No. SC85448
No. SC85552

IN THE SUPREME COURT OF MISSOURI

RUBIN WEEKS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

APPEAL FROM THE CIRCUIT COURTS OF CAPE GIRARDEAU AND BOLLINGER COUNTIES, THIRTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE WILLIAM L. SYLER, JR, JUDGE

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

These appeals are from the denial of appellant's motions for post-conviction DNA testing under §547.035, RSMo Supp. 2001, without an evidentiary hearing, in the Circuit Court of Cape Girardeau County (case no. SC85448) and the Circuit Court of Bollinger County (case no. SC85552). In these motions, appellant requested DNA testing in order to challenge his pleas of guilty and convictions for one count of kidnapping, §565.110, RSMo 1986, in Cape Girardeau County, and one count of forcible rape, §566.030, RSMo 1986, in Bollinger County. Appellant was sentenced to thirty years in the custody of the Missouri Department of Corrections on the kidnapping count and a concurrent life sentence on the forcible rape count. Jurisdiction in this case is proper because this Court granted transfer in case no. SC85448 case after opinion by the Missouri Court of Appeals, Eastern District, and this Court granted transfer in case no. SC85552 prior to opinion by the Missouri Court of Appeals, Southern District, pursuant to Article V, §10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant Rubin Weeks, was charged by information with one count of kidnapping, §565.110, RSMo 1986, in the Circuit Court of Cape Girardeau County and one count of forcible rape, §566.030, RSMo 1986, one count of forcible sodomy, §566.060, RSMo 1986, and one count of armed criminal action, §571.015, RSMo 1986, in the Circuit Court of Bollinger County (E.D.L.F. 99-100, 114, 120; S.D.L.F. 51-53).[1]

On February 13, 1992, appellant appeared before the Honorable Stephen N. Limbaugh Jr. and entered a plea of guilty to the kidnapping and rape counts pursuant to a plea agreement (S.D.L.F. 17-18). In exchange for appellant's guilty pleas to kidnapping and rape, the prosecutors of Cape Girardeau and Bollinger Counties agreed to dismiss all other charges pending against appellant and to recommend that the sentences run concurrently (S.D.L.F. 32).

The Cape Girardeau County prosecutor described the facts of the case as follows:

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[1]For clarity, respondent will refer to the legal file in case no. SC85448 as "E.D.L.F." and the legal file in case no. SC85552 as "S.D.L.F.," reflecting the district of the Court of Appeals that these cases were transferred from.

This was a situation where the defendant and the twenty-one year old girl that he raped were complete strangers. He had seen her at her place of employment and had followed her as she was driving home just after midnight and the early morning hours of October 13th of 1991. As he was driving behind her, he flashed his lights seven or eight times, which caused her to pull over. She had her doors locked and her windows rolled up. He came up to the side of the car and had indicated to her that there was some trouble with a back taillight or some part of the back of her car. She rolled down her window enough to hear what he was saying, and the next thing she knew a hand with a butcher-type knife had come in and was slashing at her hands, which were on top of the steering wheel and cut her hands. He then was able to get the door open; took her out of the car; took her to his car, and started driving with her towards Bollinger County. While they were still in Cape County, he ordered her to take off her clothes, which she removed from the lower part of her body. He then performed an act of sodomy by putting his finger in her vagina while they were still in Cape Girardeau County and while he had the knife there under his leg as he was driving the car. She saw him cross the Bollinger County line into Bollinger County, and in Bollinger County they continued to a farm, where he took her near a barn

and raped her on a blanket and also performed various types of sodomy at that time too. Your Honor, then he went and took his belt and stood over he with his belt in his hands. She felt that he was considering strangling her. She felt that she was about to die. Instead he went to his car and got duct tape by which he used to tie her ankles and her knees and her hands, and he left her tied there in Bollinger County and drove off. She was able to get free and ultimately got to the authorities.

(S.D.L.F. 39-41).

In response to the plea court's questions, appellant admitted that he removed the victim in this case, J.B.,[2] from her car and took her without her consent for the purpose of terrorizing her or inflicting physical injury on her (S.D.L.F. 20). Appellant admitted that he had sexual relations with J.B. without her consent and through the use of force and that he threatened J.B. with a knife during the rape (S.D.L.F. 21). Appellant then stated that he was guilty, that he "did what [the

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[2]In light of the fact that this Court posts publicly briefs on the Internet, respondent will identify the victim by her initials in order to protect the victim's privacy.

prosecutors] say [he] did," and that everything in the charges was true and correct (S.D.L.F. 21-22).

Appellant stated that he understood that he was giving up his right to change of venue, his right to trial by jury, his right to present defenses to the charges, and his right to testify in his own behalf (S.D.L.F. 27-29). Appellant stated that he was satisfied with his attorney and that his attorney had done everything he had asked (S.D.L.F. 29-30). The plea court accepted appellant's pleas of guilty and sentenced him as a prior and persistent offender to thirty years on the kidnapping count and a concurrent life sentence on the rape count (S.D.L.F. 38, 46-47).

On October 3, 2001, appellant filed a post-conviction motion for forensic DNA testing in the Circuit Court of Cape Girardeau County (E.D.L.F. 15, 37-50). On January 30, 2002, appellant filed a post-conviction motion for forensic DNA testing in the Circuit Court of Bollinger County (S.D.L.F. 101-114). On April 1, 2002, the circuit court, the Honorable William L. Syler, denied both motions without an evidentiary hearing in one written judgment (E.D.L.F. 30-36; S.D.L.F. 139-144; Resp.App. at A15-A20).

Appellant Weeks appealed Judge Syler's ruling denying him DNA testing without an evidentiary hearing in the Cape Girardeau County case to the Missouri Court of Appeals, Eastern District, case no. ED81171. The Court of Appeals,

Eastern District, affirmed the circuit court's judgment. Weeks v. State, no. ED81171 (Mo.App., E.D. Apr. 15, 2003)(slip op.); Resp.App. at A21-A24. This Court granted transfer of the Eastern District case after opinion upon appellant's motion. Appellant Weeks appealed Judge Syler's ruling denying him DNA testing without an evidentiary hearing in the Bollinger County case to the Missouri Court of Appeals, Southern District, case no. SD 24944. This Court ordered the Southern District case transferred prior to opinion.

ARGUMENT

I. The circuit court did not clearly err in denying appellant's motion for post-conviction DNA testing without an evidentiary hearing and the appointment of counsel because appellant failed to comply with §547.035.2 in that appellant did not verify the motion.

Appellant's motions for DNA testing were nullities because appellant did not verify his motions. Section 547.035.2, RSMo Supp. 2001,[3] requires that "the motion must allege facts under oath" to show that he is entitled to DNA[4] testing. Appellant's motions for DNA testing under §547.035 are not verified. S.D.L.F. 101-115 (Bollinger County motion); E.D.L.F. 37-50 (Cape Girardeau County motion). Appellant does not include a notary's certification, the names of any witnesses, or even any statement that his pleadings are correct under penalty of

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[3]All further references to §547.035, RSMo. Supp. 2001, refer to the statute simply as §547.035.

[4]DNA is the commonly accepted abbreviation for deoxyribonucleic acid. For simplicity, respondent will use DNA exclusively in the remainder of this brief.

perjury. Appellant therefore has not complied with the plain language of the statute.

This Court has not previously addressed the oath requirement in §547.035.2. Respondent also cannot locate any decisions in which the Missouri Court of Appeals has addressed this precise issue. However, this Court has addressed this issue through analysis of the verification requirements formerly contained in Supreme Court Rules 29.15 and 24.035.

Prior to January 1, 1996, Rules 29.15(d) and 24.035(d) both contained a requirement that a *pro se* movant's motion under the rules be "verified." This Court determined that "'[v]erified,' as used in Rules 24.035 and 29.15, means that a declaration required by Rules 24.035(d) and 29.15(d) must be made in a manner that is supported by a movant's oath or affirmation." Crawford v. State, 834 S.W.2d 749, 752 (Mo. banc 1992). Therefore, verification in the Rule 29.15 context meant supported by an oath or affirmation. The language in §547.035.2 requires an oath. The verification requirements in Rules 29.15(d) and 24.035(d) therefore are identical to the oath requirement in §547.035.

In Crawford, this Court described precisely how a statement under oath in a motion was to be verified. This Court held that

> A movant [verifies his motion] by subscribing to the required declaration while in the presence of someone authorized by Missouri law to administer oaths and affirmations. Upon a movant making the required declaration on his oath or affirmation, the person authorized to administer oaths and affirmations must affix an acknowledgment that the declaration was subscribed and sworn to in his or her presence.

Crawford, 834 S.W.2d at 752. This Court stated that "someone authorized to administer oaths and affirmations" include "a notary public, a court, a judge, justice, or clerk of a court." Id., *citing* §§486.250, 442.150(1) and 442.155.1, RSMo 1986. The post-conviction relief motion in Crawford did not "reflect that it was supported by movant's oath or affirmation" and movant further did not present his motion to a notary public, a judge, or any other qualified official so that they could affix an acknowledgment. Crawford, 834 S.W.2d at 752. This Court therefore concluded that "[m]ovant's amended motion was not properly verified. It was a nullity and presented nothing for the motion court to consider." Id.

Appellant Weeks' motions in the instant case do not materially differ from the facts in Crawford. Appellant Weeks did not present his motions to a notary public, a court, a judge, or a clerk of court. Appellant Weeks' motions do not contain an acknowledgment by any official authorized to receive oaths that appellant

subscribed to the truth of the facts in the motion in that official's presence. Appellant's motions therefore were not filed under oath or verified. Therefore, just as in Crawford, appellant Weeks' motion were a nullity that left nothing for the circuit court to consider. The verification issue is properly raised for the

This Court has eliminated the verification requirements in Rules 29.15 and 24.035. However, the change to Rule 29.15 and 24.035 does not affect this case. This Court explained that the rules were changed because in the Rule 29.15 and Rule 24.035 settings, appointed counsel is required to file an amended motion that contains all of appellant's claims. State v. White, 873 S.W.2d 590, 594 (Mo. banc 1994). A *pro se* post-conviction motion, in contrast, "need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." White, *supra*, *quoting* Bullard v. State, 853 S.W.2d 921, 922 (Mo. banc 1993). Thus, this Court held in White that the amended motion, because it actually was the legal document containing the movant's claims, needed to be verified, while the *pro se* motion did not.[5]

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[5]The current Rule 29.15(d) and Rule 24.035(d) do not require that the amended motion be verified.

Motions under §547.035 are different then motions under Rules 29.15 and 24.035 because no amended motion is filed under §547.035. The first *pro se* motion is the only motion that the circuit court relies on to issue a show cause order and to grant an evidentiary hearing. *See* §§547.035.5 and 547.035.6. Thus, the reasons that led this Court in White to lessen the verification standards for Rule 29.15 and Rule 24.035 proceedings because of the amended motion have no application to a proceeding under §547.035. The oath requirement of §547.035.2 ensures that the declarations in the motion are truthful.

Finally, the argument that appellant did not verify his motion is properly before this Court. The lack of verification made appellant's motions under §547.035 nullities. Crawford, 834 S.W.2d at 752. A lack of verification deprives the circuit court of jurisdiction. Kilgore v. State, 791 S.W.2d 393, 395 (Mo. banc 1990); Malone v. State, 798 S.W.2d 149, 151 (Mo. banc 1990). Jurisdictional issues are properly raised for the first time on appeal. Malone, *supra* ("Though the State challenged the motion's want of verification for the first time on appeal, such does not preclude consideration of the issue"). This issue is therefore properly before this Court for the first time on appeal.

For these reasons, appellant Weeks' motions under §547.035 were not under oath and were a nullity, leaving nothing for the circuit court, or this Court, to review. Therefore, this Court should decide this case in favor of the respondent.

II. The circuit court properly denied appellant's motions for DNA testing under §547.035 without an evidentiary hearing and the appointment of counsel because appellant did not plead sufficient facts to support his claim in that he plead only the conclusions that identity was an issue at trial, and that the technology for the testing was not reasonably available to the movant at the time of the trial. (Responds to portions of Points II, III, and IV in appellant's brief.)

Even if this Court chooses to overlook the fact that appellant did not verify his motion with an oath, this Court should still affirm the circuit court's judgment because appellant did not plead sufficient facts, as opposed to conclusions, that would entitle him to DNA testing.

A. Standard of Review

The standard of review of the denial of a post-conviction motion under §547.035, RSMo Supp. 2001, is clear error. Snowdell v. State, 90 S.W.3d 512, 514 (Mo.App., E.D. 2002). "[This] Court will review the motion court's overruling of a post- conviction relief motion only to determine whether the findings and conclusions are clearly erroneous." State v. Brown, 998 S.W.2d 531, 550 (Mo. banc), *cert. denied* 528 U.S. 979 (1999).

B. Factual background

In his motions for DNA testing under §547.035, appellant stated as follows regarding DNA testing:

A

1. This court [the plea court] did pass judgment and sentence upon Ruben Weeks on February 13, 1992 in these two cases number CR591-1115FX Cape Girardeau County case "Kidnapping" and number CR291-22FX Bollinger County case "Rape." By this court being the sentencing court and under new Supreme Court Rule 29.17, this Court now has jurisdiction to hear and set movant free from unlawful imprisonment. *****

2. The movant has never before been given an evidentiary hearing where he may show and support his claim of actual innocence with evidence. That being, DNA, blood, saliva, semen, and hair. This forensic evidence will show that movant did not commit the rape and kidnapping for which he was convicted. Along with a number of eyewitnesses which will show the movant was in the state of Mississippi on the date and time of the alleged crime had taken place. Identity was an issue in the case. See Weeks v. Bowersox cite at 119 F.3d 1342(8th circuit 1997). Attached Exhibit C.

B

1. There is evidence upon which DNA testing can be conducted in movant's case and the evidence was secured in relation to the crime by the prosecutors handling the movant's case and the Cape Girardeau County Missouri Sheriff's Department, and the Missouri State Crime Forensic Laboratory.

2. The technology for the testing was not reasonably available to the movant at the time he was before the trial court. See the following facts to support movant's claim of actual innocence.

S.D.L.F. at 101-02; E.D.L.F. at 37-38; Resp.App. at A1-A2. The remainder of the motion consisted of a statement of the case, S.D.L.F. at 102-05, E.D.L.F. at 38-41, Resp. App. at A2-A5, a section asserting that appellant's guilty plea was unconstitutional because appellant was not competent to plead guilty, S.D.L.F. at 105-110, E.D.L.F. at 41-46, Resp.App. at A5-A10, and a section asserting that appellant is "actually innocent" and that he can assert procedurally barred claims under Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), S.D.L.F. at 110-113, E.D.L.F. at 46-49, Resp. App. at A10-A13. Appellant in his prayer for relief asked the circuit court to set aside appellant's sentences, order a new trial, or order appellant discharged. S.D.L.F. at 113, E.D.L.F. at 49, Resp.App. at A13. Appellant listed the evidence to be tested, specifically the "rape

kit," in his motion in the "actual innocence" section. *See* S.D.L.F. at 111, E.D.L.F. at 47, Resp.App at A11.

C. §547.035 requires that a movant plead specific facts

In order to be entitled to an evidentiary hearing under §547.035, a movant 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.

§547.035.2, RSMo Supp. 2001. A court may appoint counsel only if the circuit court orders an evidentiary hearing. §547.035.6.

Appellant Weeks has pled sufficient facts relating to subsections one and two: that the rape kit from the victim, obtained in the investigation of appellant's crimes, can be tested for DNA evidence. S.D.L.F. at 111; E.D.L.F. at 47. However, appellant Weeks did not plead sufficient facts in relation to subsections 3 and 4. With regard to subsection 3, appellant simply pled that "[t]he technology for the testing was not reasonably available to the movant at the time he was before the trial court." S.D.L.F. at 102; E.D.L.F. at 38. With regard to subsection 4, appellant merely pled that "[i]dentity was an issue in the case." Id. Appellant did not plead any other facts in his motion relating to subsections 3 and 4.

With regard to subsections 3 and 4, appellant has pled bare conclusions, not facts, in order to support his motion. Section 547.035.2 requires that a movant plead facts, not conclusions, that warrant relief. This Court has been very specific that Missouri is a fact-pleading state. State v. Harris, 870 S.W.2d 798, 815 (Mo. banc), *cert. denied* 513 U.S. 953 (1994). In the context of post-conviction motions under Supreme Court Rule 29.15, this Court has explained the need to plead facts and a prohibition against inferring facts from the petition by stating that "[t]he 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." White v. State, 939 S.W.2d 887, 893 (Mo. banc 1997), *cert. denied* 522 U.S. 948 (1997).

This Court in White then explained at length why fact pleading, especially in the Rule 29.15 context, is so essential to the judicial process. This Court stated that post-conviction motions are different than other pleadings because they are "a collateral attack on a final judgment of a court." White, 939 S.W.2d at 893. This Court explained that the policy of hearing post-conviction claims that present a "genuine injustice" must be balanced against the policy of bringing finality to the criminal process. Id. Therefore, "[r]equiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality." Id.

This Court stated the price of not requiring specific factual pleadings: "Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings." Id. Therefore, this Court established the familiar standard that in order to be entitled to an evidentiary hearing, "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not

refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant." Id., *quoting* State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). Therefore, requiring fact pleading in the Rule 29.15 setting is necessary in order to bring finality to the judicial process and ensure that judicial resources are spent on claims that actually require a hearing, not on vague claims that if properly pled would spare the courts and counsel time and energy.

The policy reasons that this Court identified in White for requiring fact-specific pleadings in a Rule 29.15 motion for post-conviction relief are equally valid in the context of a motion under §547.035 for post-conviction relief. Motions for forensic DNA testing under §547.035, like Rule 29.15 motions, present a collateral attack on the final judgment of a criminal court. Moreover, motions under §547.035, like Rule 29.15 motions, may lead to hearings on vague claims that turn out, after an evidentiary hearing, to be without any basis in law or fact. For example, a motion under §547.035, pled only with bare-bones assertions and illusory conclusions, may turn out, after an evidentiary hearing and the appointment of counsel, to show that no DNA evidence exists to be tested, that the DNA evidence the movant wants tested relates to other crimes for which the movant was not charged and not the crime at issue, that movant's trial counsel decided against DNA testing as a matter of trial strategy, that the parties stipulated

at trial that the movant performed the acts what disagreed as to the legal significance of the acts, or that the evidence against movant was overwhelming. A hearing in a case such as that would serve no interests. Hearings based upon pleadings not alleging sufficient facts, as in this hypothetical case, compromise the criminal justice system by using already strained judicial resources to investigate vague and illusory claims. Therefore, evidentiary hearings should not be granted, and the post-conviction relief motion under §547.035 denied, if a movant has not pled specific facts entitling him to relief as laid out in §547.035.2.

D. Appellant did not plead specific facts related to identity

Appellant did not plead specific facts, as opposed to legal conclusions, demonstrating that identity was an issue at trial under §547.035.2(4). Appellant's pleading with regard to identity was contained in one sentence: "Identity was an issue in the case." S.D.L.F. at 102; E.D.L.F. at 38. This statement is a legal conclusion, not a fact. A post-conviction movant must plead facts, not conclusions. White, 939 S.W.2d at 893; Maynard v. State, 87 S.W.3d 865, 866 (Mo. banc 2002). Appellant Weeks did not plead any facts whatsoever to support his conclusion. Appellant cannot overcome the fact that he did not plead facts because "[a] Rule 29.15 motion, however, 'is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer

for relief.'" Hatcher v. State, 4 S.W.3d 145, 150-51 (Mo.App., S.D. 1999), *quoting* White, 939 S.W.2d at 893. Appellant did not plead facts showing that identity was at issue in the trial. The circuit court therefore properly denied the motions without an evidentiary hearing and the appointment of counsel. This claim is also refuted by the record as discussed in section III.D of this brief.

E. Appellant did not plead facts showing that DNA testing was unavailable to him at the time of trial

Section 547.035.2(3)(a) requires that a movant plead facts that show that DNA testing was not reasonably available to a movant at the time of trial. In his motions, appellant plead, again in one sentence, that "the technology for the testing was not reasonably available to the movant at the time he was before the trial court." S.D.L.F. at 102; E.D.L.F. at 38. Appellant, as with the issue of identity, thus pled only a bare conclusion. A post-conviction movant must plead facts, not conclusions, that would entitle him to relief. White, *supra*; Maynard, *supra*; Hatcher, *supra*. Appellant pled no facts in support of his conclusion in his post-conviction relief motion. Therefore, the circuit court properly denied his motions. This claim is also refuted by the record as discussed in section III.E of this brief.

Appellant attempts to remedy his error by introducing evidence in the form of affidavits to this Court in his "Supplemental Legal File 3" that was never provided

to the circuit court. Respondent has previously objected to the filing of the proposed legal file, and renews its objection at this time. In any case, appellant is bound by his presentation of evidence, or lack thereof, to the circuit court. State v. Tokar, 918 S.W.2d 753, 762 (Mo. banc), *cert. denied* 519 U.S. 933 (1996). This Court has ruled that "a party may not supplement the record with documents never presented to the trial court and to which the opposing party has had no opportunity to respond." Id. Therefore, appellant cannot rely on the affidavits in his supplemental legal file to support his claim for the first time on appeal.

F. Appellant waived his claim that the February 12, 1992, laboratory report would have exonerated him

In a related vein, appellant contends that a laboratory report dated February 12, 1992, would have exonerated him. App.Br. at 38-45. However, appellant did not raise the factual claim that the February 12, 1992, laboratory report would have cleared him in the motion court. In fact, appellant never mentioned the February 12, 1992, laboratory report in his §547.035 motions. S.D.L.F. at 101-114; E.D.L.F. at 37-50. As demonstrated in the previous section, appellant is bound by his presentation of evidence, or lack thereof, to the circuit court. Tokar, *supra*. Appellant in this Court cannot rely on documents never presented to the circuit court. Id. Therefore, as appellant did not plead the factual basis for this claim in

the circuit court, he has waived this claim. Further, as discussed in section III.F of this brief, the report does not exonerate appellant.

Claims not raised in a post-conviction motion but that are raised on appeal are waived. State v. Harris, 870 S.W.2d 798, 815 (Mo. banc 1994), *cert. denied* 513 U.S. 953 (1994); State v. Clay, 975 S.W.3d 121, 141 (Mo. banc 1998), *cert. denied* 525 U.S. 1085 (1999)(analysis under Supreme Court Rule 29.15). Appellant did not raise the facts supporting this claim, or even this claim, in his motion in the circuit court. *See* S.D.L.F. at 110-128). Appellant therefore has waived this claim, and this Court should not consider the merits of this claim. This claim is also refuted by the record as discussed in section III.F of this brief.

G. Conclusion

Appellant Weeks in the case at bar has pled only bare conclusions as to subsections 3 and 4 of §547.035. An evidentiary hearing in this case was not required because appellant Weeks has failed to plead facts, not conclusions, which would have entitled him to relief. The circuit court therefore properly denied appellant's motions without an evidentiary hearing.

III. The circuit court did not clearly err in denying appellant's post-conviction motions under §547.035 for forensic DNA testing without an evidentiary hearing and the appointment of counsel because appellant was not entitled to an evidentiary hearing in that his claim were refuted by the files and records of the case.

(Responds to Point I, and portions of Points II, III, and IV in appellant's brief.)

Even if this Court overlooks appellant's failure to verify his motion and his failure to plead sufficient facts that would entitled him to relief, appellant's claim was properly denied without an evidentiary hearing because the files and records of the case completely refute appellant's claims.

A. Standard of Review

The standard of review of the denial of a post-conviction motion under §547.035, RSMo Supp. 2001, is clear error. Snowdell v. State, 90 S.W.3d 512, 514 (Mo.App., E.D. 2002). "[This] Court will review the motion court's overruling of a post- conviction relief motion only to determine whether the findings and conclusions are clearly erroneous." State v. Brown, 998 S.W.2d 531, 550 (Mo. banc), *cert. denied* 528 U.S. 979 (1999).

B. The circuit court's ruling

The circuit court decided this issue as follows:

4. Supreme Court Rule 29.17(f) [§547.035.6] requires the Court to deny a request for DNA testing without a hearing if the Court finds "that the motion and files and records of the case conclusively show that the movant is not entitled to relief."

5. The files and records of the case conclusively show that the Movant has failed to demonstrate that the technology for the DNA testing was not reasonably available to the Movant at the time of the "trial." Rule 29.17(b)(3)(A). [§547.035.2(3)(a)] In fact, the affidavit for a search warrant to seize a sample of the Movant's blood on January 3, 1992, specifically stated that C.R. Longwell of the Southeast Missouri Regional Crime Laboratory had been trained by the FBI in DNA testing and that the biological samples on the vaginal smear and crotch of the pants could be tested for comparison to the Movant's blood sample (Notice of Disclosure in Court file, page 231). This is not a situation, envisioned by the drafters of Rule 29.17, where the capability for doing DNA testing only came about long after the defendant's trial. It is clear that such technology was reasonably available to the Movant.

6. The files and records of the case conclusively show that the Movant has failed to demonstrate that neither the Movant nor his counsel was aware of the existence of "evidence upon which DNA testing can be conducted" at the time of trial. Rule 29.17(b)(3)(B) [§547.035.2(3)(b)] In fact, the references to the blood sample being drawn for purposes of DNA testing were included in the police reports which were supplied to the defense and the Court as a part of the Notice of Disclosure (Notice of Disclosure in Court file, pages 228, 231). This is not a situation where the defense was not aware of the "existence of the evidence upon which DNA testing can be conducted."

7. The files and the records of the case conclusively show that the Movant has failed to demonstrate that the "evidence upon which DNA testing can be conducted" was unavailable to both the Movant and Movant's counsel at the time of trial. Rule 29.17(b)(3)(C) [§547.035.2(3)(c)]. In fact, such evidence had specifically been described in the police reports and lab reports (Notice of Disclosure in Court file, pages 212-216, 228, 231).

8. The files and the records of the case conclusively show that the Movant has failed to demonstrate that "identity was an issue in the trial." Rule 29.17(b)(4) [§547.035.2(4)]. In fact, there was no trial. The defendant

pled guilty to the crimes, admitting under oath his identity as the kidnapper and rapist. Identity was thus no longer an issue once he pled guilty.

9. The files and the records of the case conclusively show that the Movant has failed to demonstrate that "a reasonable probability exists that the Movant would not have been convicted if exculpatory results had been obtained through DNA testing." Rule 29.17(b)(6) [§547.035.2(5)]. The evidence in the case was overwhelming. The victim had picked the defendant out of a photo lineup and had "no doubt" that he was her rapist (Notice of Disclosure in Court file, page 182). The Movant, who was from the State of Mississippi, had been placed at the motel in Jackson, Missouri, where the victim worked, on the very day of the rape by statements of his family members, including even his wife, who had been traveling with him (Notice of Disclosure in Court file, page 164). The Movant gave full and detailed confessions to the crime, both in writing and on tape. He confessed to Mississippi authorities immediately after his arrest (Notice of Disclosure in Court file, pages 150-163). He later confessed to Cape Girardeau County investigators (Notice of Disclosure in Court file, pages 192-193, 201). The defendant admitted that after raping the victim, he had stolen one of her husband's payroll checks from her purse (Notice of Disclosure in Court file,

page 162). He was subsequently identified by a convenience store clerk at Sikeston, Missouri, as the man who had cashed the payroll check shortly after the rape (Notice of Disclosure in Court file, pages 186-190). The evidence against him was so overwhelming that even a failure to match his DNA to any samples taken from the victim would not be expected to change the results of a trial, particularly since the victim, a married woman, had told investigators that he rapist had not ejaculated (Notice of Disclosure in Court file, page 22).

S.D.L.F. at 141-44; E.D.L.F. at 33-36.

C. Legal requirements for an evidentiary hearing and the appointment of counsel under §547.035

The circuit court properly denied appellant an evidentiary hearing and the appointment of counsel on his §547.035 motion because appellant's claims are refuted by the files and records of his criminal case. In order to receive an evidentiary hearing under §547.035, a movant must allege facts under oath that demonstrate:

(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, RSMo Supp. 2001. If the circuit court determines that "the files and records of the case conclusively show that the movant is not entitled to relief, a hearing shall not be held." §547.035.6. A court may appoint counsel only if the circuit court orders an evidentiary hearing. §547.035.6. In the case at bar, appellant's claim fails because his allegations as to subsections (3), (4), and (5) are refuted by the files and records of his case. Therefore, the circuit court properly denied an evidentiary hearing.

D. Appellant's claim that identity was an issue at trial is refuted by the fact that he plead guilty

1. Identity is not an issue when a defendant pleads guilty and admits his guilt

In order to gain relief, §547.035.2(4) requires that identity be an issue at trial. However, in appellant's case, appellant plead guilty and admitted his guilt. Therefore, a trial never occurred in appellant's case. Identiy cannot be an issue in a trial which did not occur.

Furthermore, identity is an issue peculiarly for reserved for trial. When identity is at issue, the fact-finder, whether jury or judge, decides if a criminal defendant actually committed the charged crime. However, identity is never contested in a guilty plea because the defendant admits to committing the crime.[6] Identity therefore is not an issue in a case after a guilty plea is entered.

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[6]Respondent recognizes that a defendant may plead guilty and yet maintain his innocence. *See* North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). However, even if an Alford plea would require a different analysis under §547.035 then respondent suggests in the case at bar, this Court need not to address that situation in this case because appellant did not enter an Alford plea in the underlying criminal case.

A basic concept of criminal law is that a criminal defendant admits his guilt when he enters a guilty plea. *See* McMann v. Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged"). This Court has repeatedly held that "[a] plea of guilty voluntarily and understandingly made is conclusive as to the guilt of the accused, admits all of the facts charged, and waives all nonjurisdictional defects in the prior proceedings." Robinson v. State, 491 S.W.2d 314, 315 (Mo. 1973); Simpson v. State, 487 S.W.2d 512, 513 (Mo. 1972); Pauley v. State, 487 S.W.2d 565, 566 (Mo. 1972); Geren v. State, 473 S.W.2d 704, 707 (Mo. 1971). The Missouri Court of Appeals applies a similar standard, holding that "a 'plea of guilty is an admission of the facts alleged in the information.'" Goings v. State, 1 S.W.3d 600, 601 (Mo.App., S.D. 1999), *quoting* Bishop v. State, 969 S.W.2d 366, 367 (Mo.App., S.D. 1998), *quoting* Pelton v. State, 831 S.W.2d 651, 653 (Mo.App., W.D. 1992). Therefore, if a criminal defendant enters a knowing and voluntary plea, he admits to every element of the charged crime and identifies himself as the perpetrator of the crime. All questions regarding identity are then closed because the question of identity has been answered definitively by the defendant himself.

A knowing and voluntary plea in which a defendant admits his guilt therefore precludes identity being at issue in that defendant's case.

2. Appellant knowingly and voluntarily admitted his guilt when he pled guilty

As previously shown, as a general principle, a guilty plea is a bar to receiving and evidentiary hearing or DNA testing under §547.035. Additionally, in this case, appellant confessed that he committed the crimes he pled guilty to in open court. The guilty plea transcript reveals that appellant admitted committing the crimes for which he was convicted. The transcript reads as follows:

> Q. [The Court] Let me ask you about these charges. First, from the Cape Girardeau County case.
>
> [Cape Girardeau County Prosecutor] Your Honor, In the Cape Girardeau County case, he is pleading to Count I, which is kidnapping, and in the Bollinger County case, he is pleading to Count II, which is rape.
>
> Q. [The Court] Okay, in Count I, did you on October 13 of last year unlawfully remove [J.B.], without her consent, from her car on County Road 350, which was about approximately 150 yards from the intersection of County Road 350 and Highway 72?
>
> A. [Appellant] Yes.

[Appellant's Attorney] Judge, he wouldn't know where the roads were, but the act he would.

Q. You admit that's true then?

A. Yes.

Q. That was the location where you were found–or that you found [J.B.], is that right?

A. Yes.

Q. And then did you take her, without her consent, for the purpose of terrorizing her or inflicting some kind of physical injury on her?

A. Yes.

Q. Okay, then let's go to the Bollinger County case. Mr. Hahn?

[Bollinger County prosecutor] Yes, Your Honor, he is to plead under the plea agreement to Count II, being a Class A Felony of forcible rape.

THE COURT: All right.

Q. Let me ask you, on Count II, in the Bollinger County case, did you also on October 13th of last year, and that would be in Bollinger County, whereas the other was in Cape County, in Bollinger County did you have sexual intercourse with [J.B.]?

A. Yes.

Q. And that was without her consent?

A. Yes.

Q. And did you also display a deadly weapon in a threatening manner?

A. Yes.

Q. What was that weapon?

A. A knife.

Q. A knife, okay. Well, what did you do? Tell me in your own words what happened about these two crimes, one in Cape Girardeau County and one in Bollinger County, that makes you think you are guilty?

A. Because I am guilty.

Q. I understand, but tell me in your own words what happened on these two charges that makes you think that you are guilty of the crime?

A. Because I did what they say I did.

Q. So everything in those charges was true and correct?

A. Yes.

Q. No question about that?

A. No, sir.

S.D.L.F. 20-22. Appellant thus clearly admitted, in open court, that he committed the rape and kidnapping crimes for which he was convicted. Appellant cannot now

claim that the identity of the criminal was at issue when he admitted that he committed the crimes.

Appellant, as demonstrated in the guilty plea transcript, pled guilty and admitted that he committed the crimes at issue. S.D.L.F. at 20-22. Appellant admitted the identity of the perpetrator was appellant himself. Under this Court's precedent, appellant's plea of guilty and admissions are conclusive to appellant's guilt and admit all of the facts charged. Robinson, *supra*; Simpson, *supra*; Pauley, *supra*; Geren, *supra*. Appellant's identity therefore was not an issue at trial because appellant admitted that he committed the crimes at issue in his guilty plea. As appellant therefore cannot show that identity was not an issue at trial, appellant was not entitled to an evidentiary hearing or the appointment of counsel on his §547.035 motion. Appellant's claim therefore fails.

Appellant attempts to sidestep the fact that he admitted his guilt in open court through several arguments. First, appellant argues that identity was an issue because that the police, the prosecutor, and the crime lab continued working on the case after appellant had confessed to police in Mississippi and Missouri. App.Br. at 51-52. However, whether or not the police continued working on the case after appellant confessed (but prior to his guilty plea) is irrelevant. The police and the prosecutors were preparing for a full trial up to the time that appellant chose to

plead guilty and admit, in open court, that he committed the crimes. The police and prosecutors were trying to build a complete case independent of appellant's confessions, perhaps in case the trial court determined that the confessions could not be admitted into evidence. In any case, as shown above, the crucial confession that appellant gave was during his guilty plea in open court in which he admitted that he committed the crimes of kidnapping and forcible rape. Appellant's argument is meritless.

Second, appellant also attacks his plea as "weak and equivocal," App.Br. 52-54, and asserts that appellant's plea counsel told the plea court that appellant's plea was weak, App.Br. 54. Again, appellant misses the point. In response to the plea court's questions, appellant stated that he committed the crimes at issue. An admission of guilt, strong or weak, is an admission of guilt. Further, appellant's guilty plea itself is conclusive to appellant's guilt and admits all of the facts charged, including identity. Robinson, *supra*; Simpson, *supra*; Pauley, *supra*; Geren, *supra*.

With regard to appellant's plea counsel's statement that appellant understood he was pleading guilty was not happy with the situation, S.D.L.F. 35, the record shows that the plea court promptly asked about the voluntary nature of appellant's

plea. Specifically, the transcript reveals the following interchanges between the plea court and appellant:

> Q. I just want to make sure, Mr. Weeks, because you are taking these medications, that for some reasons they cause you to be pleading guilty even though you don't want to; so are you telling me they don't have any effect on you about your willingness to plead guilty?
>
> A. No, sir.
>
> *******
>
> Q. And you know what you're doing?
>
> A. Yes.
>
> Q. No question about that?
>
> A. No.
>
> Q. You are sure this is what you want to do?
>
> A. Yes.

S.D.L.F. 35-36. Therefore, the plea court ensured that appellant wanted to plead guilty. Further, as discussed above, appellant admitted his guilt when he pled guilty. Appellant's contention is meritless.

Third, and finally, appellant also attacks his guilty plea as unknowing and involuntary. App.Br. 55-62. Appellant's attack on his plea implicates the Sixth

Amendment to the United States Constitution and therefore is a constitutional challenge to his plea. However, appellant cannot attack the constitutionality of his plea collaterally in a motion under §547.035. The exclusive remedy in Missouri to challenge the constitutionality of a guilty plea is through Supreme Court Rule 24.035. Supreme Court Rule 24.035(a). Therefore, appellant's challenge to the constitutionality of his guilty plea is not appropriate in this action, and appellant's argument thus fails.

3. A guilty plea in open court waives a defense of innocence

Appellant ignores the basis truth that a guilty plea, in most cases, admits guilt and that appellant himself admitted his guilt in open court. Appellant instead argues that defendants who plead guilty are entitled to DNA testing to show their actual innocence because there is a problem in this country with "conviction of the innocent." App.Br. at 21. The *amicus* brief in this case continues that theme, arguing exclusively that the denial of DNA testing to people who have admitted their guilt and pled guilty is not fair because identity still may be an issue. *Amicus* Br. at 9.

Appellant and *amici* fail to recognize that a guilty plea constitutes a choice for the accused. Guilty pleas are not forced on any criminal defendant. In many cases, a guilty plea is a recognition by the defendant that he will receive a more

favorable sentence by admitting his guilt without a trial than he would receive after a trial. In fact, the United States Supreme Court has recognized that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to a prisons sentence even if he is unwilling or unable to admit his participation in the cases constituting the crime." North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Persons who plead guilty either admit their actual guilt or admit that the State has sufficient evidence to convict them and that a trial would be counter-productive, if not disastrous, in terms of sentencing. Pleading guilty is an informed choice, and a criminal defendant should not be able to renege on his choice to admit guilt by claiming that he really didn't do it. As §547.035 recognizes, actual innocence is a subject for trial, not the ability to retract an admission of guilt.

Further, the *amicus* brief does not address that fact that appellant did not verify his petition. The amicus brief does not address the fact that appellant failed to plead facts, not conclusions, that would entitled him to relief. Most glaringly, the *amicus* brief does not refer specifically to appellant's case and does not offer any specific reasons why appellant himself is entitled to DNA testing.

The *amici* base their arguments almost exclusively on newspaper articles, law review articles, Internet sites, and, most tellingly, on a law review article that is not

yet published and which *amici* have not presented to this Court nor counsel for respondent. *Amici* invite this Court to consider substantial numbers of documents in the form of law review articles, published and unpublished, Internet sites, and newspaper articles, that were not before the circuit court and were not admitted into evidence. Most, if not all, of this evidence is hearsay, and "[m]ere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it." Ramdass v. Angelone, 530 U.S. 156, 172, 120 S.Ct. 2113, 2123, 147 L.Ed.2d 125 (2000) (plurality op.). The admissibility and weight of the sources and positions advocated by *amici* are best considered and resolved by the circuit court, not this Court in the first instance. The *amicus* brief therefore is not helpful in this case.

For all of the above reasons, appellant's claim that the circuit court clearly erred in denying his §547.035 motion without an evidentiary hearing because appellant's identity was at issue must fail.

E. Appellant's claim that DNA testing was not reasonably available to him or his plea counsel is refuted by the record

As shown in section II.E. of this brief, appellant failed to plead facts to support his claim in the circuit court. Appellant's claim further is refuted by the record. §547.035.2 requires that a movant show that the DNA testing technology was not

available at "the time of the trial," that movant and his "trial counsel" were not aware of the evidence "at the time of the trial," and that the evidence was not otherwise available to movant and his "trial counsel" "at the time of trial." However, if a criminal defendant chooses to plead guilty, no trial is held. If no trial is held, the phrase "at the time of trial" loses any reasonable meaning because no such time exists. Subsection (3) thus would lose its plain, ordinary, meaning if an actual trial is not a prerequisite. Thus, if a trial was not held, a movant cannot satisfy the requirements of subsection (3). The records in appellant's case clearly indicate that no trial was held because appellant pled guilty in open court. Therefore, there was no "time of trial," and appellant's claim cannot prevail.

Further, appellant's claim fails because DNA testing was reasonably available at the time of appellant's guilty plea. This Court recognized in State v. Davis, 814 S.W.2d 593, 598-603 (Mo. banc 1991), *cert. denied* 502 U.S. 1047 (1992) that DNA testing using the RFLP (restriction fragmentation length polymorphism) was admissible in Missouri courts. The trial in Davis occurred in 1989. Davis, 814 S.W.3d at 698. This Court in Davis noted that two companies, Cellmark Diagnostics and Lifecodes, processed DNA samples at that time. Id. at 599, n.4. , The Florida Court of Appeals in State v. Andrews, 533 So.2d 841, 847-48 (Fla.Ct.App. 1988), the first United States decision to admit DNA evidence, noted

that DNA testing had been available for approximately ten years prior to trial in that case, or since 1978. DNA testing thus had been a standard in the scientific community for thirteen years prior to appellant's guilty plea. DNA testing was an accepted procedure before and at the time of appellant's guilty plea. Appellant presented no evidence to the contrary in the motion court. Therefore, appellant's claim must fail because he reasonably, through counsel, had access to Cellmark and Lifecodes, and thus access to DNA testing at the time of his guilty plea.

F. Appellant's claim that a February 12, 1992, DNA test would have exonerated him is refuted by the record.

Appellant relies heavily on the February 12, 1992, lab report from the Southeast Missouri Regional Crime Laboratory (SEMO) to establish his innocence. *See* Supp. L.F. 3 at 2-4. Respondent renews its objections to the affidavits and exhibits in this legal file that were not presented to the circuit court. *See* State v. Tokar, 918 S.W.2d 753, 762 (Mo. banc), *cert. denied* 519 U.S. 933 (1996) ("a party may not supplement the record with documents never presented to the trial court and to which the opposing party has had no opportunity to respond").

The SEMO crime lab report does not exonerate appellant. To the contrary, the report states that appellant Weeks "can not be eliminated from the population that could have deposited the seminal fluid in the slacks in item 28A." Supp. L.F. 3 at

3. The report also states that appellant Weeks "cannot be eliminated from the population that could have shed the blood found on items 2left [victim's left shoe], 6 [cotton-tipped swab containing blood from victim's car], 7 [bloody fingerprint from victim's car door], 17 [blood on Q-tip from top rail of gate at barn], 18 [foil wrapper with possible blood found outside the gate at the barn], 19 [victim's coat], 23 (handle and blade) [knife used in the rape], 25 [duct tape], 26 [victim's belt], 27 [victim's pantyhose], and 31 [duct tape from the victim's right ankle]." Proposed Supp. L.F. 3 at 3; *compare* Supp. L.F. at 181-82, 186-187 (evidence lists). This report, far from exonerating appellant, does not and cannot exclude appellant from the class of people who could have committed this crime. Appellant's assertions to the contrary are not accurate.

Further, appellant's claim of prosecutorial misconduct is not cognizable under §547.035. Appellant devotes a large portion of his argument to a theory that the prosecutor violated his duty to disclose exculpatory information to the defense under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See, for example,* App.Br. at 34-35 ("Missouri defendants have been allowed to withdraw their pleas when less exculpatory and far less reliable evidence has not been disclosed to them prior to their pleas.") However, appellant's Brady challenge does not go to his motions for DNA testing under §547.035 but instead

attacks his plea of guilty and his sentence as violative of the Fourteenth Amendment. Appellant cannot attack the constitutionality of his plea collaterally in a motion under §547.035. The exclusive remedy in Missouri to challenge the constitutionality of a guilty plea is through Supreme Court Rule 24.035. Supreme Court Rule 24.035(a). Therefore, appellant's challenge to the constitutionality of his guilty plea is not appropriate in this action, and appellant's argument thus fails.

G. Appellant's claim of actual innocence is refuted by the record

The motion court made specific findings that established appellant's guilt in this case. Section 547.035.2(5) requires a movant to demonstrate that "[a] reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing." The motion court's findings, quoted verbatim, with their support in the record, are as follows:

1. The victim had picked [appellant] out of a photo lineup and had "no doubt" that he was her rapist. [Supp.L.F. at 182.]
2. [Appellant], who was from the State of Mississippi, had been placed at the motel in Jackson, Missouri, where the victim worked, on the very day of the rape by statements of his family members, including even his wife, who had been traveling with him. [Supp.L.F. at 164.]

3. [Appellant] gave full and detailed confessions to the crime, both in writing and on tape. He confessed to Mississippi authorities immediately after his arrest.]Supp.L.F. 150-163.] He later confessed to Cape Girardeau County investigators. [Supp.L.F. 192-193, 201.]

4. [Appellant] admitted that after raping the victim, he had stolen one of her husband's payroll checks from her purse. [SuppL.F. 162.]

5. [Appellant] was subsequently identified by a convenience store clerk at Sikeston, Missouri, as the man who had cashed the payroll check shortly after the rape. Supp.L.F. at 186-190.

6. The evidence against [appellant] was so overwhelming that even a failure to match his DNA to any samples taken from the victim would not be expected to change the results of a trial, particularly since the victim, a married woman, had told investigators that he rapist had not ejaculated. [Supp.L.F. 22.]

S.D.L.F. at 143-44; E.D.L.F. at 35-36.

This evidence has substantial support in the circuit court's records and files. First, as previously noted in this brief, appellant had already pled guilty and thus admitted his guilt as to all elements of the crime. This Court has repeatedly held that "[a] plea of guilty voluntarily and understandingly made is conclusive as to the

guilt of the accused, admits all of the facts charged, and waives all nonjurisdictional defects in the prior proceedings." *See* Robinson v. State, 491 S.W.2d 314, 315 (Mo. 1973); Simpson v. State, 487 S.W.2d 512, 513 (Mo. 1972); Pauley v. State, 487 S.W.2d 565, 566 (Mo. 1972); Geren v. State, 473 S.W.2d 704, 707 (Mo. 1971). Appellant's admission of guilt through his plea of guilty was conclusive evidence in the court files that appellant was guilty.

Next, the court records showed that appellant did not ejaculate when he raped the victim. If the appellant did not ejaculate, the DNA evidence from the rape kit in the form of sperm could not possibly have pointed to appellant because appellant's DNA would not have been inside the victim in the form of sperm.

Further, appellant repeatedly confessed to the police. Appellant confessed that he had committed the crimes at issue in this case to two investigators from the Mississippi Department of Public Safety on October 13, 1991. Supp.L.F. 151. Appellant again confessed to the crimes he pled guilty to the Mississippi investigators in the form of a written confession on November 2, 1991. Supp.L.F. 154-158. Appellant, after being advised of his rights a third time, repeated his confession on November 3, 1991. Supp. L.F. 166-67. Appellant confessed to Sgt. David James of the Cape Girardeau Sheriff's Department on November 5, 1991. Supp. L.F. 192-93. Appellant confessed to Officer John Jordan of the Cape

Girardeau county Sheriff's Department on November 5, 1991. Supp.L.F. 201. Appellant, in all of these confessions, admitted that he kidnapped and raped the victim in this case. Appellant's confessions provide conclusive evidence that appellant committed the rape and kidnapping at issue.

Finally, the victim conclusively identified appellant Weeks as the man who kidnapped and raped her. Supp.L.F. at 182. The victim stated that "there is no doubt in my mind that this is the man who raped me." Id. Appellant admitted stealing a payroll check for $165.00 from the victim. Supp.L.F. 162. Appellant then cashed this check at a convenience store in Sikeston, Missouri. Supp. L.F. 186. Appellant also admitted to throwing the contents of the victim's purse out of the car window along the highway after leaving the victim tied up in a barn. Supp. L.F. 166. The victim's address book and a picture of the victim's husband was found near Highway 72 on the day following the rape. Supp. L.F. 77.

Based on this evidence, the circuit court properly found that appellant could have demonstrated a reasonable probability that he would not have been convicted. Therefore, the circuit court properly denied appellant an evidentiary hearing.

CONCLUSION

For the above reasons, respondent prays that this Court affirm the judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of _____, 2003, to:

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