IN THE MISSOURI SUPREME COURT

Nos. 85448 and 85552

RUBIN WEEKS,

Movant/Appellant,

v.

STATE OF MISSOURI,

Respondent/Appellee.

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

During the late evening of October 12, 1991, a young woman[1] was working as the front desk clerk at the Days Inn Motel in Jackson, Missouri. Her husband was keeping her company and talking with her about their new home while she worked. (SLF 1 at 11.)[2] The rooms were nearly all taken when a man walked in and asked for

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[1]In an effort to protect the privacy of the victim of the kidnapping and rape out of which these charges arose, Appellant will not refer to her by name in this brief. She will be referred to in this Statement of Facts as "the young woman" or "the victim." No disrespect is intended to her or any member of her family.

[2]The various portions of the Record on Appeal will be abbreviated as follows: The Legal File submitted by the Appellant pro se in the Eastern District Court of Appeals shall be cited "EDLF". The Legal File submitted by counsel for Appellant in the Southern District Court of Appeals shall be cited "SDLF". The Supplemental Legal File submitted by the Respondent and accepted for inclusion in the Record on Appeal on October 20, 2003, shall be cited "SLF 1". The Supplemental Legal File orginally submitted by counsel for Appellant in the Southern District Court of Appeals and accepted for filing by this Court on September 24, 2003, shall be cited "SLF 2". The proposed supplemental legal file that was filed by the Appellant in this Court on December 15, 2003, shall be cited "SLF 3".

a room with one queen-sized bed. He registered under the name "Robert Weems" and was given Room 11. (SLF 1 at 12.) While the young woman was busy looking down and filling out the paperwork, her husband gave the man directions to a local laundromat. (SLF 1 at 12.) The guest was wearing a light-colored jacket. (SLF 1 at 12.) In her handwritten statement, she did not describe what type of shirt or pants the guest was wearing or whether he was wearing a hat or cap. (SLF 1 at 12.) Later, her husband walked outside to empty the trash and saw one young child near Room 11. (SLF 1 at 13.)

When her shift was nearly done, she asked her husband to go on home because he was getting sleepy and because the owner of the motel would be coming in soon. (SLF 1 at 13.) Her husband went home, and she finished her work. (SLF 1 at 14.) The man who rented Room 11 came in later and asked for $2.00 in quarters. (SLF 1 at 14.) The clerk talked to him about where he was from; he told her he was from Mississippi. (SLF 1 at 14.) Around 11:45, her husband called the motel to ask if she had called him recently. She said she had not. (SLF 1 at 14.) He had received a call just minutes before asking for "James." When he asked the name of the caller, the caller hung up. The call frightened the young woman's husband. (SLF 1 at 30.)

When she left the motel in her car, she noticed a car behind her with its lights brightening and dimming in a sort of "flashing" fashion. (SLF 1 at 15.) She assumed

that the driver of that car wanted to get her attention, and she pulled over to see what the problem was. (SLF 1 at 15.) A man got out of the car behind her and walked up to her window, gesturing. (SLF 1 at 15.) When she rolled it down a little way, he first told her she had a taillight out and then reached inside her car with a large knife. (SLF 1 at 15.) They struggled briefly, and she was cut on her hand and under her chin, later requiring stitches. (SLF 1 at 41.) The man got her driver's door open and dragged her into his car, taking her keys with him. (SLF 1 at 16.) He drove off down Highway 72. (SLF 1 at 16.) He asked her: "Why did you do my brother dirty?" (SLF 1 at 16.) The young woman replied that she was new there and did not know his brother. (SLF 1 at 16.)

The young woman noticed that she was bleeding all over the light-colored vinyl seat in her attacker's car. (SLF 1 at 17.) He put his hand in her blouse and inside her bra, touching her breast and then ordered her to take her pants and belt off. (SLF 1 at 17.) She took off everything below her waist. (SLF 1 at 17.) He began touching her in the area of her vagina. (SLF 1 at 17.) He asked the victim when she last had sex and she said one day ago. (SLF 1 at 17.)

He drove her into Bollinger County and pulled from Highway 72 onto a dirt road and then into a drive and said that it was not the right one. (SLF 1 at 18.)

The woman noticed that the man was 5' 9" or 5' 10" tall and weighed about 235. (SLF 1 at 18.) He had on a flannel shirt and possibly a ball cap. (SLF 1 at 18.)

The man turned the car around, stopped it, and pulled her out his side of the car. (SLF 1 at 18.) He also got her pants and everything else of hers out of his car. (SLF 1 at 19.) He pulled her toward a barn and became frustrated when he could not get to the barn because of a fence. (SLF 1 at 19.) He put her coat on the ground and forced her to sodomize him. (SLF 1 at 19.) He then put her on her coat and performed oral sex on her and then had intercourse with her. (SLF 1 at 19.) He stopped for a while because he thought he heard a sound and then made her arouse him with her hand. (SLF 1 at 19.) He then began raping her again. (SLF 1 at 19.) He stopped and told her to put all of her clothes on. (SLF 1 at 19.) She did not; she only put her pants and coat on. (SLF 1 at 19.) He took her over to his car, which, after she looked at pictures of four-door cars, she identified as possibly a four-door car. (SLF 1 at 20.) He opened his trunk and pulled out a roll of duct tape. (SLF 1 at 20.) He pulled her back toward the barn and taped her hands. (SLF 1 at 21.) He then taped her knees and put her belongings near her. (SLF 1 at 21.) He drove away. (SLF 1 at 21.)

The victim worked free of the tape, walked down the dirt road to Highway 72 and then began running fast down the highway. (SLF 1 at 22.) She made it to a farm

house and rang the bell until an older man came to the door. (SLF 1 at 23.) She called her husband, and they went to the Sheriff's office, then to the hospital. (SLF 1 at 23; SLF 1 at 32.)

Nowhere in the handwritten statement of the victim that she prepared on October 17, 1991, did she state that her attacker was the man who registered for Room 11 at the motel. (SLF 1 at 11-23.) Nowhere in the handwritten statement of the husband of the victim that he prepared on October 18, 1991, did he state that his wife told him that the person in motel room 11 was her attacker. (SLF 1 at 27-32.)

At St. Francis Hospital, collections were taken for a rape kit. (SLF 1 at 41.) The rape kit was given to Officer Karen Buchheit. (SLF 1 at 41.)

Eight days later, police attempted to locate "Robert Weems" whose name appeared on the registration card for motel room 11. (SLF 1 at 53.) He was located in Clarksdale, Mississippi. (SLF 1 at 53.) He claimed that he had some checks stolen a few weeks earlier. Police were able to obtain a copy of the signature on the back of one of the checks that someone tried to pass at an auto parts store in Pearl, Mississippi. (SLF 1 at 54.) Document examiner A. Frank Hicks was asked to compare the signature on the registration card with the signature on the forged check. (SLF 1 at 54.) Mr. Hicks stated he could not see any obvious consistencies in the forged check and the Days Inn registration. (SLF 1 at 54.)

The composite was shown to employees of a trucking company that used to be located at the address listed on the motel registration card. (SLF 1 at 54.) One of the employees there said that it looked like Rubin Weeks. (SLF 1 at 55.) Checking Weeks' record, the police found that he had a record for forgery and passing bad checks. (SLF 1 at 55.)

Rubin Weeks' driver license showed his height to be 6' 1". (SLF 1 at 58.) His FBI data sheet showed him to be 6' 2" tall and weighing 275 pounds. (SLF 1 at 63-65.) An arrest report dated 12/12/90 showed Weeks to be 6' 2" tall. (SLF 1 at 70.)

Rubin Weeks was arrested in Bolivar County, Mississippi, on November 2, 1991, (SLF 1 at 124), and was delivered to the Cape Girardeau County Sheriff's Deputy on November 5, 1991. (SLF 1 at 126.)

On November 2, 1991, a statement attributed to Rubin Weeks was handwritten by one of the Mississippi officers. In the statement, Rubin Weeks allegedly told the officer that he and his wife and three children arrived in Jackson, Missouri, at 7:00 p.m. on October 13, 1991. (SLF 1 at 128) (emphasis added). In all other respects, the statement attributed to Rubin Weeks matched the victim's handwritten statement given two weeks prior, exactly. (SLF 1 at 128-32.)

Rubin Weeks' picture was put in a "six-pack" photo array for the victim and her husband to look at. The victim selected the photo of Rubin Weeks. (SLF 1 at 157.) Her husband selected someone else. (SLF 1 at 158.)

Rubin Weeks has been an insulin-dependent diabetic since the age of 10. He had a second-grade education and, in 1992, could neither read nor write. (SDLF at 19.) What he knew about his case, he learned from what his attorney read to him. That included the discovery produced by the prosecution. (SDLF at 19.)

Twice during his confinement in the Cape Girardeau County Jail, the jail psychologist recommended that Rubin be transported to the Fulton Diagnostic Center for treatment of depression and to try to prevent him from harming himself. Significant quantities of anti-depressants and anti-psychotic drugs were administered to Rubin both in the jail and at Fulton.

Plea negotiations were accelerated apparently because of concern about the cost and quality of medical treatment being provided to the defendant. After adamantly refusing to plead guilty for several weeks, Rubin Weeks was brought to court on the late afternoon of February 13, 1992, and pled guilty to kidnapping and raping the victim. He did not state the factual basis for his pleas even under repeated questioning by the prosecution. (SDLF at 21.) He was never able to tell the trial judge exactly what medications he was on and what they were for even under repeated questioning

by the court. (SDLF at 20.) His plea was accepted and he was sentenced to two life terms to run concurrently.

The deadline for filing a Rule 24.035 motion passed while Rubin Weeks was at Fulton State Hospital. His filing after the due date was rejected.

He filed a petition for writ of habeas corpus in the circuit court. It was denied.

He filed a petition for writ of habeas corpus in federal court. It was denied without a hearing. The Eight Circuit Court of Appeals affirmed in a 7-2 decision, with two judges dissenting on the basis that Weeks had presented sufficient facts in his petition in support of his actual innocence to overcome the procedural bar of not having presented his claims for state court review via Rule 24.035.

On October 3, 2001, Weeks filed motions for DNA testing under Rule 29.17 (now 547.035) in both counties in which he was convicted. (SLF 2 at 110.) The motion court entered show cause orders in both counties and the prosecutors filed a joint reply to the motions. On April 2, 2002, the motion court denied both motions without a hearing. (SLF 2 at 204-209.) Weeks appealed the decision of the Cape Girardeau County Court to the Missouri Court of Appeals, Eastern District. Weeks appealed the decision of the Bollinger County Court to the Missouri Court of Appeals, Southern District.

The Eastern District did not appoint counsel for Weeks and he represented himself pro se.

The Southern District appointed the public defender's office to represent Weeks on appeal. The public defender's office refused the appointment and filed a Writ of Prohibition in an attempt to withdraw from the case. This Court did not grant the public defender's office relief and an attorney from that office entered his appearance on behalf of Rubin Weeks.

The Eastern District affirmed the motion court on April 15, 2003. (Appendix at A7-10.) Weeks filed an application for transfer which this Court granted. The Southern District transferred the matter to this Court pre-decision.

POINTS RELIED ON

I. TO THE EXTENT THE MOTION COURT CONCLUDED, AS A MATTER OF LAW, THAT RELIEF UNDER §547.035 RSMO. IS NOT AVAILABLE TO PERSONS WHO PLEAD GUILTY, IT CLEARLY ERRED, BECAUSE THE PLAIN LANGUAGE OF THE STATUTE MAKES SPECIFIC PROVISIONS FOR THE PROCESSING OF MOTIONS FILED BY THOSE WHO HAVE PLED GUILTY.

Cases

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003)

King v. Laclede Gas Co., 648 S.W.2d 113 (Mo. banc 1983)

Martinez v. State, 24 S.W.3d 10 (Mo.App.E.D. 2000)

Kennedy v. Missouri Atty. General, 922 S.W.2d 68 (Mo.App. 1996)

Statutes

§547.035 RSMo. (Supp. 2001)

Supreme Court Rules

Rule 29.17

Rule 29.15

Rule 24.035

II. THE TRIAL COURT CLEARLY ERRED IN DENYING RUBIN WEEKS APPOINTMENT OF COUNSEL AND A HEARING ON HIS MOTION FOR DNA TESTING THROUGH ITS RULING THAT THE MOTION AND FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT RUBIN WEEKS WAS NOT ENTITLED TO RELIEF BECAUSE, IN LIGHT OF THE EXTRAORDINARY WEAKNESS OF THE CASE AGAINST RUBIN WEEKS (MADE APPARENT BY THE LABORATORY REPORT THAT WAS NOT PART OF THE FILES AND RECORDS OF THE CASE ONLY DUE TO PROSECUTORIAL MISCONDUCT), THERE WAS A REASONABLE PROBABILITY THAT RUBIN WEEKS WOULD NOT HAVE BEEN CONVICTED IF HE WERE ABLE TO INTRODUCE INTO EVIDENCE A DNA TEST RESULT SHOWING THAT HE COULD NOT HAVE BEEN THE SOURCE OF SEMEN IN THE VICTIM'S SLACKS OR THE VAGINAL SWABS AND SLIDES.

Cases

Brady v. Maryland, 373 U.S. 83 (1963)

United States v. Agurs, 427 U.S. 97 (1976)

Kyles v. Whitley, 514 U.S. 417 (1995)

Lee v. State, 573 S.W.2d 131 (Mo. App. W.D. 1978)

III. THE TRIAL COURT CLEARLY ERRED IN DENYING RUBIN WEEKS APPOINTMENT OF COUNSEL AND A HEARING ON HIS MOTION FOR DNA TESTING BY RULING THAT THE MOTION AND FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT IDENTITY WAS NOT AN ISSUE IN THE TRIAL BECAUSE THE FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT IDENTITY OF THE RAPIST WAS THE ONLY ISSUE IN THE CASE AND THAT THE GUILTY PLEA OF THE APPELLANT DID NOT REMOVE IDENTITY AS AN ISSUE IN THE CASE.

Cases

Lee v. State, 573 S.W.2d 131 (Mo. App. W.D. 1978)

IV. THE TRIAL COURT CLEARLY ERRED IN DENYING RUBIN WEEKS APPOINTMENT OF COUNSEL AND A HEARING ON HIS MOTION FOR DNA TESTING AND ON HIS MOTION FOR RECONSIDERATION BASED ON ITS FINDING THAT THE MOTION AND FILES AND RECORDS OF THE CASE DID NOT CONCLUSIVELY SHOW THAT DNA PROFILING TECHNOLOGY WERE NOT REASONABLY AVAILABLE TO RUBIN WEEKS BECAUSE THE ALLEGATIONS OF THE MOTION CONCERNING THE MOVANT'S LACK OF KNOWLEDGE OF DNA PROFILING WAS UNREBUTTED BY THE OTHER FILES AND RECORDS OF THE CASE AND IT IS BEYOND REASONABLE DISPUTE THAT DNA TESTING WAS NOT "REASONABLY AVAILABLE" TO ANY INDIGENT DEFENDANT IN SOUTHEAST MISSOURI IN 1992.

Cases

State v. Davis, 814 S.W.2d 593 (Mo. 1991)

Statutes

§537.035 RSMo. (Supp. 2001)

Supreme Court Rules

29.17

ARGUMENT

I. TO THE EXTENT THE MOTION COURT CONCLUDED, AS A MATTER OF LAW, THAT RELIEF UNDER §547.035 RSMO. IS NOT AVAILABLE TO PERSONS WHO PLEAD GUILTY, IT CLEARLY ERRED, BECAUSE THE PLAIN LANGUAGE OF THE STATUTE MAKES SPECIFIC PROVISIONS FOR THE PROCESSING OF MOTIONS FILED BY THOSE WHO HAVE PLED GUILTY.

The standard of review on this point is the "clearly erroneous" standard. This Court will determine if the findings and conclusions of the motion court and court of appeals are clearly erroneous, meaning, that if after reviewing the entire record, the Court is left with the definite and firm impression that a mistake has been made. Snowdell v. State, 90 S.W.3d 512, 513-14 (Mo.App.E.D. 2002).

A In judicial statutory construction, a basic principle is to construe the statute as a whole, each provision in harmony with the others, so that each provision has meaning.

The motion court stated multiple reasons for denying movant a hearing and appointment of counsel. It is difficult to tell whether the motion court found that there was a per se prohibition against a person who has pled guilty ever being granted relief under §547.035 RSMo. (Appendix at A5.) However, the Opinion of the Eastern

District Court of Appeals was very clear on the issue: "Defendants who plead guilty are not entitled to relief under this statute." (Appendix at A9.) To the extent either court found an absolute prohibition against relief under §547.035 RSMo. for those who have pled guilty, the courts plainly erred.

The statute provides that if, after examination of the motion, files and records of the case, the court does not find that they conclusively show that the movant is not entitled to relief, the court shall issue to the prosecutor an order to show cause why the motion should not be granted. §547.035.4 RSMo. (Appendix at A11.) If, and upon, the issuance of the order to show cause, "the clerk shall notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing if the transcript has not been prepared or filed." §547.035.5 RSMo. (Appendix at A11-12) (emphasis added).

If only those persons who were convicted after a trial could obtain relief under the statute, the emphasized phrase above would be unnecessary. The only reason for a clerk to order a transcript of a guilty plea in response to a show cause order under this statute is if the movant pled guilty. If relief is limited to those convicted after a trial, no movant who had pled guilty would ever be entitled to a show cause order, for any motion stating that the movant pled guilty would not survive the threshold test set forth in subsection 4 (1) of the statute. The court would simply deny the motion

without a show cause order or a hearing because of the absolute ban on relief for those who have pled guilty.

This interpretation would render the emphasized phrase a nullity. Statutory provisions are to be read in harmony with each other whenever possible. King v. Laclede Gas Co., 648 S.W.2d 113 (Mo. banc 1983); Trailiner Corp. v. Director of Revenue, 783 S.W.2d 917 (Mo. banc 1990). The courts try to avoid rendering any phrase or provision in a statute a nullity by judicial construction. Butler v. Mitchell-Hugeback, Inc., 895 S.W.3d 15 (Mo. banc. 1995).

A plain, fair reading of all of the provisions of §547.035 RSMo. yields the conclusion that the court can enter a show cause order for a movant even if that movant has pled guilty. Whether the movant is entitled to a hearing after the entry of the show cause order depends in part on what is revealed from the transcript of the guilty plea, but there is no absolute ban against relief for those who plead guilty.

The history of the statute supports the conclusion that those who have pled guilty are not barred per se. The statute codifies former Supreme Court Rule 29.17 which was vacated by the order of this Court on August 21, 2001, effective August 8, 2001. Just as the legislature borrowed language from former Rule 29.17 to enact §547.035, this Court borrowed language from other court rules to promulgate Rule 29.17. The language in several sections of Rule 29.15 and Rule 29.17 are very similar.

However, it is the subtle differences between the two rules that make the intentions of this Court, and therefore the General Assembly, quite clear.

Under Rule 29.15 and under §547.035, the movant has to "file the motion and two copies." Under Rule 29.15, the movant is directed to file those pleadings "with the clerk of the trial court." Rule 29.15(c) (emphasis added). However, under former Rule 29.17 and §547.035 RSMo., the movant seeking DNA testing is directed to file those pleadings "with the clerk of the sentencing court." §547.035.3 RSMo. (emphasis added). The difference is clear: Rule 29.15 applies only to those persons who have been found guilty in a trial. The trial court may or may not be the sentencing court, but there will be, without doubt, a trial court. Whether or not the movant has pled guilty, there will be a sentencing court, but there may not be a trial court. This Court was deliberate in its choice of language, and its meaning is clear.

Rule 29.15(c) does not direct the clerk "to notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing" as does §547.035.5 RSMo. (emphasis added). There is no need to do that because a movant who has pled guilty would not be entitled to relief under Rule 29.15; those motions are governed by Rule 24.035.

Rule 24.035(c) does not direct the clerk "to notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing"

as does §547.035.5 RSMo. (emphasis added). There is no need to do that because a movant who has been convicted in a trial would not be entitled to relief under Rule 24.035; those post-conviction motions are governed by Rule 29.15.

Unique among the procedures for seeking relief after confinement, §547.035 RSMo. directs the clerk "to notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing" because only it applies to both guilty pleas and guilty verdicts.

There is no per se prohibition against those who have pled guilty in §547.035. In fact, this Court and the General Assembly specifically provided an opportunity for them through the clear, unmistakable language of the rule and statute.

B. The provisions of §§547.035.2(3)(a), (b) and (c) do not create an ambiguity in the statute.

If the statute applies to those who plead guilty and to those who are convicted by a court or jury, why then does the statute consistently utilize the phrase "at the time of trial" in §§547.035.2(3)(a), (b) and (c)? Given the directives in §537.035.5, a less ambiguous phrase to repeat in these provisions might have been "at the time of trial or at the time of the entry of the movant's guilty plea." However, if this Court in drafting Rule 29.17 or the General Assembly in drafting §547.035 had clearly intended to limit its application to those who had been found guilty at trial, far less ambiguous methods

could have been employed than repeating the phrase "at the time of trial." One such method would have been to leave "or the movant's guilty plea hearing" out of §547.035.5. Even more clear would have been to be more specific in §547.035.1which directly deals with who may file a DNA motion. It could have read: "A person in the custody of the department of corrections who was found guilty in a trial . . . may file", etc. (Emphasis added). This the drafters did not do.

The more reasonable position is that, in the absence of a specific provision barring relief for those who have pled guilty, the statute taken as a whole, with proper consideration for preserving meaning for all provisions, provides an opportunity for DNA testing following guilty pleas as well as guilty verdicts.

C. Construing the statute to permit DNA testing after a guilty plea is consistent with the intent of the General Assembly (§547.035) and this Court (Rule 29.17) to advance the public interest in fostering accurate convictions and avoiding the "intolerable wrong" of incarcerating the innocent.

The trial court's construction of §547.035 is inconsistent with the remedial purposes of the statute and, if allowed to stand, would eviscerate an important attempt by this Court, and later by the General Assembly, to acknowledge the serious problem of wrongful convictions and provide a needed remedy for a class of defendants who

can demonstrate, through virtually certain scientific evidence, that they are actually innocent of the crimes for which they are serving undeserved and unwarranted prison sentences.

In adopting §547.035, the General Assembly recognized what DNA exonerations have clearly established: there is a problem in this country with conviction of the innocent. As of December 2003, 140 actually innocent individuals have been exonerated in the United States, including four in Missouri. See http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration&start=61&end=80. Sixty of these exonerations have occurred since 2001. Id. Studies would indicate that twenty percent of these cases involve defendants who confessed to their alleged crimes, see Barry Scheck, Peter Neufeld and Jim Dwyer, Actual Innocence (Putnam 2001) at 361; Christopher E. Smith and Madhavi McCall, Constitutional Rights and Technological Innovation in Criminal Justice, 27 S. Ill. U.L.J. 103, 125 (2002), and, as amicus have eloquently demonstrated, despite the belief that it does not happen, a significant number of such cases have involved defendants who pled guilty. It is now beyond dispute, based on existing exonerations and comprehensive studies of them, that innocent individuals plead guilty to crimes they did not commit.

This Court has recognized that, since "the purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate . . . an individual who is actually innocent." State ex rel. Amrine v. Roper, 102 S.W.3d 541, 547 (2003). It characterized such continued incarceration as a "manifest injustice" and an "intolerable wrong." Id. Access to DNA testing "advances the public interest in prosecuting crimes accurately because DNA evidence can acquit an accused just as effectively as it can convict him, Cooper v. Gammon, 943 S.W.2d 699, 704 (1997), thereby correcting an intolerable wrong. To deny DNA testing to those innocents who have pled guilty would perpetuate manifest injustice without advancing a significant countervailing state interest and would prevent the righting of intolerable wrongs which, unfortunately, we now know occur. The most logical and compelling construction of §547.035, urged by Movant, would prevent such manifest injustice.

Moreover, affording liberal construction to the statute, both as to permitting its application to defendants who have pled guilty and to require judges to construe allegations in favor of movants, properly serves the remedial purposes intended by the General Assembly and this Court. The longstanding rule in Missouri is that "remedial statutes are to be liberally construed"so as to effectuate their remedial purposes. Martinez v. State, 24 S.W.3d 10, 19 (Mo. App. E.D. 2000); accord, State ex rel.

LeFevre v. Stubbs , 642 S.W.2d 103, 106 (Mo. 1982). As this Court has repeatedly recognized, where "the statute is remedial ... it should be construed so as 'to meet the cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used ... resolving all reasonable doubts in favor of applicability of the statute to the particular case.' " State ex rel. Brown v. Board of Education of City of St. Louis, 294 Mo. 106, 114-115, 242 S.W. 85, 87 (Mo. banc 1922)." 642 S.W.2d at 106; see also SUTHERLAND, STATUTORY CONSTRUCTION, §§ 60.01 at 147 (5th ed.1992). Such construction is appropriate here to avoid the intolerable wrong of incarcerating the innocent.

Liberal construction of the statute to apply to guilty pleas, as envisioned by both this Court and the legislature, advances the important interest not only in freeing the innocent but also insuring that the guilty may be identified and punished. For every wrongfully convicted defendant, there is a guilty person who has not been brought to justice. Affording DNA testing where there is any real doubt about an incarcerated individual's guilt not only reduces the risk of the "intolerable wrong" of incarcerating the innocent, it provides a sample from which "cold hits" may be made. Such "'cold hits' resulting from the matching in CODIS identifies approximately one offender for every 1,000 samples . . . ," Jennifer Graddy, The Ethical Protocol for Collecting DNA

Samples in the Criminal Justice System, 59 J. Mo. Bar 226, 230 (2003), thereby increasing the likelihood that truly guilty defendants will be identified and punished.

Finally, liberal construction of the statute is consistent with the reality that many of those seeking testing, like Movant here, are likely to be marginally literate, untrained in law and science and functionally incapable of making the kind of detailed and complex showings that the rulings of the courts below would have required. Missouri courts have repeatedly recognized that pro se petitions must be viewed favorably toward the pleader. See, e.g., Duvall v. Lawrence, 86 S.W.3d 74 (Mo. App. E.D. 2002); Kennedy v. Missouri Atty. General, 922 S.W.2d 68, 70 (Mo. App. 1996); Howard v. Pettus, 745 S.W.2d 821, 822 (Mo. App. 1988). This is particularly true where, as here, that pleading serves the compelling function of avoiding the manifest injustice of wrongful conviction. To hold movants to high standards of pleading, especially where the language of the statute mandates that a hearing should be denied only where "the files and records of the case conclusively show that the movant is not entitled to relief' (emphasis added), is inconsistent with both the letter and the spirit of the statute and its important remedial purposes. It was precisely because movants will have counsel at the hearing stage, counsel who can undertake the very type of investigation that occurred here once counsel entered the case and accounts for the significantly more developed information now available, that this carefully crafted

statutory scheme provides for a low threshold standard. This Court should not permit a narrow and rigid construction to defeat the statute's important remedial purpose.

"Wrongful convictions are a concern of prosecutors and defense lawyers, liberals and conservatives, lawyers and non-lawyers. The issue involves the accuracy in the justice system, and accuracy is a goal that is shared by everyone. It concerns anyone who cares about law enforcement and public safety. For every innocent person wrongfully convicted, a guilty person roams free. Indeed, because the justice system is one of the cornerstones of democracy, it is not an overstatement to say that wrongful convictions concern anyone who cares about a democratic society." H. Patrick Furman, Wrongful Convictions and the Accuracy of the Criminal Justice System, 32-Sep. Colo. Lawy. at 11. Construing §547.035 to permit DNA testing to those who have pled guilty, and who make colorable showings of actual innocence, significantly advances the interest in avoiding the intolerable wrong of wrongful conviction without impeding on any significant countervailing interests. Accordingly, the rulings of the trial courts to the contrary should be reversed.

II. THE TRIAL COURT CLEARLY ERRED IN DENYING RUBIN WEEKS APPOINTMENT OF COUNSEL AND A HEARING ON HIS MOTION FOR DNA TESTING THROUGH ITS RULING THAT THE MOTION AND FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT RUBIN WEEKS WAS NOT ENTITLED TO RELIEF BECAUSE, IN LIGHT OF THE EXTRAORDINARY WEAKNESS OF THE CASE AGAINST RUBIN WEEKS (MADE APPARENT BY THE LABORATORY REPORT THAT WAS NOT PART OF THE FILES AND RECORDS OF THE CASE ONLY DUE TO PROSECUTORIAL MISCONDUCT), THERE WAS A REASONABLE PROBABILITY THAT RUBIN WEEKS WOULD NOT HAVE BEEN CONVICTED IF HE WERE ABLE TO INTRODUCE INTO EVIDENCE A DNA TEST RESULT SHOWING THAT HE COULD NOT HAVE BEEN THE SOURCE OF SEMEN IN THE VICTIM'S SLACKS OR THE VAGINAL SWABS AND SLIDES.

The standard of review on this point is the "clearly erroneous" standard. This Court will determine if the findings and conclusions of the motion court and court of appeals are clearly erroneous, meaning, that if after reviewing the entire record, the Court is left with the definite and firm impression that a mistake has been made. Snowdell v. State, 90 S.W.3d 512, 513-14 (Mo.App.E.D. 2002).

The motion court found that: "The files and 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.'" (EDLF at 79.) The court listed some of the "evidence" against the movant, including: (1) the victim picked the picture of the movant out of a photo array; (2) the movant had been placed at the motel in Jackson, Missouri, where the victim worked on the day of the rape; (3) the movant gave full and detailed confessions; and (4) a convenience store clerk in Sikeston, Missouri, identified a picture of the movant as the man who cashed a payroll check belonging to the victim's husband. In addition, the court found that even if DNA testing of the vaginal smear and slides obtained from the victim less than two hours after the rape did not identify the movant as the source of the semen, it "would not be expected to change the results of a trial, particularly since the victim, a married woman, had told investigators that her rapist had not ejaculated." (EDLF at 80.) In reaching this conclusion, and by ignoring the credible and probative scientific evidence found in the files and records of the case, the motion court plainly erred. Contributing to and compounding the error was the fact that highly exculpatory laboratory results from serology testing showing that Rubin Weeks could not possibly have been the source

of the semen stain found in the victim's slacks were withheld from the defense and the motion court in direct violation of Brady v. Maryland, 373 U.S. 83 (1963).

A. The files and records conclusively showed that the most reliable and most probative evidence of the identity of the rapist were contained in the items the movant wanted to test.

Within two hours after she was raped, the victim was taken to St. Francis Hospital. (SLF 1 at 39.) There an examination was conducted utilizing a standard "rape kit." (SLF 1 at 41.) Specimens were collected for the rape kit and turned over to Officer Karen Buchheit. (SLF 1 at 41.) She gave the rape kit to Detective Kiefer at 8 a.m. on the following day. (SLF 1at 178.) Detective Kiefer gave the rape kit to Sgt. (now Lt.) David James at 4:00 p.m. on that day. (SLF 1 at 178.) Sgt. James gave the rape kit to the Director of the SEMO Regional Crime Lab, Dr. R.C. Briner, at 9:40 a.m. on October 16, 1991. (SLF 1 at 178.) The rape kit was identified by the Cape Girardeau County Sheriff's Department as evidence item #49. (SLF 1 at 183.) The rape kit included a vaginal swab, which was identified as evidence item #49B, and vaginal smear slides which retained the same evidence number as the rape kit itself, #49. (SLF 1 at 188.) It was this evidence that the movant most wanted to test. (EDLF at 29.)

The initial analysis of the rape kit was reported in a document dated November 8, 1991, generated by the SEMO Regional Crime Laboratory. (SLF 1 at 188-90.) In that document, it was reported that vaginal smear slides in the rape kit revealed the presence of "intact human spermatozoa." (SLF 1 at 188.) The lab concluded that: "The presence of intact human spermatozoa is considered evidence for the person having been involved in sexual intercourse, which culminated in ejaculation." (SLF 1 at 188.) Likewise, it was determined that the vaginal swab, item #49B, tested positive "for the presence of human seminal fluid." (SLF 1 at 189.) In addition, a stain was located in the crotch of the black slacks worn by the victim before and after the rape, item 28A, that tested positive "for the presence of human seminal fluid." (SLF at 189.) The presence of intact sperm in the rape kit was proof positive of very recent sexual activity leading to ejaculation. (SLF 3 at12.) Thus, the initial crime lab report directly contradicted the finding of the motion court that the rapist did not ejaculate.

The stain on the slacks was subjected to serology testing; meaning that the lab attempted to determine the blood type of the contributor of the seminal fluid in the stain. Two blood types were identified in the stain: Blood type A and blood type O. (SLF 1 at 189--refer to chart regarding item 28A.) Finding two blood types was to be expected. One source of the fluids comprising the stain would come from the victim;

the other from her single attacker. The lab also analyzed the blood of the victim from a submitted sample and determined it to be Type O. (SLF 1 at 189.) The logical conclusion to be drawn from the laboratory findings of November 8, 1991, was that the rapist had Type A blood and was a secretor, that is, a person whose blood type can be determined from bodily fluids other than blood (such as semen or saliva) because they secrete identifying blood antigens through their other bodily fluids.

With that incredibly strong "lead" as to the identity of the rapist, the lab gave the police instructions as to how to go about obtaining blood and saliva from any suspect the police might have. These items were necessary "to determine whether or not any individual may be eliminated from the populations that . . . could have deposited the seminal fluid on items 28A (slacks) and 49B (vaginal smear and slides)." (SLF 1 at 189.)

In less than a week, the police followed up on the lab's suggestion. On November 15, 1991, the prosecution filed an Application for a Search Warrant (SLF 1 at 211) supported by the Affidavit of Sgt. David James. (SLF 1 at 205-10.) The application sought the seizure of Rubin Weeks' blood and saliva because they "constitute evidence of the crimes described above." (SLF 1 at 205.) The affidavit described the stain in the crotch of the slacks and the intact human spermatozoa located in the vaginal smear. (SLF 1 at 207.) The affidavit went on to suggest that the

affiant had discussed this matter with C.R. Longwell of the Southeast Regional Crime Laboratory "who has been trained by the FBI in DNA testing" and that Mr. Longwell "indicates that sufficient samples of biological matter were present on the vaginal smear and crotch of the pants [and] that a comparison to a suspect's blood should provide a conclusive scientific comparison as to whether the semen stains are from a particular suspect. (SLF 1 at 207-08) (emphasis added).

The documents containing all of these findings of scientific experts were part of the files and records of the case available to the motion court at the time of its ruling. The lab report was contained in the "Notice of Disclosure" filed by the Cape Girardeau County Prosecutor on January 3, 1992, in the Cape Girardeau County action (but not the Bollinger County action). The "Notice of Disclosure" was frequently referenced by the motion court for proof of other propositions, but not one reference to the lab report described above is contained in the Judgment. (SLF 2 at 139-44.) The opinion of C.R. Longwell, as related to Sgt. James, is contained in the Affidavit in support of the search warrant. It was presented to an associate circuit judge for her review on November 15, 1991, and officially became a part of the court's file as of the filing date of January 3, 1992. (SLF 1 at 210.)

Regardless of any other evidence that might have been contained in the files and records available to the motion court, it is beyond dispute that the police, the

prosecutor, the associate circuit judge that signed the warrant, and, especially, the experts at the local crime lab all believed that absolute proof of Rubin Weeks' guilt (or innocence) would come from a comparison of his DNA as determined from a sample of his blood to the DNA of the contributor of the semen stain on the slacks and the sperm collected in the rape kit. The motion court's conclusion that "failure to match [movant's] DNA to any samples taken from the victim would not be expected to change the result of a trial" is contrary to common sense and the everyday experiences of courts and juries all over the United States. Had evidence been presented to a jury that the semen found on those slacks and on the vaginal swab and smear could not possibly have come from Rubin Weeks, there was certainly a "reasonable probability" that he would have not been found guilty at trial. For the court to say otherwise given what was contained in the files and records before it was clearly erroneous.

B. Analysis by the SEMO Crime Lab of the blood and saliva obtained by the police from Rubin Weeks supported Rubin Weeks' claim of actual innocence, but because the prosecution did not disclose those reports to the defense or court in violation of Brady v. Maryland, the exculpatory reports did not become part of the "files and records" available to the motion court.

1. The defense requested reports of any further lab work and the prosecution had a duty to provide them.

The Notice of Disclosure containing the lab report referred to above dated November 8, 1991, was filed in Cape Girardeau County on January 3, 1992. (EDLF at 2.) Counsel for Rubin Weeks filed a Motion to Produce in Cape Girardeau County on January 7, 1992. (EDLF at 54.) In that Motion, defendant requested: "5. Any reports or statements of experts made in connection with this particular case, including results of physical or mental examinations and of specific tests, experiments or comparisons." (EDLF at 55.) Therefore, if there were any lab reports not previously produced by the prosecution through the Notice of Disclosure, they were requested in the January 7 defense motion. According to the docket sheets, no further discovery was produced in Cape Girardeau County by the prosecution in response to this motion or for any other reason. (EDLF at 2-5.) That comports with the recollection of trial counsel for movant. (SLF 3 at 8.)

No Notice of Disclosure or any other form of discovery by the state was filed in Bollinger County. (SDLF at 1.) Counsel for defendant filed a Motion to Produce in Bollinger County on February 13, 1992[3], containing the same language as quoted above. (SDLF at 1; SLF 2 at 159-61.)

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[3]Oddly enough, this was the same date that Rubin Weeks pled guilty.

Even if the reports had not been specifically requested by the defense, the prosecution was under a duty to disclose material exculpatory evidence contained in such reports by virtue of the decisions of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). That duty extended to information and evidence in the hands of investigative personnel and agencies. Giglio v. United States, 405 U.S. 150 (1972). Even if the document in question is not specifically delivered to the prosecution, the prosecution has a "duty to learn of any favorable evidence known to others acting on the government's behalf in the case." Kyles v. Whitley, 514 U.S. 417, 437 (1995). This obligation includes making inquiry of crime labs used in the investigation. In re Brown, 72 Cal. Rptr.2d 698 (Cal. 1998). In overturning a defendant's conviction, the Massachusetts Supreme Court described the duty as follows: "The prosecution had a duty to inquire concerning the existence of scientific tests, at least those conducted by the Commonwealth's own crime laboratory. . . . It could not satisfy the production order by turning over [only that] test information that it had in its files. It had a duty of inquiry." Commonwealth v. Martin, 696 N.E.2d 904 (Mass. 1998).

The duty is not limited to those cases in which the defendant is going to trial. In Missouri, inquiry and disclosure is required before the defendant pleads guilty. 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. Lee v. State, 573 S.W.2d 131 (Mo. App. W.D. 1978) (evidence not disclosed was one prior inconsistent statement by state's witness).

The recent United States Supreme Court decision in United States v. Ruiz, 536 U.S. 622 (2002), does not compel a different result with respect to the prosecution's Brady obligations prior to guilty pleas. The holding in Ruiz was limited to consideration of the government's obligation to divulge material that might have been useful in impeaching the testimony of witnesses that might or might not have been called by the government at trial. One of the Court's primary concerns was that the release of such information might disrupt other investigations and cause undercover witnesses and others serious harm. Ruiz clearly did not involve the final, conclusive results of scientific testing of trace evidence that the government provided to the lab and specifically ordered to be tested, as was the case here. The difference in exculpatory value between a serology test that conclusively determined that semen found in the crotch of the victim's slacks worn after the rape could not have come from the defendant (Weeks case) and a prior inconsistent statement from one of many government witnesses (Ruiz case) cannot be ignored.

2. There were further crime lab reports generated after the lab obtained Rubin Weeks' hair, blood and saliva, but the prosecution did not disclose those reports to the defense or the court.

The SEMO Crime Lab did not conclude its work on the Rubin Weeks case with its report of November 8, 1991. Naturally, the lab continued to analyze the physical evidence that had already been obtained by the police prior to the November 8 report and waited for the hair, blood, and saliva samples taken from Rubin Weeks to be delivered to it so that it could conduct the tests the police and prosecution referred to in the application for the search warrant.

On November 13, 1991, at 12:10 p.m., Sgt. David James delivered more than a dozen items to be tested by the SEMO lab starting with item #55. He requested very specific tests to be run by the lab on items #55 through #74. (SLF 1 183-84.)

On November 26, 1991, at 4:35 p.m., Sgt. David James delivered four items to C.R. Longwell of the crime lab, specifically #78 through #81 inclusive. He ordered certain tests for those items. (SLF 1 at 185.) Specifically, the officer asked the lab to analyze Rubin Weeks' blood to "check to see if Type A and if can be matched to blood found at crime scene. See if blood matches secretor status from cigarette butts found in motel room #11."[4] (SLF 1 at 185.)

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[4]Obviously, identity of the rapist was at issue. The police believed that they

There were two more lab reports sent to the Cape Girardeau County Sheriff's Department and the Cape Girardeau County Prosecutor by the SEMO Regional Crime Lab. (SLF 3 at 12.) The report of November 21, 1991, could have been included in the Notice of Disclosure filed in the Cape Girardeau County Court, but it was not. (SLF 1at 2-259.) However, the report simply made non-substantial, typographic corrections of the November 8, 1991, report and it is arguable that, having already produced the November 8 report in the Notice of Disclosure, the prosecution did not have a duty to produce a new copy that merely corrected typos.

The February 12, 1992, report could have been delivered to the defense in response to the January 7, 1992, Motion to Produce filed in Cape Girardeau County, but it was not. (SLF 3 at 8; EDLF at 2.) It could have been provided to the defense in response to the February 13, 1992, Motion to Produce filed in Bollinger County, but it was not. (SLF 2 at 1-2; SLF 3 at 8.) It could have been provided to defense counsel and the court before or during the guilty plea colloquy on February 13, 1992, but it was not. (SLF 2 at 16-50; SLF 3 at 8.)

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needed scientific evidence in order to establish the identity of the rapist as Rubin Weeks.

Unlike the November 21 revision, the February 12, 1992, report contained substantial new test results that could only be considered highly exculpatory with respect to Rubin Weeks. Those findings will be described in detail below.

3. The February 12, 1992, lab report proved that the case against Rubin Weeks was extraordinarily weak.

The theory that the police department was operating under was that Rubin Weeks: (1) forcibly put the bleeding victim in his car where she would have deposited her fingerprints, blood, and hair in his car and on his clothing; (2) reached into the victim's car leaving his fingerprints and cutting the victim; (3) stayed in Room 11 of the motel where the victim worked and left his head hair, pubic hair, fingerprints, blood, and semen there; and (4) signed the registration card for that motel room. Analysis of the items submitted to the SEMO Crime Lab from these various crime scenes was supposed to yield evidence damaging to Rubin Weeks. It did not.

a. The victim's hair was not found in Rubin Weeks' car.

Many hairs were found in Rubin Weeks' car when it was seized by the police. Four hairs were found on the right floorboard. They were submitted to the SEMO lab as items #65 through #68. Three hairs were found on the driver's side of the car. They were submitted to the SEMO lab as items #72 through #74. The lab was asked to determine if they were the victim's hair. (SLF 1 at 184.) The lab concluded: "Hair

from Items 65-68 and 72-74 is not consistent with the victim or suspect hair." (SLF 3 at 4.) This result is exculpatory with respect to Rubin Weeks.

b. The victim's blood was not found in Rubin Weeks' car.

According to the victim, the rapist cut her with a knife while she was in her car (SLF 1 at 15) and then forced her into his car where she was "bleeding all over his vinyl seat." (SLF 1 at 17.) Hospital records confirm that the victim was badly cut. (SLF 1 at 39-41.) The police believed that the victim's blood would be found in Rubin Weeks' car and on his clothing. The police seized a blue jacket from Rubin Weeks (Item 55), the floor mat from the passenger side of his car (Item 56), the floor mat from the driver side of his car (Item 57), a pair of his cowboy boots (Item 58), the seat belt from his car (Item 62), a piece of vinyl seat from his car (Item 69), and debris from his car (Item 71). All of these items were to be tested to try to find the victim's blood on them. (SLF 1 at 183-84.) No blood of any kind was found on any of the items except a piece of the vinyl seat (Item 69). The report did not identify the blood found on the vinyl seat as that of the victim–the "amount of material was insufficient for further testing." (SLF 3 at 3.) Clearly, a victim bleeding as much as this one would have left substantial amounts of blood on all of the items tested. This lab result was exculpatory with respect to Rubin Weeks.

c. The victim's fingerprints were not found in Rubin Weeks' car.

According to the victim, she was in the rapist's car for several minutes. It had a vinyl seat. He pushed her into the vehicle while she was bleeding and pulled her out of the vehicle on his side. She was forced to remove clothing while in the vehicle. She undoubtedly touched many surfaces of the car with bloody fingers, some of the surfaces ideal for leaving fingerprints. The police found no fingerprints from the victim in Rubin Weeks' car. This result is exculpatory with respect to Rubin Weeks.

d. Rubin Weeks' fingerprints were not found in the victim's car.

The police dusted the victim's car for fingerprints. Their theory was that the rapist left his prints in the victim's car when he reached in and cut her and dragged her out. They found several prints and labeled the latent lift cards items #12 through 16. (SLF 1 at 181.) The lab found the prints to be "useable." (SLF 1 at 190.) However, at the time of the November 8, 1991, report, the lab did not have the known fingerprints of Rubin Weeks. Consequently, the lab asked the police to "submit finger and palm prints of any suspect." (SLF 1 at 190.)

By the time of the preparation of the February 12, 1992, report, the lab had obtained the known prints of Rubin Weeks, labeled by the police as Item #82. (SLF

3 at 3.) The lab noted in that report: "Comparison of inked prints of suspect (82) submitted with latents from auto and motel room produced no match." (SLF 3 at 4.) Thus, Rubin Weeks' fingerprints were not found in the victim's car. This result was exculpatory with respect to Rubin Weeks.

e. There was no physical evidence that Rubin Weeks was the person who checked into Room 11 of the motel where the victim worked.

The victim's identification of the rapist started from the premise that he was the person who rented Room 11 at the motel where she worked. (SLF 1 at 12; SLF 1 at 5; SLF 1 at 207.) In order to establish the identity of the rapist, therefore, the police sought to determine the identity of the person who registered for and stayed in Room 11. (SLF 1 at 208.) To that end, the police gathered cigarette butts, head hair, pubic hair and fingerprints from the room. (SLF 1 at 208.)

As noted above, Rubin Weeks' fingerprints were not found anywhere in the motel room. (SLF 3 at 4.) This result was exculpatory with respect to Rubin Weeks.

The cigarette butts seized from the motel room had saliva present on them. Tests run on the saliva indicated that it came from a person whose saliva contains Type A blood antigens. (SLF 1 at 189.)

In order to try to determine if Rubin Weeks was the person who smoked those cigarettes in Room 11, the police seized cigarette butts from the ashtray in Rubin Weeks' car and labeled them as Item 60. Those cigarette butts were analyzed and found to have saliva on them, but the lab could not detect the blood type of the person who smoked those cigarettes. (SLF 3 at 3.)

If saliva is present on a cigarette butt and the saliva contains no identifying blood group antigens, then the person who deposited that saliva is a "non-secretor"--meaning that his blood type antigens are not secreted in his saliva, semen, or any other bodily fluids. When the lab tested the saliva sample taken directly from Rubin Weeks (Item 81), they found out why the saliva on the cigarettes in his ashtray did not reveal any blood type. No blood group could be detected directly from the saliva specimens he produced in the presence of police and hospital personnel. The inescapable conclusion: Rubin Weeks is a non-secretor. Therefore, he could not have been the source of the saliva bearing Type A blood antigens found on the cigarette butts in Room 11. The lab reported: "This individual [R. Weeks] may be eliminated from the population that smoked the cigarettes in item 35D." Those were the cigarette butts found in Room 11. This result, found only in the report of 2/12/92 and never delivered to the defense or court, is exculpatory with respect to Rubin Weeks.

f. Because Rubin Weeks is a non-secretor, he could not possibly be the source of the semen stain on the slacks worn by the victim before and immediately after the rape.

It is clear that the rapist ejaculated–that was confirmed by the presence of intact spermatozoa on the vaginal smear and slides. (SLF 1 at 188; SLF 3 at 12.) The victim wore the slacks identified as Item 28A before and after the rape. She ran quickly down a highway wearing them. (SLF 1 at 22.) There was a semen stain in the crotch of those slacks, and the Type A blood antigens found in that semen stain did not come from the victim. She's Type O. (SLF 1 at 188.) The Type A blood antigens found in that semen stain did not and could not have been produced by Rubin Weeks. He's Type A, but he does not secrete blood antigens in his semen. So what did the lab conclude in the report on 2/12/92? "The person whose blood and saliva are found in items 78 and 81 (R. Weeks) cannot be eliminated from the population that could have deposited the seminal fluid in the slacks in item 28A, although it would appear than another individual's seminal fluid is, also present." (SLF 3 at 3.)

This conclusion is disingenuous at best. Of course you cannot eliminate a non-secretor as a contributor to a semen stain from serology tests alone. Because you cannot tell that a non-secretor's semen is ever present from a blood test, you also cannot prove it is absent. Only a DNA test comparing the DNA profile of the semen

stain with the DNA profile of the known blood of a non-secretor (such as Rubin Weeks) will produce a definitive match or elimination of any suspect. Serology alone is insufficient. Here's why:

If the victim claimed that she was raped by only one man, and, if the lab found that the semen stain in the slacks bore only the victim's Type O antigens, then Rubin Weeks *or any other non-secretor* would be a viable suspect. If the victim claimed that she was raped by more than one man, and if the lab found that the semen stain in the slacks bore the victim's Type O antigens and someone else's Type A antigens, then Rubin Weeks or any other non-secretor would be a viable suspect as a second rapist. But where, as here, the victim claimed that there was only one rapist and the lab found that the semen stain in the slacks bore the victim's Type O antigens and someone else's Type A antigens, the only possible result is that the single rapist was a Type A secretor. Rubin Weeks is not.

This report, never revealed to the defense or court prior to the guilty plea of Rubin Weeks, and never revealed to the motion court as part of the files and records of the case, is highly exculpatory with respect to Rubin Weeks. These results are, beyond any doubt, the single most persuasive reason why DNA testing has to be done to determine who actually raped the victim.

When Weeks appealed the denial of a hearing on his federal habeas petition to the Eighth Circuit, two judges dissented from the majority and maintained that, in spite of the guilty plea, there was substantial dispute about whether the files and records conclusively showed that Weeks was not entitled to a hearing on his petition because his petition offered persuasive evidence of actual innocence. Weeks v. Bowersox, 119 F.3d 1342 (8th Cir. 1997). One can only speculate how many more judges might have joined Judge Gibson and Judge Morris Shepherd Arnold in finding that a hearing and other relief was required if the hidden lab report of February 12, 1992, could have been brought to the attention of the Eighth Circuit.

C. The evidence the motion court relied on to deny testing does not conclusively show that the result of a DNA test would not be exculpatory.

None of the alleged inculpatory evidence, individually or taken together, that was relied on by the motion court is sufficient to warrant denial of DNA testing to Appellant.

If you believe the prosecution, Rubin Weeks never missed an opportunity to confess to this crime. The prosecution claimed and the motion court found that the "Movant gave full and detailed confessions to the crime, both in writing and on tape." (SDLF at 143.) No tape containing a confession has ever been produced for the

defense. The notation "Taped Confession of Rubin Weeks" is handwritten onto the evidence log as Item 82 (SLF 1 at 185), but the lab, which relies heavily on the accuracy of its reports to match item numbers exactly with the evidence log says that Item 82 are the fingerprint standards, "major case prints", for Rubin Weeks. (SLF 3 at 3.) When the appellant sued the counties involved in this case in a Section 1983 action, the state could not produce any such tape. (EDLF at 60.)

If one believes that the movant confessed several times, including while in Mississippi before being extradited and again immediately upon his arrival in Missouri, and if one believes that those confessions are proof positive of the guilt of the movant, one has to wonder why it was so important for the police to obtain biological samples from Rubin Weeks to send to the lab. If the confessions are worthy of belief, no further proof should be necessary. The simple answer is that police and prosecution knew that scientific evidence would be truly persuasive to a jury. They wanted scientific testing of Rubin Weeks' blood because, in the words of Sgt. James quoting C.R. Longwell of the local crime lab: "a comparison to a suspect's blood should provide a conclusive scientific comparison as to whether the semen stains are from a particular suspect." (SLF 1 at 142) (emphasis added). The police and prosecution wanted conclusive proof then (even though they had a file full of alleged confessions), and Rubin Weeks wants conclusive proof now.

Moreover, the physical evidence simply does not match up with the details allegedly described by the Appellant in the various confessions attributed to him. Appellant will not parse each one to show the physical inconsistencies, but the negative testing results described in preceding sections of this brief could not have been produced if Rubin Weeks did what his "confessions" say he did.

Thus, Appellant's purported confessions are of questionable value as evidence. Moreover, the problem of false confessions is well documented and the value of confessions as conclusive evidence is often overstated. Ofshe and Leo, "*The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*", 88 J. Crim. L. & Criminology 429 (1988).

Suffice it to say that the fact that a semen stain bearing Type A blood antigens (that Rubin Weeks could not have put there) was found in the crotch of the victim's pants is far more probative of the identity of her rapist than any police report describing a confession made by the Appellant. Had the prosecution seen fit to provide the defense, the plea court, or the motion court with a copy of the February 12, 1992, lab report outlining all the exculpatory evidence described above, the motion court would not have concluded that there was no reasonable probability

that an exculpatory DNA test would have produced a different result. The fact that this report was hidden from scrutiny makes the alleged confessions highly suspect.

D. The victim's identification of Rubin Weeks is not more probative of the identity of the rapist than is a DNA test.

The person who checked into the motel and took Room 11 talked to both the victim and her husband. The husband had a longer and better view of the registrant than did the victim. She was busy filling out several sheets of paperwork while her husband was looking directly at the man and giving him directions to a coin laundry. The victim picked out Rubin Weeks from the photo array. Her husband picked out someone else. Both described the registrant as 5' 9" or 5' 10". Rubin Weeks is 6'2". Rubin Weeks had a prior record for forging checks. When the prosecution asked a handwriting expert to examine the signature of Robert Weems on the motel registration card and compare it to a forged signature on one of Weems' allegedly stolen checks and he found "no obvious consistencies". (SLF 1 at 54.)

Eyewitness testimony is known to be among the least reliable forms of testimony. Wells, G. L. & Loftus, E. F., *"Eyewitness Memory for People and Events"* in Comprehensive Handbook of Psychology, Volume 11. (New York: John Wiley and Sons, 2002).

The errors inherent in eyewitness accounts are magnified when the observer is under substantial stress. There is no doubt that this victim was terrorized and under incalculable stress during and after the attack.

It is a fundamental principle of law enforcement that alternative hypotheses about the guilt of any given suspect must always be considered. When the police sketch of the rapist was shown to one of Rubin Weeks' antagonistic former co-workers, he said that it looked like Rubin. Without any other proof at that point that the assailant may have been Rubin, he was arrested. Because the victim claimed that her attacker was a man who stayed in Room 11 in the motel, police tried to put Rubin in the motel. That failed. His hair, blood, semen, and saliva were not in that room. But someone was in that room, and we know that the person who smoked the cigarettes found in that room was a Type A secretor as was the person who contributed to the semen stain in the victim's slacks.

When the semen stain was tested, and the Type O contribution made by the victim was eliminated, the stain revealed that the source of the semen was a Type A secretor. Rubin Weeks could not have been that source. The police and prosecution did not acknowledge that the scientific evidence ruled him out. They should have returned to the original hypothesis: that the man in Room 11 was the rapist. But that man was not Rubin Weeks.

III. THE TRIAL COURT CLEARLY ERRED IN DENYING RUBIN WEEKS APPOINTMENT OF COUNSEL AND A HEARING ON HIS MOTION FOR DNA TESTING BY RULING THAT THE MOTION AND FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT IDENTITY WAS NOT AN ISSUE IN THE TRIAL BECAUSE THE FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT IDENTITY OF THE RAPIST WAS THE ONLY ISSUE IN THE CASE AND THAT THE GUILTY PLEA OF THE APPELLANT DID NOT REMOVE IDENTITY AS AN ISSUE IN THE CASE.

The standard of review on this point is the "clearly erroneous" standard. This Court will determine if the findings and conclusions of the motion court and court of appeals are clearly erroneous, meaning, that if after reviewing the entire record, the Court is left with the definite and firm impression that a mistake has been made. Snowdell v. State, 90 S.W.3d 512, 513-14 (Mo.App.E.D. 2002).

A. The police were attempting to identify the assailant even after movant allegedly confessed to the crime.

Identity of the rapist was always the only issue in this case before the movant pled guilty, and it is still the only unresolved issue. From the time the victim was taken to the hospital on October 13, 1991, until the Southeast Missouri Regional Crime Lab

issued its final report on February 12, 1992, police, prosecutors, and scientists were engaged in only one task: determining the identity of the rapist. There was no dispute about whether the victim was actually kidnaped and attacked. There was no claim that there was no penile penetration or no weapon involved, thus reducing the degree of the offense. There was no defense of consent interposed. There was no claim of mental disease or defect. There was no defense of diminished capacity. The only defense asserted by the movant was misidentification, i.e. identity--the police had the wrong man.

The motion court makes reference to the multiple purported confessions attributed to the movant and suggests that these confessions took the issue of identity out of the case. Appellant would call the Court's attention to the previous section of this brief which details the evidence police were seizing and the crime lab was processing long after those "confessions" were made a part of the police reports. Among other efforts:

1. The police were attempting to identify who the occupant of Room 11 of the motel was even after movant allegedly confessed to the crime.

2. The police were attempting to identify the man physically described by the victim even after movant allegedly confessed to the crime.

3. The police were attempting to identify the vehicle that was used in the kidnapping even after movant allegedly confessed to the crime.

4. The police were attempting to identify the person whose blood, semen, hair and saliva were in evidence at every crime scene even after movant allegedly confessed to the crime.

Actions speak louder than words. In this case, the "actions" of the police, prosecutors, and crime lab shouted that they were concerned about making a positive identification of the rapist even after they wrote down the "words" attributed to Rubin Weeks.

B. The motion and files and records of the case showed that the guilty plea of the defendant did not remove identity as an issue in the case because Rubin Weeks' guilty plea was weak and equivocal.

Close examination of the plea colloquy reveals that Rubin Weeks never told the court what the factual basis for the plea was. He never said, in his own words, what he did that made him guilty of the offenses charged. He was asked to state, in his own words, what happened:

Mr. Swingle: "Well, what did you do? Tell me in your own words what happened about these two crimes . . . that makes you think you are guilty?"

Weeks: "Because I am guilty."

Mr. Swingle: "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."

Weeks: "Because I did what they said I did." (SLF 2 at 21-22.)

From that point on in the plea colloquy, the prosecutor led the defendant through the elements of the offense and got affirmative responses. Rubin Weeks either could not or did not provide the sort of detail you would expect a guilty person to be able to provide in a plea colloquy to persuade the court that the defendant was pleading to facts rather than to just a charge. There was no attempt to establish intent or mens rea or scienter at any point in the plea exchange.

Appellant concedes that if the purpose of this proceeding were to have the guilty plea set aside, the fact that Appellant failed to state the factual basis for the plea in his own words would not be determinative of the outcome. However, in a determination of whether the files and records of the case conclusively show that identity was not an issue in the case after the guilty plea, the relative weakness of this plea has to be taken into account.

C. Defense counsel told the court that Weeks' plea was equivocal.

Even after the defendant gave affirmative one-word responses to all the key questions asked by the prosecution and the court, the court was still not fully convinced that the plea was voluntary, partly because of its concern about the drugs that the defendant had recently taken. The court asked counsel if he was entering a plea against his will and received the following response: "While he may not be pleased with the situation, he seems to comprehend . . . I think he understands. He is not happy about it, but I think he understands." (SLF 2 at 35) (emphasis added). Re-phrased, counsel was saying: "This is not what he wants to do."

Again, the amount of equivocation expressed by counsel's comments might not rise to the level sufficient for an appellate court to set aside the plea, but it is a factor that must be considered when evaluating whether the plea itself conclusively showed that all issues in the case, including identity of the actual rapist, were removed by the plea.

D. The guilty plea was made unknowingly and involuntarily.

1. Movant's cognitive processing was impaired as the combined result of head injuries, jail-administered prescription drugs and uncontrolled diabetes.

The motion court relied on the bare existence of the guilty plea rather than a critical, qualitative analysis of the guilty plea to make its findings. It gave no apparent weight to the allegations made by the movant in his motion and in the other "files and records of the case," which included his 24.035 motion (SLF 2 at 70-109) and his state habeas petition. (SLF 2 at 66-69.)

Included in the files and records available to the motion court were the following factual allegations made by movant:

•The files and records indicate that "A number of eye witnesses . . . will show that movant was in the state of Mississippi on the date and time of the alleged crime . . ." (SLF 2 at 111.)

•The files and records indicate that when he told the trial court on February 10, 1992, that he "wasn't going to plead guilty!", he was "thrown down by officers, beaten and restrained." He was then taken to Bollinger County jail where "[u]pon his arrival movant was again beaten." (SLF 2 at 112.)

•The files and records indicate that "During a foggy and unknown [read: unknowing] state of mind, as a result of the numerous beatings that movant received, and the drug induced sedated state on February 13, 1992, a (sic) involuntary guilty plea was . . . made." (SLF 2 at 113.)

•The files and records indicate that he was "denied insulin" by the Bollinger County and Cape Girardeau County Sheriff's personnel and that "mind-altering drugs had been administered" to him. (SLF 2 at 113.)

•The files and records indicate that Rubin Weeks was "not competent" to plead guilty and that his plea was "not made intelligently or knowingly due to this mental illness and the severe head trauma that he was suffering from at the time of his plea." (SLF 2 at 114.)

•The files and records indicate that he was beaten during his arrest in Mississippi and was still feeling the effects of that head trauma at the time of his plea. He offered an affidavit from a witness to the beating and its after-effects. (SDLF at 60.)

•The files and records indicate that his head injury and the crease in his skull was documented in medical records from the Fulton Reception Center on 11/26/91. (SDLF at 61.)

•The files and records indicate that he was given an intramuscular shot of 50 mg of Phenergan at the Bollinger County Jail on the day of his guilty plea by Dr. John

Englebert of Jackson, Missouri. At the time, his blood glucose level was 196 mg/dl. (SDLF at 62.)

•The files and records indicate that Rubin Weeks was "borderline retarded." (SDLF at 123.)

•The files and records indicate that defendant was under "undue pressure by the trial court and the sheriff's jail staff" to plead guilty. (SDLF at 125.)

Just saying that the defendant pled guilty does not refute these allegations. Without critical analysis or refutation by the prosecution, it was plain error for the motion court to conclude that the files and records of the case conclusively showed that identity was not an issue in the case.

2. The trial court was concerned about the movant's health and his competence to plead guilty.

The trial court expressed concern on the record about the drugs defendant was taking and the possible effect it might have on the integrity of his guilty plea. In fact, there is some indication that the court knew prior to the day of the guilty plea that defendant was quite ill. (SLF 3 at 6; ¶ 7.) The court had even consulted with defense counsel about the plea negotiations in the case and offered to contact the county commissioner in charge of the jail to inquire about the medical treatment available for the defendant. (SLF 3 at 6;¶ 6.) Consequently, during the plea colloquy, the court

asked the defendant what other drugs he had been taking in addition to his insulin. The defendant did not answer that question: his attorney did.

3. The court was misinformed by defense counsel as to the drugs defendant had been recently administered and defendant tried to correct the misinformation.

When Judge Limbaugh asked Rubin Weeks what drugs he was taking, defense counsel quickly interjected: "Judge, I can give you a report if I can find it." (SDLF at 34.) The court again asked the defendant what medication he was on. The defendant named some of the types of pills and admitted that, as to others, "I don't know what they are." (SDLF at 34.) Defense counsel then referred to a report from the Fulton State Hospital dated January 28, 1992, that contained a discharge summary listing all of the medications (including Prozac) that defendant was given while at Fulton.[5] Counsel added: "I don't know if he is getting those, but he was placed on those." (SDLF at 34.)

An experienced jurist, the trial judge knew that there was a "gap" that needed to be filled. For the third time, he asked the defendant a question designed to elicit the names of the drugs that the defendant had taken recently: "Are you getting all of those

[5]This colloquy took place more than two weeks after movant's discharge from Fulton.

drugs now?" The defendant replied as best he could: "I was under the Sheriff's care over at Cape."

At first blush, that seems to be an unresponsive answer. It did not tell the judge what drugs he had recently taken. What it did tell the court and everyone in the room was that the Fulton medications were a thing of Rubin Weeks' past and that recently, he was not under Fulton's care, he was "under the Sheriff's care over at Cape." That "care" included the recent injection of Phenergan by Dr. John Englebert. (SDLF at 62.) Phenergan (generic promethazine) is known to impair mental functioning, cause marked drowsiness, intensify the sedative action of other drugs, and is known to increase blood glucose levels. Http://www.rxlist.com/cgi/generic/prometh_ad.htm. It was given to him at a time when his blood glucose was already 196 mg/dl, (SDLF at 62) an amount much higher than the 110 mg/dl recommended as normal. As a result, Rubin Weeks could not tell the court any more about his "care."

4. The prosecution stood silent and allowed the court to be misled by the statements of defense counsel.

The persons in the room with access to all of that information were not the defendant or the judge or the defense attorney–it was the prosecutors. They alone had exclusive access to the records of the jail and were in a position to know what the defendant had recently been given and injected with. They were intimately familiar with

the medical condition of the defendant and were kept informed about his care. (SLF 3 at 6-7.)

5. Movant was coerced and pressured into pleading guilty by artificial time limits designed to thwart disclosure of exculpatory evidence.

While the trial court's motivation for wanting the parties to get the plea done quickly (if there was going to be one) was apparently an attempt to put the defendant in a position to receive better and more consistent medical care (SLF 3 at 6-7), the prosecution's motives seem less pure. Defense counsel was informed that he had until the close of business on February 11, 1992, to have his client plead guilty. (SLF 3 at 7.) In light of the fact that the crime lab returned the evidence to the police department on December 23, 1991 (SLF 3 at 14), the police and prosecution knew that it was just a matter of time before the final lab report comparing Rubin Weeks' blood, saliva, and hair against the crime scene collections would be released. It was February 5, 1992, when the prosecutor set the February 11, 1992, deadline. What was the significance of the 11th? It was not a "week." It was not a Friday (the end of a week). Why was it so important to the prosecution that everything be wrapped up before the 12th of February? Perhaps, it was because the prosecution knew that a lab report issued on February 12, 1992, would change the entire posture of the case.

Appellant freely admits that there is no proof that the timing of the guilty plea was motivated by the desire to avoid disclosure of an adverse lab report. But given the fact that the report has never been disclosed by the county prosecutors or the attorney general's office during the nearly twelve years since its delivery, and given the fact that the prosecution has constantly used the guilty plea as a shield to continue to protect against the disclosure of a report that decimates their case, causes this degree of speculation to be not wholly unjustified.

6. The prosecution knew or should have known that the factual basis of the plea it outlined for the court was contrary to the scientific evidence available to it.

The prosecution's failure to disclose the contents of the final crime lab report before the defendant pled guilty had a direct impact on the integrity of the guilty plea in two respects.

First, the plea can not be considered truly "knowing" if the defendant is not permitted to see highly exculpatory scientific evidence in a crime lab report. Missouri courts have set aside pleas of guilty when "exculpatory evidence existed at the time of the guilty plea which reasonably would have led the defendant not to so plead if he had known of that evidence" and it was suppressed by the prosecution. Lee v. State, 573 S.W.2d 131 (Mo. App. W.D. 1978).

Second, to the extent the physical evidence does not match Rubin Weeks, the factual predicate for the guilty plea is destroyed. Rubin Weeks says he "did what they say I did," but he could not have. The prosecution was in a unique position to know that, yet they processed the plea with all possible haste anyway.

The guilty plea did not remove identity as an issue in the trial or in this case. Only a DNA test comparing Rubin Weeks' blood to the vaginal swab and slides will do that once and for all.

IV. THE TRIAL COURT CLEARLY ERRED IN DENYING RUBIN WEEKS APPOINTMENT OF COUNSEL AND A HEARING ON HIS MOTION FOR DNA TESTING AND ON HIS MOTION FOR RECONSIDERATION BASED ON ITS FINDING THAT THE MOTION AND FILES AND RECORDS OF THE CASE DID NOT CONCLUSIVELY SHOW THAT DNA PROFILING TECHNOLOGY WAS NOT REASONABLY AVAILABLE TO RUBIN WEEKS BECAUSE THE ALLEGATIONS OF THE MOTION CONCERNING THE MOVANT'S LACK OF KNOWLEDGE OF DNA PROFILING WERE UNREBUTTED BY THE OTHER FILES AND RECORDS OF THE CASE AND IT IS BEYOND REASONABLE DISPUTE THAT DNA TESTING WAS NOT "REASONABLY AVAILABLE" TO ANY INDIGENT DEFENDANT IN SOUTHEAST MISSOURI IN 1992.

The standard of review on this point is the "clearly erroneous" standard. This Court will determine if the findings and conclusions of the motion court and court of appeals are clearly erroneous, meaning, that if after reviewing the entire record, the Court is left with the definite and firm impression that a mistake has been made. Snowdell v. State, 90 S.W.3d 512, 513-14 (Mo.App.E.D. 2002).

A. The standard that must be met for getting a hearing on a post-conviction DNA motion filed under § 547.035.6 RSMo. is exactly the same as the standard that must be met for the issuance of a show cause order under § 547.035.4 RSMo.

Any circuit court confronted with a motion for DNA testing, whether filed under old Rule 29.17 or under §547.035 RSMo. (Supp. 2002) must make an initial decision about whether to order the prosecutor to show cause why the requested testing should not occur. The threshold requirement for the issuance of that show cause order is found in § 547.035.4: "The court shall issue to the prosecutor an order to show cause why the motion should not be granted unless: (1) It appears from the motion that the movant is not entitled to relief; or (2) The court finds that the files and records of the case conclusively show that the movant is not entitled to relief." Logically, the issuance of a show cause order demonstrates that the court, after reviewing the motion, found that it did not appear from the motion that the movant was not entitled to relief. Similarly, the issuance of a show cause order demonstrates that the court, after reviewing the files and records of the case, found that the files and records of the case did not conclusively show that the movant was not entitled to relief.

The second issue to be resolved by the court is whether there should be a hearing on the motion. The standard for determining whether a hearing should be

ordered is set forth in §547.035.6: "If the court finds that the motion and the files and records of the case conclusively show that the movant is not entitled to relief, a hearing shall not be held." Clearly, the threshold finding for getting a hearing under § 547.035.6 is exactly the same as the threshold finding for issuing the show cause order under § 547.035.4. In both instances, the court must examine the motion, files, and records of the case and take the next step--either issue a show cause order or order a hearing--unless the motion, files, and records conclusively show that the movant is not entitled to relief. Thus, if a movant meets the first standard–that being for the issuance of the show cause order–he must also meet the standard for getting a hearing, unless there is some new or additional "file or record" in the case that is brought to the court's attention by the government's response that conclusively shows that the Movant is not entitled to relief.

The motion court in this matter issued a Show Cause Order on January 30, 2002. (SDLF at 129.) Thus, the motion court clearly found that it did not appear from the motion that Rubin Weeks was not entitled to relief, and, that after reviewing the files and records of the case existing in the file as of January 30, 2002, it found that the files and records of the case did not conclusively show that the movant was not entitled to relief.

However, after issuing the show cause order and receiving a joint response from the two prosecutors involved, the court then found that Rubin Weeks was not entitled to a hearing on the issues raised in the motion because "the files and records of the case conclusively show that the Movant is not entitled to relief." (SDLF at 139.) It is thus obvious that the motion court based its denial of the hearing entirely on the contents of the only new "file or record" that did not exist at the time of the issuance of the show cause order on January 30, 2002. That "file or record" was the Response to Motion for DNA Testing filed by the prosecutors of Cape Girardeau County and Bollinger County on March 29, 2002. (SDLF at 131-37.) Before this document was in the file, the court did not find that the files and records of the case conclusively showed that the movant was not entitled to relief, but apparently, after it was filed, the court changed its mind. Thus, whether the motion court clearly erred in denying Rubin Weeks a hearing on the motion depends on whether that one document, the only one added to the file after the issuance of the show cause order, conclusively showed that Rubin Weeks was not entitled to relief. Reliance on that document to deny Mr. Weeks DNA testing was unjustified.

B. The court based its ruling on a pleading containing a grossly misleading, if not blatantly false, statement that would have been irrelevant to the issue of whether DNA technology was reasonably available to movant

and would have constituted inadmissible hearsay if it had been offered in court.

The prosecution filed a "Notice of Disclosure" in the Circuit Court of Cape Girardeau County on January 3, 1992, that became part of the trial court's file and therefore part of the "files and records of the case" as of the time of ruling by the motion court. It has now become part of the Record on Appeal in this matter. (SLF 2 in its entirety.) This Notice of Disclosure contains evidence summaries prepared by police officers that are unsigned, not offered under oath, and clearly not subjected to cross-examination or any other form of critical analysis. It contains bare allegations, and purported witnesses' statements that are unsupportable and completely unsubstantiated with reference to the physical evidence. Much, if not all, of the documents contained in that Notice of Disclosure would be inadmissible at trial without significant foundational support. Much of it is no more than uncorroborated, inadmissible hearsay. Yet these documents constitute the "files and records of the case" upon which the motion court relied in denying DNA testing to Rubin Weeks.

There is no question that the factual allegations that Movant made in his various pleadings contained in the "files and records of the case" are sometimes similarly unsupportable on the face of the document and would require foundational support and documentary support. But, as such, they are entitled to as much weight as the

prosecution's bare allegations in making a determination of whether a hearing is required. After all, that is what hearings are for: to turn the parties' bare factual allegations and assertions into admissible, legally cognizable, proof. How can the type of incompetent, inadmissible evidence contained in the "files and records" of this particular case ever conclusively show anything? What follows immediately below is just one example of reliance on incompetent records put in the file by the prosecution that could have been easily refuted by the movant had he been given counsel and an opportunity to be heard in a hearing.

The motion court apparently was highly persuaded by the following sentence contained in the Response to Motion for DNA Testing because it repeated the sentence verbatim in the Judgment: "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." (SLF 2 at 207.)

The affidavit that this sentence makes reference to is the Affidavit of Sgt. David James filed in support of the application for a search warrant. In its original form, the relevant sentence read as follows: "C.R. Longwell has been trained by the FBI in DNA

testing. He indicates that sufficient samples of biological matter were present on the vaginal smear and the crotch of the pants, that a comparison to a suspect's blood should provide a conclusive scientific comparison as to whether the semen stains are from a particular suspect." (EDLF at 41-42.)[6]

1. This statement, even if true, does not conclusively show that DNA technology was "reasonably available" to Rubin Weeks in 1992.

The fact that C.R. Longwell might have been trained in DNA testing by the FBI did not make DNA technology reasonably available to Rubin Weeks or anyone else, for that matter. While it is undoubtedly true, as the Affidavit alludes to, that DNA profiling and comparison of properly drawn and extracted specimens could certainly conclusively prove whether semen came from a particular suspect, that does not mean that DNA technology was reasonably available to an indigent defendant like Rubin Weeks in southeast Missouri in 1992. The statement proves nothing about the proposition for which it is being offered.

2. The statement is inadmissible hearsay and not inherently reliable.

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[6]The Affidavit that the prosecutors quoted was already part of the "files and records of the case." If that Affidavit did not conclusively show that Rubin Weeks was not entitled to relief before the Show Cause Order was issued, it surely still did not do so after the prosecutors re-phrased it in their Response.

To the extent the prosecutor quoted David James' affidavit, the statements in the Response to Motion for DNA Testing are hearsay. More to the point, the original affidavit was not sworn to by C.R. Longwell–it was sworn to by David James. If this statement had been made in court by David James (assuming it got by the relevance objection), it would be objected to as inadmissible hearsay and lacking in foundation. While hearsay may be used to satisfy the relatively low threshold probable cause requirements for the issuance of a search warrant, it should not be relied upon as the sort of conclusive proof necessary to deny a hearing on a DNA motion.

3. The statements regarding C.R. Longwell are grossly misleading.

The quoted statement relied upon by the court consisted of two components with respect to Mr. Longwell. One sentence says that C.R. Longwell works for the Southeast Missouri Regional Crime Laboratory. In fact, that statement was true at the time.

The second sentence says that Mr. Longwell had been trained by the FBI in DNA testing. One very reasonable conclusion that could be drawn from reading that sentence is that C.R. Longwell has been trained to <u>perform</u> DNA testing as opposed to, for example, merely learning about its history and potential as an investigative tool for law enforcement agencies in the future. The appellant does not know whether it

is literally true that Mr. Longwell attended an FBI seminar about DNA. However, taken in combination, those two sentences can be quite misleading.

It would have been reasonable for the court or any other reader to conclude from the language from those two sentences that, as of the date of the Affidavit, C.R. Longwell, who has been trained by the FBI, performed DNA testing in the course of his employment at the Southeast Missouri Regional Crime Laboratory. If the court drew that conclusion from those two sentences, it might be tempted to conclude that the technology for DNA testing was "reasonably available" to a criminal defendant in southeast Missouri in 1992 because, after all, the local crime lab had a trained analyst performing DNA tests right there in Cape Girardeau. That conclusion would have been absolutely false.

4. There was no DNA testing taking place at the Southeast Missouri Regional Crime Lab in 1992 by C.R. Longwell or anyone else.

Had Rubin Weeks been granted a hearing, he would have been able to show by a preponderance of the evidence that DNA technology was not reasonably available to him or anyone else in southeast Missouri in 1992. Part of the testimony he would have offered would have come from the founder and executive director of the Southeast Missouri Regional Crime Lab (SEMO), Dr. R.C. Briner. As set forth in Dr. Briner's Affidavit (SLF 3 at 13-14):

•No one was doing DNA testing at SEMO in 1992;

•C.R. Longwell never became certified in DNA testing before his retirement in 1996 and never performed a DNA test for SEMO during his employment there;

•SEMO did not have a certified DNA analyst until Shirley Deng became certified sometime in 1993;

•SEMO did not have the money for DNA testing equipment until sometime in 1994 and, even after purchasing the equipment, had to have the equipment and software re-certified along with the operator, Ms. Deng;

•SEMO did not report the results of its first DNA test until September 1995.

If the statements made by the prosecutors about Mr. Longwell's training and place of employment persuaded the court that "it is clear that such [DNA] technology was reasonably available" to Rubin Weeks, that finding was clearly erroneous. Dr. Briner's Affidavit makes it very clear that, at least with respect to the Southeast Missouri Regional Crime Lab, DNA technology was not reasonably available to anyone in 1992.

E. The facts that Rubin Weeks alleged in his Motion for DNA Testing and Motion for Reconsideration supported the conclusion that the technology for DNA testing was not reasonably available to him in 1992 and those facts were unrebutted by the prosecutors' Response.

1. Rubin Weeks personally lacked sufficient knowledge and resources in 1992 to have reasonable access to DNA technology.

Rubin Weeks' Motion for DNA Testing pled facts relevant to his ability to understand and his actual understanding of DNA technology. Those facts were unrebutted by the prosecution's response. In 1992, Rubin Weeks was functionally illiterate and had a second grade education. (SDLF 2 at 19; SLF 3 at 5.) He had suffered a head injury as the result of a beating by law enforcement officers. (SLF 2 at 60, 61.) He had no knowledge of DNA technology. (SLF 2 at 147.) He was not from Missouri. He did not know where to obtain a DNA test or how to request one even if he knew he needed one. As far as his personal knowledge of the biological evidence is concerned, he did not know of its existence until discovery was conducted in a civil lawsuit he filed in 1997. (SLF 2 at 149.) He was indigent and had no funds to pay for a DNA test even if he were fully knowledgeable about where to get one and what to ask for. As was described in a previous section of this brief, he was physically ill and under the influence of prescription drugs that impaired his cognitive functioning. Weeks was thus personally in no position to request a DNA test, and thus no such test was reasonably available to him.

The prosecution did not rebut any of these specific factual allegations made by Rubin Weeks that were contained in "the files and records of the case" as of the time of the motion court's ruling.

2. Rubin Weeks' trial counsel lacked sufficient knowledge and resources in 1992 to have reasonable access to DNA technology.

Trial counsel had never requested a DNA test for a client before he represented Rubin Weeks, and he did not request one at any time after he represented Rubin Weeks. (SLF 3 at 9.) He was not sufficiently familiar with the technology to know what to request or where to request it. (SLF 3 at 9.) The Public Defender's office in his district did not have the resources to pay for such tests in 1992, and his clients certainly could not afford the cost of testing.

3. It is probable that no indigent defendant anywhere in the State of Missouri had reasonable access to DNA technology in 1992.

There may have been wealthy defendants with private attorneys who could have afforded DNA testing in 1992, but the technology was well beyond the reach of the average criminal defendant in Missouri. This Court announced in State v. Davis, 814 S.W.2d 593 (Mo. 1991), that the admissibility of DNA testing in Missouri was an issue of first impression. The Court made reference to two labs in the United States that performed such tests at the time of the Davis case: Cellmark and Lifecodes. Neither

were located in Missouri. Mr. Davis himself was not indigent and had retained counsel throughout his trial and appeals. Anecdotally, DNA testing through private labs cost more than $3000.00 per specimen to be tested as late as 1996 throughout the United States. There was no indication in 1992 that an indigent defendant could obtain testing from the few state-operated law enforcement labs that were in operation in Missouri. The state-subsidized regional crime labs did not start doing DNA testing until after the Missouri Highway Patrol began its DNA operations and those were likewise not available to indigent defendants in 1992.[7]

The files and records of this case certainly did not conclusively show that DNA technology was reasonably available to Rubin Weeks. In fact, in 1992, it was not only not reasonably available to Rubin Weeks, it was not reasonably available to indigent defendants at all.

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[7]And, of course, even if the labs had been available, the lack of confidentiality regarding the results of the testing would have had a chilling effect on the desire of any criminal defense lawyer to use a state-supported lab that was nearly exclusively used by law enforcement.

CONCLUSION

After former Circuit Judge Stephen Limbaugh carefully observed and questioned Rubin Weeks on February 13, 1992, he told the defendant: "I really don't think you're [the] kind of person who would commit a crime like this." (SDLF at 46.) Hindsight tells us he was right. Because the prosecution kept it from him, the judge did not have the benefit of knowing that, just the day before, the Southeast Missouri Regional Crime Lab had scientifically determined Rubin Weeks was not the kind of man who committed that crime.

WHEREFORE, Appellant prays that this Court find that the motion court 1) plainly erred in denying Appellant appointment of counsel and a hearing on his DNA motion and, 2) further find that the files and records of the case do not conclusively show that Appellant was not entitled to relief under 547.035, and therefore, 1) reverse the decisions of the Eastern District Court of Appeals and the motion courts and remand this action back to the motion courts with instructions to order the testing requested by the Appellant consistent with the statutory procedure for establishing the protocols of the testing, or, in the alternative, 2) reverse and remand this action back to the motion courts with instructions to appoint counsel for Appellant and set the matter for hearing, or, in the alternative, 3) to the extent this Court cannot make the findings described above because of the state of the Record on Appeal, to remand this matter back to the motions courts for development of the record that will permit appropriate findings, and , 4) for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 17,473 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 8 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 two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 18th day of December, 2003, to:

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