IN THE MISSOURI SUPREME COURT

Nos. 85448 and 85552

RUBIN WEEKS,

Movant/Appellant,

v.

STATE OF MISSOURI,

Respondent/Appellee.

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. APPELLANT'S FAILURE TO FILE A VERIFIED PRO SE MOTION FOR DNA TESTING DOES NOT REQUIRE THIS COURT TO DENY APPELLANT RELIEF.

A. The verification requirement for pro se post-conviction motions was relaxed in State v. White, 873 S.W.2d 590 (Mo. banc 1994).

This Court has recognized the difficulties inherent in requiring pro se prisoner litigants to comply with the verification requirements of post-conviction statutes and rules. As the Court noted in State v. White:

> In our experience, defendants who are incarcerated frequently complain that they have difficulty arranging for a notary public to verify their post-conviction motions so that they can be timely filed. . . . cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paperwork. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so that they can reach a just and timely result . . .

873 S.W.2d at 593. In White, this Court developed a practical solution to a practical problem – it held that the defendant's signature would serve as sufficient verification under Rule 29.15.

That issue arose again, this time in the context of a Rule 24.035 motion, in Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000). The movant in White v. State, Leamon White, had filed his pro se Rule 29.15 motion without benefit of verification before a notary, but David Wayne Tooley had failed to even sign his pro se Rule 24.035 motion. Mr. Tooley argued that his signature was unnecessary in light of this Court's ruling in White. In affirming the motion court's denial of relief to Mr. Tooley, the Court distinguished Tooley from White and held that for pro se litigants, the prisoner's signature is the minimum means of acceptable verification for Missouri post-conviction motions.

Appellant agrees with Respondent that, with respect to verification of §547.035 motions, this is an issue of first impression. As such, the decisions of this Court relative to the level of scrutiny that Rule 29.15 motions and Rule 24.035 motions are subjected to are instructive, if not controlling. The rulings of this Court in White and Tooley stand for the proposition that if a prisoner signs a post-conviction motion, he or she has provided sufficient verification of the statements contained therein. Rubin Weeks signed his Rule 29.17/§547.035 motion, therefore he has "verified" its contents to the extent required by law. There is no sound jurisprudential reason to return to the

days before the White decision when technicalities of this type "fog[ged] the underlying issues."

B. Because significant portions of the motion filed by Appellant were verified, as a whole it carried sufficient indicia of credibility to meet the letter and spirit of any verification required by §547.035.

The pro se motion seeking DNA testing under Rule 29.17 consisted of 93 pages of detailed allegations and legal citations filed at various times prior to the court's ruling. (SLF 2 at 110-203.) While there was not one "global" verification executed by Rubin Weeks before a notary public, several documents setting forth facts relevant to the statutory requirements of §547.035 were sworn to by Appellant before a notary.

•Appellant set forth facts relevant to the allegation that his guilty plea was coerced, including allegations of brutality by police and detention personnel directed at Appellant, forced drug ingestion, and coercion by law enforcement personnel, in a document executed by Appellant before a notary public. (EDLF at 139.)

•Appellant set forth facts relevant to the allegation that his guilty plea was coerced, including allegations of denial of his insulin, refusal of medical treatment for a concussion he received at the hands of police officers, and attempts by police to coerce defendant into confessing, in a document executed by Appellant before a notary public. (EDLF at 141.)

•Appellant set forth facts relevant to his state of mind at the time of his incarceration and guilty plea in a document executed by Appellant before a notary public. (EDLF at 143.)

•Appellant set forth facts relevant to his mis-identification as the person who raped the victim and specifically relevant to whether he had sufficient cuts on his body to have produced the amount of blood that the attacker apparently shed during his struggle with the victim – all in a document executed by Appellant before a notary public. (EDLF at 152.)

To the extent that the purpose of verification is to lend additional credibility to the bare allegations of a post-conviction pleading, the above affidavits accomplish that objective. Rubin Weeks substantially complied with the letter and spirit of §547.035.

C. Judicial economy dictates that this appeal be decided on the merits.

There is no bar in §547.035 against successive motions. If this Court should deny movant relief on the basis that his motion is defective for lack of verification, and thereby not consider or adjudicate the substantive issues raised by this appeal, the Appellant would not be barred from filing a new motion that is verified. The more serious policy questions raised by the lower court decisions would merely be postponed for another day. It simply makes more sense to reach the merits in this action.

D. The compelling remedial purposes of §547.035 dictate that it should be construed so as not to impose artificial restrictions on the availability of DNA testing.

As previously argued by Appellant (see supra, Opening Substitute brief at 22-24), the DNA statute is remedial in nature. It recognizes the reality that innocent people are convicted or plead guilty of crimes they did not commit and provides a remedy that appropriately balances important interests in finality and fairness. As such, it must be liberally construed. See State ex rel. LeFevre v. Stubbs, 642 S.W.2d 103, 106 (Mo. 1982).

Additionally, pro se petitions are to be construed favorably to the pleader and indulged with liberality. See, e.g., Duvall v. Lawrence, 86 S.W.3d 74, 80 (Mo. App. E.D. 2002); Herron v. Wyrick, 686 S.W.2d 56, 57 (Mo. App. W.D. 1985). This helps to insure that obscure or difficult procedural hurdles do not preclude relief for those without counsel who have colorable claims that should be heard on the merits.

These two policies converge to require that §547.035 be construed so as not to preclude incarcerated prisoners making substantial claims of innocence, the very persons the statute was designed to benefit, from taking advantage of this statutory opportunity to definitively prove their innocence by means of artificial and unnecessary procedural requirements. A construction of the statute that requires a signature, but not formal verification, is most consistent with the remedial aims of the statute to

prevent the "intolerable wrong" of continued incarceration of the innocent. State ex rel. Amrine v. Roper, 102 S.W.3d 541, 547 (2003).

II. APPELLANT'S MOTION PLED SUFFICIENT FACTS TO SATISFY THE REQUIREMENTS OF §547.035.

A. Appellant pled sufficient facts tending to prove that identity was an issue at trial.

At the core of every document filed by the Appellant in support of his request for DNA testing were his arguments that: (1) he could not have kidnaped or raped the victim because he was not in the State of Missouri at the time of the occurrence, and, (2) that he did not knowingly or voluntarily plead guilty to those crimes. Alone and in combination, these allegations make identity an issue in the case.

B. Appellant pled sufficient facts in support of the conclusion that technology for DNA testing was not reasonably available to him.

Among the facts presented to the motion court tending to prove this allegation were:

•That in 1992, movant was functionally illiterate and had a second grade education. (SLF 2 at 19; SLF 3 at 5.)

•That he had a head injury suffered as the result of a beating by law enforcement officers. (SLF 2 at 60, 61.)

•That he had no knowledge of DNA technology. (SLF 2 at 147.)

•That he did not know of the existence of the biological evidence until discovery was conducted in a civil lawsuit he filed in 1997. (SLF 2 at 149.)

•That he was "denied insulin by the Bollinger County and Cape Girardeau County Sherrifs (sic) Personnel" and that "mind-altering drugs had been administered" to him. (SLF 2 at 113.)

The facts presented to the motion court by Rubin Weeks did not deal with the state of the art of DNA testing in Missouri in 1991 and 1992 or whether Cellmark or Lifecodes was open for business. He knew nothing about those issues either in 1992 during his case or in 2002 when he filed the DNA motion. What he knew was that DNA technology was not reasonably available to him, and that is the only relevant inquiry.

C. Appellant pled sufficient facts in support of the conclusion that there was no reasonable likelihood that a jury would have convicted him if presented with scientific results showing that his DNA was not found in the vaginal swab and smear.

Every fact that Rubin Weeks presented to the motion court bearing upon the voluntariness of his guilty plea, the unknowing nature of his guilty plea, the coercive nature of the police in attempting to extract confessions from him, the misrepresentations made by the police and prosecutors to him, and his description of the witnesses supporting his alibi for the dates in question all related directly to whether there was a reasonable likelihood that a jury would have convicted him if presented with exculpatory DNA results. Appellant will grant that the motion and the exhibits he filed in support of it (nearly 100 pages in all) could have been organized better to permit the reader to discern which of his factual statements related to which threshold issue in §547.035.[1] However, given the breadth of the facts that a court could consider in reaching its decision on the issue under discussion, it is fair to say that the bulk of the factual statements in his motion related to this issue. Appellant met his burden of factual pleading.

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[1]As previously noted, as a pro se prisoner petition, this pleading is to be liberally construed. See supra at 9-10.

III. THE APPELLANT'S GUILTY PLEA DOES NOT CREATE A RECORD THAT CONCLUSIVELY SHOWS THAT APPELLANT IS NOT ENTITLED TO A DNA TEST.

A. The DNA statute provides an opportunity for those who have pled guilty and those who have gone to trial to obtain a post-conviction DNA test, but the requirements are different for the two classes of movants.

The Respondent apparently does not take issue with Appellant's argument that, as a matter of statutory construction, persons who plead guilty have an opportunity to file a motion for relief under §547.035. However, Respondent takes the position that because a guilty plea terminates any issue of "identity" in the case, no one who pleads guilty should ever obtain relief under the statute. Proper construction of the statute yields a different result.

It is clear that a person who has pled guilty is within the class of prisoners who can lawfully seek post-conviction testing under §547.035.[2] It is equally clear that a person who has put the state to its proof and has gone to trial may seek relief under the statute. It was the intent of this Court to provide an avenue of relief for both of

[2]See, statutory construction analysis, Appellant's Substitute Brief, pp. 15-19.

these classes of prisoners in fashioning Rule 29.17, and it was the intent of the General Assembly to do so in enacting §547.035.

The source of the confusion, and the source of the argument advanced by Respondent, is that some have read §547.035 to require the impossible of a prisoner who has pled guilty. The Respondent wants this statute to be interpreted in such a way that a person who has pled guilty must, before obtaining post-conviction DNA testing, establish that "identity was an issue at trial," when it is patently obvious that there was no trial. If this is a correct interpretation of the statute, then the provisions regarding transcribing the guilty plea hearing in §547.035.5 are meaningless. The proper interpretation of the statute is one in which all of the various provisions of the statute are read in harmony with each other, assigning to all the words in the statute their plain and ordinary meaning in the law and, at the same time, giving effect to the legislative purpose of the statute. See Missouri Department of Social Services v. Brookside Nursing Center, Inc., 50 S.W.3d 273, 277 (Mo. banc 2001); Gott v. Director of Revenue, 5 S.W.3d 155, 159-60 (Mo. banc 1999). The issue before this Court is how to eliminate the confusion, harmonize the various provisions of the statute with each other, and do so in a way that makes sense from a policy perspective given what we now know about the relationship between actual innocence as established by DNA testing and guilt as established by juries and guilty pleas.

B. From a policy perspective, it makes sense that under §547.035, a prisoner who has had a trial must establish that "identity was an issue at trial" in order to obtain relief.

From a policy standpoint, it would make no sense for persons to be able to obtain post-conviction DNA testing if they went to trial with an opportunity to present all of their available defenses, and the defenses that they interposed at trial did not include a challenge on the issue of identification.

For example, if a defendant was charged with rape, and he went to trial claiming that the victim consented to the sexual contact, he has interposed a defense that does not raise the issue of false identification. The consent defense not only waives the issue of identification, it acknowledges that the defendant is the person with whom the alleged victim had sexual contact. There is no issue of identity at trial. Post-conviction DNA testing will not shed any light on the contested issue at trial, namely consent, therefore post-conviction DNA testing could lawfully be denied to that prisoner.

Similarly, if a defendant was charged with homicide and he went to trial claiming self-defense, he acknowledged that he was the person who killed the alleged victim. He may have been legally justified in doing so, but there was no issue of identification of the killer at trial. Post-conviction DNA testing will not shed any light on the

contested issue at trial, namely self-defense, therefore post-conviction DNA testing could lawfully be denied to that prisoner.

Similar results would follow if the defense at trial was insanity or some form of diminished capacity. Those defenses, just as with consent and self-defense, say to the trier of fact: "You've got the right guy – it's just that I had a lawful (or explainable) reason for doing what I did." Because DNA testing is designed to determine the identity of a perpetrator of an offense, it has no relevance to certain types of defenses that are available if the defendant goes to trial.

C. From a policy perspective, it makes sense that under §547.035, a prisoner who has pled guilty does not have to establish that "identity was an issue at trial" – they have more substantial burdens to meet elsewhere in the statute.

This Court and the General Assembly created a means for a prisoner who has been convicted after a trial to obtain post-conviction DNA testing because the forensic use of DNA testing in the post-conviction setting has graphically shown us that witnesses, prosecutors, and juries sometimes make mistakes, and, when they do, innocent people are put in prison as a result. Likewise, as *amici* points out, we now know that defendants sometimes confess to, and plead guilty to, crimes that they could not possibly have committed. See also Christopher Smith and Madhavi McCall,

Constitutional Rights and Technological Innovation in Criminal Justice, 27 S. Ill. U.L.J. 103, 124-25 (2002) (discussing the extent to which innocent individuals plead guilty and explaining reasons for that occurrence).

For many years, about the only time a statement made by a defendant was believed was when the defendant admitted his or her guilt. As badly as we want to believe that a defendant will not make a statement contrary to his or her penal interests unless it is absolutely true, we now know that sometimes confessions are false. Sometimes they are coerced. Sometimes they are the product of mental retardation or mental illness. Sometimes they are given to protect another person important to the defendant. But often, there simply is no rational explanation for why a person tells a judge he or she committed a crime that was committed by another person or not committed at all. It took DNA testing to prove to some in the legal community that false confessions and false guilty pleas actually exist. Now that we know that they do, what is the proper legislative response from a post-conviction perspective?

If this Court finds that all persons who have pled guilty are candidates for relief under §547.035, but only those defendants who went to trial and actually contested the issue of identity are such candidates, some will argue that the Court has created a higher burden of proof for those who went to trial. That would not be the case. The other provisions of §547.035 place a far greater burden on one who has pled guilty.

Whether one has gone to trial or has pled guilty, the movant must still establish that "a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing." §547.035.2 (5); §547.035.7 (1). The fact that the movant confessed (or pled guilty) to the offense will undoubtedly be taken into consideration and given great weight in making the determination of whether, in light of all the evidence, there was a "reasonable probability . . . that the movant would not have been convicted" if exculpatory DNA results were offered at trial. In the final analysis, under §547.035.2 (5) and §547.035.7, the prisoner who has never confessed to anything is clearly going to have a much easier time demonstrating that he might not have been convicted had exculpatory DNA results been available to him than the prisoner who is on record confessing to the crime and pleading guilty.

It may be that there are facts and circumstances surrounding some confessions and guilty pleas that make them less trustworthy in the eyes of the court ruling on a post-conviction DNA motion, but clearly that burden of persuasion is on the movant. All things considered, a statutory scheme that permits those who have gone to trial to have to prove that identity was an issue in that trial while allowing those who have pled guilty to obtain post-conviction DNA testing withstands equal protection analysis.

D. Not all guilty pleas are created equal.

In more than one place in its brief, Respondent cites case law from this Court saying that guilty pleas dispose of all issues in a case. Every citation from every case, however, includes the qualifying phrase: "if voluntarily and understandingly made." One of the issues before this Court is whether Appellant's guilty plea was voluntary and knowing.

For that reason, Appellant pled in his Motion for DNA Testing and argued in his opening brief that his cognitive processing at the time of the guilty plea was impaired by head injuries, drugs administered by jail personnel, and out-of-control diabetes. Respondent did not deny these allegations.

Appellant argued that the court was misinformed by defense counsel as to the drugs influencing Appellant's cognitive processing on the day of the plea and that the prosecutor, who had the truth available to him, stood silent and allowed the court to be misinformed. Respondent did not deny these allegations.

Appellant argued that he was pressured into pleading guilty, perhaps in order to get him to plead before exculpatory lab results were made available. Respondent did not deny these allegations or offer a less damning explanation for the arbitrary time limits imposed on Appellant and his counsel.

Appellant argued that the guilty plea was obtained by outright fraud. The factual basis for the plea was set forth by a prosecutor who knew that a laboratory report

given to his office the day before the plea conclusively proved that the defendant could not have committed the crime. In addition, because he did not know of the existence or the exculpatory contents of the lab report, Appellant cannot be said to have knowingly pled guilty. He argued that "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 thus the guilty plea could have been set aside as "unknowing" under Lee v. State, 573 S.W.2d 131 (Mo. App. W.D. 1978). These arguments were contested by the Respondent by saying that the laboratory results concerning the semen stain were not exculpatory because there was evidence that the rapist did not ejaculate.

E. The report of February 12, 1992, was exculpatory with respect to the semen stain in the victim's slacks.

When faced with a post-conviction DNA test conclusively demonstrating that a convicted person could not have been the contributor to a certain semen sample, prosecutors and states' attorneys have often desperately tried to defend the conviction by suggesting either that:

•The exculpatory test proves nothing because the semen is not the product of the rape because the rapist did not ejaculate – "The Convicted Non-Ejaculator Theory"; or,

•The exculpatory test proves nothing because another person could have contributed his DNA to the semen sample along with the defendant, but the test only detected the DNA of the other contributor – "The Non-Indicted Co-Ejaculator Theory"

Therefore, it was not surprising when the prosecuting attorneys at the circuit court level argued that Rubin Weeks' request for a DNA test should be denied because the rapist did not ejaculate. They reasoned that a DNA test, even if it resulted in no match between the rape kit and Weeks' DNA, would not prove that Weeks did not rape the victim. Respondent reiterates that argument in this Court. (Respondent's Brief at 35 and 52.)

However, when the Respondent had to acknowledge for the first time in the history of this litigation that it had in its sole possession, prior to the defendant's guilty plea, a lab report that proved that the semen stain in the crotch of the slacks worn by the victim immediately before and immediately after the rape was the product of a Type A secretor and that Rubin Weeks is not a Type A secretor, the Respondent took the position that Rubin Weeks cannot be eliminated from the population that contributed to the stain. (Respondent's Brief at 49). The Respondent has thus created an all-purpose, hybrid defense to a DNA motion. The Respondent argues in the same pleading that Rubin Weeks did not ejaculate and yet cannot be ruled out as a contributor to the semen stain found in the crotch of the victim's slacks. It's a

defense for all seasons – if the rapist did not ejaculate, no test can prove Rubin Weeks innocent; if the rapist ejaculated, Rubin Weeks must have done so as well, so no test can prove him innocent.

The Respondent cannot have it both ways. In fact, they cannot have it either way.

1. The rapist ejaculated.

There is substantial evidence that the rapist ejaculated. Semen was present in the victim's vagina and was preserved on the swabs and slides taken at the hospital. (SLF 1 at 188; SLF 2 at 42; SLF 3 at 12.) The sperm cells in that semen were still intact, suggesting that the semen was the result of very recent sexual activity resulting in ejaculation. (SLF 2 at 42: SLF 3 at 12.) There was a stain in the crotch of the slacks worn by the victim that contained human seminal fluid. (SLF 2 at 43.) The victim did not testify at any time that she intentionally wore a pair of slacks to work bearing a semen stain in the crotch. The victim did testify that, after she was raped, she put her slacks back on, but not her pantyhose. (SLF 1 at 19.) She testified that she then ran down the road as fast as she could. (SLF 1 at 22.) There was no indication in the record that there was a semen stain in the crotch of the pantyhose that she wore immediately before the rape, but not after.

The victim never testified that the rapist did not ejaculate. She was not asked that question. She stated that the rapist was interrupted by sounds on two occasions, but she did not say that he failed to ejaculate. (SLF 1 at 19.)

The Respondent suggests that the fact that the victim was a married woman adds credibility to the claim that the rapist did not ejaculate. (Respondent's Brief at 35 and 52.) Presumably, the Respondent is stating that while an unmarried woman might not know whether a sexual partner has ejaculated, a married woman would certainly know. Treating this subject with the delicacy it deserves, Appellant would simply point out that a married woman's unique expertise in this area might be limited to being able to detect if and when her husband has ejaculated during consensual sex. The argument that a woman's marital status will make a difference in her ability to detect ejaculation by a stranger while experiencing the terror of a violent rape borders on utter nonsense. At the very least, this speculative argument would have to yield to the scientific analysis of the rape kit that established the existence of fresh semen and intact sperm in her vagina and on her clothing.

2. There was only one rapist and only one source of semen in the stain.

In is undisputed in the record that the victim was raped by a single attacker. When the semen stain was initially analyzed, Type O blood antigens were detected. Those were traceable to the victim. Type A blood antigens were also detected. No other blood types were detected. No other source of semen was detected or suspected. The victim did not testify about whether the rapist ejaculated, but she was very clear that there was only one man who raped her.

The conclusion of the lab after the initial work-up was that the single rapist was blood Type A. The blood found on the weapon and on the victim's clothing was Type O (the victim's) and Type A (the rapist's). The lab expected the blood type found in the semen to match one of the two blood types found on the weapon and other surfaces. It did – it was Type A. The lab told the police to get the blood of Rubin Weeks and allow the lab to determine if he was Type A.

3. The rapist was a Type A secretor; Rubin Weeks is not.

In order for a man's blood type to be detected from a serological examination of his semen, he must secrete blood antigens in his bodily fluids, such as his saliva, his mucosal secretions, and his semen, as well as his blood. Based on the lab's initial work-up of the semen stain, the person who contributed that semen had blood Type A and secreted Type A antigens in his bodily fluids.

When the lab obtained the blood standard from Rubin Weeks, they determined that he had Type A blood. They also determined that his body did not secrete Type A antigens in his other bodily fluids because they were not present in his saliva swabs or on the cigarette butts that were known to contain his saliva. As a non-secretor, Rubin Weeks could not possibly have been the source of the semen in the slacks of the victim.

4. If there is some doubt about the value of the serological testing on the slacks, then we should test the swabs and slides with DNA technology.

The one statement made by a Cape Girardeau County law enforcement official that Appellant will not take issue with was contained in the affidavit in support of the search warrant to seize Rubin Weeks' blood and saliva standards. "Sufficient samples of biological matter were present on the vaginal smear and crotch of the pants . . . 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.)

The arguments proffered by the state that the February 12, 1992, lab report is not exculpatory with respect to Rubin Weeks are contradictory and absolutely without support in the record. Because Rubin Weeks is a non-secretor, the results of serology testing on a semen stain will never exclude him or include him as the source of the

semen. Only a DNA test which does not depend on determining the source's blood type will include or exclude a non-secretor from any given semen sample.

F. The prosecution's failure to disclose the contents of the February 12, 1992, laboratory report is cognizable in this appeal.

The Respondent misanalyzes the significance of the failure of the prosecution to disclose the contents of the February 12, 1992, lab report to the defense in relation to the motion for DNA testing. While it is true that a claim of a "Brady violation" or "prosecutorial misconduct" might be made in a different forum to obtain other types of post-conviction relief (such as setting aside the Movant's guilty plea), those remedies are not available to Movant in this action. That does not mean, however, that the government's non-disclosure is irrelevant to this appeal. It is absolutely critical – the government's failure to disclose that report directly affected the entire course of this litigation and is the primary reason why Rubin Weeks is still in prison.

1. The non-disclosure impacted Appellant's decision to plead guilty.

As suggested above, a guilty plea made without knowledge of the existence of exculpatory evidence is one that is not entered into knowingly and understandingly. The February 12, 1992, lab report did not provide any support for the theory that Rubin Weeks had been in or touched the victim's car, or that the victim had been in

or touched Rubin Weeks' car, or that Rubin Weeks had been in Room 11 of the motel where the victim worked. Most significantly, it did not provide any support for the theory that Rubin Weeks had contributed to the semen stain found on the victim's slacks. However, it did provide support for the conclusion that the victim was raped by a man who secretes Type A blood antigens in his semen, an act that Rubin Weeks is physiologically incapable of. Had Rubin Weeks known that information on February 12, 1992, there is a reasonable likelihood that he would not have pled guilty on February 13, 1992. And, to the extent that the guilty plea and its potential strength as probative evidence of guilt is one of the considerations for the court in determining whether the requisite showings have been made by Appellant (see supra at18), the prosecution's non-disclosure, which puts that plea in context, is not only relevant, it is essential evidence in this case.

2. The non-disclosure impacted the trial court's acceptance of the guilty plea.

It is unlikely that the sentencing court would have accepted a guilty plea from Appellant if it knew that discovery had been requested but had not been completed in the case before it. It is highly unlikely that the sentencing court would have accepted a guilty plea from Appellant if it knew that the discovery that had been withheld from Appellant consisted of a lab report indicating that Rubin Weeks could not have

contributed the Type A blood antigens found in the semen stain on the slacks worn by the victim immediately before and immediately after the rape.

3. Most significantly, the non-disclosure impacted the motion courts' rulings on the DNA motions.

The prosecution was responsible for filling the "files and records of this case" with seemingly inculpatory evidence against Rubin Weeks. It is those "files and records of the case" that the motion court evaluated in order to determine whether they conclusively showed that movant was not entitled to relief. By selectively omitting the February 12, 1992, lab report from the "files and records of the case," the prosecution created a record which made it virtually impossible for Rubin Weeks, acting pro se, to meet the statutory requirements of §547.035. At the same time, the prosecution committed a fraud upon the motion court by denying the court information critical to its decision on the merits.

CONCLUSION

The balance of the issues in this case were adequately addressed in Appellant's opening brief. For all the foregoing reasons, Appellant prays that this Court remand this action back to the circuit courts of Cape Girardeau County and Bollinger County with instructions to order the DNA testing requested by Appellant, or in the alternative, reverse and remand this action back to said circuit courts with instructions to appoint

counsel for Appellant and set the motion for DNA testing for hearing, and 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 6126 words, excluding the cover and this certification, 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 22nd day of March, 2004, to:

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