No. SC100957

IN THE SUPREME COURT OF MISSOURI

JESSIE NELSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Buchanan County Circuit Court
5th Judicial Circuit, Division 3
The Honorable Patrick K. Robb, Judge

SUBSTITUTE REPLY BRIEF

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TIMELINESS:

Appellate Courts Should Have No Sua Sponte *Duty to Review the Timeliness of Amended Motions*

Respondent spends six pages discussing this Court's decisions that establish appellate courts have a *sua sponte* duty to review the timeliness of amended motions in 24.035 and 29.15 cases (Resp. Br. 17-23). Appellant does not contest that, since the issuance of *Moore v. State*, 458 S.W.3d 822, 826-27 (Mo. banc 2015), this Court's decisions have consistently held that appellate courts have a *sua sponte* duty to review the timeliness of amended motions in 24.035 and 29.15 cases. Appellant is asking this Court to reconsider why there is such a *sua sponte* duty for appellate courts.

The timeliness of an amended motion is not a jurisdictional issue, and while initial motions are subject to "complete waiver" if untimely, "[t]he deadlines for amended motions in Rule 29.15(g), on the other hand, contain no waiver provisions." *Price v. State*, 422 S.W.3d 292, 300 (Mo. banc 2014). If the timeliness of the amended motion is neither jurisdictional nor subject to "complete waiver," then why do appellate courts have a *sua sponte* duty to review the timeliness of amended motions in 24.035 and 29.15 cases?

Respondent's only answer to this question is because *Moore*, 458 S.W.3d at 826-27, and its progeny say so (Resp. Br. 17-23). If this case was in front of the Court of Appeals, that answer would be sufficient because the Court of Appeals must follow this Court's precedent. *See, e.g.*, *John Doe B.P. v. Catholic Diocese of Kansas City-St. Joseph*, 432 S.W.3d 213, 219 (Mo. App. W.D. 2014). However, this Court has the power to reconsider its decision in *Moore*, 458 S.W.3d 822, to find there is no textual justification in a Rule or statute to support the *sua sponte* duty for appellate courts to determine the timeliness of

the amended motion, and to treat timeliness of the amended motion like every other issue.

Finality

At multiple points in its brief, Respondent cites "finality" as a one of the policy concerns behind the time limits in Rules 24.035 and 29.15 (Resp. Br. 18, 28). Respondent, however, digs no deeper into this finality concern because requiring appellate courts to *sua sponte* review the timeliness of amended motions is directly contrary to the policy goal of finality. As set forth in Appellant's brief, *sua sponte* review of the timeliness of the amended motion by appellate courts results in remands for findings on abandonment, either review of the *pro se* claims or re-review of the amended motion, reissuance of the judgment, and an entirely new appellate proceeding (App. Br. 15-16); *see also Burge v. State*, 707 S.W.3d 68, 71 (Mo. App. S.D. 2025) (citing *Harley v. State*, 633 S.W.3d 912, 917 (Mo. App. E.D. 2021)). Requiring appellate courts to *sua sponte* review the timeliness of amended motions does not support finality and drags those cases out for years. In contrast, removing the requirement for *sua sponte* review of the timeliness of amended motions promotes finality because it more quickly results in reaching a final opinion on the merits.

Rule 29.15 was Not Ambiguous Between November 4, 2021, and July 1, 2023

Respondent's argument that the amended motion was untimely is based on a rule-construction argument that skips a critical step (Resp. Br. 25-27). The critical step is that canons of construction "are employed only when a statute [or Rule] is ambiguous." *Wilson v. City of St. Louis*, 662 S.W.3d 749, 757 (Mo. banc 2023) (citing *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 626 (Mo. banc 2015)). The application of canons of construction are "not required if the words at issue are plain and unambiguous." *Id.* (quoting

Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis, 220 S.W.3d 721, 726 (Mo. banc 2007)).

If an attorney was appointed to a 29.15 case on March 8, 2022, and the defendant was sentenced on or after January 1, 2018, the plain language that controlled the timing of the amended motion came from two places. On March 8, 2022, Rule 29.15(m) stated:

> This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 2018. If sentence was pronounced prior to January 1, 2018, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 2017, whichever is earlier.

On March 8, 2022, Rule 29.15(g) stated:

> If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion or statement in lieu of an amended motion shall be filed within 120 days of the earlier of the date both the mandate of the appellate court is issued and:
>
> (1) Counsel is appointed, or
>
> (2) An entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

There was no ambiguity in the plain language of Rule 29.15. Any attorney reading Rule 29.15 would conclude that in such a situation, the amended motion was due 120 days after the issuance of the mandate and appointment or entry of appearance. This is the plain language reading of Rule 29.15 as it existed March 8, 2022.

According to Respondent, however, an attorney reading these two paragraphs together on March 8, 2022, would understand that the amended motion was due 60 days after the issuance of the mandate and appointment or entry of counsel. In arriving at this conclusion, Respondent points to the December 20, 2022, amendment to Rules 24.035(m) and 29.15(m), that became effective July 1, 2023, which reads: "For sentences pronounced on or after January 1, 2018, postconviction relief proceedings shall be governed by the

provisions of Rule 24.035 [or 29.15] in effect on the date of the movant's sentencing." For Respondent, this was not an actual amendment, but merely a "clarification" of what was always the case (Resp. Br. 25-27). Conspicuously absent from Respondent's brief is any attempt at a resolution of the question: **How was an attorney who is appointed on March 8, 2022, supposed to know the schedule in Rules 24.035 and 29.15 was going to be amended on December 20, 2022, with an effective date of July 1, 2023?**

When the public defender was appointed to represent Mr. Nelson on March 8, 2022, a plain reading of Rule 29.15 provided that the amended motion was due 120 days after the issuance of the mandate and appointment of counsel. The amended motion was filed within 120 days, so it was timely filed (LF D6p1).

Respondent cites to *Smith v. State*, 697 S.W.3d 617 (Mo. App. E.D. 2024), for its holding that the date of sentencing controls the timing provisions of an amended motion even if the amended motion was due before the July 1, 2023, amendment to Rule 29.15(m) (Resp. Br. 29-31). Missing from *Smith*, 697 S.W.3d at 620, however, is any substantive discussion as to how the Eastern District arrived at that conclusion. It appears the Court in *Smith* overlooked that Rule 29.15(m) was amended July 1, 2023, and it mistakenly applied the post-July 1, 2023, version of Rule 29.15(m) to Mr. Smith's case. *Smith* is not controlling on this Court, and its lack of any meaningful discussion as to how it arrived at its conclusion should negate any potential persuasive power it may have.

POINT I:

Strategic Decisions must be Reasonable

Respondent quotes *Rios v. State*, 368 S.W.3d 301, 312 (Mo. App. W.D. 2012), for the statement of law that "[t]he selection of witnesses and the introduction of evidence are questions of trial strategy which do not provide a basis for post-conviction relief" (Resp. Br. 34). While this is an accurate quote from *Rios*, it is misleading and cannot be understood as a standalone statement of the law. When laying out the standard for the performance prong of ineffective assistance earlier in its opinion, the *Rios* Court provides the correct standard:

> To demonstrate this, Rios "must identify specific acts or omissions of counsel that resulted from unreasonable professional judgment, and the 'court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance.'" [*Deck v. State*, 68 S.W.3d 418, 425 (Mo. banc 2002)] (quoting *Strickland* [*v. Washington*, 466 U.S. 668, 688 (1984)]). We judge the reasonableness of counsel's conduct based on the facts of each case. *Williams v. State*, 205 S.W.3d 300, 305 (Mo. App. W.D.2006).

Rios, 368 S.W.3d at 305.

The notion that selection of a witness or evidence cannot provide a basis for a claim of ineffective assistance of counsel is demonstrably false. *See, e.g.*, *Buck v. Davis*, 580 U.S. 100, 119-20 (2017) (finding trial counsel ineffective for calling a psychologist in mitigation who testified the defendant was predisposed to violence because of his race, establishing the aggravator of future dangerousness); *State v. McCarter*, 883 S.W.2d 75, 77 (Mo. App. S.D. 1994) (finding trial counsel ineffective for admitting evidence of prior sexual misconduct allegations against the defendant in a sexual abuse case). Given the complete discussion in *Rios*, the explicit discussion in *Strickland*, 466 U.S.

at 691, that the reasonableness of trial counsel's actions is the critical issue in determining the performance prong, and cases finding ineffective assistance based on the selection of witnesses and evidence, the statement in *Rios* that the selection of witnesses or evidence cannot form the basis of a claim of ineffective assistance is incorrect and must be disregarded by this Court.

Strategies Must Change with the Evidence

Respondent maintains that it was a reasonable strategy for trial counsel not to admit the employment records because trial counsel did not want to strengthen Mr. Hernandez's identification of Mr. Nelson by establishing they knew each other prior to the incident (Resp. Br. 37). Appellant agrees this was a reasonable strategy up until the point in the trial where counsel elicited testimony from Mr. Nelson that he and Mr. Hernandez knew each other and worked together in the past (Tr. 1150).[1] "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). The circumstances of the case fundamentally changed when trial counsel elicited the testimony from Mr. Nelson that he knew Mr. Hernandez, and trial counsel's strategy with respect to not introducing the records became unreasonable.

Employment Records were not Cumulative

[1] In Appellant's initial brief, Appellant incorrectly stated the records established they worked together for three months (App. Br. 34). In Respondent's brief, Respondent incorrectly quoted the postconviction transcript and the work records that they worked together from "October 1, 2016 to October 5, 2016" (Resp. Br. 35). The quote from the evidentiary hearing was actually that the records established Mr. Hernandez worked at "BMS airport October 5th, 2016 to November 1st, 2016" (PCRTr. 16). The records established that Mr. Nelson and Mr. Hernandez's time working at BMS airport overlapped from October 7, 2016 to November 1, 2016 (PCRLF D10p2, 5).

Respondent argues "the employment records would have been cumulative to Defendant's trial testimony", and "[c]ounsel's failure to present cumulative evidence is not ineffective assistance of counsel" (Resp. Br. 37). Appellant agrees that the failure to present truly cumulative evidence cannot rise to the level of ineffective assistance. However, in making its argument, Respondent fails to recognize that "cumulative" has a legal meaning in Missouri, and the employment records were not "cumulative" as a matter of law (Resp. Br. 37).

"Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute." *Shallow v. Follwell*, 554 S.W.3d 878, 883-84 (Mo. banc 2018) (quoting *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004)). Evidence is not "cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence." *Id.* (quoting *Black*, 151 S.W.3d at 56). For instance, in *Shallow*, 554 S.W.3d at 880-81, it was not cumulative for four doctors to testify on behalf of the defendant in a wrongful death suit where the issue was whether the defendant negligently perforated a patient's bowel and then failed to recognize and treat that perforation. In *Black*, 151 S.W.3d 49, additional impeachment of eyewitnesses was found to be non-cumulative to impeachment that already occurred during trial. In child sex cases, prior statements admitted under 491.075 are not cumulative because "[a] child victim's out-of-court statements possess unique strengths and weaknesses and are distinct evidence from the child's trial testimony." *State v. Evans*, 490 S.W.3d 377, 388 (Mo. App. W.D. 2016) (quoting *State v. Gaines*, 316 S.W.3d 440, 450 (Mo. App. W.D. 2010)). Further, cases have recognized "[t]he defendant's own testimony on a decisive issue in a case is always received with doubt because of his interest in the result of the case.

Corroboration is critical, and corroborative testimony by a single witness can never be discounted as 'merely cumulative.'" *State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990).

Mr. Hernandez was a critical eyewitness for the State; if he was believed, the jury would find Mr. Nelson guilty (Tr. 729). Mr. Nelson was a critical witness for the defense; if he was believed, the jury would find Mr. Nelson not guilty (Tr. 1157). Their testimonies differed on the issue of whether Mr. Hernandez and Mr. Nelson knew each other prior to the incident, with Mr. Nelson testifying that he and Mr. Hernandez had worked together (Tr. 1151-52). Given the critical importance of Mr. Nelson's credibility, the critical importance of undercutting Mr. Hernandez's credibility, and that their testimonies differed on the issue of whether they knew one another prior to the incident, the employment records showing they worked together would have bolstered Mr. Nelson's testimony on this issue. As a matter of law, the employment records were not cumulative and cannot be dismissed as such. *See Shallow*, 554 S.W.3d at 880-81; *Black*, 151 S.W.3d at 56; *Evans*, 490 S.W.3d at 388.

POINT II:

Trial Counsel's Failure to Specifically and Explicitly Remember Why She Did Not File a Motion to Suppress and Pursue a* Frank*'s Hearing

Respondent cites to the principle that "counsel's 'lack of recollection alone does not overcome the presumption that her decision not to object was a reasonable trial strategy'" and then appears to try to flip it to make it mean that where counsel fails to specifically articulate a strategy, a movant has failed to overcome the presumption of reasonableness (Resp. Br. 46 (quoting

Dawson v. State, 315 S.W.3d 726, 734 (Mo. App. W.D. 2010)). Assuming this is what Respondent is trying to do, it is incorrect.

The case best demonstrating the incorrectness of Respondent's argument is *State v. Butler*, 951 S.W.2d 600, 609 (Mo. banc 1997), in which this Court found trial counsel ineffective for failing to investigate that another person committed the murder. Critically, trial counsel was deceased at the time of the postconviction hearing. *Id.* If a court can find an attorney ineffective without any testimony from that attorney, then a court can plainly find an attorney ineffective when the attorney cannot remember what strategy, if any at all, motivated a decision. Here, trial counsel testified that, while she could not specifically remember why she did not seek to suppress the search and seizure and request a *Frank*'s hearing, the only reason she would have for not doing so was if she believed Mr. Nelson lacked standing to raise the challenge (PCRTr. 22-23). As thoroughly discussed in Appellant's brief, any conclusion that Mr. Nelson lacked standing was legally incorrect, and a mistake of law cannot serve as the basis for a reasonable trial strategy (App. Br. 62-63).

Mr. Nelson Owned the Car

Respondent misconstrues Appellant's argument regarding standing, with Respondent maintaining that Appellant's position is Mr. Nelson "had standing to challenge the search because he was married to Wife and because the car title was transferable on death from Wife to him" (Resp. Br. 48). This is not Appellant's argument. Appellant's argument is Mr. Nelson was married to his wife when they bought the car, so he owns the car too (App. Br. 39-40). This is the law. *Jezewak v. Jezewak*, 3 S.W.3d 860, 864 (Mo. App. E.D. 1999) ("All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolution of marriage is presumed to be marital property regardless of whether title is held individually or by the

spouses in some form of co-ownership") (disagreed with on other grounds by *Hall v. Hall*, 118 S.W.3d 252, 260 (Mo. App. W.D. 2003)). Respondent appears to agree that the owner of a car has standing to challenge a search of the car (Resp. Br. 46). Mr. Nelson was the owner of the car, so he had standing to challenge its search.

Transcripts and Reports are Evidence

Respondent alleges that, even if Mr. Nelson had standing, he "did not call any witnesses or present ***any evidence*** during the postconviction evidentiary hearing that he would have used at the Franks hearing" (Resp. Br. 49) (emphasis added). This argument represents a misunderstanding of what evidence is. At the hearing, postconviction counsel entered into evidence the trial transcript, Mr. Nelson's Wife's recorded statement, and police reports (PCRTr. 5-6 (Mov. Exs 1, 15, 17 (PCRLF D7, D14-16))).

Transcripts from trial are evidence. *See Dickens v. Missouri Dept. of Health & Senior Services*, 208 S.W.3d 281, 283 (Mo. App. E.D. 2006) (discussing a transcript is "the official record of proceedings in a trial or hearing as taken down by a court reporter" (quoting BLACK'S LAW DICTIONARY 1535 (8th ed. 2004)).[2] Similarly, reports are evidence. *See Peters*

[2] There appears to be unanimous agreement amongst jurisdictions that transcripts from official court proceedings are evidence of what occurred in court. *See, e.g., United States v. O'Connell*, 890 F.2d 563, 567 (1st Cir. 1989) ("[T]here is no sensible rationale which would preclude reliance on sworn testimony faithfully recorded during the conduct of a judicially-supervised adversarial proceeding. All of the hallmarks of reliability attend upon such trial transcripts.") (citation and internal quotation marks omitted); *Fletcher v. Bryan*, 175 F.2d 716, 717 (4th Cir. 1949) (noting that "a certified transcript of a court record is better evidence of its contents than an affidavit with regard thereto"); *Laird v. Shelnut*, 74 S.W.3d 206, 209-10 (Ark. 2002) (explaining that an official "transcript of trial testimony is as reliable as a transcript of deposition testimony or an affidavit, both of which may be considered in summary-judgment proceedings").

v. Gen. Motors Corp., 200 S.W.3d 1, 12 (Mo. App. W.D. 2006) (recognizing that reports are evidence). As detailed in Appellant's opening brief, this evidence established what would have presented at the *Frank*'s hearing (App. Br. 58-60). This Court has made clear that "a movant is not required to reenact how a hypothetical trial would have proceeded" through recalling every witness and requestioning them if the testimony at issue is proven through other evidence. *Black*, 151 S.W.3d at 57. Here, there was no need to call people and reenact a *Frank*'s hearing, when all the evidence necessary was contained in the trial transcript or police reports, which were entered into evidence.

Findings Beyond Those Contained in the Judgment

Respondent closes its brief by making a series of factual findings regarding the motion to suppress and *Frank's* hearing (Resp. Br. 49-52). The motion court never made these findings; instead, it denied the claim on the bases that Mr. Nelson did not have standing to challenge the search of the car and the warrant was supported by probable cause (PCRLF D21p7-9). As thoroughly discussed in Appellant's opening brief, appellate courts "are not permitted to supply omitted findings and conclusions, as to do so would be tantamount to engaging in impermissible *de novo* review." *See Watson v. State*, 545 S.W.3d 909, 914 (Mo. App. W.D. 2018) (for more in-depth discussion see pages 49-50 of Appellant's Opening brief, which although discussing Point I, applies to Point II and Respondent's argument). This is why Appellant requested the remedy of remand for additional findings, so the motion court could properly consider the claim and issue findings of fact on the pertinent issues.

CONCLUSION

Based on the argument presented above and in Appellant's Substitute Brief, Mr. Nelson respectfully requests this Court reverse the judgment of the Rule 29.15 motion court and remand the case with instructions for the court to issue new findings under a correct understanding of the claims raised or to vacate and set aside the convictions and sentences in the underlying criminal action and set that matter for retrial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Damien de Loyola, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2019, in Century Schoolbook size 13-point font. Excluding the cover page, signature block, and certification of compliance, this reply brief contains 3,868 words, which does not exceed the 7,750 words allowed under Rule 84.06(b)(1).

A true and correct copy of the attached brief was sent through the e-filing system on April 28, 2025, to Wensdai Brooks, Office of the Attorney General, at Wensdai.Brooks @ago.mo.gov.

/s/ Damien de Loyola
Damien de Loyola