

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

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RYAN FERGUSON,	)	
	)	
Appellant,	)	
	)	
v.	)	No. WD71264
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

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**DEFENDANT’S MOTION FOR LEAVE TO FILE REPLY  
TO STATE’S SUGGESTIONS IN OPPOSITION TO  
APPELLANT’S MOTION  
TO REMAND BASED UPON NEWLY DISCOVERED EVIDENCE**

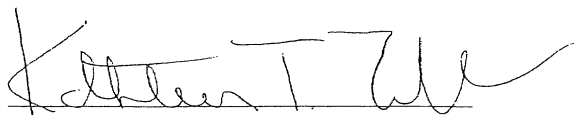
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Now comes Appellant, Ryan Ferguson, by and through his attorneys, Kathleen T. Zellner & Associates and Samuel Henderson, and in support of his Motion for Leave to File Reply to the State’s Suggestions in Opposition to Appellant’s Motion To Remand Based Upon Newly Discovered Evidence states as follows:

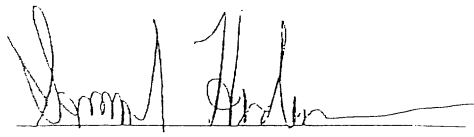
- 1) Undersigned counsel received the State’s Response by Fax at 4:59 p.m. on February 16, 2010.
- 2) Since Appellant filed his original Motion to Remand, the Missouri Supreme Court issued its opinion in *People v. Terry*, 2010 WL 454862 on February 10, 2010. Appellant believes that case supports granting of the motion and seeks to discuss the case in a reply. Appellant seeks to clarify other issues raised by the State.
- 3) The proposed Reply is attached and incorporated herein as Exhibit “A.”

WHEREFORE, Appellant respectfully requests that this Court grant him Leave to File a Reply to the State’s in Opposition to Appellant’s Motion To Remand Based Upon Newly Discovered Evidence.

Respectfully Submitted,



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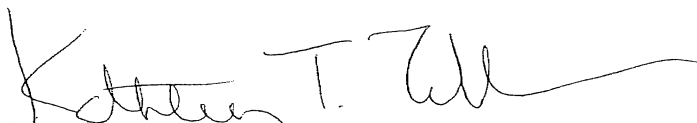


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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by facsimile transmission this 17th day of February, 2010, to:

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Kathleen T. Zellner

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**DEFENDANT’S REPLY TO STATE’S SUGGESTIONS IN OPPOSITION TO  
APPELLANT’S MOTION  
TO REMAND BASED UPON NEWLY DISCOVERED EVIDENCE**

---

Now comes Appellant, Ryan Ferguson, by and through his attorneys, Kathleen T. Zellner & Associates and Samuel Henderson, and in support of his Reply to the State’s Suggestions in Opposition to Appellant’s Motion To Remand Based Upon Newly Discovered Evidence states as follows:

The State argues that Mr. Ferguson’s co-defendant, Charles Erickson, has “substantially altered his account of how they murdered the victim.” (St. Resp. P. 2). While Ferguson agrees that Erickson has “substantially altered” his previous testimony, the State is wrong to allege that the new evidence suggests “they” murdered the victim. Rather, Erickson has confessed to the murder and robbery of Mr. Heitholt and absolved Ferguson of any wrongdoing.

The parties agree on some crucial points that should be dispositive of this motion. The State has admitted that the new evidence is material when it concedes that a “substantial



alteration” has taken place. Further, the State “is not averse to holding a full and fair evidentiary hearing.” (St. Resp. P. 2). The State does not question this Court’s jurisdiction, but argues Defendant’s Motion to Remand is not properly before this Court because it is a Rule 29.15 motion. However, Defendant is not proceeding pursuant to Rule 29.15. Ferguson is asking this Court to stay the 29.15 appeal so that a motion for a new trial may be filed and heard by the trial court. There is no statute or rule that directly addresses this situation, but as set forth in the motion, this Court has inherent discretion to remand the case under these circumstances. That conclusion is supported by the Missouri Supreme Court’s decision in *People v. Terry*, 2010 WL 454862 (Mo. 2010). Ferguson seeks a remand because he is relying on new evidence outside the record that was unavailable until the case was before this Court.

Ferguson filed the Motion to Remand because Erickson’s new testimony established that Ferguson was convicted solely on the perjured testimony of Erickson. Because Erickson provided the only evidence against Ferguson, a remand is even more appropriate in this case than in *Terry*. In *Terry*, the new DNA evidence did not fully exonerate Terry, but it did cast serious doubt on the validity of his conviction because the victim committed perjury during the trial. Here, Erickson’s testimony fully exonerates Ferguson. Erickson has admitted that he willfully and deliberately committed perjury each time he implicated Ferguson of any wrongdoing. Ferguson’s conviction, based solely on wilful and deliberate perjury, cannot stand.

The State argues that *State v. Mooney*, 670 S.W.2d 510, 515 (1984) is distinguishable because there the new evidence was discovered while the case was on direct appeal and therefore the conviction was not final. But the *Mooney* court explained that “Even where the time for filing a motion for a new trial has expired there is authority for the trial judge to grant a new trial

in any case where the accused was found guilty of a crime based on false testimony where the trial court is satisfied that an improper verdict or finding was based on perjury.” *citing, State v. Coffman*, 647 S.W.2d 849 (Mo.App.1983). *Mooney* also cited *State v. Harris*, 428 S.W.2d 427, 500, wherein this Court stated:

“It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony, and the court “if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned,” \* \* \* would be under a duty to grant a new trial. That is to say “where it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted.”

*Mooney*, 670 S.W.2d 510, 515 (1984)

“In the absence of any rule or statute relative to the situation we have in this case, i.e. where the only witness who testified to the essential factual elements of the crime of child molestation has allegedly recanted and knowledge of the witness’s recantation did not come to appellant’s attention until after appellant was sentenced, and too late to be preserved for appellate review in a timely filed motion for new trial, we are of the opinion that we have the inherent power to prevent miscarriages of justice in a proper case by remanding the case to the trial court with instructions that the appellant be permitted to file a motion for new trial upon the grounds of newly discovered evidence.”

*Mooney*, 670 S.W.2d 510, 515-516 (1984)

The *Terry* case is very similar to this case. There, the Supreme Court explained that it had the “inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal.” *Terry*, p. 4. Citing *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. Banc 1997), this Court set forth the 4 prong test to determine whether a new trial is warranted on the basis of newly discovered evidence:

- 1) The facts constituting the newly discovered evidence have come to the movant’s knowledge after the end of the trial;

- 2) 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.

Ferguson submits that the first two prongs of the test have been satisfied and they have not, and cannot, be seriously disputed. Erickson never came forward until the case was before this Court. When he advised Ferguson he was willing to admit to his prior wilful and deliberate perjury, Ferguson caused his lawyer to immediately obtain a videotaped sworn statement. Due diligence has been exercised.

The evidence is material. At the trial, the prosecutor admitted from the beginning that he had no forensic evidence. He advised the jury: "I'll tell you right now, ladies and gentlemen, over the course of this investigation, no fingerprints, blood, DNA, or hair at the scene have been identified as Ferguson's or Erickson's." (TT. 420). It has always been clear that the State's case was based upon Erickson's testimony. The new evidence does not merely impeach Erickson, it completely exonerates Ferguson.

In *Terry*, the defendant presented DNA evidence that was outside the record and a remand was proper. Here, Ferguson has presented evidence completely exonerating him of any participation in the murder and robbery of Mr. Heitholt. That evidence is outside the record, just as in *Terry*. A remand is proper. Otherwise, Ferguson's convictions could be affirmed, notwithstanding that they are based solely upon the wilful and deliberate perjury of Erickson.

In the videotaped statement, Erickson's admits to his perjury in no uncertain terms. He states "I made a lot of assumptions and turned them into facts to satisfy the police " explaining that "it was too hard to throw away my entire life and put my head on the chopping block." Adding elaboration, he said "my original story didn't make sense. I don't know why the police didn't question it." Erickson adds "I lied about remembering taking items from the victim, though I believe I did. That was all assumptions and trying to pacify the police and prosecution." Finally, Erickson states "I tried telling the police that I might have strangled the victim. One of the officers stopped me. He got mad. He did not want to hear that I might have done it."

In light of Erickson's wilful and deliberate perjury, the cause should be remanded as in *People v. Williams*, 673 S.W.2d 847 (Mo.App. 1984). There, after the defendant's time to file a motion for a new trial had expired., there was newly discovered evidence that, **if believed**, would "completely exonerate the defendant." *Williams*, 673 S.W.2d at 847 (*emphasis added*). The case was remanded to determine the believability of the evidence. In this case, there can be no doubt that if Erickson's new testimony is believed, Ferguson is completely exonerated. The *Williams* court stated "mindful though we are on the exclusivity of this Court's jurisdiction once a notice of appeal is properly filed, we are equally cognizant of the perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence." *Williams*, 673 S.W.2d at 848. This Court should reach the same conclusion.

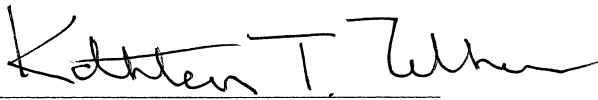
Ferguson respectfully submits that this case is even stronger than *Terry*, *Mooney*, *Williams*, and the other cases cited with regard to the propriety of awarding the relief he requests.

The circumstances present and the State's assertion that it is not averse to a fair hearing should cause this Court to grant the Motion To Remand.

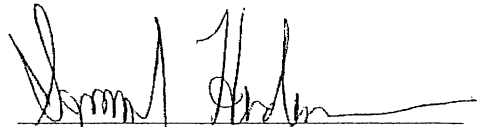
**CONCLUSION**

For the reasons stated herein, Defendant-Appellant, Ryan Ferguson, respectfully requests that this Court reverse and remand for filing of a Motion for a New Trial, and/or afford him any and all other relief deemed appropriate.

Respectfully Submitted,



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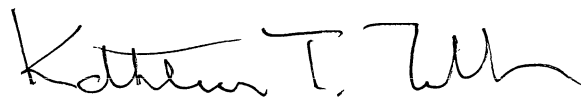


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