post-conviction appeal was pending the habeas court would have stayed the case until this higher Court issued its ruling on the motion. Now, with its decision to send Ferguson to pursue yet another legal avenue in the appropriate forum, the Court has simply elevated “form over substance” despite Justice Howard’s suggestion during the oral argument that disposing of the case in such a fashion was improper.

This Court could construe the motion to remand as a state habeas petition. Indeed, Justice Newton suggested as much at oral argument. This Court would have jurisdiction over Ferguson’s habeas petition. At oral argument the Court inquired as to where Ferguson is incarcerated. Undersigned counsel as an officer of the court advised the Court that Ferguson is presently incarcerated in Cole County, which is situated within the Western District. If necessary, official written confirmation of the location of Ferguson’s detention may be provided at the request of the Court.

In any event, this Court erred where it held that an appellate court may only exercise its inherent power to prevent miscarriages of justice by granting a motion to remand outside the time constraints of Rule 29.11(b) while the case is pending on direct appeal. That conclusion finds its origin in a misreading of *State v. Davis*, 698 S.W.2d 600 (E.D. 1985) by the Court in *State v. Warden*, 753 S.W.2d 63 (1988). The court in *Davis* explained:

A careful reading of [*State v. Mooney*, 670 S.W.2d 847 510 (1984) and *State v. Williams*, 673 S.W.2d 847 (1984)] reveals that they involved exceptional circumstances and thus are limited ... A case will only be remanded on the basis of newly discovered evidence **after appeal** where the court, in its discretion, determines that its inherent power must be exercised in order to prevent a miscarriage of justice. *Davis*, 698 S.W.2d at 603.

Davis referred to cases that were pending “**after appeal**” and explained that in those cases, the Court had “inherent power” to prevent a “miscarriage of justice”. *Id.*

Nothing in *Davis* limits this Court's power correct miscarriages of justice at any time. Still, the *Warden* Court held that *Mooney*, *Williams* and *Davis* did not apply because the *Warden* defendant's motion was filed after his direct appeal was final. That misreading of *Davis* has now infected this Court's decision in the present case.

This Court held that "Ferguson cites no case law that would support the conclusion that this Court has the authority to remand a matter during a post-conviction relief appeal." (Op. at 9). Then, this Court relies upon the *Warden* Court's misreading as described above.

This conclusion not only stems from the *Warden* Court's misreading of *Davis*, but it is nonsensical. There should be no limitation on this or any court's power to correct miscarriages of justice. Certainly fundamental principles of justice demand that once this Court is convinced a miscarriage of justice is occurring, it has the power to correct the situation. Otherwise, the calendar trumps extraordinary circumstances and perversions of justice. Such a result cannot be acceptable.

Further, if the fact that a case was pending on direct appeal was of such crucial importance, then the Supreme Court of Missouri would have incorporated that requirement into the test it articulated in *Terry* addressing whether a motion for remand should be granted:

1. The facts constituting the newly discovered evidence have come to the movant's knowledge after the end of the trial;
2. The movant's lack of prior knowledge is not owing to any want of due diligence on his part;

3. The evidence is so material that it is likely to produce a different result at a new trial; and
4. The evidence is neither cumulative nor merely of an impeaching nature. *State v. Terry*, 304 S.W.3d 105, 109 (Mo.banc. 2010), citing *State v. Whitfield*, 939, S.W.2d 361, 367 (Mo.banc. 1997).

The four prong test contains no requirement that a case must be pending on direct appeal in order for a motion to remand to be granted. In *Terry*, the Missouri Supreme Court recently addressed this precise issue and it *did not* hold that a case must be on direct appeal for an appellate court to grant a motion for remand. That is not part of the test. Rather, the focus is on whether the newly discovered evidence is of such a nature that it is likely to produce a different result at a new trial. That is the case here. Erickson has provided a sworn statement that his trial testimony implicating Ferguson was perjured. That statement has triggered this Court’s “responsibility to avoid a ‘perversion of justice.’” *Id.*

Despite the emergence of compelling evidence that Ferguson stands convicted of a crime he did not commit, this Court’s opinion erects an artificial impediment to relief that is not supported by Supreme Court precedent. If the Supreme Court had intended for the “inherent power” of an appellate court to be exercised only while a case is pending on direct appeal it would have so stated in *Terry*.

This Court’s holding that *Terry* relied heavily on Federal Rule of Criminal Procedure 33(b)(1) – which permits a motion for new trial to be filed within three years of the verdict – is also in error. *Terry* referenced Rule 33(b)(1) in one footnote, and did

not cite the Rule in support of its decision. *Id.* at 109, n. 7. Rather, the Court held that the motion for remand should have been granted because the *Whitfield* factors were met and the newly discovered evidence showed the defendant was convicted with the aid of false testimony. *Id.* at 111. The time constraints in Federal Rule 33(b)(1) have no bearing on this court's inherent authority to prevent miscarriages of justice.

In the alternative to granting rehearing, this Court should transfer this case to the Missouri Supreme Court for an examination of this issue of general interest and importance, and because this Court's holding conflicts with *Terry*.

2. This Court erred in its analysis of Ferguson's *Brady* claim, which is inconsistent with the holding in *Duley v. State*. 304 S.W.3d 158 (Mo.App.W.D. 2009). In *Duley* the court rejected the notion that evidence which would be admissible at trial must be presented at a Rule 29.15 hearing to establish a *Brady* violation. In *Duley* the undisclosed evidence was a police report reflecting a witness interview exculpatory as to the defendant. *Id.* at 160-61. The defendant did not present the testimony of the witness or any other person named in the report. *Id.* at 163-64. The court still found a *Brady* violation, holding the nondisclosure deprived the defendant of any opportunity to contact the witnesses prior to trial and use information from those witnesses in preparing his defense. *Id.* at 165.

This Court's opinion directly contradicts *Duley*. Like the defendant in *Duley*, Ferguson was denied the opportunity to contact Mabon prior to trial and investigate any information Mabon might provide. Assuming Mabon denied involvement in the crime Ferguson was deprived the opportunity to introduce his prior inconsistent statement as

substantive evidence. *Id.* The prosecution's failure to disclose what is so obviously *Brady* material denied Ferguson due process of law.

This Court further erred in relying on *Wood v. Bartholomew*. 516 U.S. 1 (1995). *Wood* is factually distinct and inapplicable. Unlike this case, the evidence against the defendant in *Wood* was more than overwhelming. The physical evidence indicated the victim was shot twice in the back of the head execution style. *Id.* at 8. The defendant admitted the he committed the robbery and the shots came from his gun. *Id.* at 2. The defendant stated before the robbery he intended to leave no witnesses. *Id.* at 3. . The defendant's trial attorney testified to the obvious – the prosecution's non-disclosure did not affect the case. *Id.* at 7. The undisclosed evidence in *Wood* was immaterial because it would not have changed the result.

Unlike *Wood*, Mabon's admission to Hudson completely exonerates Ferguson. Not only was the evidence against Ferguson far from overwhelming, the physical evidence excluded Ferguson as the perpetrator. The prosecution's failure to disclose this evidence prevented Ferguson's defense from supporting its defense that somebody else perpetrated the crime and goes to the heart of the rights *Brady* was designed to protect.

In the alternative to granting rehearing, this Court should transfer this case to the Missouri Supreme Court. Review by the Supreme Court is warranted because existing case law is unclear as to whether evidence that would be admissible at trial must be introduced at a Rule 29.15 hearing to establish a *Brady* violation. Review is also warranted to determine whether a *Brady* violation was established in this case through the testimony of Ronald Hudson and Shawna Ornt.

3. This Court erred in concluding the motion court made “substantive changes” to the State’s proposed findings of fact and conclusions of law. The Court is wrong because no substantive changes were made. The motion court’s addition of one singular fact – that Hudson offered to engage in a drug-buy for the State – did not bear on any of the issues presented in the Rule 29.15 hearing. The deletion of the State’s proposed finding that Dr. Leo was not credible is meaningless. The motion court’s order does not make *any* credibility finding as to Dr. Leo. These trivial changes do not alter the fact that the motion court simply rubberstamped the State’s proposal.

Grammar and syntax changes are irrelevant. The role of a judge is not simply to proofread the State’s proposed findings. The motion court’s order – because it was drafted by the State – reads as though it were written by an advocate. Credibility findings are supposed to be made by a detached, neutral fact finder – not the State. Becoming a mouthpiece for the prosecution is tantamount to a lack of judicial independence and judgment, a practice condemned by the Supreme Court. *Massman Const. Co. v. Mo. Highway & Transp. Com’n*, 914 S.W.2d 801 (Mo.banc 1996). This Court erred in failing to grant relief.

In the alternative to granting rehearing, this Court should transfer this case to the Missouri Supreme Court. Supreme Court review is warranted to determine whether verbatim adoption of the State’s proposed findings denies a movant the right of *judicial* findings and conclusions as required by Rule 29.15(j). Because the integrity of the judiciary is at stake, transfer is warranted.

4. This Court erred in its analysis of Ferguson's ineffective assistance of counsel claim. Trial counsel failed to present evidence that Charles Erickson was high on marijuana at the time he confessed to the crime. Due to counsel's ineffectiveness, the jury was never presented with evidence of Erickson's compromised mental state. This Court's opinion ignores the impact of this revelation. Evidence that the only witness against Ferguson was intoxicated when he implicated Ferguson would have changed the entire course of the defense. The evidence was not cumulative. No testimony that Erickson was high when meeting with police was ever introduced. This Court has failed to address this specific evidence.

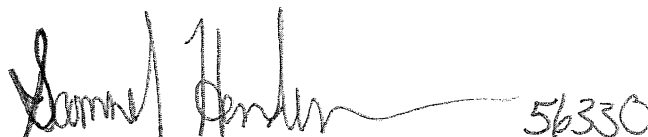
In the alternative to granting rehearing, this Court should transfer this case to the Missouri Supreme Court. Review by the Supreme Court is warranted to determine whether trial counsel's failure to discover and present testimony that the key witness against Ferguson was high at the time he implicated Ferguson constitutes ineffective assistance of counsel. Transfer is also warranted to determine whether the failure of trial counsel to present the testimony of Kevin Fletcher, Jonathan James and Eric Gathings constitutes ineffective assistance where the testimony would have undermined the credibility of the only witness against Ferguson.

WHEREFORE, for the reasons presented, Appellant respectfully requests that this court grant rehearing in this cause or in the alternative, transfer this cause to the Missouri Supreme Court.

Respectfully submitted,



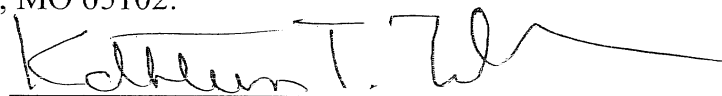
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CERTIFICATE OF SERVICE

I do hereby certify that on this 10th day of September, 2010, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.



Kathleen T. Zellner