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No. SC88936

IN THE SUPREME COURT OF MISSOURI

HUNTLEY RUFF,

*Appellant.*

vs.

STATE OF MISSOURI,

*Respondent.*

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

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## REPLY ARGUMENT

In its Substitute Brief, the State chose not to address the substantive arguments made by Mr. Ruff regarding interpretation of the “identity” prong of section 547.035. Instead, the State attempts to attack the alleged weakness of the pleadings in this case. While Mr. Ruff concedes his pleading is not a model of clarity and completeness, as will be demonstrated below, it is sufficient to meet the requirements of both section 547.035 and the Missouri Rules of Civil Procedure. Accordingly, as argued in Mr. Ruff’s opening brief, the Motion Court erred in overruling his motion for DNA testing without appointment of counsel and a hearing.

A. Contrary To The State’s Suggestion Otherwise, The Motion Court Denied Mr. Ruff’s Motion On The Ground That, Since He Did Not Rely Solely On A Mistaken Identity Theory, Identity Was Not An Issue At The Trial.

This Court should reject the State’s disingenuous argument that the Motion Court denied Mr. Ruff’s motion for DNA testing because his pleading lacked sufficient factual allegations to withstand a motion to dismiss. The State characterizes as relying on a “false premise” (S.B. 12)<sup>1</sup> Mr. Ruff’s argument that the Motion Court denied his request for DNA testing based on a flawed legal interpretation of the “identity” prong of the statute. Nowhere, however, does it

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<sup>1</sup> References to the State’s Substitute Brief will be referred to as (S.B. ).

provide a convincing argument that the court relied on any other basis. In fact, the government's very arguments refute its contention.

Although the absence of findings of fact and conclusions of law make it impossible to determine precisely why the court overruled Mr. Ruff's motion, the State's claim that the Motion Court's citation of section 547.035.2(4) supports its position that it was for lack of sufficient factual allegations borders on the preposterous. The State claims that Mr. Ruff failed to allege facts to support any of the requirements of section 547.035, not just subsection 4 (S.B. 19-22). Yet adopting the State's view would require this Court to believe that the Motion Court simply singled out subsection 4 from among all the sections as the basis for deciding that the factual allegations were insufficient. That seems extremely unlikely. Moreover, the State virtually concedes, on page 22 of its Substitute Brief, that if the Motion Court denied the request for DNA testing on the ground that the allegations were insufficient, thereby causing the motion to be insufficient, the appropriate subsection to have cited would be 547.035.4(1), and Mr. Ruff agrees. Thus, not only is there no support for the State's position; there is direct and logical support for the opposite conclusion.

Were this not enough to defeat the State's position, there is very compelling evidence that the Motion Court denied appointment of counsel and a hearing on its erroneous belief that identity could not be an issue at trial unless the sole issue in the case had been mistaken identity. This evidence comes from the timing of the court's decision and the contents of the State's response. Mr. Ruff's motion was

filed on July 1, 2005 (L.F. 123), and no response was filed until December 14, 2005 (L.F. 50). No show cause order was issued before the State's response was filed.<sup>2</sup> The Court issued its order overruling Mr. Ruff's motion on December 20, 2005. (L.F. 16) From this timing, it would be logical to assume that the Motion Court relied, at least in part, on the State's response in taking action. But more than logical assumption supports that conclusion.

The State's response to movant's motion for post-conviction DNA testing addresses one issue, and one issue only. That response did not urge, as the State does here, that Mr. Ruff's factual allegations are insufficient to warrant appointment of counsel and a hearing. Rather, the State's response focused solely and exclusively on the contention that 547.035 "requires that *identity* must have been an issue at the trial. *As demonstrated by the trial transcript (see attachments), Movant's defense at trial was NOT that he was not the perpetrator who committed the offense, but rather that NO OFFENSE OCCURRED. In other words, his defense was that the victim lied about having been raped.*" (L.F. 54) (all emphasis in original). The State cited section 547.035.2(4) three times in its two pages of substantive argument. In addition, the

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<sup>2</sup> Interestingly, the first paragraph of the state's pleading references "the Court's Order to Show Cause" (L.F. 50), yet neither the docket entries nor the files provided to counsel indicate that such an Order was entered. Further, the State concedes in its Substitute Brief that no such order was formally issued. (S.B. 24).

only section of the statute bolded in the earlier part of the State’s response was the language “**(4) Identity was an issue in the trial,**” (L.F. 52), and even more noteworthy, the language in .2 that “The motion must allege facts” was not similarly in boldface type. It is no wonder the motion judge cited that section when he overruled Mr. Ruff’s motion, and it is simply not credible to contend otherwise.

While it is true, as the State contends (S.B. 24), that in some circumstances an appellate court may uphold a trial court decision on a ground not relied upon by the court below, this is not an appropriate case for doing so. If the State wanted to raise the insufficiency of the factual allegations, it could have done so in the trial court. Had it done so, Mr. Ruff could have sought leave to amend, which likely would have been granted. *See* Mo. R. Civ. P. 55.33.<sup>3</sup> And had it done so, the Motion Court would have had the first opportunity to address the sufficiency of the allegations, rather than that task falling in the first instance on this Court. The State should not be allowed to lure the Motion Court into making a decision on one ground and then raise an alternative ground for the first time on appeal. Surely, had Mr. Ruff or any other movant attempted the same tactic, the State would be screaming procedural bar.

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<sup>3</sup> Had the State’s motion relied on the basis they now claim, and had that motion been construed as a motion to dismiss, the court would have been required to “freely grant leave to amend.” *See* Mo. R. Civ. P. 67.06.

B. Had the Motion Court overruled Mr. Ruff's motion on the ground that it failed to allege sufficient facts to support the essential elements of a claim under section 547.035, that decision would have been in error because both the statute and the pleadings require liberal construction, and the allegations presented by Mr. Ruff, requesting testing of DNA in a 1985 rape case, were sufficient under the circumstances.

The State spends the majority of its brief trying to convince this Court that the factual allegations in this case are insufficient to warrant relief. A close examination of the State's arguments and the authority on which they rely strongly suggests that this Court should not find those arguments persuasive.

The State makes much of the fact that Missouri is a "fact pleading" state and that the facts alleged by Mr. Ruff do not meet the standards for fact pleading, especially in a motion for post-conviction relief. (S.B. 14-22). But the State's arguments ignore the fact that 547.035 is not a typical post-conviction statute, but is instead a remedial statute that addresses the problem of wrongful convictions. That distinction is important, because it supports liberal construction both of the statute itself and of pleadings pursuant to it.

Initially, the State relies on *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997), for the proposition that fact pleading is especially important because "post-conviction motions, unlike other pleadings, are collateral attacks on a final judgment." (S.B. 15). While the State's paraphrasing of *White* is accurate, the import of the language is quite contrary from that urged by Respondent, because it

is taken completely out of context. When read in context, *White* actually supports Mr. Ruff.

In *White*, immediately prior to the language referenced by the State, this Court discussed the requirement under Rule 29.15 for the defendant to plead facts, and then for counsel, who is automatically appointed, to supplement the motion and allege any additional facts not raised by the movant. The Court then stated: “The *redundant requirement to plead facts* makes clear that a Rule 29.15 motion is *no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.*” 939 S.W.2d at 893 (emphasis added). The obvious import of this statement is that motions under 547.035, which do not involve this “redundant requirement,” should be treated as the kind of ordinary motion that is entitled to more generous review.

Moreover, the Court’s statements in the paragraph immediately following the language referenced by the State (S.B. 15) -- that a rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment -- must be read in the context of the previously discussed redundant review. This is confirmed by the citation of *Fields v. State*, 572 S.W.2d 477, 483 (Mo banc. 1978), immediately following the paraphrased language. Notably, in *Fields*, this Court concluded that the “requirement for lawyerlike pleadings for Pro se movants who are not permitted an appointed lawyer” and the failure to actually require specific findings of fact and conclusions of law in post-conviction cases were problematic in the context of Rule 29.15. Acknowledging that inmate filings

are “often inarticulate and inartful expressions,” that grudging appointment of counsel had contributed to “delay and confusion rather than speed and finality,” and that “summary denials of Pro se motions . . . had led to “excessive appeals” contrary to what was intended, the Court mandated appointment of counsel in all 29.15 cases. 572 S.W.2d at 482. Thus, to suggest that the need for finality automatically means that pleadings should not be liberally construed ignores what this Court was concerned about and what it did in *Fields*.

It is not clear why this Court, in adopting Rule 29.17, and the Legislature, in adopting section 547.035, provided for appointment of counsel only when a hearing was to be required. Perhaps it was because there was some belief that the pleadings required under section 547.035 might be easier for incarcerated inmates to prepare than those under 29.15, a conclusion that appears to have been in error.<sup>4</sup> Regardless of what the initial thinking was, however, we do know that the Legislature intended the Motion Court, in deciding whether to appoint counsel and hold a hearing, to consider not only the allegations of the movant but the State’s response as well. The Fiscal Note to 547.035, prepared by the Committee on Legislative Research for the Oversight Committee, states: “Assuming the intention is to apply the law as written and not frivolously, public defenders should not be

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<sup>4</sup> It is noteworthy that there is no form comparable to Form 40 for 547.035 cases, and inmates like Mr. Ruff have found it particularly difficult to adapt Form 40 to the requirements of the DNA statute.

appointed until after prosecutors (the state) fails to show cause as to why a hearing should not be granted.” It thus was clearly the intention of the Legislature to have the Court consider both the motion and the State’s response unless the movant’s filing was frivolous. This is consistent with Mr. Ruff’s argument urging liberal construction of the initial motion for testing and suggesting that denial of motions without an order to show cause and without affording full consideration of all available information is inconsistent with the remedial purposes of the statute.

Regardless of the reason for the Legislature structuring the statute as it did, liberal construction of inmate pleadings is both essential and consistent with Missouri case law and the rules of civil procedure. Missouri Rule of Civil Procedure 55.24 provides that “all pleadings shall be so construed as to do substantial justice.” Rule 55.04 requires that “each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions shall be required.” Even the State recognizes that many cases suggest that pro se movants are held to a lesser standard of pleading. As the State concedes (S.B. 18), that standard requires, at a minimum, that a movant’s petition contain “allegations from which to infer those facts” necessary to support the elements required to be plead. And *White* suggests that “missing factual allegations” can be inferred from conclusions or implied from the prayer for relief. 939 S.W.2d at 893. This is particularly necessary in cases under section 547.035, which can only be brought by incarcerated inmates, who are least likely to have access to the resources necessary to prepare pleadings with full and complete allegations of fact.

Moreover, liberal construction of inmate pleadings in cases under section 547.035 is necessary in order to avoid eviscerating the very remedial purposes the Legislature sought to advance in adopting the statute. As this Court recognized in *Weeks v. State*, 140 S.W.3d 39, 43 (Mo. banc 2004), the purpose of 547.035 was 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 were exculpatory, the defendant would not have been convicted.” Contrary to the suggestion by the State (S.B. 15), Mr. Ruff is not urging that the General Assembly intended DNA testing for every defendant who wanted it. But there is surely a significant difference between saying any defendant who wants it can receive testing and affording liberal construction to pleadings that make a colorable claim for relief.

Finally, the legislative enactment of section 650.058, which provides compensation for those exonerated under 547.035 and .037 and sanctions for those who seek DNA testing that ultimately confirms guilt, reaffirms the legislative intent that the statute should be liberally construed. One of the most difficult issues in balancing finality, accuracy and fairness has been the lack of disincentives to seeking DNA testing. The enactment of section 650.058 cures that concern. Missouri has been recognized as being on the forefront of providing sanctions instead of requiring more stringent standards for proceeding under the statute, “at the risk of failing to exonerate an innocent person who cannot meet a heavier evidentiary burden.” Gwendolyn Carroll, Comment, *Proven Guilty: An*

*Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. Crim. L. & Criminology 665, 688 (2007).

Judged by this liberal pleadings standard, the allegations made by Mr. Ruff were sufficient to require appointment of counsel and a hearing on his request for DNA testing. First, this was a rape case, and paragraph four of the petition clearly sets that out. (L.F. 126). The overwhelming majority of DNA exonerations, both nationally and in Missouri, have involved rape cases. In fact, 71% of the first 200 DNA exonerations in the United States involved defendants convicted of rape, and a total of 93% involved rape or rape-murder. Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 73 (2008), while six of seven, or 86%, of the DNA exonerations in this state were rape cases. See Innocence Project: Know the Cases, <http://www.innocenceproject.org/news/state.php?state=MO>.<sup>5</sup> This is not surprising, since DNA testing of semen in rape cases is the paradigmatic example of where DNA is most available and most likely to be exonerating.

Moreover, Mr. Ruff's conviction and sentence occurred in 1985, and this too was clearly set out in paragraph five. (L.F. 126). In his motion, Mr. Ruff stated, among other things, that there was semen available to be tested, Motion for Testing, ¶ 11 (L.F. 127), within the custody of government officials. *Id.* at ¶ 9a,

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<sup>5</sup> The Missouri exonerees who had been convicted of rape are Johnny Briscoe, Lonny Erby, Larry Johnson, Steve Toney, Armand Villasana and Anthony Woods. *Id.*

10a and 12 (L.F. 127). He further stated that such testing as is required “was not available then,” *Id.* at ¶ 13a (L.F. 127), and that “there is a reasonable probability that the results of the defendant’s conviction(s) would have been different . . . .” *Id.* at ¶ 9b (L.F. 127). Although these allegations lack the clarity and development one would expect from an attorney, they are allegations from which the facts necessary can be implied and the missing facts can be inferred from the prayer for relief. That is all that is required. *See, e.g., White*, 939 S.W.2d at 893. A petition is not insufficient “merely because of a lack of definiteness ... or [an] informality in the statement of an essential fact.” *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1994), *quoting from Myers v. City of Palmyra*, 355 S.W.2d 17, 18 (Mo. 1962).

Alternatively, even if Mr. Ruff’s initial allegations were insufficient to meet the liberal pleading requirement of the statute, they should be deemed cured by the government’s attachment of a portion of the transcript to its Motion Court response. As noted, the civil rules apply to section 547.035 to the extent possible. Pursuant to Missouri Rule of Civil Procedure 55.27(a), where a motion to dismiss for failure to state a claim is filed and “matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment.” While the government’s motion may not have been termed a 12(b)(6) motion, according to the State’s current position, it appears it was intended as such, or at least was by analogy to section 547.035. Moreover, an exhibit to a pleading is a part thereof for all purposes, Mo. R. Civ. P. 55.12, and the transcripts

supplied by the State should have been considered in determining whether the requirements of the statute had been met sufficient to require appointment of counsel and a hearing.

While these civil rules do not apply with complete symmetry to cases under section 547.035, they, along with Rule 55.24, strongly suggest that the overly technical analysis urged by the State was not intended here. Rather, the policies behind section 547.035, as well as the pleading requirements of the Missouri rules, suggest that a liberal construction of the statute and rules is necessary, and under that liberal construction, Mr. Ruff should have been afforded counsel and a hearing in which to present his case. The Motion Court's overruling of his motion without appointment of counsel and a hearing constituted error, and that judgment should be reversed.

### **CONCLUSION**

Appellant Huntley Ruff has made the showings necessary to be afforded testing under section 547.035 RSMo, with its unique, scientifically sound opportunity to obtain both accuracy and finality in his case. Accordingly, he asks this Court to order DNA testing on semen in the rape kit 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 3299 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c) and signature block.

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 April 28, 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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