IN THE
SUPREME COURT OF MISSOURI

RICHARD SCOTT MERCER,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC 95451
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
DENT COUNTY, MISSOURI
FORTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE KELLY W. PARKER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial − without explanation − of Appellant's motion for post-conviction DNA testing pursuant to section 547.035 by the Honorable Kelly Parker, judge of the Circuit Court of Dent County, Missouri. (RLF 13-14).[1] Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District ("Southern District"). MO. CONST. Art V, § 3; section 477.060. A dissenting judge certified that the majority's opinion was contrary to a previous decision of an appellate court of this state, whereupon the Southern District ordered the case transferred to this Court, so this Court has jurisdiction. MO. CONST. Art V, § 10; Rules 30.27 and 83.03.

[1] Statutory reference to section 547.035 is to RSMo Supp. 2001. All statutory references are to RSMo 2000 unless otherwise indicated. The record on appeal consists of the RSMo. § 547.035 legal file (RLF), Appellant's Rule 29.15 Motion post-conviction legal file (PLF) and transcript (PTr), the direct appeal legal file (LF) and the trial transcript (Tr). Appellant filed an Appendix to his *pro se* brief at the Southern District (App). Additional relevant pleadings and correspondence are compiled and attached hereto in Appellant's Substitute Appendix (SApp).

The Southern District issued four separate opinions centered on issues of jurisdiction and appellate review, which it raised, *sua sponte.* Accordingly, a more detailed discussion and analysis of jurisdiction is required here to address the issues raised by the Southern District.

A. TRIAL AND ORDINARY COURSE OF REVIEW

The jury heard a total of sixty-one minutes of witness testimony during Richard Mercer's one-day jury trial, after which they found him guilty of the offenses of (I) statutory rape in the second degree, and (II) incest. (RLF 10-11). Richard Mercer was sentenced to 15 years on count I and 7 years on count II, to be served consecutively, in the judgment entered by the trial court on May 5, 2008. (RLF 16-17). The Southern District affirmed Appellant's convictions on direct appeal and affirmed the denial of his motion for post-conviction relief under Rule 29.15. *State v. Mercer*, No. SD29114 (Mo.App.S.D, May 4, 2009); *Mercer v. State*, 330 S.W.3d 843 (Mo.App.S.D.2011).

B. MOTION FOR POST-CONVICTION DNA TESTING

In 2013, Mr. Mercer filed a motion for post-conviction DNA testing in the Circuit Court of Dent County, Missouri. The case was assigned to Hon. Kelly Parker. (RLF 13-4). Judge Parker ordered the prosecutor[2] to show cause and ordered the court clerk to provide the court with a copy of the transcript. (RLF 30). The

[2] The prosecutor who ordered to show cause – Bill Seay – was formerly the circuit court judge and presided over Mr. Mercer's jury trial. (RLF 10-11).

docket indicates some informal communications between the prosecutor and the court may have occurred, but the prosecutor never filed a response to Appellant's motion as ordered. (*See* RLF 14). Then, on April 21, 2014, a docket entry entitled "Case Review Held" was entered which stated, "Cause called. Movant's Post Conviction Motions Seeking Forensic DNA Testing overruled and denied." (RLF 14). This entry was not signed by Judge Parker. *Id.* It had no accompanying document. *See Id.*

Mr. Mercer was not notified of the order. (SApp. 5). As his sister-in-law had written to inform the court, Mr. Mercer had been transferred to the infirmary of a different prison undergoing surgery and chemotherapy for cancer at the time. (RLF 14, 31; SApp. 4-5). Mr. Mercer twice wrote the court asking about the status of his motion and eventually, on October 17, 2014, the docket sheets were mailed to him. (RLF 15).

C. APPEAL OF DENIAL TO MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

Special Order Allowing Mr. Mercer to File a late Notice of Appeal

On March 5, 2015, the Court of Appeals, Southern District, entered a special order granting his motion for a special order allowing the late filing of a notice of appeal after, "having fully considered the motion, it appears to the Court that the delay in filing a notice of appeal was not due to Movant's culpable negligence and that there is good cause for Movant's request." (SApp. 2). The Court had jurisdiction to enter this special order. Rule 30.03. The case was submitted on briefs and

eventually heard, *en banc*. The Southern District issued four opinions – a majority opinion, two concurring opinions, and a dissenting opinion.

Majority Opinion

The majority dismissed the appeal for lack of a final judgment because the motion court's order denying Mr. Mercer's motion was neither denominated as a "judgment" nor signed by a judge as required by Rule 74.01(a).

The majority noted that neither party had questioned whether there is a final judgment in this case, but found that it was obligated to raise the issue, *sua sponte*. (Majority at 2-4). The majority further found that it was required to read the requirement of a "final judgment" under § 512.020(5) in conjunction with Rule 74.01(a) during its *sua sponte* inquiry. (Majority at 4).[3]

The majority noted that the right to appeal is statutory. (Majority at 2). It observed that, in post-conviction DNA proceedings, § 547.037.6 provides a statutory right to appeal. (Majority at 2).[4] But while § 547.037.6 does not itself

[3] Rule 74.01(a) states in its relevant part that:

> A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed.

[4] § 547.037.6 states:

> The court shall issue findings of fact and conclusions of law whether or not a hearing is held. An appeal may be

require a "final judgment," the majority noted that language "very similar" to the language on appeals found in § 547.037.6 was found in § 536.140 (on appeals from judicial review of administrative agency decisons), and that the final judgment requirement of § 512.020 had been interpreted as applying to appeals pursuant to § 536.140. (Majority at 2). On this basis, the majority concluded that the "final judgment" requirement in the general statute section on appeals in civil cases – § 512.020(5) – applied to appeals in post-conviction DNA testing proceedings. (Majority at 2).

The majority concluded that Rule 74.01(a) applied to post-conviction DNA test proceedings pursuant to § 547.035.1, which states that post-conviction DNA testing requests are "governed by the rules of civil procedure insofar as applicable." (Majority at 5). The majority found that Rule 74.01(a) governed § 547.035.1 because it enhanced the purposes of § 547.035 by letting the parties and appellate courts know when it had fully adjudicated a matter. (Majority at 6). The majority held that the denomination and signature requirements of Rule 74.01(a) were not mere formalities, but established a "bright line test" as to when a writing was a

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taken from the court's findings and conclusions as in other civil cases.

judgment.[5] (Majority at 5)(citing ***City of St. Louis v. Hughes***, 950 S.W.2d 850, 853 (Mo. banc 1997)(finding that the appellate court lacked "jurisdiction" because the trial court did not denominate its ruling as a "judgment" as required by 74.01(a)).

The majority disagreed with the dissent as to the applicability of this Court's holding in ***J.C.W. ex rel. Webb v. Wyciskalla***, 275 S.W.3d 249, 253 (Mo. banc 2009). (Majority at 3-4).[6] The majority noted that *J.C.W.* dealt with trial court jurisdiction, and questioned its applicability in determining whether jurisdictional or prudential principles limit an appellate court's ability to reach the merits of an appeal. (Majority at 3).

The majority determined that *J.C.W.* did not alter its obligation to assess – *sua sponte* – whether there was a final judgment before it could exercise appellate review of the case, and observed that it made no practical difference whether its

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[5] Neither the majority nor the dissent discussed the lack of denomination and signature requirements in the definition of "judgment" in § 511.020:

> A 'judgment' is the final determination of the right of the parties in the action.

[6] In *J.C.W.*, this Court held that "courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called 'jurisdictional competence.'" *Id.* at 254.

duty to do so was a matter of jurisdiction or rather born of prudential concerns. (Majority at 4). Either way, the majority reasoned, it was required to dismiss the appeal for lack of a final judgment because the trial court's order denying Mr. Mercer's motion failed to meet the denomination and signature requirements of Rule 74.01. (Majority at 4).[7]

Concurring Opinions

Hon. Daniel Scott concurred in the majority opinion and wrote a separate concurrence indicating that the controlling authority from this Court, as well as this Court's Rule 74.01(a), required that, "we determine, *sua sponte*, if there is a final judgment, which is a prerequisite to appellate review." (Concurring Opinion by Judge Scott, at 1)(internal quotations omitted).

Hon. Don Burrell concurred in the majority opinion and Judge Scott's concurrence and wrote his own concurring opinion. Judge Burrell's opinion is that whether there is a final judgment is a question of jurisdiction, because *Hughes* was never explicitly overruled and there is a presumption against finding that an opinion of this Court has been overruled *sub silento.* (Concurring Opinion by Judge Burrell at 1).

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[7] It is unclear from the majority's reasoning why the majority would find the denomination and signature requirements to be a prerequisite of appellate review when the failure of motion court's to make statutorily-required findings of fact and conclusions of law is not a prerequisite to appellate review. *See* Point III, *infra.*

Dissenting Opinion

Hon. Nancy Steffen Rahmeyer wrote a dissenting opinion, to which Hon. Gary Lynch concurred. The dissent agreed that it had an obligation to determine its own jurisdiction, *sua sponte*. (Dissent at 2). However, the dissent found that the scope of the obligation to determine its jurisdiction was clarified and limited by this Court's holding in *J.C.W.*, which limited the analysis of subject matter jurisdiction to the Missouri Constitution. (Dissent at 4).

The dissent argued that it was no longer appropriate or required for an appellate court to analyze, *sua sponte*, whether or not there was a "final judgment" under Rule 74.01 because whether or not there was a final judgment did not affect the court's "jurisdiction" to hear the appeal. (Dissent at 7).[8]

The dissent also cautioned against finding additional lines of mandatory *sua sponte* inquiry. (Dissent at 9)("The inclusion of any other issues, rules, or statutes as falling within that *mandated* line should be explicit and include a careful consideration of the nature and role of appellate courts in general, their historical standards of review, and their limited resources as compared to the vast universe of potential issues, rules, and statutes."). The dissent would have reached the merits and denied the appeal. (Dissent at 12-13).

[8] The dissent did not dispute the majority's opinion that § 512.020 applied. (*See* Dissent at 2-4).

D. ANALYSIS

Appellate Court Jurisdiction

This Court's holding in *J.C.W.* should be explicitly extended to appellate courts "to clarify the meaning of the magical word of 'jurisdiction'" in appellate courts. *See* ***J.C.W.,*** 275 S.W.3d at 251.

"[I]t is clear that neither the courts nor the legislature owns the concept of subject matter jurisdiction." ***Id.*** at 254-5. "It is a function of the Missouri Constitution, which was enacted by and therefore is owned by the people." ***Id.*** at 255. Article V of the Missouri Constitution governs subject matter jurisdiction. ***Id.*** at 254.

Under the Missouri Constitution, circuit courts have "**original jurisdiction** over **all cases** and matters, civil and criminal." Article V, § 14 (emphasis added). The Court of Appeals has "general **appellate jurisdiction** in **all cases** except those within the exclusive jurisdiction of the supreme court." Article V, § 3 (emphasis added).

J.C.W. held:

> Elevating statutory restrictions to matters of "jurisdictional competence" erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter

> jurisdiction of the clarity that the constitution provides. . . . Accordingly, having fully considered the potential ill effects of recognizing a separate jurisdictional basis called jurisdictional competence, **the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called "jurisdictional competence."**

275 S.W.3d at 254 (emphasis added).

Prior decisions indicating that an appellate court lacked "jurisdiction" when there was not a "final judgment," improperly elevated a statutory restriction to a matter of "jurisdictional competence," which, as this Court noted in *J.C.W.*, erodes the constitutional boundary established by Article V of the Missouri Constitution. Whether or not there is a "final judgment" does not affect the jurisdiction of this Court to hear this appeal. This Court has jurisdiction under the Missouri Constitution to hear this appeal on transfer from the Southern District "the same as on original appeal." MO. CONST. Art V, § 10.

Further, this Court should guide appellate courts on the issue of whether or not they have the burden to analyze, *sua sponte*, whether or not there is a "final

judgment" in light of the decision in *J.C.W.*, as the presence of a "final judgment" does not affect the "jurisdiction" of the appellate court.

The Statutory Right to Appeal[9]

The Southern District thoroughly analyzed the "final judgment" requirement; analyzing ten different decisions of this Court (including *Hughes*) on that issue.[10] However, none of those cases found that found that the requirement under §

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[9] Appellant is not himself raising the issues related to "final judgment" on appeal. Appellant is merely responding to issues that the Southern District raised, *sua sponte*, below.

[10] ***Ndegwa v. KSSO, LLC***, 371 S.W.3d 798 (Mo. banc 2012)(claims brought in dispute over land and real estate taxes); ***Spicer v. Donald N. Spicer Revocable Living Trust***, 336 S.W.3d 466 (Mo. banc 2011)(petition to quiet title); ***Buemi v. Kerkhoff***, 359 S.W.3d 16 (Mo. banc 2011)(tort action by home owners against builders and developers); ***Smith v. State***, 63 S.W.3d 218 (Mo. banc 2001)(declaratory judgment action); ***McNeal v. McNeal***, 472 S.W.3d 194 (Mo. banc 2015); ***Spiece v. Garland***, 197 S.W.3d 594 (Mo. banc 2006)(personal injury lawsuit); ***Comm. For Educ. Equality v. State***, 878 S.W.2d 446 (Mo. banc 1994)(school funding suit); ***Dunivan v. State***, 466 S.W.3d 514 (Mo. banc 2015)(dicta about timeliness of Attorney General's intervention in a petition to be removed from sex offender registry); ***Boley v. Knowles***, 905 S.W.2d 86 (Mo. banc 1995).

512.020(5) for a final judgment applied to proceedings under § 547.035, which allows prisoners with claims of innocence to collaterally attack a final judgment and sentence in a criminal case.

The assumption that § 512.020 governs the statutory right to appeal from a collateral attack of a criminal judgment is misplaced. Section 512.020 applies to "[a]ny party to a suit **aggrieved by any judgment** of any trial court in any **civil** cause…." But Mr. Mercer is aggrieved by a judgment in a criminal cause, not a civil cause, because he claims that he is innocent of the crimes for which he was sentenced to, and is currently serving, 22 years in prison.

The statutory right to appeal is governed by § 547.037.6, and, contrary to the majority's opinion, the mere similarity of language between § 547.037.6 and § 536.140 does not mean that the "final judgment" language in the general civil statute on appeals governs here. Appeals directly or collaterally attacking a final judgment in a criminal case are governed by the statutes on criminal procedure under chapter 547, not statutes on civil procedure in chapter 512. *See* §§ 547.070(direct appeal); 547.037 (appeal in post-conviction proceedings for DNA testing pursuant to § 547.035.6); 547.200 (Appeals by State); 547.360.11 (appeal in post-conviction proceedings under Rule 29.15). And there is no reference to requiring the motion court to denominate its ruling on a § 547.035 motion as a "Judgment" under § 547.037.6.

Section 547.035.3 directs the motion be filed "in the original criminal case." In the criminal case, there was a final judgment entered on May 5, 2008. *See* ***State***

v. Smiley, 478 S.W.3d 411, 415 (Mo. banc 2016)("In a criminal case, a judgment is final when sentenced is entered" or when the court enters an order prior to trial dismissing the case which has the effect of precluding any further prosecution of the defendant).

Construing § 512.020's "final judgment" requirement to apply to § 547.037.6 would contradict the plain language of § 547.035.3 to file the motion in a case where the "final judgment and sentence" has already been entered. Further, it would be inconsistent with the use of the term "judgment" in criminal cases to have the motion court's ruling on a § 547.035 motion as a "Judgment."[11] Accordingly, there is no statutory "final judgment" prerequisite to appeal, and no analysis of the eleven cases by this Court on the issue of "final judgment" is needed here.

Rule 74.01 does not apply to § 547.035

As the dissent predicted, Appellant would dispute the applicability of Rule 74.01 to § 547.035. (*See* Dissenting Opinion at 9 n. 6).

[11] In criminal cases, the Rules of Criminal Procedure repeatedly reference there being a "judgment" in a criminal case in the singular and do not contemplate more than one judgment being entered in a criminal case. *See, e.g.*, Rule 29.07(b)-(c); 29.11(c); 29.13(a)-(b); 29.14; 29.15(b),(d),(e),(j); 30.01(a); 30.03; 30.04(a); 30.22. *Cf:* Rule 29.12(c); 30.04(d). Further, the rules refer to rulings in "post-conviction proceedings" as "orders," not as "judgments." Rule 29.15(k); Rule 30.03.

Post-conviction proceedings under § 547.035 are governed by civil *rules* only "insofar as applicable." § 547.035.1. To determine whether Rule 74.01(a)'s denomination and signature requirements are civil rules that govern the procedure of § 547.035 motions, the court must inquire as to whether the rule enhances, conflicts with, or is of neutral consequence to the purposes of § 547.035. ***State v. Reber***, 976 S.W.2d 450, 451 (Mo. banc 1998)(Finding that the denomination requirement under Rule 74.01(a) was inapplicable to post-conviction proceedings pursuant to Rule 29.15); ***In re C.A.D.***, 995 S.W.2d 21 (Mo.App.1999)(denomination requirement of Rule 74.01(a) conflicted with purpose of the statutes and rules to act in the best interest of the child because such a requirement would result in a delay of processing claims).

The "purpose of section 547.035 [is] to provide inmates an opportunity to have potentially exculpatory DNA tests performed on evidence." ***State v. Ruff***, 256 S.W.3d 55, 58 (Mo. banc 2008). Application of Rule 74.01(a) and dismissing an appeal from the denial of a § 547.035 motion conflicts with the purpose of § 547.035 to process claims of prisoners claiming that DNA will prove that they are innocent.[12]

[12] While the majority opinion found that Rule 74.01 enhances the purposes of § 547.035 by bringing clarity as to whether the motion court has fully adjudicated the matter, Appellant respectfully disagrees that Rule 74.01(a)'s denomination and signature requirements enhances the purpose of § 547.035. The denial of the § 547.035 motion was clearly an indication that the motion court had finished

As with post-conviction proceedings under Rule 29.15, Rule 74.01(a) does not apply to post-conviction DNA test proceedings under § 547.035.

Alternative- treat as application for a writ of mandamus

If this Court agrees with the Southern District majority opinion, it could alternatively treat this appeal as a petition for a writ of mandamus. *See* ***State v. Larson***, 79 S.W.3d 891, 893-4 (Mo. banc 2002). That way, instead of just dismissing the appeal, this Court could exercise its Article V, § 4 duties to supervise lower courts by remanding this case to the motion court with instructions to correct its errors.

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adjudicating the motion. The denomination and signature requirements of Rule 74.01(a) are unnecessary to determine whether a motion court has ruled on a § 547.035 motion, and application of those requirements conflicts with the purpose of 547.035.

STATEMENT OF FACTS

A. THE TRIAL

Richard Mercer maintained throughout his trial that he was not guilty of the conduct alleged, *i.e.*, that he had sexual intercourse with his 16-year-old daughter T.M. on February 25, 2007. (*See* RLF 1-11).

At the time of trial, Richard Mercer was 38 years old and had been married to Shirley Mercer for about 19 years.[13] (Tr. 121). They did not live together for the entire nineteen years. (Tr. 121). In fact, there were long periods during that time that they did not live together. (Tr. 121).

At the time of trial, Shirley had a 19-year-old daughter (J.H.), a 17-year-old daughter (T.M.) and a 9-year-old son (J.M.). (Tr. 120-2). Richard is T.M.'s father but he is not J.M.'s father. (Tr. 121-2).

In February of 2007, T.M. was 16-years-old. (Tr. 120). Shirley and Richard had starting living together again 2-3 months earlier after spending five years living apart. (Tr. 123). T.M. had only lived with Richard off and on a total of a couple of years throughout her entire life. (Tr. 123).

Shirley, Richard, T.M., and J.M. lived together in a two-bedroom trailer in Leasburg, Missouri. (Tr. 128). Shirley and Richard shared a bedroom. (Tr. 122, 128). T.M. and J.M. had bunk beds in the other bedroom, but T.M. chose to sleep in the living room on a fold-out couch. (Tr. 128-9). Shirley and Richard had a

[13] First names will be used for ease of exposition. No disrespect is intended.

computer desk and chair in their bedroom, which Richard often used to play video games. (Tr. 129, 153).

On February 25, 2007, Shirley worked a 2pm-11pm shift at Wal-Mart, leaving Richard at home with T.M. and J.M. (Tr. 127-8, 130). When Shirley came home, T.M. was already in bed. (Tr. 131). Richard was still awake. (Tr. 130). Shirley noticed that the bed in her bedroom was "messed up," which was unusual, because they typically made the bed every day. (Tr. 130). She asked Richard about it, and she believed his response was that he had laid down and taken a nap. (Tr. 131).

T.M. testified that on February 25, 2007, while Shirley was at work, T.M.'s younger brother J.M. went to bed at about 8:30 or 9:00. (Tr. 152-3). After J.M. went to bed, T.M. went into Richard and Shirley's room and laid "cross-ways" on their bed while watching Richard play a video game on the computer. (Tr. 153). T.M. fell asleep while laying on Richard and Shirley's bed. (Tr. 154). She was wearing shorts and a tee shirt when she fell asleep. (Tr. 154). Richard was wearing jeans and a button up shirt. (Tr. 155). When she woke up, Richard was on top of her and had his penis inside of her. (Tr. 154). Her shorts were pulled down. (Tr. 154). Richard's jeans were pulled down. (Tr. 155). Richard moved back and forth, having intercourse with her, for five or ten minutes. (Tr. 155-6). Then Richard pulled his pants back up, tucked his shirt in, and went back to playing a video game on the computer. (Tr. 156). He did not speak to her. (Tr. 156). T.M. went to get a drink and then showered. (Tr. 156).

About two weeks after that, T.M. was passing notes back and forth with her friend, Amanda Hayes, wherein she disclosed for the first time that Richard had raped her. (Tr. 157-8). Amanda convinced T.M. to see a counselor the following day. (Tr. 159). After seeing the counselor, T.M. was sent for a S.A.F.E. exam and for an interview at the Child Advocacy Center. (Tr. 160). She was put into foster care and also hospitalized for depression. (Tr. 125-6, 159-160). When asked how she felt about her father, T.M. testified "I hate him right now." (Tr. 161).

In opening statements, the prosecutor told the jury that there was a "dramatic change" in T.M. in between late February and early March of 2007. (Tr. 112). The prosecutor told the jury:

> [Shirley will] tell you about the deep and dramatic impact this thing had on her daughter. She'll tell you also that at age sixteen, before February of 2007, [T.M.] was growing up. She was starting to use make-up, starting to fix her hair, starting to get an interest in boys, and suddenly, after this, her whole appearance changed. She dressed like a boy; she dressed down; she dressed in such a manner to make herself unattractive to the opposite sex. Shirley will tell you about the changes in this girl. She didn't know right away, didn't know til March, what had happened. She will tell you the impact

> it had on her and she learned after March, when the school found out what had happened, what caused these changes in her daughter.

(Tr. 112-3).

There were no physical findings on the S.A.F.E. exam. (Tr. 114). However, the defense attorney did not present the jury with that information, and actually objected when the prosecutor tried to elicit that fact from the detective. (Tr. 172).[14]

In closing, the prosecutor argued that T.M.'s "manner" and "demeanor" gave weight to the evidence, as both were a "reaction" to being raped and were "entirely consistent" with being raped. (Tr. 182-3). The prosecutor argued that as a result of the rape, T.M. "changed her mode of dress" and "didn't wear make up any more," and "let me tell you, if something happens to a sixteen year old girl that she won't wear make up any more, you know something dramatic happened to her." (Tr. 186). The prosecutor argued further:

> Ladies and gentlemen, at the age of seventeen [T.M.] ought to be dating, going to parties, meeting young men, having that first innocent kiss with some young guy she

[14] On the SAFE exam, the nurse examiner noted that T.M. had a hymen (App. 16, 21), and found that her hymen was "normal." (App. 19). This information was never presented at trial.

> met, having that great feeling of your first true love in your chest, and she will never have that because he took it from her. He robbed her of her innocence; he did things to a young girl and changed a young girl in ways that should never, ever, ever happen.

(Tr. 187-8).

In closing arguments for the defense, Richard's defense attorney attempted to point to a comment in T.M.'s notes to her friend Amanda about breaking up with her girlfriend. [15] (Tr. 192). The prosecutor objected and asked to approach, after which he stated to the court:

> She's trying to make a case to show the jury that this little girl is a lesbian, and that's absolutely reprehensible.

(Tr. 192). After this objection, the defense attorney did not further dispute the prosecutor's contention that T.M.'s masculine manner and appearance had changed after, and were evidence of, the rape.

The jury was instructed on the offense of incest that they had to find from the evidence beyond a reasonable doubt that T.M. "was a descendant of defendant by

[15] T.M.'s notes entered as exhibits at trial are attached. (SApp. 9-11).

blood." (L.F. 67). The jury deliberated 70 minutes and then returned a verdict of guilty on both counts. The judgment and sentence were affirmed on appeal.

B. RULE 29.15 POST-CONVICTION MOTION

Richard filed a *pro se* 29.15 motion. (PLF 3-8). It alleged that his trial attorney was ineffective for (1) failing to call Clara Mercer, his mother, in that she would have provided an alibi for him for the night of the offense; (2) failing to call Dr. Janet Akremi to testify about the meaning of the findings on the SAFE exam; and (3) failing to call Dr. Evelyn Darrow, who had completed a psychological examination of T.M., during which she did not observe behaviors typically seen with an abused child and questioned whether the rape occurred. (PLF 4-5). Counsel was appointed and an amended motion was filed which raised additional claims of ineffective counsel. (PLF 11-12).

The court held an evidentiary hearing on the motion, during which Richard's attorney called numerous witnesses:

- John Barnes was T.M.'s P.E. teacher. Prior to February 25, 2007, he observed that T.M. dressed like a "tom boy," did not wear makeup, that her hair was "spiked," and that her manner and dress were more "tomboyish" than your average teenage girl, and that he had seen T.M. holding hands with another girl at school. (PTr. 7-10, 14).
- John Johnson was T.M.'s science teacher in the 2006-2007 school year and in fall 2007. (PTr. 16). He testified that he did not see a major change in T.M.'s manner or mode of dress during the 06-07 school

year. In the time he knew her, T.M. wore her hair short and spiked and was "tomboyish." (PTr. 16-17). He saw her holding hands with girls and openly expressed her sexual preference for girls. (PTr. 18-19). He saw T.M. holding hands on multiple occasions with one or maybe two different girls, but never with boys. (PTr. 21, 23-4).

- Joe Obermark was T.M.'s music teacher in the 2007-2008 school year. He testified that T.M. did not wear makeup, that she wore her hair short, and that she usually wore baggy t-shirts and jeans. (PTr. 25-6).
- Colleen Mercer, T.M.'s aunt, testified that she had known T.M. since 1995. (PTr. 27). Colleen is married to Richard's brother, Russell. (PTr. 32). T.M. and her family moved in with them for six months to a year in 2006, during which time Colleen had daily interactions with T.M. (PTr. 28). Prior to February 2007, T.M. dressed "very much like a boy." (PTr. 28). She identified T.M. in a photograph taken before February of 2007 that was introduced as movant's exhibit #1. (PTr. 28-9; SApp. 8). Colleen has never seen T.M. wear a dress or makeup. (PTr. 28). One day while T.M. lived with her, Colleen came out of her bedroom and saw T.M. in the living room with another girl and the girls had their arms around each other in a romantic way. (PTr. 29). A couple weeks to a month before T.M. accused Richard of rape, there had been a disagreement between the two because T.M. wanted to

move to Ohio and live with her sister and Richard did not let her. (PTr. 30).

- Russell Mercer testified that the whole time his niece, T.M., was growing up, she would say things like "I'm not a girl, I'm a boy. I'm little Ricky." (Tr. 40). He had never seen her wear a dress or makeup and the family was unable to get her to wear a dress at his daughter's wedding. (PTr. 40). T.M. expressed her sexual preference for girls many times. (PTr. 41). While she was living with him and Colleen, he walked into the living room and found T.M. with two girls. (PTR. 41). T.M. was sitting on one girl's lap and the girls were kissing and fondling each other's breasts. (PTr. 41). He told them "stop that right now." (PTr. 41). Russell also testified that before she accused Richard of raping her, she had made an allegation which she had repeated a number of times that while driving back from a trip to Ohio, Richard reached back and was fondling T.M. in the pickup truck while Shirley was driving. (PTr. 37-8). Then, later on, in front of the whole family, T.M. "broke down crying and said that she'd done a terrible thing, that she'd lied about all that because she wanted to stay with her sister in Ohio." (PTr. 39).
- Clara Mercer, Richard's mother and T.M.'s grandmother, testified that she never saw T.M. wear a dress, and that there were no changes to T.M.'s manner or mode of dress before and after February, 2007.

(PTr. 45). She identified Movant's exhibit #1 as a photo of T.M. between two other girls in 2004-2005 in her [Clara's] bedroom, and testified that the picture accurately depicted how the individuals customarily appeared at the time the photo was taken. (PTr. 46; SApp. 8). She testified that on February 25, 2007, Richard was with her from about 8:00pm to 11:30pm assisting her with her computer. (PTr.48). She recalled the date because she recalled calling him on his cell phone to ask him to come to her house to assist with the computer, and she knew that the date this occurred fell in between Richard's birthday (2/21) and a fundraiser for her brother, who had prostate cancer. (PTr. 47-9).

The Rule 29.15 Motion was denied after the evidentiary hearing. (PLF 2). The denial was affirmed on appeal. ***Mercer v. State***, 330 S.W.3d 843 (Mo.App.S.D. 2011).

C. MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO § 547.035

Richard Mercer filed a motion for Post-Conviction DNA testing pursuant to § 547.035 in the sentencing court under the original criminal case number. (RLF 13). The motion alleged, *inter alia,* that Richard is not T.M.'s father, that DNA testing would prove that he is not T.M.'s father, that he requested DNA testing prior to trial, that the state denied him of his right to DNA testing prior to trial because it knew from prior testing by the division of family services that he was not T.M.'s biological father, that identity was an issue at trial, and that it was reasonably likely

the jury would not have found him guilty of the incest count because there was no blood relation, and it was further reasonably likely that the jury would not have convicted on statutory rape either, as the purported blood relation between himself and T.M. was used to inflame the jury's passions against him. (RLF 25-29). The motion requested the court to appoint counsel and to conduct an evidentiary hearing. (RLF 29).

The following docket entries were made after the filing of his § 547.035 motion (Note: see RLF 13-15 for docket sheets. Documents accompanying these docket entries, if any, are contained in the record at the page(s) cited below):

- 08-Oct-2013: Filing: "Movant's Post Conviction Motions Seeking Forensic DNA Testing Under RSMo 547.035 filed. wr" (RLF 25-29).
- 09-Oct-2013: Judge Assigned; Case Review Scheduled: "Scheduled For: 21-Oct-2013; 1:00 PM; KELLY WAYNE PARKER; Review Motion filed by DFT"
- 21-Oct-2013: Case Review Held: "Cause called. State appears by PA, Mr. Seay. Mr. Seay is ordered to show cause why Movant is not entitled to a hearing on his motion on December 20, 2013 at 1:00 p.m. The court orders Division I, Court Reporter, Beverly Housewright to provide the court a copy of the transcript in this case. Clerk to notify Ms. Housewright and Movant of this entry. /s/ Judge Parker". (RLF 30).
- 23-Oct-2013: Judge/Clerk – Note: "Copy of the docket sheet was mailed to Ms. Housewright on this date. wr"

- 18-Dec-2013: Filing: “Letter to Judge Parker from Colleen Mercer, Sister-in-law to Deft. wr (copy faxed to Judge Parker).” (the Court received a letter from Mr. Mercer’s sister-in-law, Colleen Mercer, informing the Court that Mr. Mercer had been transferred to the infirmary of the Jefferson City Correctional Center for surgery and chemotherapy, and would be there for approximately six months. (RLF 31)).
- 20-Dec-2013: Case Review Held: “Cause called. State appears by PA, Mr. Seay. Cause passed to March 24, 2014 at 1:00 p.m., for case review. /s/ Judge Parker wr”
- 20-Dec-2013: Judge/Clerk – Note: “Bill came to the office and said he wanted me to check and see if I ever got the transcript from Beverly Housewright. I told him we had one in the file and it was filed August 1, 2008. I told him I had explained that to Judge Parker, but Judge Parker told him I had never talked to him about it. I checked with Kim and she said also I had talked to Judge Parker about it. I told Bill I would make him a copy but he wanted to take the original and I said I would have to check with Judge Parker, because I needed it for the file. wr”
- 23-Dec-2013: Judge/Clerk – Note: “I called Beverly Housewright this date and she gave me permission to copy the transcript for Bill Seay, because it was the holidays and she was very busy with family. wr”

- 23-Dec-2013: Case Review Scheduled for 24-Mar-2014; 1:00pm[16]
- 30-Dec-2013: Judge/Clerk – Note: "Copy of the Transcript was put into Mr. Seay's box this date. wr"
- **21-Apr-2014: Case Review Held: "Cause called. Movant's Post Conviction Motions Seeking Forensic DNA Testing Overruled and Denied."** (emphasis added).

As discussed in detail in the jurisdictional statement, *supra,* the Missouri Court of Appeals, Southern District, allowed the late filing of a notice of appeal and then heard the case *en banc*. The majority opinion dismissed the appeal because the denial of Richard's motion was not denominated as a "judgment" nor signed by the judge. The dissenting opinion certified the majority's opinion as contrary to a previous appellate decision in the state, and transferred it to this Court.

[16] There is no docket entry on March 24, 2014.

POINTS RELIED ON

I.

The motion court clearly erred by denying – without explanation – Mr. Mercer's § 547.035 Motion for Post-Conviction DNA Testing after it had previously ordered the prosecutor to show cause why the motion should not be granted, but before the prosecutor complied with the motion court's show cause order, because this denied Mr. Mercer his right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the motion court's denial of the motion in a docket entry which merely stated "Cause called. Movant's Post-Conviction Motions Seeking Forensic DNA testing overruled and denied," violated the mandate of § 547.035.8 to explain the specific bases in fact and law for the court's decision.

Belcher v. State, 299 S.W.3d 294 (Mo. banc 2009);

Weeks v. State, 140 S.W.3d 39 (Mo. banc 2004);

Clayton v. State, 164 S.W.3d 111 (Mo. App. 2005);

Crews v. State, 7 S.W.3d 563 (Mo. App. 1999);

U.S. CONST., Amend. V & XIV;

MO CONST., Art. I, § 10;

Section 547.035, RSMo Supp. 2001

II.

The motion court clearly erred in denying Mr. Mercer's motion without hearing, because this denied Mr. Mercer his right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that Mr. Mercer was not provided with the opportunity to present evidence to show the DNA testing would prove his innocence as provided for by § 547.035.

Belcher v. State, 299 S.W.3d 294 (Mo. banc 2009);

Weeks v. State, 140 S.W.3d 39 (Mo. banc 2004);

Clayton v. State, 164 S.W.3d 111 (Mo. App. 2005);

Crews v. State, 7 S.W.3d 563 (Mo. App. 1999);

U.S. CONST., Amend. V & XIV;

MO CONST., Art. I, § 10;

Section 547.035, RSMo Supp. 2001

III.

The motion court clearly erred in failing to issue findings of fact and conclusions of law because the violation of the mandate under § 547.035.8 to issue findings of fact and conclusions of law denied Mr. Mercer his right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the motion court's docket entry - "Cause called. Movant's Post Conviction Motions Seeking Forensic DNA Testing overruled and denied." – is merely conclusory language and insufficient to constitute compliance with § 547.035.8, and this case should be reversed as there is no applicable exception to the general rule requiring reversal for failure to issue findings and conclusions, nor does Rule 78.07(c) apply here, where the motion court no longer had jurisdiction over the case when Mr. Mercer was notified that it had denied his motion for post-conviction DNA testing pursuant to § 547.035.

Belcher v. State, 299 S.W.3d 294 (Mo. banc 2009);

Clayton v. State, 164 S.W.3d 111 (Mo. App. 2005);

Crews v. State, 7 S.W.3d 563 (Mo. App. 1999);

State v. Ruff, 256 S.W.3d 55, 56 (Mo. banc 2008);

U.S. CONST., Amend. V & XIV;

MO CONST., Art. I, § 10;

Section 547.035, RSMo Supp. 2001;

Section 547.037, RSMo Supp. 2001;

Rule 30.03;

Rule 75.01;

Rule 78.04;

Rule 78.07.

ARGUMENT

POINT I – SHOW CAUSE

The motion court clearly erred by denying – without explanation – Mr. Mercer's § 547.035 Motion for Post-Conviction DNA Testing after it had previously ordered the prosecutor to show cause why the motion should not be granted, but before the prosecutor complied with the motion court's show cause order, because this denied Mr. Mercer his right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the motion court's denial of the motion in a docket entry which merely stated "Cause called. Movant's Post-Conviction Motions Seeking Forensic DNA testing overruled and denied," violated the mandate of § 547.035.8 to explain the specific bases in fact and law for the court's decision.

Standard of Review

This Court reviews the motion court's determination that the prosecutor no longer needed to show cause for clear error. ***Weeks v. State***, 140 S.W.3d 39, 44 (Mo. banc 2004). However, "[a]bsent findings explaining the motion court's actions [this Court] cannot discern the reasons for the motion court's decision and [this Court] is left with conclusory statements and nothing to review." ***Clayton v. State***, 164 S.W.3d 111, 113 (Mo.App.2005). This Court is not "permitted to supplement the record by implication from the motion court's ruling." ***Id***. If there cannot be meaningful appellate review of an issue due to the motion court's failure to make

sufficient findings of fact and conclusions of law, the case should be reversed and remanded to the motion court. ***Belcher v. State***, 299 S.W.3d 294, 296 (Mo. banc 2009).[17]

Analysis

Section 547.035.4 states:

> 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 movant is not entitled to relief; or

[17] Point I (erred by denying motion without requiring prosecutor to show cause as previously ordered) and Point II (erred by not holding a hearing) are both related to Point III (failure to issue findings of fact and conclusions of law). Due to the motion court failing to issue findings of fact and conclusions of law, the motion court did not make determinations with regard to the issues raised in Points I and II, and there is nothing of substance for this Court's clear error review. For a detailed analysis of the motion court's mandate under § 547.035.8 to issue findings of fact and conclusions of law, including the limited, inapplicable exceptions to the general rule requiring a case be reversed and remanded to the motion court, see Point III, *infra.*

> (2) The court finds that the files and records of the case conclusively show that the movant is not entitled to relief.

Here, the motion court ordered the prosecutor to show cause why Mr. Mercer should not be granted a hearing on his motion. (RLF 30). But prior to the prosecutor filing a response to the motion court's show cause order,[18] and without holding a hearing on the motion, the motion court denied Mr. Mercer's motion in a conclusory docket entry which gives no indication as to why the court no longer required the prosecutor to show cause why Mr. Mercer should not be granted a hearing on his motion. (*See* RLF 14).

"The absence of findings or conclusions giving the basis of the trial court's action leaves an appellate court in the dark as to the reasons for the trial court's action and presents nothing of substance to review." ***Crews v. State***, 7 S.W.3d 563, 567 (Mo.App.1999). Here, the motion court left this Court and the appellate court in the dark as to its reasons for first ordering the prosecutor to show cause and then denying the motion prior to the prosecutor complying with its show cause order. *See* ***Id***. Accordingly, "there is nothing of substance" for this court to review. ***Id***. The

[18] While the docket indicates that there were possibly informal (ex parte) communications between the prosecutor and the court, the prosecutor never filed a response to the Court's order to show cause. (*See* RLF 14).

motion court did not make a "determination" as to the prosecutor's obligation to show cause for this court to review for clear error.

The denial of the motion cannot provide by implication, a substantive "determination" by the motion court on the show cause issue because the court cannot "supplement the record by implication from the motion court's ruling." ***Clayton***, 164 S.W.3d at 113. The motion court's reasoning in making its decision cannot be implied because "[w]ere this court to furnish the necessary findings and conclusions, review would be impliedly *de novo* and impermissible in face of the unequivocal mandate of [§ 547.035.8]." ***Crews***, 7 S.W.3d at 569.

As a *de novo* review of the trial court's action is impermissible by this Court, the only appropriate remedy, and the remedy which Mr. Mercer respectfully requests from the court, is to reverse and remand to the motion court. *See* ***Belcher***, 299 S.W.3d at 296.

POINT II. – HEARING

The motion court clearly erred in denying Mr. Mercer's motion without hearing, because this denied Mr. Mercer his right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that Mr. Mercer was not provided with the opportunity to present evidence to show the DNA testing would prove his innocence as provided for by § 547.035.

Standard of Review

This Court reviews the motion court's determination that no hearing was required on a motion for post-conviction DNA testing pursuant to § 547.035 for clear error. ***Weeks v. State***, 140 S.W.3d 39, 44 (Mo. banc 2004). "The motion court's findings and conclusions are clearly erroneous only if, after the review of the record, the appellate court is left with the definite and firm impression that a mistake has been made." ***Id***. However, "[t]he absence of findings or conclusions giving the basis of the trial court's action leaves an appellate court in the dark as to the reasons for the trial court's action and presents nothing of substance to review." ***Crews v. State***, 7 S.W.3d 563, 567 (Mo.App.1999); ***Clayton v. State***, 1674 S.W.3d 111, 113 (Mo.App.2005). If there cannot be meaningful appellate review of an issue due to the motion court's failure to make sufficient findings of fact and conclusions of law,

the case should be reversed and remanded to the motion court. ***Belcher v. State***, 299 S.W.3d 294, 296 (Mo. banc 2009).[19]

Analysis

Section 547.035.6 provides for the motion court to hold a hearing, on the record, on a motion brought under § 547.035. At the hearing, the movant has the burden of proving the allegations in the motion by a preponderance of the evidence. "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. § 547.035.6 (emphasis added).

Here, Mr. Mercer requested a hearing on his motion. (RLF 29). However, like in Point I, the motion court did not "find" anything for this court to review for clear error because it failed to issue findings of fact and conclusions of law, leaving this Court "in the dark" as to its reasoning for not scheduling a hearing. This leaves nothing for this Court to review on appeal, and supplementing the record by implication is not permitted. ***Clayton***, 164 S.W.3d at 115. It is improper for this Court to furnish the necessary findings and conclusions, as such a review would be impliedly *de novo* despite the unequivocal mandate under § 547.035.8 to the motion

[19] For a detailed analysis of the general rule that the failure to issue findings and conclusions warrants that the case be reversed and remanded to the motion court, as well as discussion of the limited inapplicable exceptions to this general rule, see Point III, *infra.*

court to do so. ***Crews***, 7 S.W.3d at 569. As the motion court did not make a finding which specifically indicates there is reason not to conduct a hearing, there is nothing substantive for this court to review and the case should be reversed and remanded to the motion court. ***Belcher***, 299 S.W.3d at 296. Mr. Mercer respectfully requests this Court reverse and remand this case to the motion court.

POINT III. – FINDINGS AND CONCLUSIONS

The motion court clearly erred in failing to issue findings of fact and conclusions of law because the violation of the mandate under § 547.035.8 to issue findings of fact and conclusions of law denied Mr. Mercer his right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the motion court's docket entry - "Cause called. Movant's Post Conviction Motions Seeking Forensic DNA Testing overruled and denied." – is merely conclusory language and insufficient to constitute compliance with § 547.035.8, and this case should be reversed as there is no applicable exception to the general rule requiring reversal for failure to issue findings and conclusions, nor does Rule 78.07(c) apply here, where the motion court no longer had jurisdiction over the case when Mr. Mercer was notified that it had denied his motion for post-conviction DNA testing pursuant to § 547.035.

Standard of Review

Denial of a post-conviction motion for DNA testing is reviewed to determine whether the motion court's findings and conclusions were clearly erroneous. ***State v. Ruff***, 256 S.W.3d 55, 56 (Mo. banc 2008). "The motion court's findings and conclusions are clearly erroneous only if, after the review of the record, the appellate court is left with the definite and firm impression that a mistake has been made." ***Weeks v. State***, 140 S.W.3d 39, 44 (Mo. banc 2004).

Analysis

Motion courts deciding motions for post-conviction DNA testing are mandated under § 547.035.8 as follows:

> The court shall issue findings of facts and conclusions of law whether or not a hearing is held.

Here, the motion court denied Mr. Mercer's motion in a docket entry which stated:

> Cause called. Movant's Post Conviction Motions Seeking Forensic DNA Testing overruled and denied.

(RLF 14).

In order to comply with the requirement to issue findings of fact and conclusions of law under § 547.035.8, the findings and conclusions must be sufficiently specific to allow for meaningful appellate review. ***Belcher v. State***, 299 S.W.3d 294, 296 (Mo. banc 2009). "Where the motion court determines a ground for relief is refuted by the files and records, the court should identify the portion of the file or record that does so." *Id.* (citing ***Moore v. State***, 927 S.W.2d 939, 942 (Mo.App.1996)). It is clear error for a motion court to fail to issue findings of fact and conclusions of law. ***Clayton,*** 164 S.W.3d at 112, 116. Conclusory statements which do not allow an appellate court to discern the basis for a motion court's ruling are not sufficient to comply with the statute requiring the issuance of findings of fact and conclusions of law. ***Id.*** at 115.

This conclusory statement failed to meet the statutory requirement that the motion court issue findings and conclusions, as this Court cannot discern from it the basis for the motion court's ruling. This case should be reversed and remanded to the motion court.

There is no applicable exception to the general rule that a motion court's failure to issue findings and conclusions warrants reversal

At the Southern District, Respondent argued for an exception to the general rule requiring remand for failure to issue findings of fact and conclusions of law. Specifically, Respondent alleged that movant did not allege on the face of his motion that DNA testing was unavailable at the time of his testing in 2008.[20]

Entertaining an argument that reversal and remand is not required if the motion is insufficient is a *de facto* implied *de novo* review which is not permitted by §§ 547.035, 547.037. *See* ***Crews***, 7 S.W.3d at 568-9 (observing that the cases which refused to remand relied on another exception beyond the "insufficient

[20] This argument overlooks cases finding that whether or not DNA testing was reasonably available is a subjective inquiry into the Movant's particular circumstances. ***Fields v. State***, 425 S.W.3d 215 (Mo.App.2014); ***Weeks,*** 140 S.W.3d at 48. It also fails to acknowledge that "[a]ny shortcomings in Movant's pleadings can be forgiven 'in light of the purpose of 547.035: to provide inmates an opportunity to have potentially exculpatory DNA tests performed on evidence.'" ***Fields***, 425 S.W.3d at 217 n. 2 (quoting ***Ruff***, 256 S.W.3d at 58).

motion" exception, and questioning whether that exception alone provided a basis for relief); ***Clayton v. State***, 1674 S.W.3d 111, 115-6 (Mo.App.2005) (questioning whether the five exceptions to the requirement a case be reversed and remanded in Rule 29.15 proceedings applied to § 547.035 proceedings).

It is not clear that Mr. Mercer's motion failed to comply with the pleading requirements on the face of the motion. In fact, as the motion court ordered the prosecutor to "show cause," it can be assumed that the motion court found that the motion was sufficient on its face under § 547.035.4(1). What is clear, however, on its face, is that the motion court's docket entry violated the mandate of 547.035.8 to issue findings of fact and conclusions of law. It is also clear that the legislature intended for appellate courts to review findings of fact and conclusions of law by the motion court on appeal, not for appellate courts to conduct their own review to make the findings of fact and conclusions of law. § 547.037.6.

Rule 78.07(c) is inapplicable to Mr. Mercer under these circumstances

Respondent argued at the Southern District, and the dissenting opinion agreed, that Point III should be denied because Mr. Mercer did not file a motion to amend the judgment under Rule 78.07(c).

Rule 78.07(c) states that the failure to make statutorily required findings must be raised in a motion to amend the judgment. Rule 78.04 states that any motion to amend the judgment must be filed no later than 30 days after the judgment. Rule 75.01 states that the trial court retains control over the case for 30 days after the issuance of the judgment.

Mr. Mercer was not notified by the court of the denial of his motion until October 17, 2014, which was well beyond 30 days after the motion court denied his motion on April 21, 2014. (RLF 14-15). Assuming, *arguendo,* that the order denying the motion was a "judgment" for purposes of Rules 78.07(c), 78.04, and 75.01, the motion court no longer had jurisdiction over the case to hear a motion pursuant to Rule 78.07(c). In light of his circumstances, Mr. Mercer filed and was granted a "special order" by the Southern District to file a late notice of appeal. His decision to do so was the only proper recourse he had under the rules. *See* Rules 30.03, 78.04, 75.01.

CONCLUSION

As argued in Points I, II, and III, the motion court's failure to issue the statutorily-required findings of fact and conclusions of law require that this case be reversed and remanded to the motion court.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Jennifer K. Bukowsky, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9177 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 2nd day of May, 2016, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to James Layton, Solicitor General, at James.Layton@ago.mo.gov.

/s/ Jennifer K. Bukowsky