

No. SC89589

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In the  
Supreme Court of Missouri

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**RANDY BELCHER,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from Livingston County Circuit Court  
Forty-Third Judicial Circuit  
The Honorable Stephen K. Griffin, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 4

JURISDICTIONAL STATEMENT ..... 7

STATEMENT OF FACTS ..... 8

ARGUMENT..... 10

    Point I ..... 10

        A. Transfer is not the appropriate procedure for challenging errors made by the court of appeals. .... 10

        B. The appellate court did not err in considering Respondent’s arguments regarding Appellant’s failure to make his allegations under oath because Respondent had no preservation burden in the motion court..... 11

        C. The plain language of the statute requires the allegations to be made under oath.14

        D. Conclusion ..... 18

    Point II ..... 19

        A. Standard of Review ..... 19

        B. Further findings were not required because Appellant’s motion was insufficient.21

            1. *Appellant did not allege facts demonstrating that identity was an issue at trial.* .22

            2. *Appellant did not allege facts demonstrating a reasonable probability of a different result.* ..... 24

        C. Conclusion ..... 25

CONCLUSION ..... 26

CERTIFICATE OF COMPLIANCE ..... 27

APPENDIX ..... 28

## TABLE OF AUTHORITIES

### Cases

<i>Barry v. State</i> , 850 S.W.2d 348 (Mo. banc 1993).....	14, 23
<i>Clayton v. State</i> , 164 S.W.3d 111 (Mo. App. E.D. 2005).....	23
<i>Crews v. State</i> , 7 S.W.3d 563 (Mo. App. E.D. 1999).....	14
<i>Dupree v. Zenith Goldine Pharmaceuticals, Inc.</i> , 63 S.W.3d 220 (Mo. banc 2002).....	11
<i>Gilliland v. State</i> , 882 S.W.2d 322 (Mo. App. S.D. 1994).....	23
<i>Goodwin v. State</i> , 191 S.W.3d 20 (Mo. banc 2006).....	12
<i>Harrell v. Department of Corrections</i> , 207 S.W.3d 690 (Mo. App. W.D. 2006).....	13
<i>Hudson v. State</i> , 190 S.W.3d 434 (Mo. App. W.D. 2006).....	15, 18
<i>Ivory v. State</i> , 211 S.W.3d 185 (Mo. App. W.D. 2007).....	14, 23
<i>Kilgore v. State</i> , 791 S.W.2d 393 (Mo. banc 1990).....	17
<i>McClanahan v. State</i> , 276 S.W.3d 893 (Mo. App. S.D. 2009).....	27
<i>Parker v. Swope</i> , 157 S.W.3d 350 (Mo. App. E.D. 2005).....	13
<i>Precision Investments, L.L.C. v. Cornerstone Propane, L.C.</i> , 220 S.W.3d 301 (Mo. banc 2007).....	11
<i>State ex rel. Broadway-Washington Associates, Ltd. v. Manners</i> , 186 S.W.3d 272 (Mo. banc 2006).....	15
<i>State ex rel. Nixon v. Daugherty</i> , 186 S.W.3d 253 (Mo. banc 2006).....	18
<i>State v. Becker</i> , 938 S.W.2d 267 (Mo. banc 1997).....	13
<i>State v. Belcher</i> , 805 S.W.2d 245 (Mo. App. S.D. 1991).....	8, 9, 25, 27
<i>State v. Cotton</i> , 32 S.W.3d 577 (Mo. App. W.D. 2000).....	22

<i>State v. Fults</i> , 98 S.W.3d 877 (Mo. App. E.D. 2003).....	24, 25
<i>State v. Hackler</i> , 122 S.W.3d 132 (Mo. App. S.D. 2003).....	22
<i>State v. Ruff</i> , 256 S.W.3d 55 (Mo. banc 2008).....	17, 21, 22
<i>State v. Rumble</i> , 680 S.W.2d 939 (Mo. banc 1984).....	15, 17
<i>State v. Waters</i> , 221 S.W.3d 416 (Mo. App. W.D. 2006).....	16, 19, 20, 24
<i>State v. White</i> , 873 S.W.2d 590 (Mo. banc 1994).....	17
<i>Trehan v. State</i> , 872 S.W.2d 156 (Mo. App. S.D. 1994).....	14
<i>Wallingford v. State</i> , 131 S.W.3d 781 (Mo. banc 2004).....	17, 18, 19
<i>Weeks v. State</i> , 140 S.W.3d 39 (Mo. banc 2004).....	25, 26

Statutes

Section 512.020, RSMo 2000.....	13
Section 547.035, RSMo Cum. Supp. 2002.....	passim
Section 566.030, RSMo 1986.....	7, 8, 26

Rules

Supreme Court Rule 24.035.....	passim
Supreme Court Rule 29.15.....	passim
Supreme Court Rule 29.15(f) (1995).....	17
Supreme Court Rule 29.15(g) (1996).....	17
Supreme Court Rule 30.04.....	22
Supreme Court Rule 55.03.....	18, 19
Supreme Court Rule 83.04.....	7
Supreme Court Rule 83.08.....	11

Supreme Court Rule 83.09 ..... 11

Constitutional Provisions

Mo. Const. art. V, § 10 ..... 7

## **JURISDICTIONAL STATEMENT**

This appeal is from the denial of a motion for DNA testing under § 547.035, RSMo Cum. Supp. 2002,<sup>1</sup> in the Circuit Court of Livingston County. The DNA testing was sought in relation to Appellant's conviction for rape, § 566.030, RSMo 1986, for which he was sentenced to life. After the Court of Appeals, Western District, affirmed the motion court's judgment, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

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<sup>1</sup> All references to §547.035 are to RSMo Cum. Supp. 2002.

## STATEMENT OF FACTS

In 1989, Appellant, Randy Belcher, pleaded guilty to one count of rape, § 566.030, RSMo 1986 (L.F. 5). He was sentenced to life imprisonment (L.F. 5-6).<sup>2</sup>

In September of 1987, Appellant asked his fourteen-year-old neighbor, K., to come over to his house to help him with a plumbing problem. *State v. Belcher*, 805 S.W.2d 245 (Mo. App. S.D. 1991). After she entered his home, Appellant locked the door and told her he had lied about the plumbing problem. *Id.* When Appellant's father returned, they threatened K. and then took her to a hotel room. *Id.* at 247. Appellant forced K. to have sex with him; Appellant's father also raped K. twice. *Id.* The next morning, they took K. to the river where they pushed her in and shot at her. *Id.* at 247-248.

Almost seventeen years after pleading guilty to raping K., on May 4, 2006, Appellant filed a motion for DNA testing pursuant to § 547.035 (L.F. 1). On April 11, 2007, the court denied that motion via a docket entry (L.F. 1). Appellant attempted to appeal, but that appeal

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<sup>2</sup> The record on appeal does not contain a copy of the guilty plea transcript in this case. However, the events that gave rise to this conviction also resulted in three convictions in Greene County (L.F. 21-22). The appeal of those convictions resulted in a published opinion. *State v. Belcher*, 805 S.W.2d 245 (Mo. App. S.D. 1991). Appellant relied on the opinion and the record from that case in developing the facts in his original motion for DNA testing (L.F. 21-22). For clarity's sake, Respondent has also adopted the facts from the published opinion, but not those from the record in that case, as those files and transcripts were never made a part of the record in this case.

was dismissed for lack of an appealable judgment (L.F. 15). Appellant requested the motion court to strike its order and enter an appealable judgment (L.F. 32-36). The motion court filed a signed judgment on October 12, 2007, and this appeal followed (L.F. 37, 43).

## ARGUMENT

### Point I

**This Court should decline to review Appellant’s first point because transfer is not the appropriate procedure for addressing claims of appellate court error and a writ of prohibition is not appropriate in this case in that the appellate court properly applied the law.**

In his first point, Appellant argues that the court of appeals erred when it affirmed the motion court’s judgment because neither court allowed him to cure the defect in his original pleading—that it had not been made under oath—when the deficiency was made known to him (App. Sup. Br. 11). An application for transfer is not the appropriate way to raise this claim. A claim that the appellate court exceeded its authority or lacked jurisdiction to act should be brought in a petition for a writ of prohibition. Moreover, even if had sought such a writ, it would have been denied because the appellate court properly applied the law.

**A. Transfer is not the appropriate procedure for challenging errors made by the court of appeals.**

When a case is transferred to the Supreme Court of Missouri, the Supreme Court determines the case as if it were on original appeal. Supreme Court Rule 83.09; *Precision Investments, L.L.C. v. Cornerstone Propane, L.C.*, 220 S.W.3d 301, 303 (Mo. banc 2007). Additionally, on transfer, the party is limited to the grounds raised in the original brief. Supreme Court Rule 83.08; *Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220, 222 (Mo. banc 2002). Improperly added claims will not be considered. *See id.* An

application for transfer is not the appropriate vehicle for obtaining review of an error made by the court of appeals. *Precision Investments*, 220 S.W.3d at 303.

Here, Appellant's claim that the appellate court erred in denying his appeal based on the signature requirement of § 547.035, was not included in his original brief in the court of appeals. Neither did that brief challenge the requirement that the allegations in his motion be made under oath. He merely challenged the denial of the motion without findings of fact and conclusions of law (App. Br. 4). In his reply brief, Appellant only addressed an issue regarding the record on appeal, (App. Rep. Br. 1-2), and the issue of identity (App. Reply Br. 2-3). Consequently, Appellant's arguments concerning the requirement of an oath should not be considered. *Dupree*, 63 S.W.3d at 222. Moreover, his point challenges not the ruling of the motion court, but an action on the part of the court of appeals. Such a complaint cannot be considered on transfer. *Precision Investments*, 220 S.W.3d at 303. While it is true that a pleading may be construed as a petition for a writ, that would not be appropriate in this case because the appellate court did not err as discussed below.

**B. The appellate court did not err in considering Respondent's arguments regarding Appellant's failure to make his allegations under oath because Respondent had no preservation burden in the motion court.**

Appellant makes several arguments for explaining why the appellate court's decision to address the verification requirement was erroneous. Each of these arguments rests on a misunderstanding of the applicable burden of proof.

First, Appellant says that the court of appeals should not have considered Respondent's argument that findings and conclusions were not required because the motion

itself was insufficient in that it was not made under oath as required by § 547.035 (App. Br. 13-14). In support of this contention, Appellant notes that the State did not file a responsive pleading in the motion court and did not file a cross-appeal.

The State was under no obligation to file a responsive pleading in the motion court because the State had no burden of proof in the motion court. In a motion for post-conviction relief, the movant bears the burden of proof by a preponderance of the evidence. *See Goodwin v. State*, 191 S.W.3d 20, 25 (Mo. banc 2006). Moreover, under § 547.035, the State is not even required to file an answer. Section 547.035.4 provides that after a motion for post-conviction DNA testing is filed, the court will issue a show cause order to the prosecutor. But no show cause order is issued where either “(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.” *Id.* No show cause order was entered in the present case (L.F. 1). Consequently, the State was not required to file a pleading and had no burden of proof or preservation. Under these circumstances, the State may suggest alternate reasons why the decision of the motion court should be affirmed. *See State v. Becker*, 938 S.W.2d 267, 268 (Mo. banc 1997) (noting that even if the trial court stated the wrong reason for its decision, a correct result “should be affirmed if sustainable on other grounds.”).

Furthermore, the State cannot be penalized for failing to file a cross-appeal because such an appeal would not have been allowed. To be entitled to an appeal, the party must be aggrieved by the decision of the court below. § 512.020, RSMo 2000; *Harrell v. Department of Corrections*, 207 S.W.3d 690, 692 (Mo.

App. W.D. 2006). A party may not appeal where the trial court ruled in their favor. *Parker v. Swope*, 157 S.W.3d 350, 352 (Mo. App. E.D. 2005). Here, the trial court denied Appellant's motion (L.F. 1). That decision was entirely favorable to the State and, thus, no appeal would have been allowed.

Appellant also claims that the issue of his failure to comply with the requirement of the oath was not an issue he raised, and so it should not have been considered (App. Sub. Br. 14-15). This argument overlooks the fact that the pleading requirements are a factor the courts must consider in determining the claim Appellant did raise. Appellant claimed that the motion court erred in denying his motion without findings of fact and conclusions of law (App. Br. 4). Such findings and conclusions are not required where the motion itself is insufficient. *Ivory v. State*, 211 S.W.3d 185, 191 (Mo. App. W.D. 2007); *Crews v. State*, 7 S.W.3d 563 (Mo. App. E.D. 1999); *Trehan v. State*, 872 S.W.2d 156 (Mo. App. S.D. 1994). *See also Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993). One of the pleading requirements for a motion for post-conviction DNA testing is that the allegations be made "under oath." § 547.035.2. Thus, it was appropriate for the appellate court to consider whether Appellant made his allegations under oath when it made its decision.

While it may seem incongruous to argue that Appellant may not bring this claim on transfer while at the same time arguing that it was appropriate for the court of appeals to consider the facts underlying this issue, the two inquiries involve legally distinct issues. The claim Appellant raised in the court of appeals was that the motion court clearly erred in denying his motion without entering findings of fact and conclusions of law (App. Br. 4). However, on transfer, Appellant, relying on the general principle that § 547.035, should be

interpreted in parallel with Rule 29.15 and Rule 24.035 (App. Sub. Br. 11, 16-18), argues the appellate court erred in deciding the case on that issue because the oath should not be required. The first claim addresses compliance with the statute, while the second claim addresses the validity of the statute's requirement that the allegations be made under oath. These questions are factually related but legally distinct. Therefore, Appellant's arguments on this point should not be considered.

**C. The plain language of the statute requires the allegations to be made under oath.**

Substantively, Appellant argues that the signature requirement of the statute should be interpreted in the same way as the signature requirement in actions under Rules 29.15 and 24.035 (App. Sub. Br. 16-18). This argument fails because it ignores the plain meaning of the statute, the factual context in which the statute was enacted, and the conflicting interests the legislature balanced in crafting the statute.

The court's goal in interpreting a statute is to effectuate the intent of the legislature. *Hudson v. State*, 190 S.W.3d 434, 440 (Mo. App. W.D. 2006). In most cases, this means examining the plain, ordinary meaning of the words used in the statute. *Id.*; *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. banc 2006). It is only where the statute is ambiguous that courts resort to extrinsic aids to determine the intent of the legislature. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984).

Section 547.035 requires the movant to allege five things: 1) that evidence exists which can be DNA tested; 2) that the evidence to be tested was secured in relation to the crime; 3) that the evidence was not previously tested through no fault of the movant; 4) that identity was an issue at trial; and 5) that there is a reasonable probability that the result of

trial would have been different if the results of DNA testing had been exculpatory. These allegations must be made “under oath.” *Id.* This requirement is clear and not ambiguous. Therefore, the court should follow the rules as laid down in the statute, without resort to canons of construction, such as interpretation in light of similar statutes, as Appellant urges.

Appellant failed to make the required factual allegations under oath as required by Section 547.035.2. (L.F. 30). Appellant signed a standard signature block, but the motion does not contain an oath, affirmation, or affidavit of Appellant attesting to the matters contained in the motion. (L.F. 30). Appellant should have made his allegations under oath to be entitled to proceed on his motion for DNA testing, but he failed to do so. Appellant’s motion is insufficient under the statute and so findings of fact and conclusions of law were not required. *State v. Waters*, 221 S.W.3d 416, 418 (Mo. App. W.D. 2006).

Should this court decide to look beyond the language of the statute, there is strong support for the conclusion that the legislature intended this requirement to operate as it did in this case. When interpreting statutes, courts “must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law.” *Rumble*, 680 S.W.2d at 942. The signature requirement of both Rule 29.15 and 24.035 were undergoing a progressive process of relaxation at the time § 547.035 was enacted. When 29.15 and Rule 24.035 were first adopted, they required both the pro se motion and the amended motion to be signed and verified. *See Kilgore v. State*, 791 S.W.2d 393, 395 (Mo. banc 1990). Gradually, this requirement was changed to effectuate the purposes of the rules. First the verification requirement for the pro se motion was eliminated. *State v. White*, 873 S.W.2d 590, 594 (Mo. banc 1994). Then, in 1995, the verification requirement for the amended

motion was removed. *Compare* Supreme Court Rule 29.15(f) (1995) *with* Supreme Court Rule 29.15(g) (1996). Finally, in *Wallingford v. State*, 131 S.W.3d 781 (Mo. banc 2004), this Court decided that the signature requirement was not jurisdictional, and so could be corrected at any time.

Section 547.035 was enacted in 2001 to provide an opportunity for inmates to obtain DNA testing that could be potentially exculpatory. *State v. Ruff*, 256 S.W.3d 55, 58 (Mo. banc 2008). In 2001, the verification requirement had already been eliminated from Rules 29.15 and 24.035. Yet, the General Assembly still incorporated into the post-conviction DNA testing statute the requirement that the allegations be made under oath. § 547.035.2. Since the legislature knew of the relaxation of the requirements of the post-conviction rules at the time it imposed the requirement that a motion under § 547.035 be made under oath, it can be inferred that the legislature intended to make the availability of DNA testing more limited than ordinary post-conviction relief.

This conclusion is supported by the purpose of the statute and the interests the legislature was balancing when it crafted the statute. In enacting § 547.035 the legislature balanced the State's interest in the finality of criminal convictions against "the real concern that DNA technology could produce exonerating results." *Hudson*, 190 S.W.3d at 440-441. The resulting compromise allowed for DNA testing, but only under limited circumstances. *Id.*

Appellant argues that he should have been permitted to correct this deficiency based on the reasoning in *Wallingford* and Supreme Court Rule 55.03(a), but this argument ignores the delicate balance struck by the legislature, and thus ignores the purpose of the statute. As

with Rule 29.15 and Rule 24.035, motions for post-conviction DNA testing are subject to “the rules of civil procedure insofar as applicable.” § 547.035.1. To determine whether a rule of civil procedure applies in the post-conviction context, courts must consider “whether the rule enhances, conflicts with, or is of neutral consequence to the purpose of” the post-conviction procedure. *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006). Here, by adopting the requirement that had already been removed from Rule 29.15 and Rule 24.035, the legislature clearly expressed an intent to limit the availability of this remedy by strictly enforcing procedural requirements. Consequently, case law relying on Supreme Court Rule 55.03(a) to relax the pleading requirements of Rule 29.15 and Rule 24.035 should not be considered persuasive in the context of § 547.035.

Two more of Appellant’s assertions merit mention. First, Appellant argues that the requirement should be loosened because a notary was not available to him in the department of corrections (App. Sub. Br. 16-17). If that were the case, he would not have been able to correct the deficiency by providing a notarized copy to the circuit court when the deficiency was pointed out to him (App. Br. 8).<sup>3</sup> Second, Appellant attempts to distinguish *State v. Waters*, 221 S.W.3d 416, 418 (Mo. App. W.D. 2006), on the ground that he alleged identity

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<sup>3</sup> Appellant states in his brief that the procedure laid out in *Wallingford v. State*, 131 S.W.3d 781 (Mo. banc 2004), was used in this case. While that may be true, Respondent has not received a copy of the corrected motion. Appellant is responsible for compiling the record on appeal and serving a copy of the record on appeal on Respondent. Supreme Court Rule 81.12(d).

was an issue. This argument fails for two reasons. First, Appellant uses an overly narrow reading of *Waters*. The court in that case held that findings and conclusions were not required where the motion for post-conviction DNA testing was insufficient. 221 S.W.3d at 418. It just so happens that the motion in that case was insufficient because it failed to allege identity was an issue. *Id.* There are any number of other ways a motion may be insufficient, including, as here, where the required allegations were not made under oath. Even if the holding in *Waters* was limited by the specific type of insufficiency in that case, Appellant did not plead facts demonstrating that identity was an issue, as discussed in Point II, Part B1.

**D. Conclusion**

Appellant's claim that the appellate court erred should not be considered because transfer is not the appropriate mechanism to address claims of appellate court error and Appellant did not raise that claim below. In any event, the appellate court did not err because its decision complies with the plain language of § 547.035, as well as its purpose.

## Point II

**The motion court did not clearly err in denying Appellant's motion without entering detailed findings of fact and conclusions of law because findings of fact and conclusions of law were not required in that Appellant's motion was insufficient. Appellant's motion was insufficient because identity was not an issue at trial and there is not a reasonable probability that Appellant would not have been convicted if DNA testing provided exculpatory results.**

There are several exceptions to the requirement that a post-conviction court must enter findings of fact and conclusions of law, and this case fits into the exception that no findings or conclusions are required where the motion itself is insufficient. The facts alleged in Appellant's motion do not demonstrate that identity was an issue because the victim was familiar with her attackers and Appellant pleaded guilty. Moreover, the facts he alleged also failed to demonstrate a reasonable probability of a different result because if the DNA testing had implicated the only other suspect in the case, that result would have corroborated the victim's account.

### **A. Standard of Review**

A motion court's decision on a motion for post-conviction DNA testing is reviewed for clear error. *State v. Ruff*, 256 S.W.3d 55, 56 (Mo. banc 2008). Clear error will only be

found where a review of the entire record leaves the appellate court with “the definite and firm impression that a mistake has been made.” *Id.*<sup>4</sup>

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<sup>4</sup> The Appellant has the duty to provide the record on appeal. Supreme Court Rule 30.04; *State v. Cotton*, 32 S.W.3d 577 (Mo. App. W.D. 2000). The record must include “all of the record, proceedings, and evidence necessary for a determination of all questions to be presented.” Supreme Court Rule 30.04. Failure to comply with the procedural rules is grounds for dismissal. *State v. Hackler*, 122 S.W.3d 132 (Mo. App. S.D. 2003).

Appellant claims that the findings of fact and conclusions of law issued in this case were insufficient (App. Br. 4). In denying relief, the motion court stated that “The Court has reviewed the complete file, *including transcripts relating thereto*. The Court finds that the entire file and records of the case conclusively show that the Defendant/Movant is not entitled to relief.” (L.F. 1) (emphasis added). The transcripts are necessary to determine whether the findings are sufficient because the motion court relied on them. Since Appellant failed to provide them, this Court should decline to review his claims. *State v. Cotton*, 32 S.W.3d 577 (Mo. App. W.D. 2000).

**B. Further findings were not required because Appellant’s motion was insufficient.**

When ruling on a motion for post-conviction DNA testing, the motion court must enter findings of fact and conclusions of law on all issues presented. § 547.035.8; *Barry v. State*, 850 S.W.2d 348, 349-350 (Mo. banc 1993). However, “[t]here is no precise formula for findings and conclusions of a motion court in a postconviction proceeding; they are sufficient if they permit review of the judgment.” *Gilliland v. State*, 882 S.W.2d 322, 326 (Mo. App. S.D. 1994). If “the correctness of the motion court’s action is clear from the record, there is no need to remand for additional findings and conclusions.” *Id.* Additionally, there are several exceptions to the requirement of findings. *See Barry*, 850 S.W.2d at 349-350; *Ivory v. State*, 211 S.W.3d 185, 191 (Mo. App. W.D. 2007). Relevant to this case, no findings are required where the motion itself is insufficient. *Clayton v. State*, 164 S.W.3d 111, 115 (Mo. App. E.D. 2005).

Section 547.035 provides a vehicle for post-conviction DNA testing if certain conditions are met. To obtain testing, a movant under the statute must make the following allegations under oath:

- (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.

§ 547.035.2. Thus, a motion for DNA testing is not sufficient if it does not properly allege that identity was an issue at trial, or where it is not reasonably probable that the movant would not have been convicted if DNA testing produced exculpatory results. *State v. Waters*, 221 S.W.3d 416, 418 (Mo. App. W.D. 2006); § 547.035.2.

1. *Appellant did not allege facts demonstrating that identity was an issue at trial.*

Where the victim knows the defendant, identity is not an issue at trial. *State v. Fults*, 98 S.W.3d 877, 879 (Mo. App. E.D. 2003). In *Fults*, where the defendant was convicted of rape, sodomy, and incest, the defendant alleged in his motion for DNA testing that "DNA testing would have established his innocence, discredited his daughter, and exonerated him as the actual perpetrator." *Id.* at 879-880. The court held that this was an insufficient allegation that identity was an issue at trial. *Id.* at 880.

Similarly, in the present case, the victim knew her attackers. *State v. Belcher*, 805 S.W.2d 245 (Mo. App. S.D. 1991). They were her neighbors and she felt comfortable enough with Appellant that she willingly went with him, alone, to help him with a plumbing problem in his parents' home. *Id.* at 246-247. At his guilty plea, Appellant admitted all the

facts necessary for the court to find a factual basis for both rape and kidnapping (L.F. 6). Thus, the facts of this case demonstrate that identity was not an issue at trial.

While there is some authority suggesting that any defense by which the defendant claims he did not commit the crime will put identity at issue, that general principle is not applicable under the specific facts of this case. Not only did the victim know her attackers, Appellant also pleaded guilty to the crimes. This Court's decision in *Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004), does not change the impact of the guilty plea in this case. That case held that identity could be an issue after a guilty plea, but the facts of that case differ in significant respects from those of the present case. *Weeks* involved a rape and kidnapping where the victim was accosted by a stranger who pulled her out of her car at night. *Id.* at 41. In holding that the defendant in *Weeks* could obtain post-conviction DNA testing of the evidence collected in connection to his case, the court acknowledged that his was a rare case: "as a practical matter, it can be anticipated that fewer persons who have pleaded guilty will be able to meet the requirement of the statute that they show that a reasonable probability exists that they would not have been convicted if exculpatory results had been obtained through DNA testing." *Id.* at 46. The key issue was whether "the facts placed the perpetrator's identity at issue." *Id.* at 47. Here, unlike in *Weeks*, the facts did not place the identity of the perpetrator at issue because the victim knew Appellant and his father.

Appellant alleged in his motion that identity was an issue because he has always maintained his innocence and the other suspect was a blood relative (L.F. 28-29). Neither of these arguments actually put the identity of the attackers at issue given the facts of the case. First, the record refutes Appellant's claim that he has always maintained his innocence.

Appellant was convicted pursuant to a plea of guilty (L.F. 5), and nothing in the record indicates that this was an *Alford* plea. Thus, Appellant admitted the facts alleged under oath and so cannot now say that he has always maintained his innocence.

Appellant alleges that identity was an issue because he had an alibi witness who would testify that he was somewhere else when the victim was lured from her home (L.F. 28). This is not sufficient to place his identity at issue because abduction is not an element of rape. § 566.030, RSMo 1986. Whether it was Appellant or Appellant's father who actually abducted the victim is irrelevant to determining whether Appellant raped the victim several hours later as the State alleged. Moreover, the allegations supporting Appellant's claim of alibi were not sufficient. Where a proposed alibi witness cannot account for the accused's whereabouts at the specific time of the crime, the testimony of that witness will not create a reasonable probability of a different outcome. *McClanahan v. State*, 276 S.W.3d 893, 897-898 (Mo. App. S.D. 2009). Appellant did not allege that he was somewhere else when the rape took place, only that he was somewhere else when the kidnapping took place (L.F. 28). Thus, identity was not an issue at the time of the trial of this case.

2. *Appellant did not allege facts demonstrating a reasonable probability of a different result.*

Neither did Appellant allege facts demonstrating a reasonable probability that he “would not have been convicted if exculpatory results had been obtained through the requested DNA testing.” § 547.035.2. In his motion, Appellant alleged that there was a reasonable probability that he would not have been convicted because the DNA test results would demonstrate that “another suspect” had committed the crime (L.F. 29). This

allegation ignores the facts of the case. In the Greene County case involving this incident, the victim testified that Appellant and his father kept her in a hotel room overnight where they raped and sodomized her. *State v. Belcher*, 805 S.W.2d 245 (Mo. App. S.D. 1991). Appellant's father was not "another suspect," but a second participant in the crime. Therefore, evidence of DNA testing indicating that Appellant's father raped the victim would not have a reasonable probability of changing the result of trial because such evidence would have supported the testimony of the complaining witness. DNA evidence implicating the "other suspect" in this case would have made the State's case stronger, not weaker. Appellant has not made sufficient allegations to require further findings of fact.

### **C. Conclusion**

Further findings of fact and conclusions of law were not required in this case because Appellant's motion was insufficient. Identity was not an issue in this case because the victim knew Appellant and Appellant pleaded guilty to the crime. Moreover, it is not reasonably probable that Appellant would not have been convicted if DNA testing revealed that Appellant's father had raped the victim because the victim testified in the related Greene County Case that Appellant and his father acted together in the commission of the crimes. The denial of Appellant's motion for DNA testing should be affirmed.

## CONCLUSION

The motion court did not clearly err. The denial of Appellant's motion for DNA testing should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,081 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 21st day of April, 2009, to:

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**APPENDIX**

Judgment..... A1

Docket Sheets ..... A2