SC95451

IN THE SUPREME COURT OF MISSOURI

RICHARD S. MERCER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Dent County, Missouri
The Honorable Kelly W. Parker, Judge

SUBSTITUTE BRIEF OF RESPONDENT

CHRIS KOSTER
Attorney General

JAMES R. LAYTON
Mo. Bar No. 45631
Solicitor General
KAREN L. KRAMER
Mo. Bar No. 47100
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
(573) 751-0774 (Facsimile)
James.Layton@ago.mo.gov
Karen.Kramer@ago.mo.gov

ATTORNEYS FOR
RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITY

OTHER AUTHORITIES

STATEMENT OF FACTS

A. Prior proceedings: conviction and denial of postconviction relief.

In March 2008, a jury found appellant Mercer guilty of second degree statutory rape and incest (LF 4, 13, 19-20, 72-73, 205). Having found Mercer to be a prior and persistent offender (Tr. 36), the trial court sentenced Mercer to 15 years on the rape charge and 7 years on the incest charge, said sentences to run consecutively (LF 14, 83-84; Tr. 222). Mercer's convictions and sentences were affirmed by the Court of Appeals. *State v. Mercer*, No. SD29114 (Mo. App. S.D., May 4, 2009).

Mercer filed a *pro se* Rule 29.15 motion for postconviction relief (PCRLF 1, 3-8). Appointed counsel filed an amended motion on Mercer's behalf (PCRLF 1, 10-21). After an evidentiary hearing (PCRLF 2), the motion court issued findings of facts, conclusions of law, and judgment denying Mercer's motion for postconviction relief (Supp. PCRLF 1-4). The motion court's ruling was upheld by the Court of Appeals. *Mercer v. State*, 330 S.W.3d 843 (Mo. App. S.D. 2011).

B. DNA testing proceeding.

In October 2013, Mercer filed a *pro se* motion seeking forensic DNA testing under § 547.035, RSMo. (DNALF[1] 25-29). Mercer claimed that a DNA test would prove that the State had failed to prove that the victim was not related to him by blood and he therefore could not be guilty of incest (DNALF 26). Mercer pled that there were DFS records that proved that the victim was his daughter (DNALF 26). And Mercer argued that the State improperly used his relationship with the victim in order to influence the jury to convict Appellant of statutory rape (DNALF 27).

The circuit court ordered the prosecutor to "show cause why Movant [Mercer] is not entitled to a hearing on his motion on December 20, 2013" (DNALF 30). The court also ordered the court clerk to provide the court with "a copy of the transcript in this case" (DNALF 30).

On December 20, the State appeared, but the matter was passed to March 2014 (DNALF 14). The matter was not taken up until April, when,

---

[1] We use "DNALF" to distinguish the legal file submitted by Mercer to the Court of Appeals, Southern District in this appeal from other legal files that were incorporated into the record of this appeal. In this Court's docket, the "DNALF" is found in the December 29, 2015 filing of the record, listed as "SD33779 Legal File - One Volume 5-19-15 FINAL."

according to the docket sheet, "Movant's Post Conviction Motions Seeking Forensic DNA Testing [were] overruled and denied" (DNALF 14).[2]

[2] In August 2014, Mercer wrote to the court, saying that the "last thing [he] heard from the Court" was notice of the October 2013 show cause order (DNALF 32). After he learned of the April 2014 disposition of his motion, Mercer obtained a special order from the Missouri Court of Appeals, Southern District, and filed a notice of appeal (*see* DNALF 15).

ARGUMENT

I. Mercer does not qualify for an appeal under § 547.037, and has no right of appeal under § 512.020.

"The right to appeal is purely statutory." *State v. Burns*, 994 S.W.2d 941 (Mo. 1999), quoted with approval, *State v. Smiley*, 478 S.W.3d 411, 414 (Mo. 2016). Mercer appeals from a decision made under the postconviction DNA testing law, §§ 547.035-547.037. That law provides a right to appeal in some instances—but not the circumstances here. And because the DNA testing law is a "special statutory proceeding," an appeal is not available under the general appeal rights granted in § 512.020.

A. The procedure provided by § 547.035 does not provide a right of appeal, and only those motions for DNA testing that are granted move on to § 547.037.

The first section in the DNA testing law, § 547.035, applies to a "person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate the person's innocence of the crime for which the person is in custody." § 547.035.1. That section does not provide a right of appeal.

The statutory process (diagrammed as Figure 1 on p. 10) begins when such a person "file[s] a postconviction motion in the sentencing court" seeking

DNA testing. *Id.* The statute sets out a list of things that the movant must allege under oath:

> (1) There is evidence upon which DNA testing can be conducted; and
>
> (2) The evidence was secured in relation to the crime; and
>
> (3) The evidence was not previously tested by the movant because:
>
> > (a) The technology for the testing was not reasonably available to the movant at the time of the trial;
> >
> > (b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or
> >
> > (c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and
>
> (4) Identity was an issue in the trial; and
>
> (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results

had been obtained through the requested DNA testing.

§ 547.035.2.

The circuit court reviews the motion—and if necessary the record of the case—and considers whether the motion fits into one of two categories:

(1) "It appears from the motion that the movant is not entitled to relief" (§ 547.035.4(1)); or

(2) "the files and records of the case conclusively show that the movant is not entitled to relief" (§ 547.035.4(2)).

If the motion does not fit into one of these categories, "[t]the court shall issue to the prosecutor an order to show cause why the motion should not be granted." § 547.035.4. We will refer to this as category (3).

If the motion falls into categories (1) or (2), the next step is defined by § 547.035.8. Though no "hearing is held" when motions fall into categories (1) and (2), the statute provides for findings and conclusions: "The court shall issue findings of fact and conclusions of law whether or not a hearing is held." *Id.* For motions that fall into categories (1) and (2), the § 547.035 path ends with the findings and conclusions. The statute does not provide for an appeal.

The statute provides additional steps for category (3) motions—*i.e.*, those in which the court must issue an order to show cause. First, the clerk

obtains transcripts of the trial or guilty plea proceeding and the sentencing hearing. § 547.035.5. Then the court considers "the motion and the files and records of the case." § 547.035.6.

If the court concludes from that review that the motion and records "conclusively show that the movant is not entitled to relief"—what we will refer to as category 3(a)—"a hearing shall not be held." *Id.* The next and last step on the (3)(a) path is the same as for categories (1) and (2): "The court shall issue findings of fact and conclusions of law …." § 547.035.8. The statute does not provide a right of appeal.

If the court does not conclude based on this more complete record that there is conclusively *not* a basis for relief—what we will call category (3)(b)—"a hearing shall be held." § 547.035.6. After the hearing, the court must order testing *if*:

> (1) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and
>
> (2) That movant is entitled to relief.

§ 547.035.7. Again, whether the court makes the requisite findings and orders testing, or denies the motion, "[t]he court shall issue findings of fact and conclusions of law." § 547.035.8.

We will refer to instances where the circuit court denies relief—where it does not order testing—as category (3)(b)(1). The new findings and conclusions are the end of the (3)(b)(1) path, just as for categories (1), (2), and (3)(a). The statute does not provide a right of appeal.

If the court does order testing—what we will refer to as category (3)(b)(2)—the testing is done at a facility either agreed to by the parties or, if they do not agree, by one designated by the court. § 547.035.7. At that point, the procedure provided by § 547.035 ends. Once the test results come back, further action proceeds under § 547.037. But § 547.037 applies only to those motions that fall into category (3)(b)(2). In other words, it applies only to those instances where the circuit court ordered testing pursuant to § 547.035.7, *not* to motions that fall into categories (1), (2), 3(a), or 3(b)(1).

To recap, motions made under § 547.035 fall into five categories (diagrammed as Figure 1 on p. 10). The first three do not require a hearing:

- (1) It appears from the motion itself that the movant is not entitled to relief (§ 547.035.4(1))—*i.e.*, the motion is facially deficient.
- (2) The "files and records of the case conclusively show that the movant is not entitled to relief" (§ 547.035.4(2))—*e.g.*, the motion is conclusively contradicted by the record of the case already extant and available.

- (3)(a): The more complete files and records conclusively show the movant is not entitled to relief (§ 547.035.5, 547.035.6).

If the motion does not fall into one of those categories, the circuit court orders completion of the record and holds a hearing. The motion is then placed into one of two categories:

- (3)(b)(1): The court does not order testing.
- (3)(b)(2): The court orders testing because "[a] reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing" (§ 547.035.7).

As discussed below, the circuit court treated Mercer's case under category (3)(b)(1)—though it actually fit into category (1). Section 547.035 does not provide a right of appeal for either of those categories.

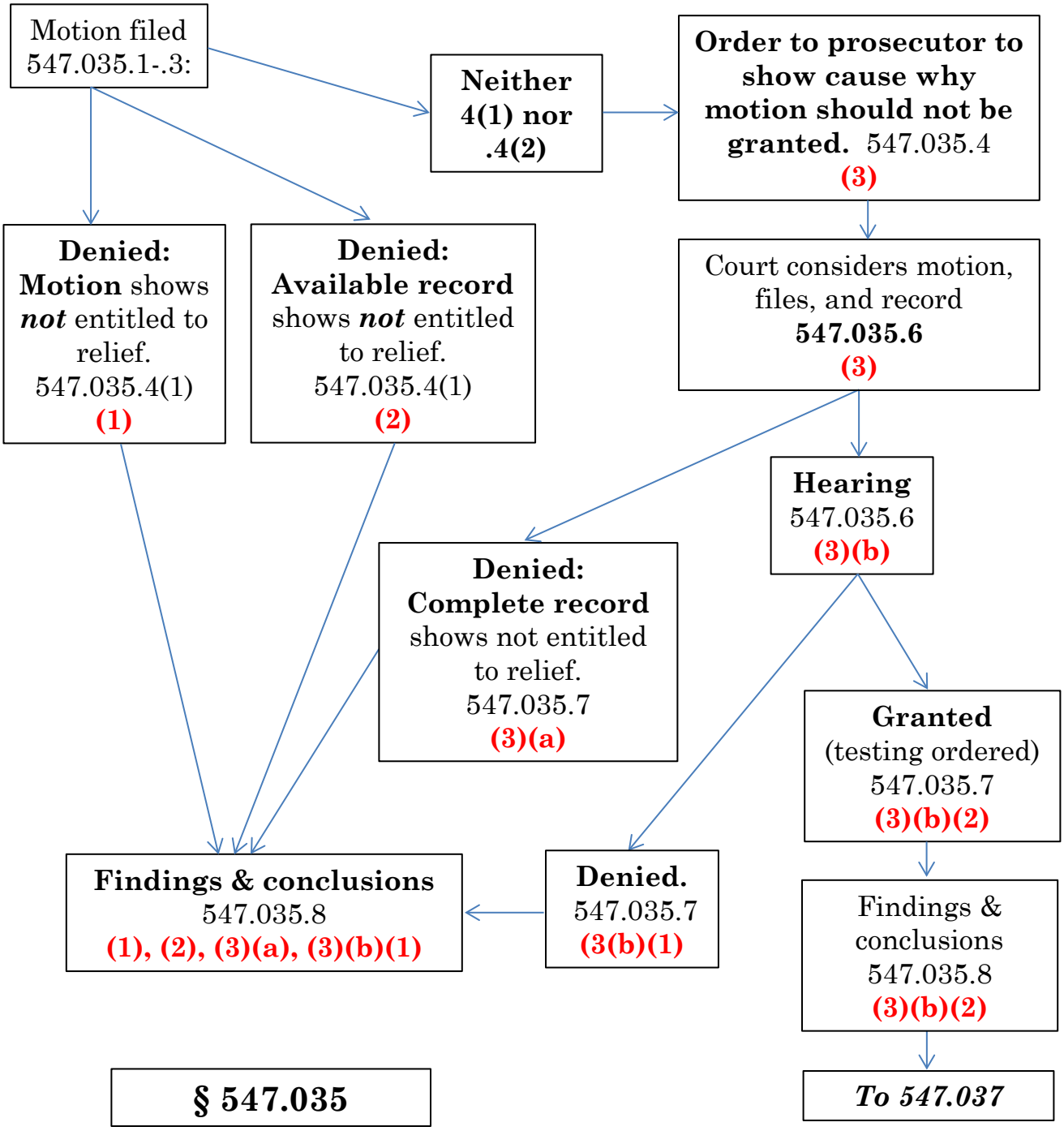

Figure 1

B. Because the circuit court did not order DNA testing, § 547.037 does not provide Mercer a right of appeal.

Appellant Mercer expressly relies on § 547.037.6. But that subsection and the appeal right it contains do not apply to his case.

As discussed above, § 547.037 authorizes a motion for release "[i]f testing ordered pursuant to section 547.035 demonstrates a person's innocence of the crime." § 547.037.1. Subsections 1-5 address what happens once such a motion is filed: (1) the court issues a new show cause order; (2) if the prosecutor consents, the court orders release; (3) if the prosecutor objects, the court holds a hearing; and (4) if the court finds that the testing demonstrates innocence, the court orders release—"[o]therwise, relief shall be denied the movant." § 547.037.2-5.

Subsection 6 of § 547.037, on which Mercer relies, is simply another step in the procedure set out by subsections 1 through 5. It requires findings of fact and conclusions of law, just as § 547.035.6 does. But the requirement in § 547.037 is for findings and conclusions to support the court's decision on the merits after testing; the parallel (not duplicative) requirement in § 547.035.6 is for findings and conclusions to support the decision whether to order testing. Subsection 547.037.6 does authorize an appeal—but only as to an order issued pursuant to § 547.037—*i.e.*, the circuit court's post-testing order granting or denying release.

Because the circuit court did not order testing in Mercer's case, § 547.037 and its appeal right do not apply to him.

C. Mercer cannot appeal under § 512.020 because this is a special statutory proceeding in which the right of appeal is limited.

Unable to appeal pursuant to § 547.037, Mercer must turn to some other statute to find a right to appeal. He discusses the general right to appeal provided in § 512.020. He does so because an appeal under his preferred source, § 547.037.6, is available "as in other civil cases," *i.e.*, as under § 512.020. But as discussed above, § 547.037.6 is not available to him, and there is no similar cross-reference to § 512.020 in § 547.035.

That leaves the question whether § 512.020 grants a right to appeal decisions made under § 547.035—*i.e.*, motions for testing filed under § 547.035.1 that the circuit court denies without a hearing that fall into categories (1), (2), or (3)(a), and those in category 3(b) that the circuit court denies ((3)(b)(1)) or grants ((3)(b)(2)) after hearing. The answer may not be as clear as the exclusion of § 547.035 appeals from § 547.037.6, but based on current precedent, the answer is "no."

Although § 512.020 generally allows an appeal to be taken from a "[f]inal judgment in the case," that authorization is available only when "an

appeal is not … clearly limited in special statutory proceedings." There is no guidance in the statute regarding what constitutes "special statutory proceedings" and when an appeal in such a proceeding is "clearly limited." But the Missouri Court of Appeals, Southern District, has construed and applied that language in a context that is quite comparable to this one—and held that an appeal was not available.

In *In re Salcedo*, 34 S.W.3d 862 (Mo. App. S.D. 2001), the court considered another proceeding that follows a criminal conviction: the adjudication of whether a person is a "sexually violent predator." *See* §§ 632.480-.515. The court held that the "sexually violent predator" statute created a "special statutory proceeding": It "erects an elaborate, step-by-step procedure" allocating certain rights to the Attorney General and the alleged predator—a procedure that "is entirely a creature of statute; it exists nowhere else in Missouri jurisprudence." 34 S.W.3d at 867. The same is true of the DNA testing procedure set out in §§ 547.035 and .037.

The court then considered whether the "special statutory proceeding" "clearly limited" the right to appeal. The court did not find a specific limitation anywhere in the statute. But it used a canon of construction—"[t]he express mention of one thing in a statute implies the exclusion of another." (34 S.W.3d at 868)—to reach "the inescapable conclusion that … the General Assembly 'clearly limited' the right to appeal in the special

statutory proceeding created by the SVP Act" (34 S.W.3d at 869). The General Assembly had specifically provided for appeal in "one specific instance, viz: a determination under § 632.495 that a person is a sexually violent predator." *Id.* By omitting any authorization for appeal at other points in the process, the court held, the General Assembly had "clearly limited" the right of appeal to that particular point.

That analysis leads to the same result here. The General Assembly specifically provided for an appeal of a release decision—for or against—based on test results. By omitting from the statute any right of appeal during the proceedings in which the circuit court considers whether to order a test, the General Assembly declined to give anyone, the prosecutor or the movant, the right to appeal the decisions made under § 547.035.

II. If one whose motion for testing was denied could appeal under § 512.020, Mercer's appeal would be premature because the April 2014 Order is not a "final judgment."

Section 512.020.5 provides (though, again, not for certain "special statutory proceedings") for the appeal only of "final judgments." The General Assembly has used but not defined "final judgment." It has defined "judgment": "the final determination of the right of the parties in the action."

This Court has declared, "A trial court's judgment is final ... if the judgment disposes of all disputed issues in the case and leaves nothing for future adjudication." *Burns*, 994 S.W.2d at 942 (internal quotation marks omitted), *quoted with approval, Smiley*, 478 S.W.3d at 415. The Court has embodied that rule—which is consistent with the legislative demand that a "judgment" finally determine the rights of the parties—through aspects of three of the Court's rules.

First, in Rule 74.01(a), the Court explains that "judgment" refers to what is appealable: "74.01. Judgment. Included Matters. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." For purposes of an appeal authorized by § 512.020.5, a "judgment" must be a "final judgment." For purposes of § 547.037 (again, inapplicable here), the "final" adjective would not be required.

Second, also in Rule 74.01(a), the Court sets out two requirements for when a "judgment" is "rendered" and thus "entered": "A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed." Thus a "final judgment" (and, in an appropriate case, a "judgment" under § 547.037) must be in writing, signed, and denominated "judgment" or "decree."

The third rule, 81.05, addresses what makes a "judgment" "final," thus starting the clock for filing a notice of appeal: "For the purpose of

ascertaining the time within which an appeal may be taken: (1) A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Thus a "judgment," whether under § 512.020.5 or § 547.037, becomes a "final judgment" only after 30 days—and then only if no timely after-judgment order is filed.

Where Mercer's appeal would fail (again, if an appeal were available to him under § 512.020.5) is at the second point. There is no order denominated "judgment." Thus the 30 days for becoming "final" would not have begun, and a notice of appeal would be premature.

III. If Mercer could appeal from the April 2014 Order, the decision of the circuit court should be affirmed because his Petition was inadequate. (Responds to Appellant's Points I, II, and III).

Mercer contends that the motion court clearly erred in denying his Motion Seeking Forensic DNA Testing because the prosecutor failed to show cause as ordered by the court (App. Br. 14), the court failed to hold a hearing on appellant's motion (App. Br. 17), and the court failed to issue findings of fact and conclusions of law (App. Br. 20). Because appellant's motion seeking DNA testing was insufficient under § 547.035, appellant's claims are without merit.

A. Standard of review.

In reviewing the denial of a motion for DNA testing under § 547.035, the appellate court considers whether the motion court's findings of fact and conclusion of law were clearly erroneous. *Fields v. State*, 425 S.W.3d 215, 216 (Mo. App. E.D. 2014). The motion court's findings and conclusions are clearly erroneous if, after review of the record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.* A movant is entitled to a hearing unless the court finds that the motion and the files and records of the case conclusively show that he is not entitled to relief. *Id., citing* § 547.035.6, RSMo. The appellate court reviews the motion court's determination that no hearing was required for clear error. 425 S.W.3d at 216.

B. The circuit court implicitly concluded that the motion, files, and records conclusively showed that Mercer was not entitled to relief.

Though the circuit court did not enter findings of fact and conclusions of law, it is apparent that the court found that Mercer's motion fit into category 3(a) of those outlined in part I above—*i.e.*, that the court found "that the motion and the files and records of the case conclusively show the movant is not entitled to relief." § 547.035.6.

As explained in part I, upon receiving the motion, the circuit 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." § 547.035.4. Along with issuing an order to show cause to the prosecutor, the court is to obtain trial, plea, and sentencing transcripts. § 547.035.5. But "[i]f the court [then] 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.

That path—the one we described in part I as 3(a)—is the one the circuit court took. The court issued an order to show cause and instructed the reporter to prepare and file the transcript. DNALF 30. Having received the transcript and heard the prosecutor, the court denied the motion. DNALF 15.

The circuit court did fail to take the final step in that path: to "issue findings of fact and conclusions of law"—a requirement "whether or not a hearing is held." § 547.035.8. Under the statute, that was error. So assuming that the order denying the motion was appealable (and again, it is not) and that it is final (and again, it is not), this Court could consider remand. But Mercer failed to preserve that issue.

This is a civil matter, and like postconviction cases, it should be governed by the rules of civil procedure insofar as applicable. *See Atchison v. State*, 420 S.W.3d 559, 561 (Mo. App. S.D. 2013). Under the rules of civil procedure, a claim regarding the form or language of the judgment must be raised in a motion to amend the judgment in order to be preserved for appellate review. Supreme Court Rule 78.07(c). If the party challenging the failure to make statutorily required findings does not file a motion to amend the judgment, the issue is not preserved for appellate review. *Atchison*, 420 S.W.3d at 561.

Rule 78.07 (c) is applicable in the postconviction context because the rule prevents delay by bringing errors to the attention of the motion court at a time when those errors can be easily corrected. *Atchison,* 420 S.W.3d at 561-562. This rationale is equally applicable to motions filed under § 547.035. If a postconviction movant does not challenge the lack of findings via a motion to amend the judgment, his argument that the motion court clearly erred in denying his claim without findings and conclusions is not preserved for appellate review. *Atchison,* 420 S.W.3d at 562. "The appropriate course of action in such circumstances is to dismiss the point and affirm the motion court's judgment." *Id.*

It appears from the docket that Mercer did not file a motion to amend as required by Rule 78.07. Thus, any claim he now raises regarding a lack of

sufficient findings and conclusions is unpreserved, and the appropriate course of action is to dismiss the point and affirm the motion court's judgment.[3]

C. If the Court finds that the issue of making findings and conclusions was preserved, it should nonetheless deny relief because, as the circuit court should have found and this Court can find, Mercer's Petition was inadequate.

If the Court finds that the question of findings and conclusions was preserved, the Court could reverse and remand, requiring the circuit court to enter findings and conclusions. But that is unnecessary. This Court can render the judgment that the circuit court should have rendered (*see* Rule

[3] In the alternative, there are instances in which a failure to enter findings of fact and conclusions of law will not result in reversal and remand. *See, g.*, *Henningfeld v. State*, 451 S.W.3d 343, 349 (Mo. App. E.D. 2014). One such instance is where the issues were not properly raised or the motion was insufficient. *Id.* at 350, n. 4. *See also State v. Waters*, 221 S.W.3d 416, 419 (Mo. App. W.D. 2006) (because movant's motion for DNA testing did not allege that identity was an issue and was therefore insufficient, findings and conclusions were not required). This case is analogous.

84.14) and the circuit court should have denied relief at an earlier stage—where the only finding that the court should have made was that the Petition did not meet the statutory requirements.

Section 547.035 allows a person to file a postconviction motion in the sentencing court seeking forensic DNA testing that will demonstrate the defendant's innocence of the crime for which he or she is in custody. As discussed above, the motion must allege facts demonstrating five things. Critical here is the third:

> (3) the evidence was not previously tested by movant because:
>
> (a) The technology for the testing was not reasonably available … at the time of trial;
>
> (b) Neither the movant nor … trial counsel was aware of the existence of the evidence at the time of trial; or
>
> (c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial;

§ 547.035.2.

Mercer failed to invoke (3)(a): he did not allege that DNA testing was not reasonably available at the time of trial in 2008.

Mercer failed to invoke (3)(b): he did not allege that at the time of trial either he or his trial counsel were unaware of the existence of evidence to be tested.

And Mercer failed to invoke (3)(c): he did not allege that such evidence was unavailable to him at the time of trial.

Absent such allegations, Mercer was not entitled to a hearing to obtain DNA testing. *See Hudson v. State*, 270 S.W.3d 464, 468-469 (Mo. App. S.D. 2008) (movant failed to meet statutory requirements for a hearing on DNA testing where DNA analysis was available to the movant). And the circuit court should have simply denied the motion with a finding that Mercer failed to plead the requirements of § 547.035.2. There is no need to remand for findings and conclusions when Mercer's motion failed to state a prerequisite for relief.

CONCLUSION

In view of the foregoing, the appeal should be dismissed. In the alternative, the decision of the circuit court denying the Motion Seeking Forensic DNA Testing should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

By: /s/ *James R. Layton*

James R. Layton
Mo. Bar No. 45631
Solicitor General
KAREN L. KRAMER
Mo. Bar No. 47100
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
Karen.Kramer@ago.mo.gov

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of Respondent's Substitute Brief was served electronically via Missouri CaseNet efiling system on the 17th day of June, 2016, to:

Jennifer K. Bukowsky
217 North 9th Street
Columbia, Missouri 65201
j@lawbuk.com

Attorney for Appellant

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,676 words.

/s/ *James R. Layton*
Solicitor General