

No. SC88936

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In the  
Missouri Supreme Court

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STATE OF MISSOURI,

Respondent,

v.

HUNTLEY RUFF,

Appellant.

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Appeal from Jackson County Circuit Court  
Sixteenth Judicial Circuit  
The Honorable Marco Roldan, Judge

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RESPONDENT'S SUBSTITUTE BRIEF

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## **JURISDICTIONAL STATEMENT**

This appeal is from the denial of Appellant's motion for DNA testing under § 547.035 in the Circuit Court of Jackson County. The convictions sought to be vacated were for forcible rape, § 566.030, RSMo Cum. Supp. 1984, forcible sodomy, § 566.060 RSMo Cum. Supp. 1984, robbery, § 569.020 RSMo Cum. Supp. 1984, and armed criminal action, § 571.015 RSMo Cum. Supp. 1984. Appellant was sentenced to consecutive terms of imprisonment for fifty years for rape, fifty years for sodomy, thirty years for robbery, and thirty years for armed criminal action. On January 22, 2008, pursuant to Supreme Court Rule 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS<sup>1</sup>

In 1985, Appellant was convicted of forcible rape, sodomy, robbery, and armed criminal action. (L.F. 220, D.A. L.F. 48, Tr. 278-279). The following evidence was produced at trial:

In 1984, Appellant was working as a broiler cook at the Philips House Hotel in Kansas City. (Tr. 199). As part of that job, Appellant was required to wear a kitchen uniform. (Tr. 199).

On October 1, 1984, S.H. had traveled from Oklahoma to Kansas City to attend a seminar. (Tr. 47). She registered as a guest at the Phillips House Hotel. (Tr. 47-48). At 7:18 p.m., after unpacking her belongings in her room, S.H. ordered room service. (Tr. 48-50, 194). Randall Sorenson, a waiter at the hotel, delivered S.H.'s meal at around 7:30. (Tr. 50).

When she finished her dinner, S.H. opened her hotel-room door to place the empty food tray in the hallway. (Tr. 50-51). When she did, she saw Appellant, dressed in a chef's uniform, standing in the doorway. (Tr. 50-51). Appellant told S.H. there was a discrepancy regarding her bill and that he needed to see her food tray.

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<sup>1</sup> Respondent will cite the record as follows: direct-appeal legal file (D.A. L.F.), direct-appeal transcript (Tr.), and legal file from the motion for DNA testing (L.F. and Supp. L.F.).

(Tr. 50). Appellant looked at the tray and a room service ticket as S.H. stood nearby. (Tr. 51-52).

Appellant then grabbed S.H., held a knife to her throat, and dragged her to the bedroom area of the room. (Tr. 52-53). S.H. screamed and struggled, but Appellant told her to cooperate or he would kill her. (Tr. 52-53). He pushed S.H. into the bathroom and ordered her to disrobe. (Tr. 53). He then took her back to the bedroom and told her to empty her purse. (Tr. 54). Appellant took \$85 to \$90 and some gum from the purse. (Tr. 55, 62).

Appellant then told S.H. to close the room's curtains. (Tr. 56). When S.H. returned from doing so, Appellant unzipped his pants, removed his penis, and told S.H. to sit on the bed. (Tr. 57). He then placed his penis in her mouth and moved her head back and forth. (Tr. 57-58). After that, he told S.H. to lie down, and he raped her. (Tr. 58-59).

When Appellant left the hotel room, S.H. called her pastor, and the pastor called the police. (Tr. 63).

Police responded and took S.H. to St. Luke's Hospital where physicians examined her. (Tr. 63-64, 168-169). S.H. had lacerations, puncture wounds, and bruising on her head, neck, ear, and chest. (Tr. 175). There was sperm present in S.H.'s vagina, and it was active, indicating it had been present for no longer than twenty-four hours. (Tr. 175-179).

Police arrested Appellant at his home. (Tr. 134-135). S.H. identified Appellant at the police station the next morning. (Tr. 65-67, 136-137).

At trial, a cook from the hotel testified that Appellant was missing from the kitchen at around 7:10. (Tr. 186-187). The cook also said that later that night, Appellant twice asked the *maitre d'* if they could close the kitchen early. (Tr. 187). Appellant's work records indicated that he got to work the day of the rape at 2:50 p.m. and left at 9:41 p.m. (Tr. 197-198).

An expert in blood testing and hair comparison testified about the evidence collected at the scene. (Tr. 142). He testified that the semen recovered in the victim's vaginal swabs returned inconclusive blood-type results, so the expert could not tell whether it belonged to Appellant. (Tr. 145). There were semen stains on the hotel bedspread that matched neither Appellant nor the victim. (Tr. 157). The evidence indicated that the semen stains were located in a different place on the bed than where the rape occurred, and the bedspread had not been washed after the prior occupant had stayed there. (Tr. 153-154, 162-163, 208-209).

In closing argument, Appellant argued that the victim was suing the hotel and that she was lying in the criminal case to ensure a recovery in the civil suit. (Tr. 261, 268-269). He argued that it was not a case of mistaken identity but that the victim had seen Appellant in the hotel and then described him to police in fabricating the rape:

This is not a case of mistaken identity. There is no question that when she [the victim] gave that description to the police she was doing her best to describe [Appellant] who she had seen there in the hotel, probably when she went down to the lobby to get the Coke from the Coke machine.

And there is no question that she saw [Appellant] in the chef's uniform. No question that she saw him wearing his green pants. No question that he had on his hat, but she didn't look at him face to face for twenty minutes to half an hour like she testified she did and still think – she didn't kiss him with tongues and still think that he had just a chipped tooth and not those three missing teeth. Did not happen that way. Her testimony is not reasonable in light of all the evidence.

(Tr. 265-266). Appellant argued that it did not make sense for the victim's minor injuries to have still been bleeding long after the attack, and he suggested that the State did not prove that the injuries were not self-inflicted. (Tr. 263-264). Appellant also pointed out that he worked as a chef at the hotel and that he had "an unusual appearance or unique appearance" and did not "look like anybody else that work[ed] there." (Tr. 262).

The jury found Appellant guilty of all counts, and he was sentenced as a persistent sexual offender<sup>2</sup> to consecutive terms of imprisonment for fifty years for rape, fifty years for sodomy, thirty years for robbery, and thirty years for armed criminal action. (Tr. 220).

Appellant appealed, and the Western District affirmed the sentence and judgment in *State v. Ruff*, 721 S.W.2d 163 (Mo.App., W.D. 1986). Subsequently, Appellant filed a motion for post-conviction relief, and the denial of his motion was affirmed in *Ruff v. State*, 768 S.W.2d 119 (Mo.App., W.D. 1988).

Appellant applied for a federal writ of *habeas corpus*, and the district court issued a writ on April 16, 1992. (L.F. 133). It found that the prosecutor had violated *Brady v. Maryland*, by failing to disclose that the guest who occupied the hotel room the night before S.H. had denied having sex there. (L.F. 133). The guest had later recanted and admitted she had sex in the room, but the district court found that irrelevant for purposes of the *Brady* violation. (DNA L.F. 134). The Eighth Circuit reversed. *Ruff v. Armontrout*, 993 F.2d 639, 642 (8th Cir. 1993). It held that evidence eliminating one source of the stain did not exonerate Appellant, particularly in light of the victim's identification and other evidence against Appellant. *Id.*

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<sup>2</sup> Appellant had prior convictions from two cases in the District of Columbia, each involving a rape and a robbery. (Tr. 79-80).

On July 1, 2005, Appellant filed his motion for post-conviction DNA testing pursuant to § 547.035. (L.F. 123, Supp. L.F. 2). Appellant alleged that “[t]here is ‘DNA’ or other testable materials covered by RSMo § 547.035 within the custody of city, county, state or federal entities that can be tested.” (L.F. 127). He stated, “There is a reasonable probability that the results of the defendant’s conviction(s) would have been different as outline[d] by the statute.” (L.F. 127). He alleged that DNA testing was not available at the time of his trial. (L.F. 128). The “items” he indicated he believed could be tested were “[b]lood,” “[h]air,” “[s]emen,” “[p]hosphate,” “[s]aliva,” “[t]issue,” and “[f]ibers.” (L.F. 127). He also alleged that “[a]t trial, it was disclose[d] that semen stains did not match petitioner. . . . At no time was any test done on the alleged other persons. . . . Furthermore, there was not one shred of evidence that the semen came from the night before.” (L.F. 127). He further requested a “DNA Test on sweat inside shoes connected with the murder scene and the victim’s blood.” (L.F. 128).

The motion court denied the motion without an evidentiary hearing on December, 20, 2006. (L.F. 8, Supp. L.F. 2). Appellant filed a motion to reconsider on January 3, 2006, which motion was denied on January 19, 2006. (Supp. L.F. 1-2). The Missouri Court of Appeals, Western District, granted Appellant leave to file a late notice of appeal, and he filed his notice within the time granted. (L.F. 1, 9).

## ARGUMENT

### I

**The motion court did not clearly err in denying an evidentiary hearing on Appellant’s motion for post-conviction DNA testing pursuant to § 547.035. Appellant’s motion lacked factual allegations to show he was entitled to relief.**

Appellant claims the motion court erred in denying his motion for DNA testing without a hearing “on the ground that . . . identity was not at issue.” (App.Br. 7). He points out that the State argued in a response filed with the circuit court that identity was not at issue because the defense at trial was that the victim had fabricated the whole crime rather than misidentifying Appellant. (App. Br. 8, 28). From that, he concludes that the motion court “apparently erroneously construed the statute” to mean that identity is only at issue when the defense is mistaken identity rather than contesting that the defendant did not commit the crime. (App.Br. 7). He also argues that his pleadings should be liberally construed because he was pro se and that they were sufficient because they put the State and court on notice of “how he believed he met the statutory requirements and what issues needed to be addressed.” (App. Br. 31).

Appellant’s argument rests on a false premise about why the motion court denied his claim. The court denied his claim because Appellant failed to plead sufficient facts, not because it believed that the statute only applies to cases of

mistaken identity. Because Appellant failed to plead sufficient facts, he was not entitled to a hearing, and the motion court's judgment should be affirmed.

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

Review in a post-conviction motion for DNA testing is limited to a determination of whether the findings of facts and conclusions of law are clearly erroneous. *Weeks v. State*, 140 S.W.3d 39, 43-44 (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. *Hudson v. State*, 190 S.W.3d 434, 438 (Mo.App., W.D. 2006).

Appellant argues that the standard of review should be *de novo* based on the premise that the motion court erroneously interpreted a statute in denying Appellant's motion. (App. Br. 8). While this court reviews questions of statutory interpretation *de novo*, *State v. Kinder*, 122 S.W.3d 624, 629 (Mo.App., E.D. 2003), Appellant's case should still be reviewed for clear error. If a motion court commits an error of law (which as discussed below, did not happen in the present case), it might reach a decision that is clearly erroneous. But this Court should resist Appellant's efforts to obtain plenary review in this Court rather than review of the motion court's decision.

**B. *Appellant failed to plead sufficient facts to warrant relief.***

This Court should affirm the dismissal of Appellant's motion for DNA testing because Appellant failed to plead facts warranting relief as required by the statute. To

obtain a hearing on a motion for post-conviction DNA testing, the movant must allege facts 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 testing was not reasonably available to the movant at the time of 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 required DNA testing.

§ 547.035.2, RSMo Supp. 2004.<sup>3</sup>

***1. Section 547.035 requires fact pleading, not notice pleading.***

Contrary to Appellant's suggestions, § 547.035 requires factual rather than conclusory pleadings. Section 547.035.2 requires that a movant "allege facts" that

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<sup>3</sup> All statutory references are to RSMo Cum. Supp. 2004 unless otherwise noted.

would warrant relief. The statute also mandates that the rules of civil procedure apply insofar as applicable. § 547.035.1. The civil rules, like the DNA statute, require fact pleading. *See* Missouri Supreme Court Rule 55.05; *State v. Harris*, 870 S.W.2d 798, 815 (Mo. banc 1994).

Fact pleading is especially important in motions for post-conviction relief. *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997). That is because post-conviction motions, unlike other pleadings, are collateral attacks on a final judgment. *Id.* at 893. The policies of hearing claims that present a genuine injustice must be balanced against the policy of bringing finality to the criminal process. *Id.* Requiring a post-conviction movant to plead facts is also necessary to ensure judicial resources are spent on claims that actually warrant consideration, not on vague claims that if properly pled would spare the courts and counsel time and energy. *See Id.*

Section 547.035 does not provide for liberal construction in the absence of factual allegations. Section 547.035 demonstrates that the State wants DNA testing to be available where such testing would avoid incarcerating an innocent person. But it does not want, and it cannot afford, testing in every case. If the General Assembly had intended for DNA testing for every convict who desired it, there would have been no point in requiring factual pleading to satisfy the elements listed in the statute. The statute could have simply provided testing for everyone who requested it. It did not. *See* § 547.035.2. Because the statute requires allegations of fact to satisfy its basic

threshold, conclusory allegations and the desire for DNA testing are insufficient. *See State v. Miner*, 498 S.W.2d 814, 815 (Mo.App., St.L. Dist. 1973) (applying similar analysis in discussing fact pleading in a claim under former Rule 27.26).

Appellant argues that his pleading should be liberally construed because he was proceeding *pro se*. (App. Br. 30). While, as Appellant points out, courts sometimes say that review of *pro se* petitions should be less rigorous, *see, e.g., Kennedy v. Missouri Atty. Gen.*, 922 S.W.2d 68, 70 (Mo.App., W.D. 1996), it appears that the Eastern District is correct in concluding that the standard for reviewing a *pro se* petition is actually the same as in any other case. *See Scher v. Sindel*, 837 S.W.2d 350, 352 (Mo.App., E.D. 1992). In reviewing the adequacy of any pleading, the court assumes all the allegations are true and liberally grants all reasonable inferences therefrom. *Richardson v. Richardson*, 218 S.W.3d 426, 428 (Mo. banc 2007). The court simply asks whether, assuming the allegations are true, the plaintiff would have a cause of action. *Id.* Even where appellate courts have purported to apply a more lax standard for *pro se* litigants, the courts have actually applied the same standard as in any other case – they have construed the facts liberally in favor of the pleading party. *See, e.g., Watley v. Missouri Bd. of Probation and Parole*, 863 S.W.2d 337, 338 (Mo.App., W.D. 1993). They do not grant relief based on conclusory allegations that relief is warranted. *Scher v. Sindel*, 837 S.W.2d at 352.

Appellant has not identified any case, and Respondent is aware of none, that would relax the standards to the extent that *pro se* litigants could prevail simply upon notice pleading. “Missouri is not a ‘notice pleading’ state.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993). Given the choice, the Missouri Legislature has purposely avoided adopting the federal notice pleading standard. *Id. see also* § 547.035.2.

Rather, even in cases of *pro se* litigants, courts have required pleading facts, not conclusions, that would warrant relief. *See, e.g., Scher v. Sindel*, 837 S.W.2d at 353 (holding that the petitioner’s allegations were “purely conclusory” and provided “no legitimate basis” for the claim); *State ex rel. Bibbs v. Director of Revenue*, 237 S.W.3d 252, 257, 257 n 1-2 (Mo.App., W.D. 2007) (distinguishing the federal notice-pleading system and noting that the trial court properly granted a motion to dismiss where the *pro se* litigant had failed to plead facts that would state a claim); *Babcock v. KTVI-TV, Inc.*, 873 S.W.2d 293, 295-296 (Mo.App., E.D. 1994) (“To state a claim, a *pro se* litigant must plead facts which state a claim as a matter of law. . . . In determining the sufficiency of a petition to state a claim, conclusions of the pleader are not considered.”); *Dudley v. Shaver*, 770 S.W.2d 712, 715 (Mo.App., W.D. 1989) (“Courts should show tolerance and patience toward *pro se* litigants. . . But judicial tolerance does not contemplate judicial guesswork. Even a *pro se* petition must clearly inform the court of the plaintiff’s legal claim and the facts upon which he bases his

claim . . . No court can accurately declare the rights of the parties without facts, pleaded and proved, from which the court can determine those rights.”); *Mullen v. Renner*, 685 S.W.2d 212, 215 (Mo.App., W.D. 1984) (“Despite the admonition, often stated by appellate courts, that pleadings of one appearing *pro se* should be construed liberally in favor of the pleader, those pleadings still ‘must set forth the claim in a manner which, taking the pleaded facts as true, states a claim as a matter of law.’”) (citation omitted); *Cain v. Webster*, 770 S.W.2d 327, 328-329 (Mo.App., S.D. 1989) (noting that “[t]o state a claim, a *pro se* litigant is required to plead facts which state a claim as a matter of law” and holding that a petitioner’s conclusory allegations did not require a response from the court).

Even the cases that Appellant cites as urging a more liberal pleading standard for *pro se* movants all required the movant to plead facts in support of his claim. In *Duvall v. Lawrence*, 86 S.W.3d at 80, after stating that “[a] *pro se* petition is held to a less rigorous standard,” the court said “[t]he petition must state allegations of fact in support of each essential element of the cause pleaded. . . . If the petition consists of only conclusions and does not contain ultimate facts or any allegations from which to infer those facts, a motion to dismiss is properly granted.” In *Howard v. Pettus*, 745 S.W.2d 821, 822 (Mo.App., W.D. 1988), the court said, “[t]o state a constitutional claim, the petition must set forth facts showing a deprivation of a right secured by the United States Constitution.” In *Kennedy v. Missouri Atty. Gen.*, 922 S.W.2d 68, 70

(Mo.App., W.D. 1996), the court said, “[i]n comparison to attorney prepared pleadings, a *pro se* petition is held to a less rigorous standard.” But the court also said that the petition must include facts in support of each essential element, and it held that the movant had not pled sufficient facts to warrant relief. *Id.* at 71.

In short, *pro se* litigants, like any other petitioner, must plead facts, not conclusions to obtain relief.

## ***2. Appellant failed to plead sufficient facts.***

Even under a liberal reading of Appellant’s motion, he fell far short of pleading sufficient facts to show he was entitled to relief under § 547.035. The motion was wholly insufficient to provide a basis for relief, and in particular, Appellant did not plead facts showing that identity was at issue or that any DNA testing would have changed the outcome of trial. First, Appellant failed to plead facts showing that identity was at issue at trial. Besides naming the crimes for which he was convicted, Appellant’s motion was devoid of any description of his trial or the evidence presented. (L.F. 123-131). He did not, for example, plead that he had not relied on a defense of consent. Appellant made a conclusory allegation that there was a “reasonable probability that the results of [his] convictions would have been different,” but he did not present any factual support for that claim or explain how that would be so. (L.F. 127). The only allegation that could even be construed to relate to identity was Appellant’s claim that “[t]he facts of Defendant’s case fall[] within the

procedures outlined by the statute.” (L.F. 127). Even if that pleading could be interpreted as a conclusion relating to identity, it is merely a conclusion and omits factual allegations as required by the statute.<sup>4</sup>

Besides failing to plead facts showing that identity was at issue, Appellant’s motion failed to plead facts showing that DNA testing would even have mattered in his case. Rather than pointing to exhibits or evidence to test, Appellant pled only that there was “‘DNA’ or other testable materials covered by RSMO 547.035” in government custody that could be tested. (L.F. 127). He did list various categories of substances, some of which generally might contain genetic material (Appellant lists “[b]lood,” “[h]air,” “[s]emen,” “[p]hosphate,” “[s]aliva,” “[t]issue,” and “[f]ibers”). (L.F. 127). But he did not identify any particular evidence that he wanted to test.

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<sup>4</sup> In Appellant’s motion, he cites to L.F. 124 to argue he alleged that identity was at issue. (App. Br. 31). Appellant’s motion on page 124 of the legal file does contain the words “Identity was at issue at trial,” but that is among a list of statutory requirements provided as “INSTRUCTIONS” for completing the motion. (L.F. 124). It was not a factual allegation. That it was not a factual allegation is demonstrated by the additional line stating, “[i]t appears from the motion that the Defendant is not entitled to relief.” (L.F. 124). At any rate, an allegation that “identity was at issue at trial” would be a general conclusion, not a fact.

From reading Appellant's list containing types of things that can generally be tested for DNA, it is impossible to tell whether any of those things existed in his case or whether showing that any of them did not contain Appellant's DNA would have even mattered. Appellant argues that his motion was sufficient because it noted that there was semen evidence collected and that DNA testing would have provided a different result. (App. Br. 24, 31). But even construing the pleadings in that manner, there are still only conclusory allegations. Semen is present in many cases, and Appellant did not provide any facts to explain why testing would have affected the outcome of his case. In fact, besides the notation of "[s]emen" as an item Appellant believed could be tested, the only allegation regarding semen was that some semen stains were shown at trial *not* to match Appellant. (L.F. 127). That allegation showed that testing would *not* have affected the outcome (the jurors already knew that the semen stains did not come from Appellant, but they convicted him anyway). Appellant's motion included no mention of semen in a rape kit or in the victim's underwear. For the motion court to have determined that there was some semen besides the stains that had already been found not to match Appellant, it would have had to read the transcript from the criminal case and act as an advocate. That should be avoided in favor of requiring the movant to plead facts as required by the statute. *See Tyler v. Harper*, 670 S.W.2d 14, 16 (Mo.App., W.D. 1984) (determining the court would have had to abdicate its role of impartial arbiter and act as an advocate for the

movant to prevail, which would compromise the “very essence of judicial integrity”). Because Appellant did not plead facts showing that identity was at issue or that testing of any of the things in his list would have affected the outcome of trial, he was not entitled to an evidentiary hearing.

Appellant suggests that the motion court was required to read the entire record before ruling on his motion. (App. Br. 31). He is incorrect. When evaluating whether to have a hearing on a motion for DNA testing, the court does not have the transcript from the criminal case. The transcript is only ordered if the court issues a show-cause order for a reply from the State. *See* § 547.035.5. And, such an order is not required where “[i]t appears from the motion that the movant is not entitled to relief.” § 547.035.4(1). Though Appellant does not explain why he believes the trial court is required to read the entire record before ruling on the motion, presumably it is because one of the reasons for denying the claim without an evidentiary hearing is where “[t]he court finds that *the files and records* of the case conclusively show that the movant is not entitled to relief.” § 547.035.4(2). But Appellant ignores that the statute also provides for determining that Appellant is not entitled to relief “*from the motion.*” § 547.035.4(1). It makes sense to *allow* the court to deny the motion based on the record where the court is familiar with it (for example where the motion court and the trial court were the same). But in Appellant’s case (and likely in many cases), the motion court was a different court and had to decide Appellant’s request for DNA

testing years after the trial. Providing that the motion court can deny the claim based on the motion itself along with the provision for ordering the transcript after issuing a show cause order demonstrates that the motion court is not required to read the entire record before ruling.

Appellant argues that his pleadings were sufficient because “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.” (App. Br. 31). But, as noted above, Missouri is not a notice pleading state. *See ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d at 379. Both the rules of civil procedure and § 547.035 require fact pleading. Appellant’s desire for testing, without factual pleadings as required by the statute, was insufficient.

Contrary to Appellant’s arguments, the State should not be bound by its response to Appellant’s motion in the circuit court. (App. Br. 27-28). Appellant argues that the State’s only response to his motion was an argument that identity had not been at issue during the trial because Appellant’s theory was that no offense had occurred, not that he was not the perpetrator. (App. Br. 27-28, L.F. 54). Relying on Rule 55.09, he argues that the State should be bound by that response on appeal.

The State, however, should not be bound by the arguments raised in its response to Appellant’s motion. Appellant points out that under Rule 55.09, where a

responsive pleading is required, allegations that are not denied are deemed admitted. (App.Br. 28). Appellant ignores the second portion of Rule 55.09: “[s]pecific averments in a pleading to which no responsive pleading is required shall be taken as denied.” The State is only required to file any response to a motion for DNA testing when the court issues a show-cause order. § 547.035.4. It seems doubtful that a response to a show-cause order is the kind of “responsive pleading” that would trigger Rule 55.09. But, in any case, Appellant acknowledges that the State was not ordered to respond to his DNA motion. (App. Br. 2). Thus, under Rule 55.09, Appellant’s allegations were denied.

Appellant also suggests that the State should have raised its arguments in the circuit court when it had a chance to do so. The State, however, was not required to make any response to Appellant’s. Further, even on appeal, a party may raise a defense that a petition fails to state a claim upon which relief can be granted. Supreme Court Rule 55.27(g)(2). Appellant’s motion, since it did not plead sufficient facts, failed to state a claim. As such, the State should not be prevented from arguing that Appellant’s claim failed to state sufficient facts.

Besides the State not being bound by its unsolicited response, the motion court should also not be bound. Appellant seems to assume that the trial court could only have dismissed the motion for the reasons provided in the State’s unsolicited response to his motion. But section 547.035.4 places the responsibility for weighing the merits

of a motion for DNA testing on the circuit court. If it appears from the motion that the movant is not entitled to relief, the court can deny the claim without requesting any input from the state. It would be peculiar to conclude that the motion court could only deny a motion for the reasons provided by the State at a point in the proceedings when the court itself is charged with determining the merits of the claim. As such, the motion court's decision was not constrained to what was raised in the State's response. Also, generally the motion court's decision should be affirmed if it reached the correct result, even if it stated an incorrect reason for doing so. *Blackmon v. State*, 168 S.W.3d 129, 134 (Mo.App., W.D. 2005); *Branson v. State*, 145 S.W.3d 57, 58 (Mo.App., S.D. 2004).

Further, it appears that the motion court denied Appellant's motion for failing to state sufficient facts rather than for the reasons suggested by the State's response. The motion court denied Appellant's motion "[p]ursuant to Section 547.035.2(4). (L.F. 8). Section 547.035.2(4) states, "[t]he motion must allege facts under oath demonstrating that . . . [i]dentity was an issue in the trial." Thus it appears that the motion court denied Appellant's claim because he did not plead facts demonstrating that identity was at issue. Had the court denied the motion because the transcript showed that identity was not actually at issue (based on the theory that Appellant had denied that it was a case of mistaken identity and argued instead that no crime occurred), which is the reason Appellant suggests for the ruling, it would have cited 547.035.4(2): "[t]he

court finds that the files and records of the case conclusively show that the movant is not entitled to relief.”

Although Appellant has never claimed that his case should be remanded for more detailed findings and conclusions, he does suggest that the findings were insufficient. In motions for post-conviction relief, however, courts have recognized a number of exceptions where the case, despite lacking detailed findings, need not be remanded for new findings and conclusions. *State v. Waters*, 221 S.W.3d 416, 419 (Mo.App., W.D. 2006). One of the exceptions is where the motion was deficient and therefore ineffective. *Id.* Since Appellant did not allege facts showing that identity was at issue or that DNA testing would have affected the result of trial, his motion was insufficient, and a remand for further findings is not required. *See Id.*

Finally, Appellant should not be allowed to amend his petition as he requests. Appellant cites Rule 55.33 and argues that he should be allowed to amend his motion because the rule provides that amendments should be “liberally granted.” (App. Br. 32, 32 n. 5). Appellant does not suggest how he would amend his petition, and he cites no authority that would allow him to amend his petition on appeal following a judgment in the circuit court. He is asking this Court to create authority to amend on appeal that is not provided in the rules. Since nothing in § 547.035 would prohibit Appellant from filing a subsequent petition, there would be little harm from preventing Appellant from amending his petition on appeal. However, this case is a

review of the circuit court's decision regarding Appellant's motion. If this Court allowed Appellant to amend his motion and then granted DNA testing, it would be convicting the circuit court of error that it did not commit. This Court should review the appeal based on the pleadings the motion court had available rather provide review on a possible amended petition as if it was a case of original jurisdiction.

In sum, the motion court did not err in denying Appellant's motion based on a conclusion that identity was not actually at issue because that is not why the court denied the motion. It denied the motion because Appellant failed to plead sufficient facts as required by the statute. In any case, since Appellant did not plead sufficient facts to warrant relief, he was not entitled to a hearing on his request for DNA testing. The motion court did not clearly err in denying a hearing, and Appellant's point should be denied.<sup>5</sup>

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<sup>5</sup> Appellant argues that this Court should order testing rather than even remanding for a hearing. While that is the remedy this Court provided in *Weeks v. State*, 140 S.W.3d 39, 50 (Mo. banc 2004), it would not be appropriate in Appellant's case because it is uncertain whether the evidence at issue still exists. Thus, at most, Appellant should be granted a hearing rather than an order for testing.

## CONCLUSION

For the foregoing reasons, the denial of an evidentiary hearing on Appellant's post-conviction 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 6,079 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 17<sup>th</sup> day of April, 2008, to:

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**APPENDIX**

Order (denying motion for DNA testing) .....A1

Appellant’s Motion for DNA Testing Under Sections 547.035 and 547.037 .....A2