

attached documentation) that his co-defendant, Charles Erickson, has substantially altered his account of how they murdered the victim. Mr. Ferguson requests that this Court stay the pending appeal and remand the case to the trial court so that the new evidence provided by Mr. Erickson can be considered and a decision rendered as to whether a new trial is warranted.

The state is not averse to holding a full and fair evidentiary hearing to test the validity of the newly available evidence set forth in Mr. Ferguson's motion. But Mr. Ferguson's motion for remand is not properly addressed to this Court. The current appeal is an appeal from the denial of Mr. Ferguson's post-conviction motion, and under the express terms of Rule 29.15, a movant cannot file a successive Rule 29.15 motion or raise new claims not included in the original motion. See Rule 29.15(d) (claims not included in the post-conviction motion are waived) and Rule 29.15 (l) (successive motions are not allowed). "A motion is successive when it follows a previous post-conviction motion addressing the same conviction." *State v. Parker*, 274 S.W.3d 551, 555 (Mo.App. W.D. 2008). Such motions are barred "even when the movant alleges that the grounds for his motion were unknown at the time of the original motion." *Id.*

Thus, here, if the Court were to remand the case, there would be no authority for the motion court to consider the new claim asserted in the motion to remand, and any attempt by the motion court to do so would contravene the express terms of

Rule 29.15. Moreover, it is well settled that claims of newly discovered evidence are not properly brought in a Rule 29.15 motion. *State v. Ferguson*, 20 S.W.3d 485, 505 (Mo. banc 2000); *State v. Kelley*, 953 S.W.2d 73, 91-92 (Mo.App. S.D. 1997).¹

Citing *State v. Mooney*, 670 S.W.2d 510, 515 (Mo.App. E.D. 1984), along with various cases that have analyzed and applied *Mooney*, Mr. Ferguson asserts that this Court has “inherent discretion” to remand this case to evaluate a claim of newly discovered evidence. And, in fact, on February 10, 2010, shortly after Mr. Ferguson filed his motion to remand, the Missouri Supreme Court analyzed a *Mooney* claim and held that Missouri appellate courts have inherent authority to remand for an evaluation of newly discovered evidence, in cases where there has been a miscarriage of justice. See *State v. Terry*, No. SC90332, 2010 WL 454862 (Mo. banc February 10, 2010).

But Mr. Ferguson’s reliance on *Mooney* and cases decided in its wake is misplaced. In *Mooney* and the cases cited by Mr. Ferguson (*Williams*, *Davis*, and *McQuary*), and in *State v. Terry*, the appellate court was considering a claim of newly discovered evidence on direct appeal – at a time when the defendant’s conviction

¹ An exception to this general rule is made when it comes to light that the state has knowingly relied on perjured testimony to obtain a conviction. *State v. Kelley*, 953 S.W.2d at 92. Here, Mr. Ferguson has not alleged in his motion that the state knew that Mr. Erickson was testifying falsely at trial.

was not yet final. As such, in those cases, the motion to remand was filed in the ongoing criminal proceeding, and it was properly viewed as a motion to remand for an opportunity to file another motion for new trial out of time. Here, by contrast, Mr. Ferguson has filed his motion in a separate civil proceeding that is designed to collaterally attack a final criminal conviction. The only relevant issues here are the claims raised in the post-conviction motion, and, as stated above, prior case law makes plain that claims of newly discovered evidence are not cognizable.

Mr. Ferguson does cite one post-conviction case – *McQuarry v. State*, 241 S.W.3d 446 (Mo.App. W.D. 2007) (*McQuarry II*) – and he asserts that it stands for the proposition that a post-conviction case can be remanded to present new evidence for the purpose of “creating a record capable for review by this Court” (Mot. to Rem. at 12). But Mr. Ferguson’s characterization of this case is inaccurate. In *McQuarry II*, the claim (which involved juror misconduct) had been asserted in the movant’s timely-filed post-conviction motion, and evidence of the juror misconduct had already been presented to the motion court. *Id.* at 450-451. The motion court, however, had failed to issue any findings or conclusions on the claim, apparently based on the well-settled general rule that claims of trial court error must ordinarily be litigated on direct appeal and, thus, cannot be litigated in a post-conviction motion under Rule 29.15. *Id.* at 454. This Court determined that the motion court had clearly erred because the claim that had been asserted in the Rule 29.15 motion could not have

been raised on direct appeal. *Id.* at 452-454. Accordingly, the Court applied the exception to the general rule, which states that “where the alleged errors amount to constitutional violations, they may be addressed if ‘exceptional circumstances are shown which justify not raising the constitutional grounds on direct appeal.’ ” *Id.* at 452-453. Accordingly, the Court remanded for findings and conclusions on the issue that had been litigated in the Rule 29.15 proceeding. In short, the case does not present facts like Mr. Ferguson’s case, as the remand was simply the ordinary sort of remand that follows the motion court’s failure to issue required findings of fact and conclusions of law.

In Mr. Ferguson’s case – unlike *McQuarry II* – the claim of newly discovered evidence is being raised for the first time in Mr. Ferguson’s motion to remand. The claim was not raised in Mr. Ferguson’s Rule 29.15 motion, and, thus, Mr. Ferguson is not asking merely for additional findings on a claim that was overlooked by the motion court; rather, Mr. Ferguson is attempting to file a successive claim well outside the mandatory time limits of Rule 29.15. In fact, Mr. Ferguson is requesting that the case be remanded so that the motion court can order a new trial. But there is no authority for the motion court to grant a new trial on a claim that was not raised in Mr. Ferguson’s Rule 29.15 motion, and, additionally, claims of newly discovered evidence are not cognizable in a Rule 29.15 motion.

Mr. Ferguson also cites to *Amrine v. Bowersox*, 128 F.3d 1222 (8th Cir. 1997), a

case involving an appeal from the denial of a federal habeas corpus petition. But given the distinctly different nature of federal habeas corpus petitions and post-conviction proceedings under Rule 29.15, the case has no application to the facts of Mr. Ferguson's case. Indeed, the case says absolutely nothing about the propriety of remanding a case in the procedural posture that Mr. Ferguson's case is in.

Finally, Mr. Ferguson cites to *People v. Burrows*, 665 N.E.2d 1319 (Ill. 1996), as an example where a recanting co-defendant's testimony was deemed sufficient to grant the defendant a new trial. One critical difference between that case and Mr. Ferguson's case, though, is that in *Burrows* the claim was asserted in the defendant's post-conviction motion, and the defendant was granted relief in the motion court. *Id.* at 1322. Additionally, the state failed to assert (and thus waived any argument) that the claim of newly-discovered evidence was not properly raised in the defendant's post-conviction motion. *Id.* at 1324. Here, by contrast, Mr. Ferguson did not raise this claim in his post-conviction motion, and he is attempting to assert it outside the bounds of Rule 29.15.

To respondent's knowledge, there is only one situation in which a motion court is authorized to re-open a Rule 29.15 proceeding – when it is alleged that a movant has been abandoned by post-conviction counsel. *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009). Rule 29.15 was not “designed for duplicative and unending challenges to the finality of a judgment.” *Id.* at 59.

Again, the state is not averse to a full and fair hearing on the issues presented by Mr. Ferguson's motion, including whether Mr. Erickson's newly available testimony is material. But in light of the foregoing, respondent submits that Mr. Ferguson's present motion is not properly before this Court.

WHEREFORE, respondent prays that the Court deny appellant's motion to remand.

Respectfully submitted,

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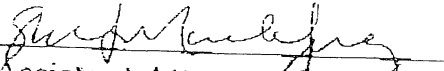
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CERTIFICATE OF SERVICE

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