IN THE SUPREME COURT OF MISSOURI

No. SC88936

HUNTLEY RUFF,

Appellant.

vs.

STATE OF MISSOURI,

Respondent.

Appeal from the Decision of the Circuit Court of Jackson County, Missouri
The Honorable Marco Roldan

APPELLANT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

This is an appeal from the denial of Mr. Ruff's motion for DNA testing pursuant to § 547.035 RSMo. (L.F. 26). Pursuant to § 547.037.6, an appeal may be taken from the court's findings and conclusions as in other civil cases. The Court of Appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the Supreme Court. Mo. Const. Art. V, § 3. This case does not challenge the validity of a treaty or statute, nor does it involve the death penalty, title to state office or the revenue laws. Accordingly, original jurisdiction was in the Court of Appeals. This Court ordered transfer from the Western District after decision pursuant to its constitutional authority. Art. V, § 10. Jurisdiction is thus properly in this Court.

STATEMENT OF FACTS[1]

Procedural History

On October 19, 1984, a Jackson County, Missouri Grand Jury returned a six count indictment charging Appellant Huntley Ruff with forcible rape, forcible sodomy, robbery in the first degree, and armed criminal action. (L.F. 323-25). On July 10, 1985, after a two day jury trial, Mr. Ruff was found guilty

[1] References to the Motion for DNA Testing Legal File will be designated (L.F.), and to the Supplementary Legal File (Supp. L.F.). References to the Trial Transcript will be designated (Tr.).

of all charges. (L.F. 248-251). His post-trial motions were overruled and he was sentenced to a total of 160 years in the Division of Adult Institutions. (L.F. 220).

Mr. Ruff appealed to the Missouri Court of Appeals, Western District, and that court, in a per curiam order, affirmed his convictions. (L.F.197). Mr. Ruff's 27.26 Motion was denied after an evidentiary hearing, and that denial was affirmed by the Missouri Court of Appeals on October 25, 1988. (L.F. 171-174). After exhausting his avenues for relief in the state courts, Mr. Ruff filed a Writ of Habeas Corpus with the Federal District Court for the Western District of Missouri in 1989, and that court held an evidentiary hearing. In his ruling dated April 16, 1991, the Honorable Elmo B. Hunter found that Mr. Ruff's right to due process had been violated and issued the requested Writ. (L.F. 133-138). On May 18, 1993, the United States Court of Appeals for the Eighth Circuit reversed and the United States Supreme Court denied certiorari. *Ruff v. Armontrout*, 77 F.3d 265 (8th Cir.), *cert. denied*, 519 U.S. 889 (1996).

On July 1, 2005, Mr. Ruff, acting pro se, filed a Motion for D.N.A. Testing Under Sections 547.035 and 547.037 RSMo, requesting that counsel be assigned and a hearing held. (L.F. 123). That motion is the subject of this appeal. On December 14, 2005, the State of Missouri, without having been so ordered by the Court, filed a response to the motion for post-conviction DNA testing. (L.F. 50). On December 20, 2005, The Honorable Marco Roldan

overruled the motion pursuant to Section 547.035.2(4) RSMo.[2]" On January 3, 2006, Mr. Ruff filed an opposition to the State's motion to dismiss (L.F. 28), as well as a motion for reconsideration. (L.F.23). Judge Roldan denied that motion in an Order dated January 19, 2006. (L.F.16).

Mr. Ruff, acting pro se, filed a Notice of Appeal with the Circuit Court on March 7, 2006. (L.F. 1, Supp. L.F. 1) After a flurry of motions related to the acquisition of the legal file and extensions of time to file, he filed his brief with the Missouri Court of Appeals on November 21, 2006. The Court of Appeals affirmed Judge Roldan's decision in a Memorandum Opinion filed September 4, 2007. Appellant filed an Application to Transfer to this Court on November 15, 2007. That Application was granted on January 22, 2008 and counsel was appointed January 25, 2008.

Facts

In 1984, Huntley Ruff was employed as a cook at the Phillips House Hotel in Kansas City. (Tr. 197, 199). On October 1, 1984, the victim, SH, travelled to Kansas City to attend a seminar and registered at the Phillips House Hotel. (Tr. 47-48). She ordered room service, which was delivered to her room. (Tr. 50). According to her testimony, when she went to place the empty tray

[2] § 547.035.2(4) RSMo. states: "The motion must allege facts under oath demonstrating that . . .[i]dentity was an issue in the trial."

outside her door, she was approached by a man in a chef's uniform who indicated there was a question about her bill. (Tr. 51). The man then grabbed her, held a knife to her throat (Tr. 50-52) and eventually sodomized and raped her. (Tr. 57-59). The man took approximately $85 from her purse as well as some earrings. (Tr. 55, 62, 74, 88-90). When the man left the room, SH called her pastor, who called police. (Tr. 63). SH was taken to St. Luke's Hospital, where she was examined and a rape kit was prepared. (Tr. 63-64, 144, 179). The examination showed the presence of motile sperm, meaning that the sperm had been present for less that 24 hours. (Tr. 79). Sperm was also found on SH's panties. (Tr. 148).

Because Mr. Ruff worked in the kitchen, wore a uniform and fit aspects of the description given by SH, he was arrested at his home the next morning. (Tr. 134-35). SH identified Mr. Ruff in a lineup later that day. (Tr. 65-67). None of the jewelry or money taken from SH was found in a consensual search of Mr. Ruff's home. (Tr. 214-217).

At trial, the State presented the testimony of SH, medical personnel who examined her, several police officers, workers at the Phillips House and a forensic expert. (Tr. i-ii). Defense counsel cross-examined SH extensively, questioning her about the lineup and about various aspects of her story. (Tr. 81-119, 124-125). He also elicited testimony that SH was suing the Phillips House Hotel as a result of the rape for a large sum of money. (Tr. 94-97). During the

trial, counsel strenuously objected to the introduction of a "reenactment" of the crime scene that had been done the day before trial in order to demonstrate that a semen stain on the bedspread that did not match Mr. Ruff likely did not come from the perpetrator. (Tr. 70, 148-154). This evidence was admitted over counsel's objection. (Tr. 69-70, 152, 153).

Although the rape kit was admitted into evidence, (Tr.144), the results of tests done on the semen were "inconclusive." (Tr. 145). The expert was unable to determine whether the semen from the rape kit matched Mr. Ruff's blood type. (Tr. 145-148).

In closing argument, counsel challenged the State's evidence, which tended to show Mr. Ruff had the opportunity to commit the crime. (Tr. 258-260). He pointed out discrepancies in SH's testimony. (Tr. 261-263, 266-268). He stressed the inconsistency of Mr. Ruff's blood type with the semen found on the bedspread at the scene. (Tr. 266-267). In addition, he argued that the evidence demonstrated that SH had fabricated the rape in order to sue the hotel. (Tr. 263, 268). He then suggested that she purposely identified Mr. Ruff, who she had seen earlier at the hotel, in order to make her case. (Tr. 265-266). In the course of his argument, in which he strenuously denied that Mr. Ruff had committed the rape and robbery, he stated, "This is not a case of mistaken identity." (Tr. 265). The meaning and import of that statement has become a major issue in this case.

POINT RELIED ON

THE MOTION COURT ERRED IN DENYING, WITHOUT A HEARING, MR. RUFF'S MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO § 547.035 RSMO ON THE GROUND THAT, SINCE IDENTITY WAS NOT AN ISSUE AT TRIAL, MR. RUFF WAS NOT ENTITLED TO RELIEF BECAUSE THE COURT APPARENTLY ERRONEOUSLY CONSTRUED THE STATUTE TO REQUIRE THAT "MISTAKEN IDENTITY" BE AN ISSUE AT TRIAL RATHER THAN THAT THE DEFENDANT MERELY CONTEST HIS IDENTITY AS THE PERPETRATOR, AND UNDER THE CORRECT LEGAL STANDARD, MR. RUFF QUALIFIED FOR DNA TESTING IN THAT HE CONTINUALLY CHALLENGED HIS IDENTITY AS THE PERPETRATOR OF THE RAPE, IF A RAPE ACTUALLY OCCURRED, AND NEVER PROFFERED ANY DEFENSE AT TRIAL INCONSISTENT WITH HIS CONTENTION THAT HE DID NOT RAPE THE VICTIM.

Weeks v. State, 140 S.W.3d 39 (Mo. banc 2004)

People v. Urioste, 736 N.E.2d 706 (Ill. App. 2000)

Anderson v. State, 831 A.2d 858 (Del. 2003)

State v. Donovan, 853 A.2d 772 (Me. 2004)

§ 547.035 RSMo

ARGUMENT

THE MOTION COURT ERRED IN DENYING, WITHOUT A HEARING, MR. RUFF'S MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO § 547.035 RSMO ON THE GROUND THAT, SINCE IDENTITY WAS NOT AN ISSUE AT TRIAL, MR. RUFF WAS NOT ENTITLED TO RELIEF BECAUSE THE COURT APPARENTLY ERRONEOUSLY CONSTRUED THE STATUTE TO REQUIRE THAT "MISTAKEN IDENTITY" BE AN ISSUE AT TRIAL RATHER THAN THAT THE DEFENDANT MERELY CONTEST HIS IDENTITY AS THE PERPETRATOR, AND UNDER THE CORRECT LEGAL STANDARD, MR. RUFF QUALIFIED FOR DNA TESTING IN THAT HE CONTINUALLY CHALLENGED HIS IDENTITY AS THE PERPETRATOR OF THE RAPE, IF A RAPE ACTUALLY OCCURRED, AND NEVER PROFFERED ANY DEFENSE AT TRIAL INCONSISTENT WITH HIS CONTENTION THAT HE DID NOT RAPE THE VICTIM.

STANDARD OF REVIEW

Ordinarily, the standard of review for denial of a post-conviction motion for DNA testing is limited to a determination of whether the motion court's findings of fact and conclusions of law were clearly erroneous. *Weeks v. State*, 140 S.W.3d 39, 44 (Mo. banc 2004). The motion court's findings and conclusions are clearly erroneous only if, after review of the record, "the

appellate court is left with the definite and firm impression that a mistake has been made." *Id, quoting from State v. Brown*, 998 S.W.2d 531, 550 (Mo. banc 1999). Where, as here, the motion is denied without a hearing, this Court reviews the lower court's determination that no hearing was required for clear error. *Id.*

However, where, as here, no findings of fact or conclusions of law were issued by the motion court, who apparently denied Mr. Ruff's motion for DNA testing on the only ground asserted by the government in its Response to Movant's Motion for Post-Conviction DNA Testing -- that where "Movant's defense at trial was NOT that he was not the perpetrator who committed the offense, but rather that NO OFFENSE OCCURRED," identity was not an issue at trial under the terms of the statute and Movant cannot be afforded testing pursuant to § 547.035 -- that standard of review is inappropriate. Interpretation of a statute is a question of law that is reviewed de novo, *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 442 (Mo. banc 2007); *Smith v. Shaw*, 159 S.W.3d 830, 833 (Mo. banc 2005), and that de novo standard should be applied to the construction of § 547.035 in this case. *State v. Kinder*, 122 S.W.3d 624, 629 (Mo. App. 2003).

ANALYSIS

A. Section 547.035 RSMo, Which Serves the Remedial Purpose of Providing Potentially Exonerating DNA Testing to Those With Plausible Claims of Innocence, Should be Liberally Construed to Effectuate Its Remedial Purpose.

Since the advent of DNA testing, 215 incarcerated individuals, including seven in the state of Missouri, have been exonerated by DNA. *See* http://www.innocenceproject.org/know/. In adopting section 547.035, the General Assembly recognized what DNA exonerations have clearly established: there is a problem in this country with conviction of the innocent. As this Court in *Weeks v. State,* 140 S.W.3d 39 (Mo. banc 2004), recognized, the purpose of section 547.035 is "to permit convicted persons an opportunity to obtain DNA testing in an effort to show their innocence in instances in which there is a reasonable probability that, if such testing results were exculpatory, the defendant would not have been convicted. *Sec.* 547.035.7." 140 S.W.3d at 43.

Since "the purpose of the criminal justice system is to convict the guilty and free the innocent," post-conviction DNA testing is now a crucial component of our system, because "it is completely arbitrary to continue to incarcerate . . . an individual who is actually innocent." *State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 547 (Mo. banc 2003). As Justice Powell wrote in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), "a prisoner retains a powerful and

legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *Id.* at 452 This Court has characterized continued incarceration in the face of likely innocence to be a "manifest injustice" and an "intolerable wrong." 102 S.W.3d at 547. Access to DNA testing "advances the public interest . . . because DNA evidence can acquit an accused just as effectively as it can convict him," thereby assuring fair and accurate results. *Cooper v. Gammon,* 943 S.W.2d 699, 704 (Mo. App. 1997).

Section 547.035, originally derived from this Court's Rule 29.17, *Weeks,* 140 S.W.3d at 43 and n 4, recognizes this important interest. In adopting the statute, the General Assembly struck a balance between the interests of wrongfully convicted individuals to obtain exoneration, the societal interest in seeing that the right person is incarcerated and punished for an offense, and the legitimate need for finality of convictions. *Hudson v. State,* 190 S.W.3d 434, 440-441 (Mo App. 2006); *State v. Kinder,* 122 S.W.3d 624, 631-632 (Mo. App. 2003). The statute, when construed together with later-adopted companion statutes providing compensation for those wrongfully convicted and sanctions for those improperly seeking the benefits of testing, §§ 650.058, 217.262 RSMo, successfully accomplishes the important goals of obtaining justice for those wrongfully incarcerated as well as accuracy and finality within our system of justice.

Because the post-conviction DNA statute is remedial in nature, advancing the important interest not only in freeing the innocent but also insuring that the guilty may be identified and punished, it should be liberally construed. *See, e.g., Martinez v. State*, 24 S.W.3d 10, 19 (Mo. App. 2000); *State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103, 106 (Mo. banc 1982); Craig Sullivan, *Statutory Construction in Missouri*, 59 J. Mo. B. 120, 123 (2003); *see also Anderson v. State*, 831 A.2d 858, 864 (Del. 2003) (applying rule of liberal construction to the Delaware post-conviction DNA statute in light of its remedial purpose). For every wrongfully convicted defendant, there is a guilty person who has not been brought to justice. Affording DNA testing where there is any real doubt about an incarcerated individual's guilt not only reduces the risk of the "intolerable wrong" of incarcerating the innocent, it provides a sample from which "cold hit" identifications may be made. Such "cold hits," when matched in the CODIS database, identify approximately one offender for every 1,000 samples, Jennifer Graddy, *The Ethical Protocol for Collecting DNA Samples in the Criminal Justice System*, 59 J. Mo. Bar 226, 230 (2003), thereby increasing the likelihood that truly guilty defendants will be identified and punished.

When read in this context, the Motion Court's apparent reading of the statute to require a defense of "mistaken identity" in order to obtain post-conviction DNA testing was erroneous.

B. Both The Plain Language Of The Statute And The Policy Behind It Require That "Identity," Not "Mistaken Identity," Be An Issue At Trial.

Section 547.035 was adopted by the General Assembly to afford those claiming to be innocent of the crime for which they are imprisoned the opportunity to seek DNA testing where such testing, when balanced against the state's interest in finality, is warranted. As the Illinois Court of Appeals stated with regard to its post-conviction DNA testing statute, which is similar to the Missouri statute, *Phillips v. State*, 178 S.W.3d 679, 682 (Mo. App. 2005), the legislature "intended to provide an avenue for convicted defendants who maintained their innocence to test available genetic material capable of producing new and dramatic evidence materially relevant to the question of innocence." *People v. Urioste*, 736 N.E.2d 706, 710 (Ill. App. 2000). It further noted that the legislature "recognized that advances in scientific technology harbored the potential to correct injustice through the highly reliable use of genetics." *Id.* Despite this, the legislature did not intend for every defendant to have access to post-conviction DNA testing. Rather, as did the Missouri General Assembly, it limited the scope of the statute to those able to make several required preliminary showings.

As relates to this case, "[i]n order to successfully open the door for further forensic testing of evidence," *Urioste*, 736 N.E.2d at 710, a convicted

individual must allege facts that demonstrate that "identity was an issue in the trial." § 547.03.2(4). The government would limit the availability of DNA testing only to those who argue "mistaken identity" at trial. (L.F. 54). As was true with the similarly limited interpretation at issue in *Weeks,* such an interpretation constitutes an "unduly narrow reading of the statute," 140 S.W.3d at 45, and should be rejected in favor of a more plain reading that simply requires a defendant to seriously contest his identity as the perpetrator of the alleged offense.

It is well settled that "[t]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *Donaldson v. Crawford*, 230 S.W.3d 340, 342 (Mo. banc 2007); *State v. Graham***,** 204 S.W.3d 655, 656 (Mo. banc 2006). "[E]very word, clause, sentence, and provision of a statute" must have effect, *Hyde Park Housing Partnership v. Director of Revenue,* 850 S.W.2d 82, 84 (Mo. banc 1993), and it will "be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Civil Service Com'n of City of St. Louis v. Bd. of Aldermen*, 92 S.W.3d 785, 788 (Mo. banc 2003); *Weeks*, 140 S.W.3d at 46. In addition, "[a] court may not add words by implication to a statute that is clear and unambiguous," *Emery v. Wal-Mart Stores, Inc.***,** 976 S.W.2d 439, 449 (Mo. banc 1998), nor resort to canons of construction to add words to a statute

which are not there. *Ryder Student Transp. Services, Inc. v. Director of Revenue,* 896 S.W.2d 633, 635 (Mo. banc 1995); *see also Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002).

In relevant part, section 547.035.2(4) requires that a movant allege facts under oath demonstrating that "identity was an issue at trial." This requirement was designed to help ensure that only defendants for whom the question of identity was truly in dispute would qualify for post-conviction DNA testing. *Urioste,* 736 N.E.2d at 313. By drafting the statute this way, the legislature "sought to guard against frivolous requests by limiting the remedy to those cases where . . . the use of the new technology could test properly preserved genetic material to either confirm or decidedly negate other identification evidence that produced the conviction" *Id.* Since Missouri's statute is similar to the Illinois statute both in language and purpose, *see Phillips*, 18 S.W.3d at 682, this interpretation is equally compelling with regard to § 547.035.2(4).[3]

[3] In fact, the Illinois statute is more restrictive on its face than the Missouri statute, since 725 ILCS 5/116-3 (West 1998), by its terms, allows for post-conviction DNA testing only where "identity was *the* issue in the trial." (emphasis added).

The plain language of Missouri's post-conviction DNA testing statute requires that "identity was an issue at trial." Nowhere in the statute do the words "mistaken identity" appear, and it would violate basic tenets of statutory construction for this Court to add language the legislature chose not to adopt. The statute should be read as it was written – a defendant meets this requirement where, through cross-examination and argument, he denies at trial that he was the perpetrator of the alleged offense and requires the government to prove otherwise.

Several states, including Illinois, have properly construed the "identity" language in their statutes to permit DNA testing where, as here, a defendant seriously contests his identification as the perpetrator of an alleged offense. *See, e.g.*, *Urioste,* 736 N.E.2d at 313-314; *People v. Hockenberry,* 737 N.E.2d 1088, 1091-1092 (Ill. App. 2000); *Anderson v. State,* 831 A.2d 858, 865 (Del. 2003); *State v. Donovan,* 853 A.2d 772, 776 (Me. 2004). These courts recognize that "[i]dentity is always an issue in a criminal trial unless the defendant admits having engaged in the alleged criminal conduct and relies on a defense such as consent or justification." *Anderson,* 831 A.2d at 865. As the court in *Hockenberry* stated, "when courts speak of 'identity' in a criminal case, they are referring to whether the defendant was indeed the perpetrator or whether somebody else committed the crime." 737 N.E.2d at 1091. Where, as in *Hockenberry* and in this case, the defendant denied he engaged in any sexual

acts with the victim, and where the state put on evidence to establish that the defendant was the perpetrator, "we believe that the identity of the perpetrator was necessarily an issue at trial. The state was obligated to prove that the defendant was indeed the individual who had committed an act of sexual penetration upon the victim." *Id.* at 1092.

The fact that a defendant contests identity by not only claiming that he did not commit the crime, but by suggesting that no crime was in fact committed, does not prevent identity from being an issue at trial. Not only is a defendant permitted to present multiple and potentially inconsistent defenses, *see, e.g., State v. Pollard,* 719 S.W.2d 38, 40 (Mo. App. 1986), but, as the court concluded in *Urioste*, "it would make no sense, and run contrary to the underlying purpose of the enactment, to restrict its remedy to that isolated case where a defendant chose to forgo a test of the State's case in all its particulars, save the question of who committed the acts charged. We can think of no reason the legislature would want to provide the given remedy and, at the same time, confine its use so narrowly." 736 N.E.2d at 712. Thus, "[p]rovided that identity was a genuine issue, contested during the trial that led to the conviction, a lingering question of actual innocence could still exist. Even if other questions were litigated during the same trial, the identity of the crime's perpetrator would remain a question that postconviction testing with modern procedures could potentially address." *Id.* In such circumstances, "[t]he reason

the legislature provided for postconviction testing would still exist, whether identity was an isolated issue or one among several issues litigated at the trial." *Id.*

The Illinois court in *Urioste* surely was correct when it concluded that the post-conviction DNA statute "was not enacted for the purpose of limiting the number of issues that potentially innocent defendants could raise and litigate during the trial. It was made a part of the postconviction testing statute to assure its use only by those defendants who claimed at their trial that they did not commit the acts charged." 736 N.E.2d at 712-713. Accordingly, "[w]hen the [Illinois] legislature used the language 'identity was the issue at the trial,' it confined the statutory remedy to trials where identity was a legitimate contested issue, but not necessarily the only issue litigated." *Id.* at 713.

The Illinois court's conclusion is fully consistent with the result reached by the Supreme Judicial Court of Maine in *State v. Donovan*. Agreeing with the Delaware Supreme Court in *Anderson v. State*, the court held that, for purposes of meeting the requirements of the Maine DNA statute, "identity may be at issue during a trial even when the alleged victim identifies only the defendant as the perpetrator of a crime but the defendant claims no crime was committed." 853 A.2d at 776. Moreover, it concluded that, for purposes of complying with the requirements of the statute permitting postconviction DNA testing, "'[i]dentity is always an issue in a criminal trial unless the defendant

admits having engaged in the alleged criminal conduct and relies on a defense such as consent or justification.' *Anderson,* 831 A.2d at 865." *Donovan,* 853 A.2d at 776.

In fact, as far as counsel can ascertain, every jurisdiction that has addressed this issue has rejected a narrow interpretation of the identity requirement and has extended its statute to cases where a defendant not only denies commission of the crime, but suggests no crime occurred at all. As a noted commentator on the interpretation of post-conviction DNA statutes has concluded, the "identity" provisions of these statutes "logically include[] those petitioners who claim that they were not present at the scene or who present certain kinds of antagonistic defenses, but would logically exclude petitioners who claim, for example, the defense of consent to a rape charge." Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes,* 38 Cal. W. L. Rev. 355, 375-376 and n. 83 (2002).

This interpretation is consistent with appellate court decisions in Missouri. In W*eeks*, this Court, in considering whether a person who pled guilty could demonstrate that "identity was an issue at the trial," thereby gaining access to DNA testing in an appropriate case, held that, "[i]f the facts placed the perpetrator's identity at issue," then identity was an issue at trial, 140 S.W.3d at 47. Moreover, this Court noted that a movant "must also continue to claim that

he was not the perpetrator, or there would be no prejudice from denying DNA testing." *Id.* at n.9. As the next section will demonstrate, Mr. Ruff meets this standard.

This Court in *Weeks* acknowledged the type of case in which identity would not be an issue: "if a person accused of rape admits to having sexual intercourse with the victim, but claims that she consented, identity would not be at issue, and no DNA test would be required." *Id.* at n.8. This Court thus implicitly agreed with the conclusions in *Urioste, Hockenberry*, *Anderson* and *Donovan*, where those courts acknowledged that issues such as consent and justification do not warrant testing. *See supra.* at 15-18.

Moreover, the cases in which Missouri appellate courts have declined to find identity was an issue at trial are not inconsistent with the interpretation this Court is urged to adopt. In *State v. Fields,* 186 S.W.3d 501 (Mo. App. 2006), identity was not an issue because "movant did not contest the fact that he shot the victim at trial." *Id.* at 503. In *Phillips v. State*, 178 S.W.3d 679 (Mo. App. 2005), it appears that the defendant claimed self-defense, precisely the type of defense that includes a concession that movant was the person who shot the victim. *Id.* at 681, 682. The consistency of *State v. Waters*, 221 S.W.3d 416 (Mo. App. 2006) is less clear, since the allegations in that case were found by the court to be deficient and insufficient to support the claims made. *Id.* at 418, 419. To the extent that identity was not an issue because movant claimed the

sexual contact in the case was consensual, *Waters* is fully consistent with the interpretation urged in this case. Mr. Waters, however, apparently claimed alternative defenses of fabrication and consent. *Id.* at 418. Had his allegations been sufficient to withstand the first level of review under § 547.035, further inquiry may have been required under the interpretation this Court is asked to adopt.

The interpretation urged by Mr. Ruff in this case, that identity is an issue at trial if a movant claims he or she did not commit the acts charged, either because another person did or no one did, is fully consistent with the language of the statute and the intent of the General Assembly in adopting this remedial legislation. Construing the statute to allow a movant who denies commission of the acts giving rise to the offense access to testing, but denying such access to those who admit to commission of the acts and claim defenses such as consent, justification, or self defense, advances the legislative purpose and maintains the proper balance between the need for assuring justice and accuracy to those who are likely innocent and providing finality to our system of criminal justice.

C. Based On Mr. Ruff's Conduct Both At And After The Trial Leading To His Conviction, Identity Was An Issue At Trial.

Appellant Huntley Ruff has challenged his identity as the perpetrator of the alleged rape since the beginning and has continued to deny any involvement in the offense up to this day. Despite his repeated denials, the State argued, and

the Motion Court apparently agreed, that identity was not an issue at trial and therefore Mr. Ruff did not qualify for testing under Missouri's post-conviction DNA statute.

As previously argued, that ruling appears to have been based on an erroneous belief that defense counsel's isolated statement in closing that this was not a case of "mistaken identity" precluded relief under the statute. Under any reasonable interpretation of this remedial statute, identification was an issue in this case.

At numerous times during the two-day jury trial, both the prosecution and the defense raised the issue of identity. During his opening statement, the Jackson County Prosecutor discussed the description given by SH of her attacker. (Tr. 7). He explained how the police used that description as a basis to take Mr. Ruff into custody, (Tr. 15-16), and how SH made an identification as part of a police lineup. (Tr. 16). The Prosecutor elicited direct testimony from SH about the description, (Tr. 65-66), and the lineup, (Tr. 67), and had SH identify Mr. Ruff in Court. (Tr. 73-74). When reminded by the Court that the lineup had not been entered into evidence, the Prosecutor made sure to do so at that time. (Tr. 139).

The State's attempts to prove identity as the key issue in the case were further bolstered by its creative efforts to admit a "reconstruction" of the rape to demonstrate that what would have been exculpatory results from testing of

semen stains on the bedspread were in fact irrelevant to the case. (Tr. 69-73). The State throughout the trial was very concerned about proving Mr. Ruff's identity as the rapist.

Counsel for the defense also addressed identity throughout the case, testing SH regarding possible problems with the lineup during cross-examination. (Tr. 115-116). Moreover, the defense strenuously objected to admission into evidence of testimony regarding the "reconstruction," which undercut his best efforts to contest that someone else committed the rape by showing that the sperm found on the bedspread did not belong to Mr. Ruff. (Tr. 70, 266-268).

The defense also called SH's identification of Mr. Ruff into question during closing argument, (Tr. 265-266), as well as pointing out discrepancies in her testimony. (Tr. 261-263, 266-268). It was in the course of this argument, in which he strenuously denied that Mr. Ruff had committed the rape and robbery, that counsel for Mr. Ruff uttered the phrase upon which the State has relied to urge that he should be denied testing: "This is not a case of mistaken identity." (Tr. 265). Counsel was not indicating identity was not an issue in the trial, but, conversely, was contending that SH intentionally and opportunistically identified Mr. Ruff as her assailant. In its Motion For Judgment of Acquittal At The Close of The States Evidence, defense counsel stated, "The evidence fails to establish that the alleged offense, if any, was committed by the defendant if

at all knowingly or willfully." (L.F. 283). The defense made the same averment in its Motion For Judgment of Acquittal At The Close of All of The Evidence. (L.F. 282). Moreover, in Mr. Ruff's First Amended 27.26 Motion, filed May 12, 1987, he alleged that he was "prejudiced by an unnecessarily suggestive line-up procedure and tainted in-court identification." (L.F. 171-72).

Mr. Ruff continued to contest his identity as the perpetrator, this time in a federal forum. He took his cause before the Federal District Court for the Western District of Missouri, where The Honorable Elmo B. Hunter found that the State had violated Mr. Ruff's right to due process of law by suppressing potentially exculpatory evidence regarding the contributor of semen stains on the bedspread in the room occupied by SH. (L.F. 136). Of the potential evidentiary value of the semen stains, Judge Hunter wrote, "The evidence suppressed would show that the prior occupant of the room did not have sex the night before, thus, it would be reasonable for the jury to infer that the semen came from the rapist, and because the rapist's semen did not match [Mr. Ruff], [Mr. Ruff] was not the rapist." (L.F. 136-37).[4]

[4] Judge Hunter's decision was reversed by the United States Court of Appeals for the Eighth Circuit. *Ruff v. Armontrout*, 77 F.3d 265 (8th Cir.), *cert. denied*, 519 U.S. 889 (1996).

After exhausting his ability to contest identity in the federal courts, on July 1, 2005, Mr. Ruff filed a pro se Motion for D.N.A. Testing Under Sections 547.035 and 547.037 RSMo. (L.F. 123). In that Motion, Mr. Ruff alleged that evidence of semen had been collected for his trial and, had that evidence been subjected to DNA testing, there was a reasonable probability that he would not have been convicted. (L.F. 127). Mr. Ruff also alleged that identity was an issue at trial by stating, "At the trial it was disclose [sic] that semen stains did not match petitioner." *Id*. In its Response, unsolicited by the Motion Court, the State purported to refute only the allegation that identity was an issue at trial. (L.F. 54).

The Motion Court, without comment, and without even issuing findings of fact and conclusions of law as required by section 547.035.8, denied Mr. Ruff's motion. (L.F. 26). In so doing, the Motion Court apparently adopted the State's position that identity was not an issue at trial because Mr. Ruff's claim was not one of "mistaken identity." But that conclusion ignores what Mr. Ruff has claimed from the very beginning – that the State had the wrong man and he did not rape SH. His defense at trial, in effect "that either nobody raped the victim, but if somebody did, it wasn't me," is precisely the kind of defense that puts identity at issue, and the Motion Court erred in overruling his Motion for DNA Testing on this basis.

D. The Erroneous Denial of Mr. Ruff's Motion for Post-Conviction DNA Testing Requires An Appropriate Remedy, And This Court Should Order The Testing Or, In The Alternative, Remand For Further Proceedings To Allow Mr. Ruff To Make His Case.

The messy procedural posture of this case complicates determination of the appropriate remedy for the Motion Court's denial of testing without appointment of counsel and a hearing. The filing of the State's Response to Movant's Motion for Post-Conviction DNA Testing (L.F. 50) without an order to show cause, the absence of Findings of Fact and Conclusions of Law by the Motion Court, and the decision of the Motion Court before receipt of Mr. Ruff's response to the State's motion and without a hearing, suggest that, although a remedy is required, the appropriate action to be taken by this Court is unclear.

1. Since Mr. Ruff has established the essential requisites for DNA testing, this Court should order the test.

In *Weeks*, this Court ordered DNA testing for movant where it found that the showings necessary to warrant testing had been made and the judge below denied such testing due to an erroneous interpretation of the law. 140 S.W.3d at 50. The Court acknowledged that, to be entitled to testing, "the movant need not conclusively prove his innocence." *Id.* If the Court is satisfied that "(1) a

reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and (2) that movant is entitled to relief," § 547.035, this Court "may enter the judgment the trial court ought to have entered. *Rule* 84.14." 140 S.W.3d at 50.

This case presents a classic case for relief under the post-conviction DNA testing statute. Mr. Ruff is seeking testing of the victim's rape kit and panties, secured in relation to the crime (L.F. 308, Tr. 143, 148), in which motile sperm was found. (Tr. 144, 148, 179). There is no question that DNA testing was not available to Mr. Ruff at the time of his trial in 1985, because DNA testing was not even available in Missouri until, at the earliest, 1991, s*ee Weeks*, 140 S.W.3d at 48, and forensic use of DNA technology in criminal cases did not begin in the United States until 1986. Edward Connors, Thomas Lundregan, Neal Miller, Tom McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (NIJ 1996), http://www.ncjrs.gov/txtfiles/dnaevid.txt.

Moreover, there is no question that, had DNA testing been available at the time of Mr. Ruff's trial, and had these items been tested and found not to contain Mr. Ruff's sperm, the outcome of the trial would have been different. It is likely that, had the sperm been conclusively shown not to belong to Mr. Ruff, he would not even have been prosecuted at all. As was the case in *Weeks*, Mr.

Ruff has "met all the requirements for an order for DNA testing," 140 S.W.3d at 50, and the appropriate relief is for this Court to order a DNA test.

That ordering the test now is the most appropriate remedy is bolstered by the manner in which this case was litigated and decided in the Circuit Court. Mr. Ruff filed his motion for DNA testing on July 1, 2005 (L.F. 123). When no action was taken on his motion, he sent letters to the Missouri Supreme Court requesting assistance, and Counsel to the Court forwarded those letters to the Circuit Court Administrator. (L.F. 115-122). Circuit Assistant Legal Counsel forwarded Mr. Ruff's letter of September 14, 2005 to Division 16. (L.F. 114). Still no action was taken on the motion until the State filed its response on December 14, 2005. (L.F. 50). Six days later, on December 20, 2005, the motion judge overruled the motion. (L.F. 26). Nothing in the record indicates what precipitated the State's response, but there is no record that a show cause order was issued. Mr. Ruff's opposition to the State's motion to dismiss was mailed on December 29, 2005, (L.F. 24), and filed in court on January 3, 2006 (L.F. 23), along with his motion to reconsider. (L.F. 28). The motion to reconsider was overruled on January 19, 2006. (L.F. 16).

The motion judge's order overruling Mr. Ruff's motion was a two sentence order that did not include findings of facts and conclusions of law. The order merely stated that the motion "is overruled" pursuant to section 547.035 RSMo. (L.F.26). The absence of a show cause order makes it somewhat

difficult to interpret the judge's order, as does the absence of the required findings and conclusions. It appears clear, however, that the judge overruled Mr. Ruff's motion solely on the one ground presented in the State's response - the question of whether identity was an issue where Mr. Ruff did not claim "mistaken identity" but instead alleged in closing that SH was not raped at all. This seems clear in light of the fact that that was the only issue raised in the State's motion and the only statutory reference identified by the motion court judge. (L.F. 26).

It is not surprising that the Motion Court's order was based solely on §547.035.2(4), since, as noted, that is the only issue addressed in the State's response. But at this stage of litigation, the State should be bound by that response. Under the civil rules, which govern the litigation of claims under section 547.035 "insofar as applicable," § 547.035.1 RSMo., averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleadings. Mo. R. Civ. P. 55.09. While the limited applicability of the civil rules suggests that it may not be fully appropriate to deem all allegations in Mr. Ruff's motion to be admitted as a result of the State's failure to address or deny them in its responsive pleading, in fairness, those allegations should receive greater credence given the manner in which the case developed and the State's failure to contest them when it had the opportunity to do so in the Circuit Court. In the

absence of facts or allegations in the State's response undercutting the allegations made by Mr. Ruff in his motion, and in light of the fact that those allegations appear established and well-taken, granting immediate relief to Mr. Ruff would be appropriate in this case.

2. If this Court finds that ordering DNA testing is not appropriate at this stage of the litigation, it should remand to the Motion Court to require appointment of counsel and a hearing on Mr. Ruff's Motion for Post-Conviction DNA Testing.

It appears clear that the Motion Court's overruling of Mr. Ruff's motion for DNA testing was based on the only ground alleged in the State's response – that identity was not an issue at trial. Since Mr. Ruff has established that identity *was* an issue at trial, all necessary allegations were made in his motion for testing, and a hearing on that motion was required. The Motion Court clearly erred in overruling the motion without a hearing and appointment of counsel, and remand to allow Mr. Ruff to proceed with his claims is required.

Mr. Ruff's motion in this case is fairly typical of pro se motions filed by indigent incarcerated individuals who do not have the assistance of counsel or other legally-trained personnel in preparing their pleadings. Mr. Ruff did the best he could in setting out his claims. Using the language of the statute cobbled together with what appears to be a Form 40, Mr. Ruff attempted to

meet the statutory requirements by providing what information he had available to him. But as an incarcerated inmate, that information surely was limited. It is for that reason that Mr. Ruff's motion requires liberal construction.

Liberal construction of the pleadings is consistent with the reality that many of those seeking testing are likely to be marginally literate, untrained in law and science, lacking trained legal assistance and access to legal materials and the records in their cases, and functionally incapable of making detailed and complex showings. Missouri courts have repeatedly recognized that pro se petitions must be viewed favorably toward the pleader. *See, e.g., Duvall v. Lawrence,* 86 S.W.3d 74 (Mo. App. 2002); *Kennedy v. Missouri Atty. General,* 922 S.W.2d 68, 70 (Mo. App. 1996); *Howard v. Pettus,* 745 S.W.2d 821, 822 (Mo. App. 1988). This is particularly true where, as here, that pleading serves the compelling function of avoiding the manifest injustice of wrongful conviction.

To hold movants to high standards of pleading, especially where the language of the statute mandates that a hearing should be denied only where the court finds that "the motion and the files and records of the case *conclusively show* that the movant is not entitled to relief," § 547.035.6 (emphasis added), is inconsistent with both the letter and the spirit of the statute and its important remedial purposes. It was precisely because movants will have counsel at the hearing stage who can undertake the investigation necessary to provide detailed

allegations and to prepare for a hearing that this carefully crafted statutory scheme provides for a low threshold standard. This Court should not permit a narrow and rigid construction to defeat the statute's important remedial purpose.

Considering both the need for liberal construction and the State's limited responsive pleading, Mr. Ruff's motion should be deemed sufficient to comply with the statutory requirements to warrant a hearing on his claims. Mr. Ruff alleged that there was evidence to be tested, semen, that was collected in relation to the crime. (L.F. 127, 128). He alleged the evidence had not been previously tested because DNA testing was not available at the time of trial. (L.F. 124, 128). He alleged identity was an issue at trial (L.F. 124, 127), and that there was a reasonable probability he would not have been convicted if a favorable DNA test had been obtained. (L.F. 124, 127). While Mr. Ruff's allegations are not fully developed and lack the detail and precision one would expect from an attorney, they were adequate to put both the State and the Motion Court on notice of what Mr. Ruff was claiming, how he believed he met the statutory requirements and what issues needed to be addressed. Given that the Motion Court is required to consider the files and records in the case in making its decision, and given the need for liberal construction of the pleadings, those allegations were sufficient in this case.

The Motion Court erred in overruling Mr. Ruff's motion for testing on an erroneous legal ground, and there is no indication that the court considered

the remaining allegations at all. Given the allegations made by Mr. Ruff and the liberal pleading requirements, if this Court does not order testing, it should remand the case back to the Motion Court with instructions to appoint counsel and afford Mr. Ruff a hearing on his claims. At a minimum, this case should be remanded with instructions to allow Mr. Ruff to amend any portion of his pleadings that may be deemed deficient[5] and then to require the Motion Court to consider those allegations along with this Court's decision and the files and records in this case. Once the Motion Court has done so, it should be clear that Mr. Ruff is entitled to a hearing and relief.

CONCLUSION

DNA testing provides a unique, scientifically sound opportunity to obtain both accuracy and finality in criminal cases. For cases tried before the availability of DNA, the General Assembly adopted section 547.035 to allow incarcerated individuals with plausible claims of innocence to obtain the benefit of this testing in order to prove their innocence. Appellant Huntley Ruff has made the showings necessary to be afforded testing under the statute. Accordingly, he asks this Court to order DNA testing on semen in the rape kit

[5] Missouri Rule of Civil Procedure 55.33 permits amendment and suggests that leave of court to amend should be "liberally granted."

and the victim's panties or, in the alternative, to remand this case to the Motion Court for appointment of counsel and a hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) in that it contains 8535 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix.

I further certify that the labeled disk filed with the hard copies of this brief has been scanned for viruses and is virus-free.

I further certify that on March 27, 2008, two true and correct copies of this brief, as well as a labeled disk containing the same, were mailed postage prepaid to:

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_____
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APPENDIX

547.035. Post-conviction motion for DNA testing; procedure

1. A person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate the person's innocence of the crime for which the person is in custody may file a postconviction motion in the sentencing court seeking such testing. The procedure to be followed for such motions is governed by the rules of civil procedure insofar as applicable.

2. The motion must allege facts under oath demonstrating that:

(1) There is evidence upon which DNA testing can be conducted; and

(2) The evidence was secured in relation to the crime; and

(3) The evidence was not previously tested by the movant because:

(a) The technology for the testing was not reasonably available to the movant at the time of the trial;

(b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or

(c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and

(4) Identity was an issue in the trial; and

(5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

3. Movant shall file the motion and two copies thereof with the clerk of the sentencing court. The clerk shall file the motion in the original criminal case and shall immediately deliver a copy of the motion to the prosecutor.

4. The court shall issue to the prosecutor an order to show cause why the motion should not be granted unless:

(1) It appears from the motion that the movant is not entitled to relief; or

(2) The court finds that the files and records of the case conclusively show that the movant is not entitled to relief.

5. Upon the issuance of the order to show cause, the clerk shall notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing if the transcript has not been prepared or filed.

6. If the court finds that the motion and the files and records of the case conclusively show that the movant is not entitled to relief, a hearing shall not be held. If a hearing is ordered, counsel shall be appointed to represent the movant if the movant is indigent. The hearing shall be on the record. Movant need not be present at the hearing. The court may order that testimony of the movant shall be received by deposition. The movant shall have the burden of proving the allegations of the motion by a preponderance of the evidence.

7. The court shall order appropriate testing if the court finds:

(1) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and

(2) That movant is entitled to relief.

Such testing shall be conducted by a facility mutually agreed upon by the movant and by the state and approved by the court. If the parties are unable to agree, the court shall designate the testing facility. The court shall impose reasonable conditions on the testing to protect the state's interests in the integrity of the evidence and the testing process.

8. The court shall issue findings of fact and conclusions of law whether or not a hearing is held.

547.037. Results proving innocence; motion for release; procedure

1. If testing ordered pursuant to section 547.035 demonstrates a person's innocence of the crime for which the person is in custody, a motion for release may be filed in the sentencing court.

2. The court shall issue to the prosecutor an order to show cause why the motion should not be granted. The prosecutor shall file a response consenting to or opposing the motion.

3. If the prosecutor consents to the motion and if the court finds that such testing demonstrates the movant's innocence of the crime for which he or she is in custody, the court shall order the movant's release from the sentence for the crime for which testing occurred.

4. If the prosecutor files a response opposing the movant's release, the court shall conduct a hearing. If a hearing is ordered, the public defender shall be appointed to represent the movant if the movant is indigent. The hearing shall be on the record. The movant shall have the burden of proving the allegations of the motion by a preponderance of the evidence.

5. If the court finds that the testing ordered pursuant to section 547.035 demonstrates the movant's innocence of the crime for which he or she is in custody, the court shall order the movant's release from the sentence for the crime for which the testing occurred. Otherwise, relief shall be denied the movant.

6. The court shall issue findings of fact and conclusions of law whether or not a hearing is held. An appeal may be taken from the court's findings and conclusions as in other civil cases.

650.058. DNA profiling analysis, finding of "actually innocent", restitution, expungement--DNA confirmation of guilt, liability for costs

1. Notwithstanding the sovereign immunity of the state, any individual who was found guilty of a felony in a Missouri court and was later determined to be actually innocent of such crime solely as a result of DNA profiling analysis may be paid restitution. The individual may receive an amount of fifty dollars per day for each day of post-conviction incarceration for the crime for which the individual is determined to be actually innocent. The petition for the payment of said restitution shall be filed with the sentencing court. For the purposes of this section, the term **"actually innocent"** shall mean:

(1) The individual was convicted of a felony for which a final order of release was entered by the court;

(2) All appeals of the order of release have been exhausted;

(3) The individual was not serving any term of a sentence for any other crime concurrently with the sentence for which he or she is determined to be actually innocent, unless such individual was serving another concurrent sentence because his or her parole was revoked by a court or the board of probation and parole in connection with the crime for which the person has been exonerated; and

(4) Testing ordered under section 547.035, RSMo, or testing by the order of any state or federal court, if such person was exonerated on or before August 28, 2004, or testing ordered under section 650.055, if such person was or is exonerated after August 28, 2004, demonstrates a person's innocence of the crime for which the person is in custody. Any individual who receives restitution under this section shall be prohibited from seeking any civil redress from the state, its departments and agencies, or any employee thereof, or any political subdivision or its employees. This section shall not be construed as a waiver of sovereign immunity for any purposes other than the restitution provided for herein. The department of corrections shall determine the aggregate amount of restitution owed during a fiscal year. If insufficient moneys are appropriated each fiscal year to pay restitution to such persons, the department shall pay each individual who has received an order awarding restitution a pro rata share of the amount appropriated. Provided sufficient moneys are appropriated to the department, the amounts owed to such individual shall be paid on June thirtieth of each subsequent fiscal year, until such time as the restitution to the individual has been paid in full. However, no individual awarded restitution under this subsection shall receive more than thirty-six thousand five hundred dollars during each fiscal year. No interest on unpaid restitution shall be awarded to the individual. No individual who has been determined by the court to be actually innocent shall be responsible for the costs of care under section 217.831, RSMo.

2. If the results of the DNA testing confirm the person's guilt, then the person filing for DNA testing under section 547.035, RSMo, shall:

(1) Be liable for any reasonable costs incurred when conducting the DNA test, including but not limited to the cost of the test. Such costs shall be determined by the court and shall be included in the findings of fact and conclusions of law made by the court; and

(2) Be sanctioned under the provisions of section 217.262, RSMo.

3. A petition for payment of restitution under this section may only be filed by the individual determined to be actually innocent or the individual's legal guardian. No claim or petition for restitution under this section may be filed by the individual's heirs or assigns. An individual's right to receive restitution under this section is not assignable or otherwise transferrable. The state's obligation to pay restitution under this section shall cease upon the individual's death. Any beneficiary designation that purports to bequeath, assign, or otherwise convey the right to receive such restitution shall be void and unenforceable.

4. An individual who is determined to be actually innocent of a crime under this chapter shall automatically be granted an order of expungement from the court in which he or she pled guilty or was sentenced to expunge from all official records all recordations of his or her arrest, plea, trial or conviction. Upon granting of the order of expungement, the records and files maintained in any administrative or court proceeding in an associate or circuit division of the court shall be confidential and only available to the parties or by order of the court for good cause shown. The effect of such order shall be to restore such person to the status he or she occupied prior to such arrest, plea or conviction and as if such event had never taken place. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge such arrest, plea, trial, conviction or expungement in response to any inquiry made of him or her for any purpose whatsoever and no such inquiry shall be made for information relating to an expungement under this section.

217.262. Additional period added to time offender is first eligible for parole or deduction from offender's account, when--limitations on adverse action

1. An additional sixty days shall be added to the time that an offender is first eligible for parole consideration hearing or a sum of up to fifty percent of the average balance of the offender's account for any portion of the preceding twelve months during which the offender's account had a positive balance, shall be deducted from an offender's account for each instance that a court finds that the offender has done any of the following while in the custody of the department:

(1) Filed a false, frivolous or malicious action or claim with the court;

(2) Brought an action or claim with the court solely or primarily for delay or harassment;

(3) Unreasonably expanded or delayed a judicial proceeding;

(4) Testified falsely or otherwise submitted false evidence or information to the court;

(5) Attempted to create or obtain a false affidavit, testimony, or evidence; or

(6) Abused the discovery process in any judicial action or proceeding.

2. The department of corrections may promulgate rules in accordance with section 217.040 providing that the conduct described in subdivisions (1) to (6) of subsection 1 of this section shall be a conduct violation and subject an offender to discipline.

3. The maximum term of imprisonment of an offender as imposed by the sentencing court shall not be extended by the provisions of subsection 1 of this section.

4. In no instance shall the balance of an offender's account be reduced to an amount less than ten dollars pursuant to this section. The amount due pursuant to subsection 1 of this section may be deducted from any compensation payable or later paid to the offender, or from any other property belonging to the offender in the custody and control of the department.