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IN THE
SUPREME COURT OF MISSOURI

CEDRIC MACK,	)	
	)	
Appellant/Movant,	)	
	)	
v.	)	No. SC100921
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF HARRISON COUNTY
STATE OF MISSOURI
THIRD JUDICIAL CIRCUIT
THE HONORABLE JACK N. PEACE, JUDGE AT TRIAL AND SENTENCING
THE HONORABLE THOMAS R. ALLEY, JUDGE AT INITIAL POST-CONVICTION PROCEEDINGS
THE HONORABLE RYAN W. HORSMAN, JUDGE AT SUBSEQUENT POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

STEPHANIE HOEPLINGER
Missouri Bar No. 60656
Assistant Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(866) 452-4425 (facsimile)
Stephanie.Hoeplinger[at]mspd.mo.gov

ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

In Harrison County Circuit Court Cause No. 16AH-CR00304-01, the State of Missouri charged that Appellant Cedric Mack committed the class D felony of driving while intoxicated as a persistent offender, violating § 577.010, RSMo (Count I), and the class D felony of driving while license was suspended or revoked, violating § 302.321, RSMo (Count II) [Tr. 2; LF1 p. 9-12].[1] The state dismissed Count II, and the case proceeded to a jury trial on Count I [LF1 p. 45; Tr. 44]. The jury found Mr. Mack guilty of driving while intoxicated as a persistent offender [Tr. 175]. On April 20, 2017, the Honorable Jack N. Peace sentenced Mr. Mack to four years' imprisonment in the Missouri Department of Corrections [Tr. 187].

Mr. Mack appealed his conviction and sentence [LF1 p. 80-81]. The Western District affirmed his conviction and sentence and issued its mandate on December 5, 2018 [LF3 D1 p. 41]. Mr. Mack timely filed a *pro se* post-

[1] All statutory references are to RSMo 2016 unless otherwise indicated. Appellant will cite to the record on appeal as follows: (1) Legal file from Appellant's Direct Appeal Cause No. WD80719, transferred on November 25, 2020, "[LF1 p. #];"; (2) Legal file from Appellant's first Post-Conviction Appeal, Cause No. WD84140, transferred on October 12, 2023, "[LF2 D# p. #];" (3) Legal file from Appellant's second Post-Conviction Appeal, Cause No. WD86527, "[LF3 D# p. #];" (4) Transcript of trial in underlying criminal case, Cause No. 16AH-CR00304-01, "[Tr. #];" (5) Transcript of post-conviction matters heard on February 20, 2020, "[PCR #];" (6) Transcript from abandonment inquiry heard on March 31, 2023, "[Ab. Hr. #];" and (7) Appendix, "[App #]."

conviction motion on January 14, 2019 [LF3 D2 p. 1]. Mr. Mack's public defender filed an amended motion on June 3, 2019 [LF3 D5 p. 1]. The motion court denied Mr. Mack's post-conviction amended motion on July 8, 2020 [LF3 D7 p. 1]. Mr. Mack appealed the denial of his post-conviction motion [LF3 D9 p. 1].

The Western District remanded for an abandonment inquiry. *Mack v. State*, 635 S.W.3d 607, 613 (Mo. App. W.D. 2021). On March 31, 2023, the motion court found that Mr. Mack's public defender had abandoned him and determined the appropriate remedy was to consider the amended motion on its merits [LF3 D17 p. 1]. The motion court denied Mr. Mack's post-conviction motion on July 27, 2023 [LF3 D18 p. 1]. Mr. Mack appealed that decision [D19 p. 1].

The Western District issued an opinion affirming the motion court's denial of Mr. Mack's post-conviction motion. *Cedric Mack v. State of Missouri*, No. WD86527. The state requested transfer to this Court, which was granted on March 4, 2025. Therefore, jurisdiction lies with the Supreme Court of Missouri. Mo. Const., art. V, § 9; Rule 83.04.

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STATEMENT OF FACTS

Underlying Criminal Case

Corporal received a dispatch that there were two anonymous phone calls reporting a silver car with black racing stripes and an Iowa license plate driving in a careless and imprudent manner [Tr. 112-13]. Corporal located the car driving the opposite direction as him on Highway I-35 [Tr. 114]. He observed the car stop briefly halfway on the shoulder and halfway in the driving lane, then continue northbound [Tr. 114].

Corporal pulled into the crossover, reversed direction, caught up to the car, and stopped it [Tr. 114]. Mr. Mack was driving [Tr. 115]. Corporal asked Mr. Mack for his driver's license, but Mr. Mack handed him a credit card [Tr. 115]. Corporal smelled alcohol, and, when Mr. Mack could not find his driver's license, he asked him to sit in the patrol car [Tr. 115-16]. Mr. Mack stumbled, swayed, had slurred speech, and bloodshot eyes [Tr. 116-17]. Mr. Mack originally gave a different name to Corporal but eventually gave his true name [Tr. 119].

Corporal conducted several field sobriety tests on Mr. Mack, and Mr. Mack only successfully completed one—counting backwards [Tr. 119-32]. Corporal arrested Mr. Mack for driving while intoxicated [Tr. 132].

Mr. Mack had a jury trial [Tr. 36]. The state presented the testimony of Corporal, and Corporal's dashboard camera video [Tr. 111-163]. The jury

convicted Mr. Mack of driving while intoxicated and the court sentenced him to 4 years' imprisonment [Tr. 175, 187]. After he was sentenced, Mr. Mack was advised of his post-conviction rights under Rule 29.15 [Tr. 187]. The court told Mr. Mack "[i]f you do not have the money to hire a lawyer, a lawyer will be appointed at that time to represent you on that matter" [Tr. 188-89].

Post-Conviction Case

Mr. Mack was sentenced on April 20, 2017, and timely filed a notice of appeal on April 24, 2017 [Tr. 187; LF1 p. 80]. The Western District affirmed his conviction and sentence and issued its mandate on December 5, 2018 [LF3 D1 p. 41]. Mr. Mack timely filed a *pro se* Motion to Vacate, Set Aside, or Correct Judgment or Sentence by filing it 40 days after the mandate issued [LF3 D2 p. 1]. Rule 29.15(b) [App 12-13].[2]

His *pro se* motion contained a signed and notarized *in forma pauperis* affidavit [LF3 D2 p. 6]. Mr. Mack told the court, "I need a public defender to take my case please because I have no funds" [LF3 D2 p. 6]. The motion court never appointed counsel for Mr. Mack [LF3 D1 p. 5]. Forty-nine days after Mr. Mack filed his *pro se* motion, a public defender entered her appearance [LF3 D23 p. 1]. This identified the attorney as working at the "Office of the

[2] Because Mr. Mack was sentenced before January 1, 2018, and filed his *pro se* motion in 2019, the version of 29.15 in effect on December 31, 2017, applies to his case. Rule 29.15(m) (effective Jan. 1, 2018). This will be the rule Mr. Mack cites to in this brief, unless otherwise indicated.

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State Public Defender" [LF3 D23 p. 1]. Mr. Mack's amended motion was due May 3, 2019. Rule 29.15(g) [App 13-14]. The public defender filed a request for an extra 30 days to file the amended motion, which was untimely granted on May 6, 2019 [LF3 D3 p. 1-2; LF3 D4 p. 1].

The amended motion—filed on June 3, 2019—contained three claims [LF3 D5 p. 2]. Relevant to this appeal, Mr. Mack claimed Trial Counsel was ineffective for failing to file and litigate prior to trial a motion to suppress the evidence obtained as fruits of the law enforcement's stop of his car without reasonable suspicion [LF3 D5 p. 2]. At the evidentiary hearing, Mr. Mack presented the motion court with Corporal's trial testimony, Corporal's dashboard camera video [Movant's Exhibit 2], and a later-filed affidavit from Trial Counsel [PCR 2-4, 7-8; LF3 D6 p. 1-3].

Trial Counsel's affidavit stated she did not file and litigate a motion to suppress the evidence based on Corporal lacking reasonable suspicion for the stop [LF3 D6 p. 2]. She believed Movant's Exhibit 2 showed Mr. Mack's car slow and pull to the side of the road before Corporal activated his emergency lights [LF3 D6 p. 2]. She therefore did not think this was a meritorious issue [LF3 D6 p. 2].

The motion court denied Mr. Mack's post-conviction amended motion [LF3 D7 p. 1]. On appeal, the state argued "that because the motion court did not grant the motion for an extension to file an amended motion until after

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the initial deadline for filing the amended brief passed, the amended motion filed thereafter was untimely, and the cause must be remanded back for an abandonment inquiry." *Mack*, 635 S.W.3d at 611. Following this Court's precedent in *Watson v. State*, 536 S.W.3d 716, 719 (Mo. banc 2018), the Western District agreed and remanded for the motion court to "conduct an abandonment inquiry and for further proceedings consistent with the outcome of the inquiry." *Mack*, 635 S.W.3d at 613.

On remand, the motion court found the public defender had abandoned Mr. Mack and—under *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991)—accepted the untimely amended motion as timely filed [LF3 D17 p. 1]. The state did not object to a finding of abandonment [Ab. Hr. 4]. On July 27, 2023, the motion court issued new findings of fact and conclusions of law denying Mr. Mack's amended post-conviction motion [LF3 D18 p. 1; App 3]. The motion court found that Corporal had reasonable suspicion necessary for an investigatory stop and therefore any motion to suppress would not have been meritorious [LF3 D18 p. 8; App 10].

This appeal follows [LF3 D19 p. 1]. To avoid unnecessary repetition, additional facts may be set forth in the Argument portion of this brief.

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POINTS RELIED ON

I. The motion court clearly erred in not appointing counsel for Mr. Mack and in denying him post-conviction relief without appointing counsel, because this violated Rule 29.15(e), in that the motion court was required to appoint counsel since Mr. Mack timely filed a *pro se* post-conviction motion, filled out the *in forma pauperis* affidavit, and was indigent. Mr. Mack was prejudiced because Rule 29.15 did not work as intended in his case.

Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991);
Price v. State, 422 S.W.3d 292 (Mo. banc 2014);
Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991);
Watson v. State, 536 S.W.3d 716 (Mo. banc 2018); and
Rule 29.15.

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II. The motion court clearly erred in denying Mr. Mack's Rule 29.15 amended motion claim that Trial Counsel was ineffective for failing to file and litigate a motion to suppress evidence derived from Corporal's investigatory stop, because Mr. Mack was denied effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 18(a) of the Missouri Constitution, in that Corporal did not have reasonable suspicion to believe Mr. Mack had been or was engaging in criminal conduct and the evidence would have been suppressed if Trial Counsel had filed a motion to suppress. But for Trial Counsel's unprofessional error, there is a reasonable likelihood Mr. Mack's trial result would have been different.

State v. Pike, 162 S.W.3d 464 (Mo. banc 2005);
State v. Roark, 229 S.W.3d 216 (Mo. App. W.D. 2007);
Strickland v. Washington, 466 U.S. 668 (1984);
Terry v. Ohio, 392 U.S. 1 (1968);
Rule 29.15;
Mo. Const., art. I, §§ 10 and 18(a); and
U.S. Const., amends. VI and XIV.

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ARGUMENT

I. The motion court clearly erred in not appointing counsel for Mr. Mack and in denying him post-conviction relief without appointing counsel, because this violated Rule 29.15(e), in that the motion court was required to appoint counsel since Mr. Mack timely filed a *pro se* post-conviction motion, filled out the *in forma pauperis* affidavit, and was indigent. Mr. Mack was prejudiced because Rule 29.15 did not work as intended in his case.

Preservation

A public defender entered her appearance on behalf of Mr. Mack on March 4, 2019, 49 days after his *pro se* post-conviction motion was filed [LF3 D2 p. 1; LF3 D23 p. 1]. Mr. Mack's *pro* se motion included an *in forma pauperis* affidavit [LF3 D2 p. 6]. The public defender's entry of appearance stated she was appearing as a representative of the Office of the State Public Defender [LF3 D23 p. 1].

Standard of Review

This Court reviews rulings of the motion court to determine whether they were clearly erroneous. Rule 29.15(k) [App 14]. Findings and conclusions are clearly erroneous if, after a review of the record, this Court is left with a definite and firm impression a mistake has been made. *Ramsey v. State*, 438 S.W.3d 521, 522 (Mo. App. E.D. 2014).

When Rule 29.15(e) fails to operate as intended because appointed counsel fails to timely file an amended motion, this Court has held that the motion court has an independent duty to determine whether counsel abandoned Movant. *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). If that does not happen, appellate courts remand the matter back to the motion court to determine whether counsel abandoned Movant, regardless of whether the issue of abandonment had been raised below. *Id*. at 826.

Argument

Before Rule 29.15, there was Rule 27.26, through which this Court decided that "appointing counsel for all indigent inmates who assert post-conviction claims was the best way to further the purpose of ensuring thorough review without undue delay in achieving finality of criminal convictions." *Price v. State*, 422 S.W.3d 292, 297 (Mo. banc 2014). Rule 29.15(e) continues this policy and requires that "when an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant"[3] [App 13].

[3] The version of Rule 29.15 applicable to Mr. Mack does not contain a time limit for appointing counsel. It should be noted, however, that Rule 29.15 was amended on June 27, 2017—just slightly more than two months after Mr. Mack was sentenced— to include the requirement that counsel be appointed for indigent movants within 30 days of the filing of a *pro se* motion. Rule 29.15(e) (effective Jan. 1, 2018). That rule became effective on January 1, 2018, over a year before Mr. Mack filed for post-conviction relief. Due to the scheduling provision contained in subsection (m), Mr. Mack's case is

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Rule 29.15 envisions that amended motions should be filed in all cases, unless an attorney decides the *pro se* motion has sufficiently pled all claims. *Vogl v. State*, 437 S.W.3d 218, 226 (Mo. banc 2014). Rule 29.15 requires the appointment of counsel for indigent movants because an amended motion is a final pleading which requires legal expertise. *Id.* at 227. This Court has held that the limited scope of appellate review under Rule 29.15(j) assumes that the motion court and appointed counsel have complied with all provisions of the rule. *Price*, 422 S.W.3d at 298; *Luleff v. State*, 807 S.W.2d 495, 497-98 (Mo. banc 1991); *see also Borschnack v. State*, 614 S.W.3d 561, 569 (Mo. App. S.D. 2020).

In *Luleff v. State*, this Court held that when appointed counsel fails to file an amended motion, the motion court should appoint new counsel, allowing subsequent counsel time to file an amended motion. *Luleff*, 807 S.W.2d at 498. The rationale for this ruling was that—when appointed counsel fails to file an amended motion or fails to determine there was no need to amend the *pro se* claims—this Court can presume there was a complete failure to comply with Rule 29.15(e). *Id.* at 498. The only way to

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controlled by the version of the rule in effect on December 31, 2017. Rule 29.15(m) (effective Jan. 1, 2018). The post-conviction rules still contain the 30-day requirement. Rule 29.15(e) (effective July 1, 2023). This indicates 30 days is a reasonable time within which the motion court should appoint counsel under Rule 29.15.

return the parties to the position Rule 29.15(e) envisioned would be to appoint new counsel and allow new counsel time to file an amended motion. *Id*. at 497-98.

Sanders v. State—decided the same day as *Luleff*—involved appointed counsel who filed an amended motion after the deadline for filing had passed. 807 S.W.2d at 494. This Court applied the rationale from *Luleff*—that the parties should be returned to the position Rule 29.15(e) envisioned—and held the motion court should treat the late amended motion as timely filed. *Id*. at 494-95.[4]

Here, we not only have an untimely filed amended motion[5], but also a motion court that failed to appoint counsel as required by Rule 29.15(e). This

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[4] An untimely filed amended motion is to be deemed timely filed under *Sanders* only if the movant demonstrated the untimely filing was not due to his negligence or intentional conduct. *Sanders*, 807 S.W.2d at 495.

[5] It should be noted that the amended motion would have been timely filed if the motion court had timely ruled on the public defender's motion for an extra 30 days in which to file the amended motion [LF3 D3 p. 1-2; LF3 D4 p. 1]. The amended motion was originally due May 3, 2019, and the motion court did not grant the public defender's extension request until May 6, 2019 [LF3 D4 p. 1]. Rule 29.15(g) [App 13-14]. In 2019, there was a district split regarding whether a request for extra time was validly granted if it was outside the original deadline for filing the amended motion. *Federhofer v. State*, 462 S.W.3d 838, 841 (Mo. App. E.D. 2015) and *Volner v. State*, 253 S.W.3d 590, 592 (Mo. App. S.D. 2008) held that if the request was granted within the 30-day extension period, it was valid. The Western District's opinion in *Perkins v. State*, 569 S.W.3d 426, 435 n.7 (Mo. App. W.D. 2018) acknowledged the holding in *Federhofer*, but pondered whether that violated this Court's ruling in *Clemmons v. State*, 785 S.W.2d 524, 527 (Mo. banc 1990), decided 25 years before *Federhofer*. *Perkins* held that, to be valid, the

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Court's rationale in *Luleff* and *Sanders* applies nonetheless, because "[u]nderlying the limitation of the scope of review contained in subsection (j) of *Rule 29.15* is the assumption that ***the motion court*** and appointed counsel will comply with all provisions of the rule." *Luleff*, 807 S.W.2d at 297-98 (emphasis added); *see also Gittemeier v. State*, 527 S.W.3d 64, 69 (Mo. banc 2017) (abandonment doctrine created to ensure Rule 29.15(e) working as intended); *Barton v. State*, 486 S.W.3d 332, 337 (Mo. banc 2016) (in cases like *Luleff* and *Sanders* it is as if counsel had not been appointed at all); *Price*, 422 S.W.3d at 303 (if counsel completely fails to comply with Rule 29.15(e) everyone is in the same practical position as if the motion court failed to make an appointment at all).

The courts used the same reasoning in *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001), overruled in part on other grounds by *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010), *Naylor v. State*, 569 S.W.3d 28 (Mo. App. W.D. 2018), and *Ramsey v. State*, 438 S.W.3d 521 (Mo.

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request must be granted within the original time period for filing the amended motion. *Id*. It was not until 2021 that the Eastern District definitively stated *Clemmons* controlled and the granting of a request for extra time must be done by the original due date for the amended motion. *Earl v. State*, 628 S.W.3d 695, 699 (Mo. App. E.D. 2021). The Southern District maintained that the request was valid as long as it was granted within the expanded time limits. *Scrivens v. State*, 360 S.W.3d 917, 898 n.2 (Mo. App. S.D. 2021). However, in 2023, the Southern District agreed with the Eastern and Western Districts. *Courtois v. State*, 667 S.W.3d 161, 163 (Mo. App. S.D. 2023).

App. E.D. 2014). In *Jaynes*, the petitioner filed a state habeas action because his post-conviction counsel also represented him at trial, creating a conflict of interest. *Id*. at 217. He alleged this deprived him of his rights under Rule 29.15. *Id*. This Court denied him state habeas relief but found he had pleaded "that the trial court deprived him of appointed counsel—a right granted under Rule 29.15(e)—because the court appointed a lawyer with a conflict of interest." *Id*. It further found that under *Luleff*, "the matter should be treated as though no counsel had been appointed" and the Rule 29.15 motion should be reopened. *Id*. This Court found there would be no bar to a motion to reopen his post-conviction case, assuming he proved his counsel had a conflict of interest and his *pro se* motion was timely filed. *Id*. at 217-18.

In *Naylor*, the motion court denied the movant's post-conviction motion without appointing counsel, even though the movant was told he would be appointed an attorney if he filed for post-conviction relief and he properly filled out the *in forma pauperis* affidavit. *Naylor*, 569 S.W.3d at 30-31. The Western District held that the motion court's failure to appoint counsel for the movant was error—even though the *pro se* motion was filed untimely—and remanded to the motion court for appointment of counsel. *Id*. at 32.

In *Ramsey*, the movant filed a timely *pro se* post-conviction motion, and three months later a public defender entered an appearance without an appointment order. *Ramsey*, 438 S.W.3d at 521-22. The motion court denied

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the movant's post-conviction motion before an amended motion was filed. *Id*. The Eastern District held "[t]he requirement to appoint counsel for an indigent *pro se* movant is mandatory" and that "[a] motion court that dismisses a *pro se* Rule 24.035 motion without appointing counsel commits clear error." *Id*.[6] Even though a public defender had already entered her appearance, the Eastern District remanded back to the motion court to appoint counsel. *Id*.

Mr. Mack unquestionably qualified for appointment of counsel under Rule 29.15(e). He appropriately filled out the *in forma pauperis* affidavit in his timely filed *pro se* motion:

[6] Because the provisions in Rule 24.035 and 29.15 requiring the motion court to appoint counsel for indigent movants is the same, case law applies equally to both rules. *Vogl*, 437 S.W.3d at 224 n.7.

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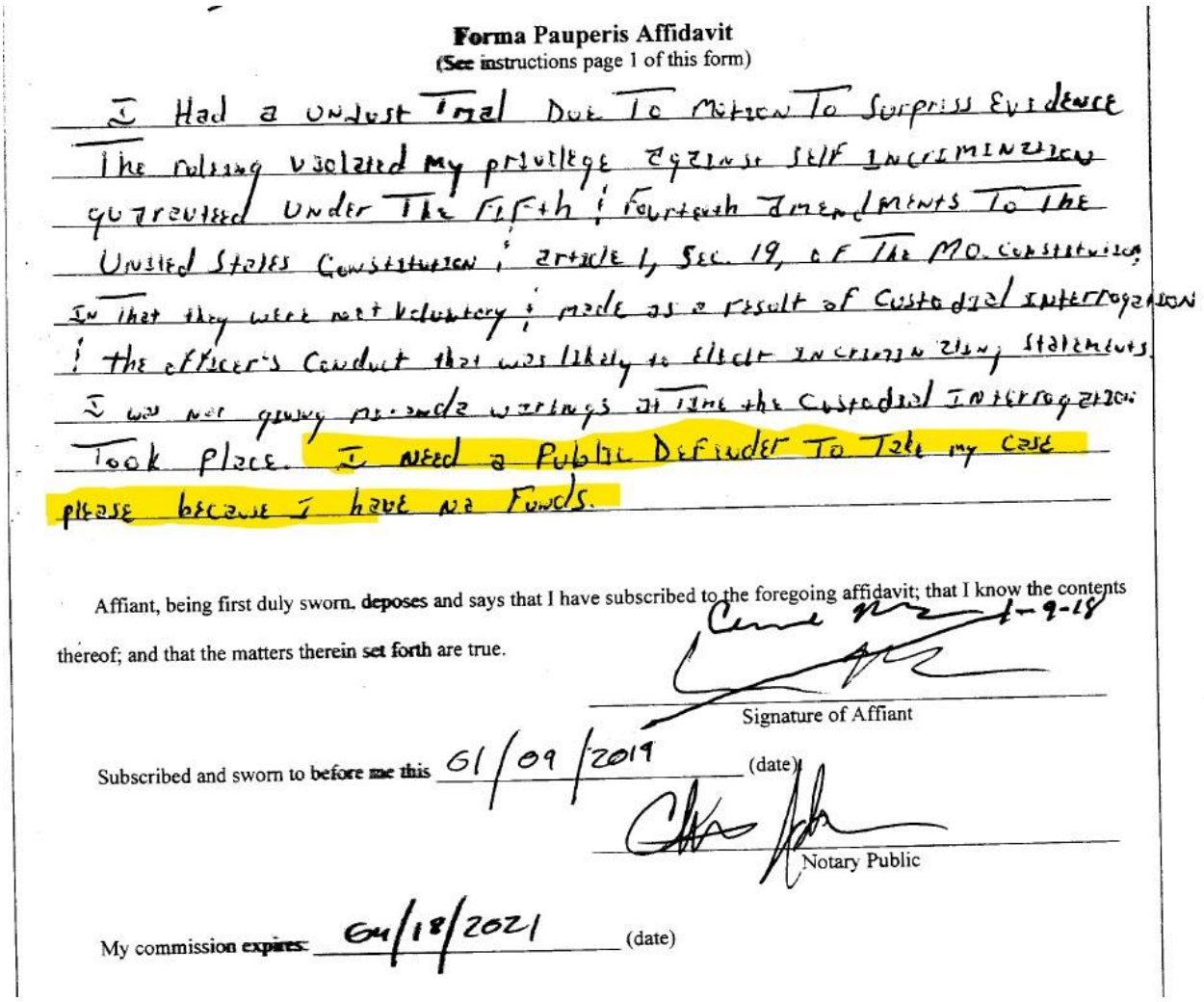

Forma Pauperis Affidavit
(See instructions page 1 of this form)

I Had a UNJust Trial Due To Motion To Surpriss Evidence The ruling violated my privilege against self incrimination guaranteed under the Fifth & Fourteenth Amendments To the United States Constitution, article I, Sec. 19, of The MO. Constitution In that they were not voluntary, made as a result of custodial interrogation & the officer's conduct that was likely to elicit incriminating statements. I was not given miranda warnings at time the custodial interrogation Took place. I need a Public Defender To Take my case please because I have no Funds.

Affiant, being first duly sworn, deposes and says that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

1-9-18

Signature of Affiant

Subscribed and sworn to before me this 01/09/2019 (date)

Notary Public

My commission expires: 04/18/2021 (date)

[LF3 D2 p. 6] (highlighting added). He was represented by a public defender in his underlying criminal case and direct appeal [Tr. 1; LF1 p. 80]. *Bennett v. State*, 88 S.W.3d 448, 450 (Mo. banc 2002) (if movant permitted to proceed *in forma pauperis* at time trial conducted, filing of notarized, *in forma pauperis* affidavit form with post-conviction motion sufficient to appoint counsel). The motion court found Mr. Mack indigent in its November 5, 2020, order [LF3 D11 p. 1]. Mr. Mack was indigent, and therefore the motion court was required to appoint counsel. Rule 29.15(e) [App 13]; *see also Barton*, 486

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S.W.3d at 336 (Rule 29.15 requires the appointment of counsel when a defendant is indigent); *Price*, 422 S.W.3d at 297 (Rule 29.15(e) provides counsel will be appointed for all indigent inmates who timely file initial post-conviction motion); *Bennett*, 88 S.W.3d at 449 (because of vital role attorney plays in motions filed pursuant to Rule 29.15, motion court should assure appointment of counsel for indigent movants); *Borschnack*, 614 S.W.3d at 563 (Rule 29.15(e) provides that counsel will be appointed for all indigent inmates who file timely initial post-conviction motions); *Naylor*, 569 S.W.3d at 32 (motion court required to appoint counsel for indigent movant even though *pro se* motion facially untimely).[7]

The abandonment doctrine was created to further this Court's requirement that Rule 29.15 be made to work as intended. If courts are responsible for its breach, they have an obligation to remedy the harm to the movant. As *Price* explained, the abandonment doctrine arose to strike a

[7] There is nothing preventing the motion court from appointing counsel after an attorney has entered on the case. *Davis v. State*, No. ED112275 slip op. at *7 (Mo. App. E.D. February 18, 2025), *motion for reh'g filed* March 5, 2025 (if motion to appoint counsel had been granted at any time in the case, and with no objection by the state, or if motion court had appointed counsel *sua sponte*, counsel from the public defender's office would have been deemed appointed counsel); *Steele v. State*, 555 S.W.3d 486, 489 n.5 (Mo. App. S.D. 2018) (motion court appointed counsel after Movant claimed retained counsel abandoned him); *Ramsey*, 438 S.W.3d at 521-22 (remanded to motion court to appoint counsel even though public defender entered with no appointment order).

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balance between the fact there is no constitutional right to counsel in post-conviction proceedings—thus, no right to effective assistance of post-conviction counsel—and the fact that Rules 24.035 and 29.15 create a rule-based right to counsel for indigent movants to ensure review of post-conviction claims without undue delay. *Price*, 422 S.W.3d at 297. The abandonment doctrine "balances the Court's need to enforce the requirements of Rule 29.15(e) [regarding appointment of counsel for indigent movants] and its unwillingness to allow ineffective assistance claims regarding post-conviction counsel[.]" *Id.* at 298. "Accordingly, the rationale behind the creation of the abandonment doctrine in *Luleff* and *Sanders* was not a newfound willingness to police the performance of postconviction counsel generally. Instead, the doctrine was created to further the Court's insistence that Rule 29.15(e) **be made to work as intended**." *Id.* (emphasis added).[8]

This Court applied these principles to the situation in *Price*. There, movant-Price hired private counsel to file his initial Rule 29.15 motion for him, but private counsel filed the motion late. *Id.* at 295. Price argued he should receive the benefit of the abandonment doctrine. *Id.* This Court held that since Price chose to retain private counsel, he was bound by counsel's erroneous actions. *Id.* at 302-03. "Price is entitled to retain counsel [for the

[8] Here, Rule 29.15(e) did *not* work as intended because the motion court failed to appoint counsel.

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purpose of filing his initial Rule 29.15 motion], but, by doing so, he took the same risk that every other civil litigant takes when retaining counsel, i.e., he chose to substitute counsel's performance for his own and bound himself to the former as though it were the latter." *Id*. at 302. "***The attorney is the agent of the party*** employing him, and in the court stands in his stead, and ***any act of the attorney must from necessity be considered as the act of his client, and obligatory on the client***." *Id*. (quoting *Kerby v. Chadwell*, 10 Mo. 392, 393-94 (Mo. 1847)) (emphasis in *Price*).

> There are only two potentially applicable grounds on which a client is not bound by the actions or inactions of his counsel: (1) the client is a defendant in a criminal prosecution and counsel's performance is so deficient that it constitutes a violation of the defendant's constitutional right to effective assistance of counsel; and (2) the client is an indigent inmate who initiates a timely post-conviction proceeding and his court appointed counsel's failure to fulfill the duties imposed by Rule 29.15(e) is not merely incompetent but tantamount to the motion court having failed to appoint counsel at all.

Id. at 303.

Courts are "obligated to provide a remedy in [these] two discrete circumstances[.]" *Id*. Regarding the second circumstances—relevant to Mr. Mack's case—"Rule 29.15(e) requires the motion court to appoint counsel to perform certain tasks and, under *Luleff* and *Sanders*, counsel's complete failure to do so leaves everyone (including the appellate courts) in the same

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practical position as if the motion court had failed to make the appointment at all." *Id*. However, since movant-Price had chosen to hire private counsel for his post-conviction motion, neither of the two possible exceptions applied. *Id*.

In 2017, these principles were applied in *Gittemeier v. State*, 527 S.W.3d 64 (Mo. banc 2017). There, movant-Gittemeier hired privately retained counsel, who ultimately filed his amended motion late. *Gittemeier*, 527 S.W.3d at 67-68. Gittemeier claimed he should receive the benefit of the abandonment doctrine. *Id*. at 68. Relying on its discussion in *Price*, this Court reiterated that the "abandonment doctrine arose out of the need to balance two important policies: 'the Court's decision to provide counsel for all indigent inmates [under Rules 24.035 and 29.15] and the Court's steadfast refusal to acknowledge claims based on the ineffectiveness of post-conviction counsel.'" *Id*. at 69 (quoting *Price*, 422 S.W.3d at 297). Gittemeier had chosen to hire privately retained counsel; thus, he did not get the benefit of the abandonment doctrine because "in light of the abandonment doctrine's origins and the limited purpose it was created to serve, the doctrine applies only to situations involving appointed postconviction counsel." *Id*. at 71.

Although this Court's use of the phrase 'appointed counsel' appeared to indicate the abandonment doctrine would not apply anytime there was not 'appointed counsel,' the origins and purpose of the doctrine—to ensure that the appointment provisions of Rule 29.15(e) "be made to work as intended,"

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Price, 422 S.W.3d at 298—and this Court's subsequent ruling in *Watson v. State*, 536 S.W.3d 716 (Mo. banc 2018), show that is not the case.

In *Watson*, movant-Watson timely filed a *pro se* post-conviction motion. *Watson*, 536 S.W.3d at 717. The motion court notified the public defender's office, "but did not appoint counsel." *Id*. "A special public defender entered her appearance[.]" *Id*. This Court ultimately held—for reasons not relevant to this case—that the special public defender filed the amended motion late. *Id*. at 719. Though not discussed by this Court, under *Gittemeier*—decided the previous year—Watson should not receive the benefit of the abandonment doctrine since the special public defender was never 'appointed.' But that's *not* how this Court ruled. Instead, this Court held "[t]he untimely filing of an amended motion by postconviction counsel creates a presumption of abandonment" and remanded the case for an abandonment hearing *Id*. Thus, Watson received the benefit of the abandonment doctrine even though the special public defender in his case was not 'appointed,' but had entered an appearance.

Taken together, *Price*, *Gittemeier*, and *Watson* show that the abandonment doctrine applies when the appointment provisions of Rule 29.15(e) do not work as intended—frustrating the Rule's intent to provide counsel to indigent persons—and where the movants themselves did not

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choose—i.e., 'retain'—their counsel. That is exactly the situation in Mr. Mack's case.

Here, the appointment process in Rule 29.15(e) did not work as intended because the motion court failed to appoint counsel [LF3 D1 p. 5-14]. Mr. Mack—an indigent person—had to rely on a public defender whom he did not choose or retain [LF3 D2 p. 6]. The motion court's failure to comply with the mandatory appointment provision of Rule 29.15(e) coupled with counsel's failure to file the amended motion on time, "leaves everyone (including the appellate courts) in the same practical position as if the motion court had failed to make the appointment at all." *Price*, 422 S.W.3d at 303. That is, without the ability to consider counsel's amended motion. This is precisely one of the two situations this Court stated that "[t]he courts are obligated to provide a remedy[.]" *Id*. Thus, under these circumstances, the abandonment doctrine should apply, and Mr. Mack's amended motion should be deemed timely filed.

This Court should restore Mr. Mack back to the position he would have been in if the motion court had appointed counsel. Because a public defender entered her appearance and filed an amended motion on Mr. Mack's behalf, and because the motion court already accepted the untimely amended motion as timely under *Sanders*, this Court should proceed to decide the issue raised in Point II on its merits. *See Jendro v. State*, 680 S.W.3d 585, 592-93 (Mo.

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App. S.D. 2023) (Rule 84.14 authorized appellate courts to hand down judgment that fully disposes of a case even though such judgment is normally within purview of lower courts if additional proceedings in lower court are not necessary). This would put Mr. Mack in the same position as if the motion court had appointed counsel as required by Rule 29.15(e).

Conclusion

Because the motion court failed to fulfill its mandatory obligation under Rule 29.15(e) to appoint counsel for an indigent movant who timely filed a *pro se* post-conviction motion and filled out the in forma pauperis affidavit, this Court must return Mr. Mack back to the position he would have been in had the motion court appointed counsel and thus must decide the issue Mr. Mack raised in Point II on its merits.

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II. The motion court clearly erred in denying Mr. Mack's Rule 29.15 amended motion claim that Trial Counsel was ineffective for failing to file and litigate a motion to suppress evidence derived from Corporal's investigatory stop, because Mr. Mack was denied effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 18(a) of the Missouri Constitution, in that Corporal did not have reasonable suspicion to believe Mr. Mack had been or was engaging in criminal conduct and the evidence would have been suppressed if Trial Counsel had filed a motion to suppress. But for Trial Counsel's unprofessional error, there is a reasonable likelihood Mr. Mack's trial result would have been different.

Preservation

In his amended motion, Mr. Mack claimed Trial Counsel was ineffective in failing to file and litigate before trial a motion to suppress the evidence obtained as fruits of law enforcement's stop of Mr. Mack's vehicle without reasonable suspicion [LF3 D5 p. 2]. Evidence of this claim was presented to the motion court [LF3 D6 p. 1-3; PCR 2, 7-8]. The motion court denied the claim in its findings of fact and conclusions of law [LF3 D18 p. 6-8; App 8-10]. Therefore, this claim is preserved for appellate review. *Mouse v.*

State, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, claim raised in post-conviction appeal must have been raised in amended post-conviction motion).

Standard of Review

Review of the denial of a post-conviction motion under Rule 29.15 is "to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Hopkins v. State*, 519 S.W.3d 433, 435 (Mo. banc 2017). The motion court's findings and conclusions are clearly erroneous "if a full review of the record leaves the reviewing court with 'the definite and firm impression that a mistake has been made.'" *Id.* (quoting *Moore*, 458 S.W.3d at 829).

Argument

The Sixth Amendment—applicable to the states through the Fourteenth Amendment—guarantees Mr. Mack the right to the assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963); *Faretta v. California*, 422 U.S. 806, 807 (1975). This guarantee would be little more than an empty promise if it did not also require effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987).

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To demonstrate Trial Counsel was ineffective, Mr. Mack must satisfy the two-prong *Strickland*[9] test. First, he must show that Trial Counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." *Sanders*, 738 S.W.2d at 857 (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)); *Seales v. State*, 580 S.W.2d 733, 736 (Mo. banc 1979). Second, he must demonstrate Trial Counsel's ineffectiveness prejudiced him. *Id*. Trial Counsel's ineffectiveness prejudiced Mr. Mack if there is a reasonable probability, absent Trial Counsel's error, the trial result would have been different. *Strickland*, 466 U.S. at 694.

Trial Counsel was ineffective for failing to file and litigate—before trial—a motion to suppress the evidence obtained as a result of Corporal's investigatory stop because Corporal did not have reasonable suspicion that Mr. Mack committed a crime before conducting the stop. *State v. Roark*, 229 S.W.3d 216, 219 (Mo. App. W.D. 2007). A motion to suppress would have been granted in Mr. Mack's case because Corporal never corroborated the anonymous reports of a car—which description matched that of the car driven by Mr. Mack—driving in a careless and imprudent manner and

[9] *Strickland v. Washington*, 466 U.S. 668 (1984).

Corporal's observations, by themselves, did not amount to reasonable suspicion [Tr. 112-14].

Generally, to justify a search or seizure, the Fourth Amendment requires a warrant based upon probable cause. *Roark*, 229 S.W.3d at 219. "An exception to this rule was recognized in *Terry v. Ohio*, where the Supreme Court held that a brief investigative stop may be conducted where an officer has a 'reasonable suspicion' based on 'specific and articulable facts' that illegal activity has occurred or is occurring." *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). "The existence of reasonable suspicion is determined objectively: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?'" *Id*. (citing *Terry*, 392 U.S. at 21-22).

"[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27. Because the specific facts available to Corporal at the time he stopped Mr. Mack did not create a reasonable suspicion Mr. Mack had engaged or was engaging in illegal activity, the investigatory stop violated Mr. Mack's Fourth Amendment rights. Trial

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Counsel was ineffective for failing to attempt to suppress the evidence obtained as a result of the stop.

Before the stop, Corporal received a dispatch indicating two unknown individuals had called to report that a silver car with an Iowa license plate driving in a careless and imprudent manner [Tr. 112-13]. Corporal located Mr. Mack's car driving the opposite direction, entered the crossover, and stopped him [Tr. 113-14]. Before turning around, Corporal observed Mr. Mack's car stop halfway in the shoulder of the road and halfway in the lane of traffic [Tr. 114]. Corporal's dashboard camera footage began after he turned around and only 30 seconds before he activated his emergency lights [Movant's Exhibit 2 22:34:09]. Corporal followed Mr. Mack, and the video showed Mr. Mack's back wheel approach the fog line twice but ultimately stay within his lane [Movant's Exhibit 2 22:34:40]. Corporal activated his emergency lights and pulled Mr. Mack over [Movant's Exhibit 2 22:34:40]. The video showed Mr. Mack pull slowly over fully on the shoulder of the road [Movant's Exhibit 2]. The specific, articulable facts Corporal had before stopping Mr. Mack were two anonymous calls to dispatch about careless and imprudent driving and his personal observations that Mr. Mack briefly pulled over partially on the shoulder, and continued driving northbound [Tr. 112-14, 153]. This was not enough to provide reasonable suspicion for an investigatory stop.

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Roark involved a defendant charged with driving while intoxicated. 229 S.W.3d at 217. There, a police officer received a dispatch about a "possibly intoxicated driver." *Id*. The police officer located and pulled behind the defendant. *Id*. During this time, he saw the defendant's "passenger-side tires cross the fog line twice, onto the paved shoulder of the highway but that none of the surrounding traffic had to take 'evasive action' as a result." *Id*. The defendant pulled into a hotel parking lot and went inside to the hotel bar. *Id*. The police officer followed defendant inside and asked him to go back out to the parking lot. *Id*. The defendant followed the officer outside where the officer performed field sobriety tests. *Id*. at 218.

On appeal, the defendant challenged the trial court's denial of his motion to suppress the stop. *Id*. at 219. The Western District found that "[t]he only articulable fact offered to support the proposition that [the officer] had developed a reasonable suspicion that criminal activity was afoot was the transgression of [defendant's] passenger-side tires over the fog line[,]" and that nothing else in the record supported the notion that the defendant was "driving erratically or in a dangerous manner." *Id.* at 219-21. Regarding the dispatch call that reported defendant's alleged driving while intoxicated,

> As a general rule, 'the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable.' When assessing the reasonableness of police action in response to such tips, courts pay particular attention to whether such information is

> 'supplemented by independent police investigation.' Thus, where an anonymous tip contains 'a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted,' its credibility is significantly enhanced by independent confirmation.

Id. at 221 (citing *Illinois v. Gates*, 462 U.S. 213, 217, 237-38, 245 (1983)).

The Western District found that "no such details were contained in the anonymous tip received by" the officer and the only information the officer could confirm were basic facts about the location and description of the car. *Id*. This was not enough to provide reason to believe not only that the caller was honest but also that he was well informed. *Id*. (citing *Alabama v. White*, 496 U.S. 325, 332 (1990)).

Thus, "the anonymous information added nothing of substance to the [police officer's] first hand observations," so the Western District relied only on the officer's observations of how the defendant drove. *Roark*, 229 S.W.3d at 221. The court held that, while reasonable suspicion can be based on erratic driving, "[the officer] did not initiate a stop upon observing [the defendant's] transgressions over the fog line, suggesting that the conduct observed was not sufficiently erratic or dangerous to trigger an immediate stop." *Id*. at 222. The court determined the stop was not based on reasonable suspicion and reversed the trial court's denial of the defendant's motion to suppress. *Id*.

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Roark found language from *State v. Abeln* persuasive. *Id*. *Abeln* stated:

> The trial court could reasonably have found that the State failed to prove by a preponderance of the evidence that a traffic stop was warranted to issue a citation or a warning for careless and imprudent driving, or any other traffic violation, in light of the ambiguity in the trooper's testimony as to how far onto or beyond the fog line Respondent's tires went or how long they remained there, and the fact that the officer did not initiate a stop immediately after observing this conduct, did not view it as "particularly dangerous," and did not issue a citation or warning to Respondent for this conduct.

State v. Abeln, 136 S.W.3d 803, 810 n.7 (Mo. App. W.D. 2004).

Mr. Mack's case is similar to *Roark*. Before Corporal located Mr. Mack, he only had anonymous reports of a car being driven in a careless and imprudent manner coupled with a description of the car [Tr. 113]. Like *Roark*, he did not confirm these reports with his own observations of careless and imprudent driving before deciding to activate his lights and stop Mr. Mack [Tr. 114]. The only action Corporal observed was Mr. Mack stopped halfway on the shoulder and halfway in the lane of traffic for a brief period of time before continuing northbound [Tr. 114]. Corporal observed this at nighttime across four lanes of traffic [Movant's Exhibit 2; Tr. 114]. Because his personal observations did not confirm Mr. Mack was driving in a careless and imprudent manner, the anonymous tips could not be used to show Corporal had a reasonable suspicion Mr. Mack was engaging in or had

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engaged in illegal activity. The only articulable fact Corporal had at the time he stopped Mr. Mack was that Mr. Mack had briefly, partially pulled to the side of the road [Tr. 114; Movant's Exhibit 2]. This observation did not indicate Mr. Mack was driving erratically or in a dangerous manner and was insufficient to justify Corporal's investigatory stop of Mr. Mack.

In Trial Counsel's affidavit, she stated she chose not to file a motion to suppress the evidence derived from Corporal's stop of Mr. Mack because she believed the dashboard camera video showed Mr. Mack's vehicle slow and pull to the shoulder of the road before the emergency lights were activated [LF3 D6 p. 2]. However, Movant's Exhibit 2 clearly refuted Trial Counsel's recollection, because it showed Mr. Mack pull over to the shoulder of the road after Corporal's emergency lights were activated [Movant's Exhibit 2]. Trial Counsel's decision not to file and litigate a motion to suppress was based on a mistaken belief regarding a critical fact and was not reasonable. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (counsel's mistaken belief as to availability of funding to hire expert constituted deficient performance).

Because Mr. Mack's motion to suppress would likely have succeeded, Trial Counsel was ineffective for failing to file and litigate it. *Eddy v. State*, 176 S.W.3d 214, 218 (Mo. App. W.D. 2005). The motion court's findings and conclusions denying Mr. Mack's post-conviction motion were clearly erroneous.

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If Trial Counsel had filed and won a motion to suppress, there is a reasonable probability Mr. Mack's trial result would have been different, as all observations after the stop would have been suppressed. This would have included Corporal's testimony that: (1) Mr. Mack handed him his credit card instead of driver's license [Tr. 115]; (2) Mr. Mack stumbled, was swaying, and had bloodshot eyes [Tr. 116-17]; (3) Corporal smelled an odor of alcohol coming from Mr. Mack [Tr. 116]; (4) Mr. Mack initially gave another name [Tr. 117]; (5) Mr. Mack refused to take a preliminary breath test and a breathalyzer [Tr. 119, 134]; (6) Mr. Mack failed all the field sobriety tests except counting backwards [Tr. 119-20, 127, 130, 132]; (7) Mr. Mack stated he had been drinking and there was alcohol in the car [Tr. 135]; and (8) Corporal found an alcohol container in Mr. Mack's back seat [Tr. 136]. Without this evidence, there is a reasonable likelihood Mr. Mack's trial result would have been different.

Motion Court's Ruling was Clearly Erroneous

The motion court relied on three facts in denying Mr. Mack's post-conviction claim: (1) the anonymous tips reporting Mr. Mack driving in a careless and imprudent manner; (2) the dashboard camera video showing Mr. Mack's rear tire approach the fog line; and (3) Corporal's observation of Mr. Mack stop briefly on the shoulder of the road [LF3 D18 p. 7; App 9]. The motion court found it had to determine whether the anonymous tips coupled

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with Corporal's observations created reasonable suspicion for the investigatory stop [LF3 D18 p. 8; App 10]. The motion court found it did and therefore Trial Counsel could not be ineffective for failing to file a motion to suppress [LF3 D18 p. 8; App 10].

This finding and conclusion was clearly erroneous because, as stated above, under *Roark*, the anonymous tips were not corroborated by Corporal's observations. *Roark*, 229 S.W.3d at 221. Additionally, Corporal's observations—in and of themselves—were not sufficient for him to develop a reasonable suspicion Mr. Mack had engaged in or was engaging in criminal conduct. *Id.* at 222 (tires crossing fog line twice not enough to create reasonable suspicion of criminal activity). Furthermore, Corporal's limited sight observation of Mr. Mack briefly stopped partially on the shoulder were also not sufficient to create a reasonable suspicion he was or had engaged in criminal conduct. *See State v. Cardwell*, 452 S.W.3d 263, 266 (Mo. App. W.D. 2015) (no reasonable suspicion to stop when defendant travelling slowly down gravel road at 1:00 a.m. and pulled to side to let officer pass). Therefore, the motion court's contrary finding was clearly erroneous.

Conclusion

Trial Counsel was ineffective for failing to file and litigate a motion to suppress the evidence obtained as a result of Corporal's illegal investigatory stop. Mr. Mack's trial result would have been different but for Trial Counsel's

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failure. Trial Counsel's ineffectiveness deprived Mr. Mack of his constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 18(a) of the Missouri Constitution. This Court should reverse the motion court's judgment and remand for a new trial.

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CONCLUSION

WHEREFORE based on his argument in Point I of this substitute brief, this Court should place Mr. Mack in the position he would have been in if the motion court had appointed counsel as Rule 29.15(e) requires and should consider Point II on its merits. Based on his argument in Point II of this substitute brief, this Court should reverse the motion court's judgment denying Mr. Mack's post-conviction motion and remand for a new trial.

Respectfully submitted,

/s/ Stephanie Hoeplinger

STEPHANIE HOEPLINGER, No. 60656
Assistant Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(866) 452-4452 (facsimile)
Stephanie.Hoeplinger[at]mspd.mo.gov

ATTORNEY FOR APPELLANT

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Century Schoolbook 13-point font, and does not exceed the word limits for an appellant's brief in this Court. The word-processing software identified that this brief contains 8,529 words excluding the cover page, signature block, and certificate of compliance. It is in searchable PDF form. I hereby certify that all parties have been served this brief via the Missouri Courts e-Filing System.

/s/ Stephanie Hoeplinger

Stephanie Hoeplinger, Mo. Bar No. 60656
Assistant Public Defender
1010 Market St., Ste. 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(866) 452-4452 (facsimile)
Stephanie.Hoeplinger[at]mspd.mo.gov

ATTORNEY FOR APPELLANT