No. SC95484

IN THE

Supreme Court of Missouri

NATALIE R. DEPRIEST,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Francois County Circuit Court
Twenty-fourth Judicial Circuit
The Honorable Kenneth W. Pratte, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Ms. DePriest appeals the denial of her Rule 24.035 motion, in which she alleged (1) that plea counsel was ineffective in light of a conflict of interest that arose from his representing Ms. DePriest and her brother simultaneously; (2) that § 195.017 is facially unconstitutional, which renders her conviction unconstitutional; (3) that plea counsel was ineffective for failing to challenge the constitutionality of § 195.017 at the earliest opportunity; and (4) that the motion court violated Rule 24.02(b) by using a "group plea" procedure, a procedure which "should *per se* invalidate a guilty plea[.]" (L.F. 31, 45, 56-58). The motion court denied Ms. DePriest's motion without an evidentiary hearing (L.F. 63-66).[1]

* * *

The State charged Ms. DePriest with the class B felony of producing a controlled substance (more than five grams of marijuana), § 195.211, RSMo.

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[1] At various points in her Statement of Facts, Ms. DePriest makes assertions of fact that are supported by a citation to allegations in her post-conviction motion (*see* App.Sub.Br. 11-21). To the extent that she cites to the allegations in the amended motion on pages 30 through 62 of the legal file, respondent submits that those facts have not been established (except as those facts might be demonstrated by other competent evidence in the record).

Supp. 2014, the class B felony of possession of a controlled substance with intent to distribute (more than five grams of marijuana), § 195.211, RSMo Supp. 2014, and the class C felony of unlawful possession of a weapon (short barrel rifle), § 571.020.1, RSMo Cum. Supp. 2010 (L.F. 12-13).

After the charges were initially filed, Ms. DePriest posted bond (L.F. 1). Later, Ms. DePriest was ordered to submit to drug testing every two weeks (L.F. 4). In March, 2013, Ms. DePriest filed a motion to suppress (L.F. 4). In April, 2013, the State filed a motion to revoke bond (L.F. 5). A hearing was held on the motion to revoke bond, and, on May 24, 2013, the bond was revoked, and Ms. DePriest was taken into custody (L.F. 5). On June 28, 2013, the court held a suppression hearing and took the motion to suppress under advisement (L.F. 5-6). Ms. DePriest's case was set for trial on September 5, 2013 (L.F. 6).

On August 16, 2013, Ms. DePriest informed the court that she intended to plead guilty pursuant to a plea agreement (*see* L.F. 7; Tr. 3, 7, 48-50). At the guilty plea hearing, six other defendants also pleaded guilty, including Ms. DePriest's brother, who was charged with the same offenses in a separate case (Tr. 3-7). Ms. DePriest and her brother were represented in their respective cases by the same attorney, Mr. Dan Viets (Tr. 6-7, 11).

After identifying each defendant and each attorney in the various cases, the court advised the defendants that it needed to ask them "a number

of questions in order to determine that your pleas of guilty are knowingly, intelligently, and voluntarily given, to be sure that you fully understand the rights that you'll be giving up by waiving your right to a jury trial, and to be sure that you fully understand the consequences of entering your pleas of guilty" (Tr. 7). The court explained that it was addressing them all together "to save a great deal of time" (Tr. 8). The court then explained that before it could accept a guilty plea, it needed "to advise the defendant of their legal rights and ask a number of questions" (Tr. 8). The court then explained that it would question the group beginning with one of the defendants and "then move straight on down the line in order" (Tr. 8).

The court explained that there would "be times when [it] need[ed] to talk to you in more detail about your particular case," and the court stated that it would "make it very clear to you at that time" when it needed to do that (Tr. 8). The court then stated, "If at any time there is something you do not understand, you're confused about something, I want you to be sure and stop me, get your attorney's attention, do whatever is necessary, and we will be sure and stop and take the time and go over and explain anything to you that you have got questions about" (Tr. 8).

The court then asked if any of the attorneys had "any objection to the Court taking up [their] client's pleas of guilty in [that] manner" (Tr. 8-9). The attorneys advised the court that they did not (Tr. 9). The court then asked the

defendants if they had any objections or "any questions about it at all," and each defendant said that he or she did not (Tr. 9). Ms. DePriest stated, "No, sir" (Tr. 9).

The court then questioned the defendants to ensure that their guilty pleas were knowing, intelligent, and voluntary, inquiring at times of the individual defendants about specific facts or circumstances (*see* Tr. 10-63). For her part, Ms. DePriest assured the court that she fully understood the charges, that she had discussed her case with counsel "[t]en or more" times and spent "[a]t least five hours" doing so, and that counsel had investigated the case to her satisfaction (Tr. 10, 16-18).

When the court inquired about any confessions or statements made by the defendants, Ms. DePriest's brother stated that he had not made any such statements (Tr. 20). The prosecutor stated that he thought that he had (Tr. 20). Defense counsel stated, "Well, Your Honor, that is a matter of dispute. But we understand that we're waiving any objection. We're waiving a ruling on our Motion to Suppress" (Tr. 20). The court stated that the motion to suppress had been taken under advisement, and it observed that it had not yet ruled on the motion (Tr. 20). The court then addressed Ms. DePriest's brother, explained that the motion to suppress had not been ruled on, and asked if he still wanted to plead guilty (Tr. 21). Ms. DePriest's brother stated that he wanted to plead guilty, and the court then asked Ms. Depriest if she

also wanted to continue with her guilty plea; Ms. DePriest stated that she wanted to proceed (Tr. 21). Ms. DePriest assured the court that she had "had sufficient opportunity to discuss the case" with counsel, that she had discussed all available defenses with counsel, and that she did not have any complaints about counsel (Tr. 22).

Each defendant then entered a plea of guilty. When the court got to Ms. DePriest's case, the prosecutor stated that she was pleading guilty to "Counts I and II only" (Tr. 24). Ms. DePriest then entered a formal plea of guilty to "the class B felony of producing a controlled substance, more than five grams of marijuana," and "the class B felony of possession of a controlled substance with intent to distribute more than five grams of marijuana" (Tr. 24). The court then questioned the defendants about the rights they were giving up by pleading guilty, and Ms. DePriest assured the court that she understood those rights (Tr. 28-31).

The court then advised each defendant about the elements of the charged offenses. The court addressed Ms. DePriest and advised her of the elements, and Ms. DePriest said that she understood and admitted those elements (Tr. 35-36). The court also advised Ms. DePriest about the range of punishment for each offense, and Ms. DePriest said that she understood (Tr. 41). Ms. DePriest assured the court that no "threats or pressure of any kind [had] been exerted against [her] to cause [her] to plead guilty" (Tr. 42).

The court then inquired about plea agreements with the defendants. When the court inquired about Ms. DePriest's case, the prosecutor stated that she was "pleading open to Counts I and II," and that "[a]ll other counts and case against her are dismissed" (Tr. 48). The State further agreed that "her bond can be reinstated" (Tr. 48). Defense counsel stated, "That is correct, Your Honor. It is our understanding that no new charge would be filed based on another check" (Tr. 48). The State clarified that, while no new charges would be filed, the State was "going to ask for any restitution of any checks that are out there," if Ms. DePriest was granted probation at some point (Tr. 49). Defense counsel said that was understood (Tr. 49). The court asked if the defense wanted a sentencing assessment report (SAR) in the DePriests' cases, and defense counsel said that they did (Tr. 49). Ms. DePriest stated that she understood her plea agreement, and she stated that she had no questions about it (Tr. 49-50). Ms. DePriest assured the court that no other promises had been made to her (Tr. 51).

The court then inquired about collateral consequences of the pleas that counsel might have discussed with their clients. Defense counsel stated that he had discussed possible parole with the DePriests (Tr. 53). He stated, "We have discussed the hope that if the Court chooses to order either defendants to serve time in the Department of Corrections, our hope that the Department of Corrections would parole them at some point in the near

future" (Tr. 53). Defense counsel stated that he thought the DePriests understood that "there is no guarantees as to when or whether they will be paroled" (Tr. 53). Ms. DePriest confirmed her understanding of those circumstances (Tr. 53).

Ms. DePriest assured the court that she was pleading guilty because she was, in fact, guilty of the charged offenses (Tr. 54). The court then addressed Ms. DePriest and asked her to tell the court what she had done that led to the charges (Tr. 59). As to Count I, Ms. DePriest said, "I watered and trimmed marijuana plants" (Tr. 59). She admitted that she was "aiding and involved in the cultivating of marijuana," that it was more than five grams, and that she knew it was a controlled substance and illegal (Tr. 59). As to Count II, she stated, "I did possess it with the intent of sharing it with others" (Tr. 59-60). She admitted that she intended to distribute it (Tr. 60). The court asked the defendant's about their level of education, and Ms. DePriest informed the court that she had a bachelor's degree (Tr. 60).

Ms. DePriest assured the court that she was not under the influence of alcohol or drugs (Tr. 60-61). She assured the court that she understood that she could withdraw her plea at that time, but she stated that it was still her desire to plead guilty to the charges (Tr. 62). Defense counsel stated that he knew of no reason the court should not accept the guilty pleas, and Ms. DePriest assured the court that counsel had not told her to answer

untruthfully, that no one had told her that there were any "special deals" that had not been mentioned, and that she had answered the court's questions truthfully (Tr. 62-63). The court then asked the DePriests if they understood that an SAR would be ordered "to help [the judge] determine what disposition to make in [their] cases," and Ms. DePriest said that she understood (Tr. 63-64).

The court then accepted the defendants' guilty pleas (Tr. 65). The court scheduled a later sentencing date for the DePriests and ordered an SAR (Tr. 66). The court reinstated Ms. DePriest's bond and ordered her to submit to drug testing every two weeks (Tr. 66).

On November 12, 2013, Ms. DePriest appeared for sentencing (Tr. 68). The court inquired about any corrections to the SAR, and defense counsel disputed whether there was a homemade explosive device at the DePriests' residence and a "ledger that related to any marijuana sales" (Tr. 68). The court observed that those issues had been discussed "in the other record" (a reference to Ms. DePriest's brother's case), and the court agreed that the apparent homemade explosive device "[t]urned out not to be such" (Tr. 68-69). The court also observed that "[t]here was some testimony at the Motion to suppress that could lead to a conclusion that these were records of sales," but the court stated that "[i]t wasn't definitive" (Tr. 69). The court observed that the police officers believed that they were records of sales (Tr. 69).

The prosecutor argued for "the maximum sentence on the two counts" (Tr. 69). Based on his review of the SAR, the prosecutor believed that Ms. DePriest viewed the case as "a major annoyance because marijuana should be legal" (Tr. 70). The prosecutor argued that, regardless of her views, it was illegal to produce and distribute marijuana (Tr. 70). The prosecutor argued that Ms. DePriest was "just as guilty as Mr. DePriest" because she "tended the plants" and "knew what was going on" (Tr. 70). The prosecutor argued that Ms. DePriest had committed "a large scale violation of the law," and that it appeared "from all this that her regret is that she was caught" (Tr. 71).

Defense counsel acknowledged that they were "intensely, acutely, painfully aware of the fact that marijuana is illegal"—"No one is disputing that marijuana is illegal" (Tr. 71-72). He stated that "that's not really worthy of wasting the Court's time trying to make that point I don't think" (Tr. 72). Defense counsel argued instead that Ms. DePriest was "a young lady with no prior criminal history whatsoever, no prior criminal convictions, period" (Tr. 72). He pointed out that, after she wrote a bad check, she spent eighty-five days in jail, "until they said, well, if you'll plead guilty, then . . . we'll let you out of jail" (Tr. 72). He stated that she then pleaded guilty, and that she was "not disputing her guilt" (Tr. 72).

Defense counsel argued, however, that Ms. DePriest's role in the crimes was minimal, and he opined that "her brother would minimize her role in

this" (Tr. 72). He pointed out that Ms. DePriest had expressed her remorse in her statement to the probation office, and he observed that she had "a college degree and a fifteen year successful career" (Tr. 72). He then presented letters that had been written on Ms. DePriest's behalf, including a letter from a former employer (Tr. 72). He also presented a letter from a prospective employer "from a Kansas City company which [was] offering Ms. Depriest a job which would allow her to support herself" (Tr. 73).

Defense counsel informed the court that Ms. DePriest was working and that she had "the potential to be employed at a much more productive job if she's given the opportunity" (Tr. 73). He pointed out that Ms. DePriest had a favorable "risk score" of five, and that it would have been even more favorable if she had been at her job just a little longer (Tr. 73). He argued that Ms. DePriest deserved "a lot more" than the SAR's "unexplained recommendation against probation," and he asserted that she was "an excellent candidate for probation" (Tr. 73-74). Counsel asked that the court suspend imposition of sentence, and he argued that Ms. DePriest was "exactly the type of defendant for whom a suspended imposition of sentence was invented"—a defendant with no prior convictions who had not harmed anyone (Tr. 74).

Defense counsel anticipated that the State would argue that she was distributing a dangerous drug, but he pointed out that alcohol and tobacco are "far more dangerous by any objective consideration" (Tr. 74). He pointed

out that Ms. DePriest had not threatened anyone in the community (Tr. 74). He reiterated that they were not disputing that she was "guilty of breaking the law," and he stated that "she stands before you begging for mercy" (Tr. 74). He stated, "I think she deserves mercy, Your Honor" (Tr. 74). He then asked for a suspended imposition of sentence, "leaving her in a position to indeed receive a sentence the State is requesting if she violates probation, but leaving her with one opportunity to avoid the lifelong stigma . . . of a felony drug conviction" (Tr. 74). He concluded, "And I ask you to grant her mercy, Your Honor" (Tr. 75).

The prosecutor referred the court to Ms. DePriest's version of the offense and argued that it did not support "the conclusion that she's begging for mercy for anything" (Tr. 75). The prosecutor argued that "there's nothing in there but minimization" of her role in the crimes (Tr. 75). Defense counsel responded by pointing out that Ms. DePriest had said, "This is a huge mistake, and I regret it. I've learned to respect the laws of the state I live in. I will always follow the probation rules and make my payments on time. I take full responsibility" (Tr. 75).

The court observed that, in terms of culpability, it was difficult to "differentiate between her and her brother, living there together, sharing the same apartment" (Tr. 75). The court stated that, based on the evidence at the suppression hearing, Ms. DePriest "couldn't live there without knowing

exactly what was going on and the degree to which it was going on" (Tr. 76). The court observed that she "admitted she participated in it" (Tr. 76). The court then observed that Ms. DePriest differed from her brother in one respect, namely, that she did not have "possession of the rifle, which was attributed to" her brother (Tr. 76).

The court denied the request for probation and sentenced Ms. DePriest to fifteen years for each offense (Tr. 76). The court ordered the sentences to run concurrently (Tr. 76). Ms. DePriest expressed satisfaction with counsel's representation (Tr. 79).

On April 29, 2014, Ms. DePriest timely filed a *pro se* motion pursuant to Rule 24.035 (*see* L.F. 10).[2] The motion court appointed counsel to represent Ms. DePriest on that same day (L.F. 10). A transcript of the guilty plea and sentencing had previously been filed on December 20, 2013 (L.F. 9). Thus, Ms. DePriest's amended motion was initially due by June 30, 2014 (since June 28, 2014, was a Saturday). *See* Rule 24.035(g); Rule 44.01(a). On May 23, 2014, the motion court granted Ms. DePriest an additional thirty days to

[2] The *pro se* motion was not included in the legal file. A copy of the *pro se* motion is available on Missouri Case.net in *Natalie R. DePriest v. State of Missouri*, No. 14SF-CC00093. The *pro se* motion states that Ms. DePriest was delivered to the department of corrections on December 4, 2013.

file her amended motion (L.F. 10, 29).

On July 28, 2014, Ms. DePriest timely filed an amended motion (L.F. 11, 30). Ms. Depriest alleged (1) that plea counsel was ineffective in light of a conflict of interest that arose from his representing Ms. DePriest and her brother simultaneously; (2) that § 195.017 is facially unconstitutional, which rendered her convictions unconstitutional; (3) that plea counsel was ineffective for failing to challenge the constitutionality of § 195.017 at the earliest opportunity; and (4) that the motion court violated Rule 24.02(b) by using a "group plea" procedure, a procedure which "should *per se* invalidate a guilty plea" (L.F. 31, 45, 56-58).

The motion court denied Ms. DePriest's post-conviction motion without an evidentiary hearing (L.F. 63-66).

ARGUMENT

I.

The motion court did not clearly err in denying Ms. DePriest's claim that plea counsel labored under a conflict of interest.

In her first point, Ms. DePriest asserts that the motion court clearly erred in denying her claim that plea counsel was ineffective "for representing [her] while under an actual conflict of interest that adversely affected his performance and prejudiced [her]" (App.Sub.Br. 29). She asserts that counsel represented her and her brother but that their interests "were in no way aligned," and that counsel "did a disservice to both clients, but particularly [Ms. DePriest], in continuing to represent both of them even as this case became extremely adversarial and the interests of the defendants grew further apart" (App.Sub.Br. 29).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts,

not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id*.

B. Ms. DePriest failed to allege facts showing an actual conflict of interest that adversely affected counsel's performance

Generally, to prevail on a claim of ineffective assistance of counsel, the movant must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also "affirmatively prove prejudice." *Id*. at 693. However, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

1. The motion court's findings

In denying this claim, the motion observed that "to evidence a conflict of interest, something must have been done by counsel in the trial, or something must have been foregone by counsel and lost to the accused, which was detrimental to the accused's interests and advantageous to the one with antagonistic interests" (L.F. 64). The motion court stated that Ms. DePriest had failed to allege "what she 'lost' by continuing to hang in with [plea counsel] as her attorney" (L.F. 64).

The motion court observed that Ms. DePriest was aware of the dual representation, and that she could not "contend [her brother] got any advantage if there was any to be had, from the dual representation" (L.F. 64). The motion court stated that Ms. DePriest had "merely hint[ed]" at potential conflicts without identifying actual conflicts or failures by counsel (L.F. 64). The motion court concluded that Ms. DePriest "cannot show what disadvantage she suffered from the dual representation," and that "[a]bsent that showing she [was] not entitled to relief" (L.F. 64). The motion court did not clearly err.

2. Ms. DePriest failed to allege facts warranting relief

First, the mere fact that counsel represented Ms. DePriest and her co-actor brother was not sufficient to show an actual conflict of interests. *See Smith v. State*, 972 S.W.2d 551, 555 (Mo.App. S.D. 1998). "Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). "This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." *Id*. For instance, " 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.' " *Id*.

That being said, however, in cases where defense counsel advises the trial court before trial (or a guilty plea) that joint representation involves a conflict of interests, the court should either inquire into the potential conflict or take steps to ensure that each defendant has conflict-free counsel. *See id*. at 485-486.; *see also Mickens v. Taylor*, 535 U.S. 162, 168 (2002) (*Holloway* thus creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict."). Here, of course, defense counsel did not advise the plea court that there was any conflict of interests, and neither Ms. DePriest nor her brother intimated that their interests were in conflict before the plea.

Generally, as a matter of professional conduct,[3] under Rule 4-1.7, unless a client consents to concurrent representation and other conditions are satisfied, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 4-1.7(a). "A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of

[3] "Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." *Id.*

In *Cuyler v. Sullivan*, the Court observed that "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest." 446 U.S. at 348. The Court observed, "Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects [before the trial] to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Id.* "But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Id.*

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-350. "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350. In this context, " 'an actual conflict of interest' " means "a conflict *that affected counsel's*

performance—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. at 171.

In her amended motion, Ms. DePriest outlined potential conflicts of interests, but she did not allege facts showing that counsel labored under an actual conflict of interests that adversely affected counsel's performance and thereby deprived her of some benefit. At the outset of her claim, for instance, she alleged generally that plea counsel could not advise her either to accept or reject plea offers "because they were always offered as a 'package': both defendants plead guilty, or neither" (L.F. 32). She alleged that "[s]he continually received these 'package' plea offers, that could be made only because she was represented by the same lawyer as her brother" (L.F.32).

But the fact that she received "package" plea offers did not preclude plea counsel from giving Ms. DePriest advice, and subsequent allegations in the amended motion show that counsel *did* give her advice about the State's plea offers (*see* L.F. 34, 36-37). Moreover, regardless of whether she and her brother were represented by the same attorney, and regardless of whether their levels of culpability were different, it was well within the State's prerogative to extend "package" plea offers to the defendants, and separate representation would not have forced the State to extend individual offers. The State was understandably wary about resolving only one case, as that would permit the defendant who pleaded guilty to attempt to exonerate the

other defendant by trying to take all the blame for the crimes.

In short, it was not the joint representation that caused the State to extend "package" plea agreements in this case; rather, it was the State's apparent concern that one sibling might be willing to "take the fall" for the other sibling. In other words, if Ms. DePriest and her brother had been represented by separate counsel, the State still would have made "package" plea offers to ensure a just resolution of both cases.

Ms. DePriest also alleged generally that counsel "could not candidly and honestly advise [her] about the wisdom of testifying against [her brother] because of his duty of loyalty to [her brother]" (L.F. 32). Conspicuously absent from the amended motion, however, was any allegation that a plea offer contemplating such testimony was actually extended by the State, that plea counsel actually failed to advise her about the wisdom of testifying against her brother, or that counsel advised either for or against such action. It is, therefore, not apparent from the allegations in the motion that counsel's conduct was actually adversely affected by the alleged conflict of interest.

Turning to the actual facts alleged in the motion, it is further apparent that Ms. DePriest failed to allege facts warranting relief or, as the motion court concluded, that Ms. DePriest "merely hint[ed]" at potential conflicts of interest (L.F. 64). The amended motion alleged that Ms. DePriest signed a "Statement and Waiver of Conflict of Interest" (L.F. 33). The amended motion

then alleged that in a letter to the DePriests, plea counsel informed them that he ". . . might be forced to withdraw from both or your cases if one of you decides to take an action against the other which would harm the other's case" (L.F. 33). The amended motion alleged that the waiver signed by Ms. DePriest stated that "an actual conflict would arise, 'if either is offered a disposition that would harm the other's position or require testimony against the other' " (L.F. 34).

With regard to counsel's conduct in the case thereafter, the amended motion alleged that counsel informed the DePriests in a letter dated March 21, 2012, that the State had made a plea offer of ten years to both of them (L.F. 34). The amended motion alleged that counsel advised them not to accept the State's offer (L.F. 34). Ms. DePriest did not allege that counsel's advice in this instance was adverse to her interests (L.F.34).

The amended motion further alleged that, after a motion to suppress was denied on July 5, 2012, and after the case was bound over, plea counsel contacted the prosecutor and expressed a wish to negotiate a plea agreement (L.F. 34). The amended motion alleged that plea counsel stated in his letter "that he 'really [did] not see how the Prosecutor [thought] he [had] any case against [Natalie] for cultivation' " of marijuana (L.F. 35). Ms. DePriest did not allege that counsel's inquiry about a plea agreement, along with counsel's assertion that he did not see how the prosecutor thought he had a case

against Ms. DePriest, was adverse to her interests (L.F. 34-35).

The amended motion next alleged that, on May 9, 2013, plea counsel told the prosecutor that Ms. DePriest's brother "would plead guilty to the Class B felony of production of a controlled substance, in exchange for his recommendation of an SIS" (L.F. 35). The amended motion alleged that plea counsel simultaneously informed the prosecutor that the evidence did not connect Ms. DePriest to "any felonious activity" (L.F. 35). The amended motion alleged that counsel stated " 'I do not deny that she may very well have been aware of the fact that [her brother] was growing marijuana plants in the closet in his bedroom, but I have not seen any evidence whatsoever to indicate that she participated in that activity" (L.F. 35). The amended motion alleged that counsel asked in his letter that "the gun charge be dismissed, because there was no evidence [Ms. DePriest] possessed the firearm" (L.F. 35). The amended motion alleged that counsel informed the prosecutor that Ms. DePriest was willing to "plead guilty to a misdemeanor marijuana charge, with an SIS" (L.F. 35). Ms. DePriest did not allege that this offer was adverse to her interests (L.F. 35).

The amended motion alleged that, after Ms. DePriest was charged with passing a bad check in another case, the prosecutor rejected plea counsel's offers and informed plea counsel that the State "had previously made offers of 10 years and 15 years pursuant to Section 559.115 for both clients" (L.F. 35).

The amended motion alleged that the prosecutor "was not inclined to make any further offers" (L.F. 35-36). The amended motion alleged that the prosecutor wanted to try the cases unless the DePriests were both willing to " '. . . take a prison offer now' " (L.F.36).

The amended motion alleged, however, that on May 24, 2013, the prosecutor outlined another deal for Ms. DePriest to plead guilty to one class B felony in exchange for the other charges being dismissed and the prosecutor recommending fifteen years pursuant to § 559.115 (L.F. 36). The amended motion alleged that the prosecutor would also withdraw his motion to revoke Ms. DePriest's bond and defer sentencing until a later date in June (L.F. 36). The amended motion alleged that the prosecutor suggested that another offer would be made if Ms. DePriest did not accept the State's offer, and that the potential future offer would include a provision that Ms. DePriest testify against her brother (L.F. 36). The amended motion did not allege that any offer contemplating such testimony was actually extended by the State (L.F. 36).

The amended motion alleged that counsel memorialized in a letter that he had verbally advised Ms. DePriest not to accept the State's offer (L.F. 36). The amended motion alleged that counsel stated in his letter to Ms. DePriest—which was addressed to her only—"As I have discussed with you since I first entered your case, I believe that you are not guilty of the felony

offenses you are charged with, but even if you were, I would recommend that we ask the Judge to grant an [SIS]" (L.F. 36). The amended motion did not allege that counsel's advice was adverse to Ms. DePriest's interests or that counsel's advice was given to benefit her brother (L.F. 36).[4]

The amended motion alleged that plea counsel advised the prosecutor in a letter dated June 17, 2013, that Ms. DePriest would enter an open plea if the prosecutor "would consent to her being released from jail" (L.F. 36). The amended motion did not allege that counsel's offer at that time was adverse to Ms. DePriest's interests (L.F. 36).

The amended motion next alleged that, in a letter dated June 19, 2013, plea counsel wrote a letter to the DePriests and their father (L.F. 36). The letter stated that the prosecutor had " '. . . agreed that he would not object to the Judge letting Natalie out of jail while her sentencing is pending if she enters a plea of guilty to all the charges' " (L.F. 36-37). The amended motion alleged that the letter stated that the prosecutor "would also want an assurance from Natalie that she would not then testify of [sic] behalf of [her brother], trying to take all of the blame and get him off the hook' " (L.F. 37).

[4] Indeed, this advice to Ms. DePriest did not seem to benefit her brother, as it raised the specter of the State trying to divide their loyalties with a plea offer that could create a conflict of interests.

The amended motion alleged that the letter advised that if the DePriests both pleaded guilty to all of the charges, the prosecutor would not object to Ms. DePriest being released from jail (L.F. 37). The amended motion further alleged that the letter stated that the prosecutor would be asking the judge to send them to prison for at least 120 days, but that the defense would be free to ask for probation (L.F. 37). The amended motion alleged that plea counsel stated in his letter, "I am not trying to get you to take this offer. I do not believe Natalie is guilty and I do not believe the prosecutor can prove otherwise" (L.F. 37). The amended motion alleged that counsel also stated, "However, it is certainly her decision to make whether to enter a guilty plea and I will respect her decision and proceed accordingly" (L.F. 37). The amended motion did not alleged that counsel's advice at that time was adverse to Ms. DePriest's interests or that counsel's advice was given to benefit her brother (L.F. 36-37).

According to the amended motion, Ms. DePriest's brother subsequently contacted plea counsel and told him that he "would plead guilty to the charges if the prosecutor would agree to an SIS for Natalie and her bond being reinstated" (L.F. 37). The amended motion alleged that counsel informed Ms. DePriest's brother—in a letter addressed to him only—that "it was his understanding that the prosecutor would agree to Natalie's bond being reinstated only if *both* pleaded guilty and agreed to a sentence of 15

years pursuant to Section 559.115" (L.F. 37). The amended motion alleged that plea counsel nevertheless wrote a letter to the prosecutor stating that Ms. DePriest's brother "would enter an open plea and request an SIS, in exchange for the prosecutor consenting to the bond in Natalie's case being reinstated" (L.F. 37). The amended motion did not allege that counsel's conduct in writing this letter to the prosecutor was adverse to Ms. DePriest's interests (L.F. 37).

The amended motion alleged that the prosecutor then offered to dismiss Ms. DePriest's bad check charges in exchange for the DePriests' pleading guilty to all of the charges (L.F. 37). The amended motion alleged that the prosecutor also agreed to not object to Ms. DePriest's bond being reinstated (L.F. 37). The amended motion alleged that counsel countered this offer by informing someone at the prosecutor's office that Ms. DePriest's brother would plead guilty if the prosecutor would dismiss Ms. DePriest's "drug and gun charges" (instead of the bad check charges) (L.F. 37). The amended motion did not allege that counsel's offer at that time was adverse to Ms. DePriest's interests (L.F. 37).

The amended motion alleged that counsel advised Ms. DePriest in a letter dated July 31, 2013—and addressed to her only—that it was "possible for [her brother] to enter an open plea of guilty" and then "testify on her behalf if she went to trial" (L.F. 38). The amended motion alleged that

counsel said "he believed that [her brother] should plead guilty" (L.F. 38). The amended motion did not allege that this advice was adverse to Ms. DePriest's interests (L.F. 38).

Finally, the amended motion alleged that plea counsel spoke to the DePriests in court (L.F. 38). The amended motion alleged that counsel negotiated a plea for Ms. DePriest to "enter a plea to both pending marijuana charges only, and the prosecutor would consent to reinstate her bond" (L.F. 38). The amended motion alleged that, "[l]ater, the prosecutor verbally informed counsel that deal was only good if [Ms. DePriest's] brother also pleaded guilty" (L.F. 38). The amended motion alleged that "[t]he prosecutor stated that he was afraid that [Ms. DePriest] would later testify favorably for [her] brother down the road" (L.F. 38). The amended motion did not allege that counsel's efforts in negotiating the final plea agreement was adverse to Ms. DePriest's interests (L.F. 38).

In alleging that there was an actual conflict of interest that adversely affected plea counsel's performance, the amended motion pointed out (and Ms. DePriest argues on appeal) that "[c]ounsel believed [Ms. DePriest] was not guilty of the charged crimes, and stated as much to her numerous times in person and via letter" (L.F. 40; *see* App.Sub.Br. 40). The amended motion then cited to evidence that clearly showed Ms. DePriest's brother's guilt (L.F. 40). The amended motion alleged that "[w]ith respect to [Ms. DePriest],

counsel was not able to use [her brother's] vulnerability and culpability in this case as leverage to secure a relatively favorable outcome for [her] due to his concurrent duty of loyalty to him" (L.F. 40; *see* App.Sub.Br. 40).

But as outlined above, the facts alleged in the amended motion did not show that counsel failed to use her brother's "vulnerability and culpability as leverage." To the contrary, the allegations outlined above show that plea counsel repeatedly urged the State to extend greater leniency to Ms. DePriest, as the evidence—in plea counsel's opinion—showed that she was not as guilty as her brother. The amended motion alleged, for instance, that on July 5, 2012, plea counsel advised the prosecutor (in conjunction with impending plea negotiations) "that he 'really [did] not see how the Prosecutor [thought] he [had] any case against [Natalie] for cultivation' " (L.F. 35).

Later, on May 9, 2013, in extending plea offers to the State, counsel said that Ms. DePriest's brother would plead guilty to a class B felony, but that the evidence did not connect Ms. DePriest to "any felonious activity" (L.F. 35). The amended motion alleged that counsel stated " 'I do not deny that she may very well have been aware of the fact that [her brother] was growing marijuana plants in the closet in his bedroom, but I have not seen any evidence whatsoever to indicate that she participated in that activity" (L.F. 35). Counsel also asked in his letter that "the gun charge be dismissed, because there was no evidence she possessed the firearm" (L.F. 35). Counsel

informed the prosecutor that Ms. DePriest was willing to "plead guilty to a misdemeanor marijuana charge, with an SIS" (L.F. 35).

Subsequently, at the urging of Ms. DePriest's brother—and after Ms. DePriest's bond had been revoked and she had been taken into custody (*see* L.F. 5)—plea counsel informed the prosecutor that Ms. DePriest's brother would enter an open plea to a class B felony if the prosecutor "would consent to [Ms. DePriest's] being released from jail" (L.F. 36). Then, although the prosecutor had indicated that both of the DePriests needed to plead guilty to have the bond reinstated, plea counsel again informed the prosecutor that Ms. DePriest's brother "would enter an open plea and request an SIS, in exchange for the prosecutor consenting to the bond in Natalie's case being reinstated" (L.F. 37). Finally, plea counsel also countered another offer by informing the prosecutor that Ms. DePriest's brother would plead guilty if the prosecutor would dismiss Ms. DePriest's "drug and gun charges" (L.F. 37).

In short, the amended motion utterly failed to allege facts in support of its conclusion that counsel failed "to use [her brother's] vulnerability and culpability in this case as leverage to secure a relatively favorable outcome for [Ms. DePriest]" (L.F. 40). To the contrary, the facts alleged in the motion showed that counsel repeatedly sought to convince the prosecutor that Ms. DePriest was less culpable and, thus, deserving of a better plea offer. The fact that the State refused to *make* a better offer to Ms. DePriest was not caused

by any alleged conflict of interest in this case.

Ms. DePriest further alleged that "due to the fact these defendants were represented by the same person, the prosecutor was able to present 'package' offers where both defendants had to plead guilty in order for either to take advantage of a plea deal" (L.F. 40). She alleged that "[d]espite vastly different levels of culpability, both defendants received the same offers from the State" (L.F. 40). And, finally, she alleged that, "[h]ad [she] had her own lawyer from the beginning, she would have had an advocate who could have more effectively represented her and drawn a distinction between her level of culpability, relative to her brother" (L.F. 40).

But the State's use of "package" deals was not a result of there being a single defense attorney. The State's concerns in the case existed whether the DePriests were represented by one or multiple attorneys. Accordingly, even if the DePriests had been represented by separate attorneys, the State would have made its plea offers contingent upon acceptance by both defendants. In addition, as outlined above, the allegations in the amended motion reveal that plea counsel did draw "a distinction between her level of culpability, relative to her brother." Accordingly, it was not the purported conflict of interest that caused the State to refrain from giving Ms. DePriest a better offer; rather, it was the State's unwillingness to perceive any appreciable difference between the DePriests' culpability on the drug charges, along with

the State's willingness to try both cases, if necessary.[5]

Ms. DePriest also alleged in her amended motion, and she argues on appeal, that "[a] reasonably competent lawyer representing *only* [*her*] and outfitted with undivided loyalty, zealous advocacy, and independent judgment may have advised [her] from the beginning that it would be in her best interest to distance herself from her more culpable codefendant, including offering to testify against her brother in exchange for an SIS or a reduced charge, for example" (L.F. 42; *see* App.Sub.Br. 41). She alleged that she "might have been found not guilty after a trial, or, unhampered by an attorney with divided loyalties, been able to walk away from this case with a relatively good outcome compared to [her brother]" (L.F. 42). She further alleged that, in light of the State's "package" plea offers, counsel "had an incentive to steer [her] towards the disastrous open plea in this case, to help his other client [her brother] secure an outcome that was, essentially, [her

[5] Ultimately, the State did give Ms. DePriest a better plea offer, as it agreed to dismiss the weapon offense, and it agreed to dismiss other charges and consent to the reinstatement of her bond. These were concessions negotiated on Ms. DePriest's behalf by plea counsel.

brother's] only option, since a trial was out of the question for him" (L.F. 43).[6] But, again, Ms. DePriest failed to allege facts to support these conclusory allegations.

Ms. DePriest alleged what a "reasonably competent lawyer" would have done, but she did not allege that plea counsel actually failed to give her the advice outlined in the amended motion (L.F. 42). In other words, to allege facts warranting relief, it is not sufficient to allege merely what a reasonable attorney would have done; rather, a movant must allege that counsel actually failed to perform reasonably.[7] Moreover, to the extent that Ms. DePriest's best interest was to go to trial or negotiate for a plea offer that was better

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[6] It should be noted that the outcome was only "disastrous" in hindsight. Under *Strickland*, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

[7] Ms. DePriest alleged that "[s]he would testify she and [plea counsel] never discussed a strategy about her case alone. They only discussed what was good for her and [her brother] together" (L.F. 44). But this vague allegation did not show that counsel actually advised her, or actually did anything, contrary to her interests.

than her brother's plea offer, the facts alleged in the amended motion do not show that plea counsel ever acted adversely to those interests (or that counsel "steered" Ms. DePriest toward an unfavorable plea to benefit her brother). As outlined above, counsel repeatedly advised Ms. DePriest *not* to accept the State's plea offers, and counsel repeatedly attempted to obtain a better offer for Ms. DePriest precisely because counsel believed that Ms. DePriest was not guilty of the charged felony offenses (*see* L.F. 34-38). There were no facts alleged in the amended motion showing that plea counsel "steered" Ms. DePriest toward accepting the offer that she ultimately accepted.[8]

On appeal, Ms. DePriest asserts that "[i]t would have been impossible

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[8] Ms. DePriest did not allege in her amended motion that she wanted to go to trial or that her guilty plea was rendered involuntary by the alleged conflict (L.F. 31-45). She also failed to allege any facts showing that her plea was rendered involuntary by the alleged conflict of interest, or that counsel urged her plea to improve her brother's prospects. *See generally Dukes v. Warden*, 406 U.S. 250 (1972) (concluding that the defendant did not allege that attorneys allegedly burdened with a conflict induced the defendant to plead guilty "in furtherance of a plan to obtain more favorable consideration from the court for other clients"). To the contrary, counsel ultimately negotiated a deal for Ms. DePriest that was better than the deal obtained by her brother.

for [her] to go to a joint trial with [her brother], counsel, and" a defense that "the illegal items belong to [her brother] and that she had no part in the production of marijuana" (App.Sub.Br. 39). But there was no allegation in the amended motion that Ms. DePriest and her brother were going to be tried jointly, and the record does not show that they were charged in the same case, or that their cases had been joined for trial. *See generally McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) ("In actions under Rule 29.15, 'any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal.' "). In any event, the allegations in the amended motion showed that the cases were separate (counsel even suggested at one point that Ms. DePriest could go to trial after her brother pleaded guilty), that the State was willing to try both cases, and that the State believed that Ms. DePriest's "brother's case [would] go first" (L.F. 36, 38). Thus, Ms. DePriest's arguments about a joint trial are of no consequence.

Ms. DePriest cites various cases in support of her argument, but none of the cases she cites compel reversal here. For instance, she cites *United States v. Unger*, 700 F.2d 445, 454 (8th Cir. 1983), for the proposition that " '[t]he potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations' " (App.Sub.Br. 38). But that was not a holding of the case; rather, the court was quoting from the

ABA Standards for Criminal Justice (2d ed. 1980). The court in *Unger* had previously held (in an earlier appeal) that the defendant's attorney labored under a conflict of interest, and the issue in the subsequent appeal was whether the defendant had waived the conflict. 700 F.2d at 449-452. Here, unlike in *Unger* where a conflict of interests was proved, Ms. DePriest failed to allege facts showing an actual conflict of interest that adversely affected counsel's performance.

Ms. DePriest also cites *State ex rel. Horn v. Ray*, 325 S.W.3d 500 (Mo.App. E.D. 2010) (*see* App.Sub.Br. 40). But in that case the conflict of interest was brought to the trial court's attention before trial, and the facts showed that the attorney—who was representing both the defendant and the victim in a criminal case—had a conflict of interest under Rule 4-1.7(a) that both could not be waived under the provisions of Rule 4-1.7(b) and could not be waived in light of the defendant's right to the effective assistance of counsel and the interests of the courts and the public in maintaining the integrity of the judicial system. No such facts are present here, and, as outlined above, Ms. DePriest failed to allege facts showing that counsel had an actual conflict of interest that adversely affected his performance.

Ms. DePriest also cites *Plunk v. Hobbs*, 766 F.3d 760, 764 (8th Cir. 2014), for the general proposition that it is "virtually impossible" to assess "the impact of a conflict of interest on the attorney's options, tactics, and

decision in plea negotiations" (App.Sub.Br. 42). This observation was made in conjunction with the well-settled proposition that prejudice is presumed once an actual conflict is proved. The Court stated, however, that to trigger the presumption, a petitioner who did not object at trial must show that a conflict of interest "significantly affected counsel's performance." *Id.*

There is no *per se* rule that a defendant who is advised by the same attorney as a codefendant is deprived of his right to effective assistance of counsel under the Sixth Amendment. *Id.* A petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued, show that the alternative strategy was objectively reasonable under the facts of the case, and establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict. *Id.* A conflict of interest may adversely affect counsel's representation when it prevents an attorney from exploring potential plea opportunities, but only when a lesser charge or a favorable sentencing recommendation would be acceptable to the prosecution. *Id.* at 765 (citing *Holloway v. Arkansas*, 435 U.S. at 489-490). "If the prosecutor would not have been receptive to a more favorable plea bargain, then there is no basis to conclude that any conflict of interest harmed the lawyer's advocacy." *Id.* (citing *Burger v. Kemp*, 483 U.S. 776, 785-786 (1987)). Here, as set forth above, Ms. DePriest failed to allege facts showing that counsel did anything (or failed to do anything) to her detriment

as a consequence of the alleged conflict of interest.

In sum, Ms. DePriest failed to allege facts showing that counsel ever gave her advice or took action that was adverse to her interests, or that counsel ever gave her advice or took action that was adverse to her interests in favor of her brother's interests. Accordingly, Ms. DePriest failed to allege facts showing "a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. at 171. This point should be denied.

II.

The motion court did not clearly err in denying Ms. DePriest's claim that the plea court violated Rule 24.02 by employing a "group plea" procedure.[9]

In her second point, Ms. DePriest asserts that the plea court's use of a "group plea" procedure "invalidated her guilty plea" (App.Sub.Br. 25). She asserts that the group plea procedure caused the plea court "to fail to make inquiry about the fact that [Ms. DePriest] and [her brother] were represented by the same lawyer," and "to fail to take adequate steps to ascertain whether the conflict of interest warranted separate counsel" (App.Sub.Br. 25).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the

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[9] In Point II of appellant's Argument, the point relied on and the arguments in support do not correspond. It appears that the point relied on in Point II of the Argument is an erroneous duplication of the third point relied on (*see* App.Sub.Br. 26, 47). The point relied on that corresponds to the argument is included among the Points Relied On (*see* App.Sub.Br. 25).

entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. The "group plea" did not invalidate Ms. DePriest's plea

In denying this claim, the motion court observed that Ms. DePriest's assertion that a group plea should automatically invalidate a guilty plea was rejected in *Wright v. State*, 411 S.W.3d 381, 387 (Mo.App. E.D. 2013) (L.F. 65). The motion court observed that Ms. DePriest had not alleged in her post-conviction motion that any of her responses at the guilty plea hearing were merely "parroted" responses engendered by the group plea procedure (L.F. 65). The motion court observed that Ms. DePriest had indicated at the guilty plea hearing that she understood the court's questions and stated that she had no objection to pleading guilty in a group that included her brother (L.F. 66). The motion court stated that the Court in *Roberts v. State*, 276 S.W.3d 833, 836-837 (Mo. 2009), disapproved the practice of group pleas, but the motion court observed that the Court had not held that the practice was "*per se* invalid" (L.F. 66). The motion court observed that, while group pleas have

been disapproved because they could result in confusion for the defendant, there was no allegation by Ms. DePriest that she was "confused about anything," or that she was "surprised or confused about any aspect of her guilty plea" (L.F. 66). The motion court further observed that while Ms. DePriest had alleged that "there might have been some inquiry at her plea about a conflict of interest" (if a group plea had not been employed) the motion court had "found no such conflict existed and no such allegation was raised" (L.F. 66). The motion court did not clearly err in denying this claim.

In her amended motion, Ms. DePriest pointed out that Rule 24.02(b) requires a court to address the defendant personally in open court and inform the defendant of, and ensure the defendant understands, certain aspects of a guilty plea (L.F. 57). She alleged that "there were seven criminal defendants who pleaded guilty" at her hearing (including herself), and she asserted that "[t]his procedure should *per se* invalidate a guilty plea" (L.F. 58).

The record shows, however, that, consistent with the requirements of Rule 24.02(b), the court personally addressed Ms. DePriest at the guilty plea hearing and questioned her to ensure that her guilty plea was knowing, intelligent, and voluntary (Tr. 10-63). Rule 24.02(b) requires advice about certain aspects of pleading guilty, *e.g.*, the nature of the charge, the range of punishment, the rights associated with trial, etc., and Ms. DePriest did not allege in her post-conviction motion that the plea court failed to advise her

about any of those circumstances, or that she did not understand them (L.F. 57-59). Accordingly, Ms. DePriest failed to allege facts showing a violation of Rule 24.02(b).

Instead, Ms. DePriest alleged in her motion that the group plea procedure "exacerbated the damage caused by the conflict of interest by making it less likely that the court would make inquiry about the fact these codefendants were represented by the same lawyer and 'take adequate steps to ascertain whether the conflicts warrant separate counsel' as the court should" (L.F. 58). She alleged that the plea court "did not make special inquiry about the fact of the dual representation or explore whether the dual representation was a problem in this particular case" (L.F. 58). She alleged further that "[h]ad this plea not been taken as part of a line of unrelated criminal defendants, there is a reasonable likelihood at least some of the facts pleaded in this motion would have emerged and the prosecutor and the court would have been alerted to the conflict and the court would have been forced to order separate counsel at that point, or at a minimum would not have accepted the guilty plea at that time" (L.F. 58).

But aside from apparent speculation, Ms. DePriest failed to allege any facts showing a causal relationship between the "group plea" procedure employed by the court and the lack of questioning about the alleged conflict of interest; thus, these allegations amounted merely to speculation. Whether

questioning Ms. DePrest alone or in the presence of other defendants, there is no reasonable probability that the plea court would have asked different questions in accepting her plea. The plea court was guided by Rule 24.02 in questioning the defendants, and there is nothing in that rule that would have required to the plea court to "explore" the dual representation that took place in this case. In fact, if the guilty pleas had been taken separately, it is possible that Ms. DePriest's brother's case might not have been mentioned at all—or at least not more than it was mentioned in the group plea setting.

Moreover, there was nothing about the group plea procedure that *prevented* the court from inquiring about any potential conflict of interest in this case. The record shows that, from time to time in questioning the various defendants, the plea court perceived the need to inquire about specific aspects of a given case (*see*, *e.g.*, Tr. 12-14, 36-39). Had the plea court perceived a conflict of interest in the DePriests case (or had it been advised of one), it presumably would have inquired about the issue and taken steps to ensure either that counsel was not laboring under a conflict of interest, or that Ms. DePriest was aware of, and had waived, the conflict.

In short, Ms. DePriest failed to allege facts showing that her guilty plea was "invalidated" by the group plea procedure. There is no *per se* rule that a group guilty plea is impermissible, or that such a procedure automatically renders a guilty plea invalid. *See Roberts v. State*, 276 S.W.3d 833, 836 n. 5

(Mo. 2009); *see also Wright v. State*, 411 S.W.3d at 387.

In *Roberts* this Court noted, "Group pleas are used as a time-saving mechanism in some of Missouri's circuit courts, although the use of group pleas has been criticized repeatedly by the court of appeals." 276 S.W.3d 836 n. 5 (citing *Castor v. State*, 245 S.W.3d 909, 915 n. 8 (Mo.App. E.D. 2008); *Elverum v. State*, 232 S.W.3d 710, 712 n. 4 (Mo.App. E.D. 2007); *Guynes v. State*, 191 S.W.3d 80, 83 n. 2 (Mo.App. E.D. 2006)). Then, having noted the criticism leveled by the Court of Appeals, the Court stated that it was "not persuaded by Movant's arguments suggesting that group plea should be deemed automatically invalid or declared impermissible[.]" *Id*. The Court observed, however, that "group pleas are not preferred procedure and should be used sparingly." *Id*. The Court then observed that other jurisdictions "also have criticized the use of group pleas but also have not invalidated them." *Id*. Accordingly, while plea courts should exercise care in saving time with group pleas, a guilty plea entered at such a proceeding is not "*per se* invalid" as urged by Ms. DePriest.

Instead, the relevant question is whether the defendant's guilty plea was entered knowingly, intelligently, and voluntarily. And, here, while the record confirms that the plea court employed a group plea to "save a great deal of time" (Tr. 8), the record also shows that the plea court addressed each defendant personally and questioned each defendant at length to ensure that

his or her guilty plea was knowingly, intelligently, and voluntarily entered (Tr. 4-63). Ms. DePriest did not allege any facts showing that the group plea procedure violated Rule 24.02(b), that the procedure failed to satisfy the constitutional requirement that a guilty plea be knowing, intelligent, and voluntary, or that she would not have pleaded guilty if her plea had been taken in succession to (instead of together with) the other defendants who pleaded guilty on the day she pleaded guilty.

In her brief, Ms. DePriest relies on *Holloway v. Arkansas*, 435 U.S. 475 (1978), and she asserts that "[w]hen alerted to possible conflicts, such as those involving dual representation, the court has an affirmative duty to [inquire about the conflict] to protect the rights of the unsuspecting defendant" (AppSub.Br. 53). She then asserts that she did not object at the plea hearing because she "had no reason to believe anything was amiss" (App.Sub.Br. 54). In other words, she seemingly argues that the dual representation of co-actors alone required the plea court to inquire *sua sponte* about any conflict of interest.

This particular claim—that the plea court's group plea procedure was deficient in light of *Holloway*—was not included in Ms. DePriest's amended motion (*see* L.F. 57-59). As a consequence, the Court should decline to review it now. *See McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) ("In actions under Rule 29.15, 'any allegations or issues that are not raised in the Rule

29.15 motion are waived on appeal.' ").

Respondent acknowledges that Ms. DePriest cited *Holloway* in her conflict-of-interest claim and stated that a trial court must make an inquiry when "alerted to possible conflicts of interest" (L.F. 44). But that allegation was made in conjunction with Ms. DePriest's observation that her conflict-of-interest claim was not refuted by the record (L.F. 44). The allegation was not included in the amended motion as a separate claim of plea court error; thus, it cannot be imported into Ms. DePriest's claim that the group plea procedure violated Rule 24.02(b) and was "*per se* invalid."

In any event, Ms. DePriest did not allege any facts showing that, if her guilty plea had been entered in succession to the other defendants, the plea court would have been alerted to a potential conflict of interest that was not apparent in the group plea setting. In addition, as the United States Supreme Court stated in *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980), the Sixth Amendment does not require "state courts themselves to initiate inquiries into the propriety of multiple representation in every case." Rather, because defense attorneys "have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises," "[a]bsent special circumstances, . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.* In other

words, unless there are facts showing that "the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id*. (citing *Holloway* in support).

In sum, Ms. DePriest failed to allege facts showing a violation of Rule 24.02(b), and she failed to allege facts showing that the group plea procedure employed by the court rendered her guilty plea unknowing, unintelligent, or involuntary. This point should be denied.

III.

The motion court did not clearly err in denying Ms. DePriest's claim that her conviction is unconstitutional in light of the alleged facial unconstitutionality of § 195.017, which classifies marijuana as a schedule I controlled substance.

In her third point, Ms. DePriest asserts that the motion court clearly erred in denying her motion without a hearing because she alleged facts showing "that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance and there is no rational basis for its categorization in schedule I" (App.Sub.Br. 56).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have

resulted in prejudice to the movant. *Id*.

B. By pleading guilty, Ms. DePriest waived her challenge to the constitutionality of § 195.017

In denying this claim, the motion court stated that in *State v. Mitchell*, 563 S.W.2d 18 (Mo. 1978), this Court "held the classification of marijuana as a controlled substance did not violate the equal protection clause" (L.F. 65). The motion court observed that the Court had "found there was a 'rational basis' for the classification scheme and therefore it did not violate the Equal Protection Clause" (L.F. 65). The motion court further observed that in *State v. McManus*, 718 S.W.2d 130 (Mo. 1986), the Court "again used 'rational basis' scrutiny in resolving the Equal Protection claim" (L.F. 65). The motion court observed that the Court had noted "that there at that time were arguably medical uses for marijuana but because the level of tetrohydrocannabinol ("THC") in marijuana cannot be properly controlled it cannot be widely accepted for medical use" (L.F. 65). The motion court observed that Ms. DePriest had "not alleged, nor quantified, and indeed cannot quantify" how "the consistency, potency, and harmful potential of marijuana changed since *McManus* was decided" (L.F. 65). The motion court concluded, "No, as at the time of the ruling in *Mitchell*, the benign uses of marijuana are 'debatable' at best" (L.F. 65). Accordingly, the motion court declined to depart from the holdings in *Mitchell* and *McManus* (L.F. 65). The

motion court did not clearly err in denying Ms. DePriest's claim.

In addition to the binding precedent of *Mitchell* and *McManus*, there was a separate and distinct basis for denying Ms. DePriest's challenge to the constitutionality of § 195.017, namely, the fact that she waived her claim by pleading guilty. *See Feldhaus v. State*, 311 S.W.3d 802, 804-805 (Mo. 2010).

" 'The general rule in Missouri is "that a plea of guilty voluntarily and understandably made waives all non-jurisdictional defects and defenses." ' " *Id.* at 805. "Except for certain double jeopardy claims . . ., constitutional claims raised after a plea of guilty are nonjurisdictional." *Id.*; *see also Ross v. State*, 335 S.W.3d 479, 480-481 (Mo. 2011). In addition, " '[a] constitutional claim must be raised at the earliest opportunity and preserved at each step of the judicial process.' " *Strong v. State*, 263 S.W.3d 636, 646 (Mo. 2008); *see also* Rule 24.04.

Here, Ms. DePriest did not challenge the constitutionality of § 195.017 at the earliest opportunity. Indeed, she concedes as much in her fourth point, where she asserts that counsel was ineffective for failing to assert this claim "at the earliest opportunity" and, "[a]s a consequence, the constitutional challenge was waived" (*see* App.Sub.Br. 73). In short, because Ms. DePriest did not assert her constitutional challenge at the earliest opportunity and instead pleaded guilty, she waived this non-jurisdictional defect or defense.

In *Ross v. State*, 335 S.W.3d at 480-481, the defendant asserted in a

Rule 24.035 motion that § 566.034 was unconstitutional because it violated article III, section 23 of the Missouri Constitution. This Court observed, however, that "[c]hallenges to the constitutional validity of a statute are waived if not raised at the first opportunity." *Id.* at 480. The Court observed that "[t]his Court avoids deciding a constitutional question if the case can be fully resolved without reaching it." *Id.*

Accordingly, because the defendant in *Ross* had pleaded guilty without challenging the constitutionality of the statute, the Court declined to reach the merits of his challenge. *Id.* at 480-481. The same is true in Ms. DePriest's case. Ms. DePriest made no challenge to the constitutionality of § 195.017 before she pleaded guilty, and she only asserted her claim in a 24.035 motion after she had pleaded guilty. The Court should decline to review her constitutional challenge.[10]

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[10] Respondent acknowledges that in *State v. Mitchell*, the court concluded that a facial challenge to the constitutionality of § 195.017 was not waived by a guilty plea. 563 S.W.3d at 22-23. There, citing *Kansas City v. Hammer*, 347 S.W.2d 865, 868 (Mo. 1961), the Court concluded that a challenge to the constitutionality of a statute went "to the subject matter of the prosecution" and could be raised at any stage of the proceedings. 563 S.W.2d at 22-23. The Court then observed that "jurisdictional defects and defenses are not waived

Additionally, although the motion court addressed the merits of her claim, this Court is not required to do so. A reviewing court "will not reverse when the motion court reached the right result, even if it was for the wrong reason." *Cox v. State*, 479 S.W.3d 152, 157 (Mo.App. S.D. 2015); *see Edgar v. Fitzpatrick*, 377 S.W.2d 314, 318 (Mo. 1964) ("The trial court did not base its judgment on these reasons . . . but a correct decision will not be disturbed because the court gave a wrong or insufficient reason therefor."). Here, while the motion court rejected Ms. DePriest's claim on the merits, it also would have been proper to reject it on the basis of waiver. As such, the motion court did not clearly err in denying Ms. DePriest's claim.[11] This point should be denied.

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by entering a guilty plea." *Id.* at 23. In *Feldhaus*, however, the Court held that a constitutional challenge to a statute was not jurisdictional. 311 S.W.3d at 805 (citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009)).

[11] As discussed below in Point IV, the motion court also did not clearly err in denying Mr. DePriest's claim on the merits.

IV.

The motion court did not clearly err in denying Ms. DePriest's claim that counsel was ineffective for failing to timely challenge the constitutionality of § 195.017.

In her fourth point, Ms. DePriest asserts that the motion court clearly erred in denying her claim that plea counsel was ineffective for failing to challenge the constitutionality of § 195.017 at the earliest opportunity (App.Sub.Br. 73). She asserts that counsel was ineffective for failing to assert that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance (App.Sub.Br. 73).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have

resulted in prejudice to the movant. *Id*.

B. Ms. DePriest failed to allege facts warranting relief

In denying this claim, the motion court stated that in *State v. Mitchell*, 563 S.W.2d 18 (Mo. 1978), this Court "held the classification of marijuana as a controlled substance did not violate the equal protection clause" (L.F. 65). The motion court observed that the Court had "found there was a 'rational basis' for the classification scheme and therefore it did not violate the Equal Protection Clause" (L.F. 65). The motion court further observed that in *State v. McManus*, 718 S.W.2d 130 (Mo. 1986), the Court "again used 'rational basis' scrutiny in resolving the Equal Protection claim" (L.F. 65). The motion court observed that the Court had noted "that there at that time were arguably medical uses for marijuana but because the level of tetrohydrocannabinol ("THC") in marijuana cannot be properly controlled it cannot be widely accepted for medical use" (L.F. 65). The motion court observed that Ms. DePriest had "not alleged, nor quantified, and indeed cannot quantify" how "the consistency, potency, and harmful potential of marijuana changed since *McManus* was decided" (L.F. 65). The motion court concluded, "Now, as at the time of the ruling in *Mitchell*, the benign uses of marijuana are 'debatable' at best" (L.F. 65). Accordingly, the motion court declined to depart from the holdings in *Mitchell* and *McManus*, and the motion court additionally found that counsel was not ineffective for failing to

challenge the constitutionality of the statute (L.F. 65). The motion court did not clearly err in denying Ms. DePriest's claim.

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also "affirmatively prove prejudice." *Id.* at 693. Generally, after a guilty plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

1. Ms. DePriest failed to allege facts showing prejudice

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.*

Here, Ms. DePriest failed to allege facts showing that she was prejudiced by counsel's alleged error. At no point in her amended motion did Ms. DePriest assert that, but for counsel's alleged error, she would not have pleaded guilty and would have insisted on going to trial or avoided trial altogether (L.F. 56-57). Instead, she alleged that she was "prejudiced by

counsels' [sic] failure to do so, because had he raised the issue in the trial court and preserved the issue, the matter would have been preserved for appeal and successfully raised on appeal" (L.F. 57).

But "[t]he failure to preserve error for appellate review is not cognizable in a Rule 29.15 motion." *Strong v. State*, 263 S.W.3d 636, 646 (Mo. 2008). Even if it were cognizable, Ms. DePriest did not allege facts showing that—before trial—she would have thought it better to proceed to trial instead of taking the opportunity presented by the State's plea offer. This was a calculation that only Ms. DePriest could make; thus, it was incumbent upon her to plead facts showing that she would have taken her chances at trial in hopes of successfully challenging the constitutionality of § 195.017.

On appeal, Ms. DePriest asserts that, but for counsel's alleged error, "[t]here is a reasonable probability that . . . the court would have dismissed the charges, and that [she] would have avoided conviction altogether" (App.Sub.Br. 78). But this claim of prejudice was not included in Ms. DePriest's amended motion (L.F. 57-58); thus, it is not properly asserted now. "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal." *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014); *see McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) ("In actions under Rule 29.15, 'any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal.' ")

2. Ms. DePriest failed to allege facts showing that plea counsel's performance fell below an objective standard of reasonableness

In her amended motion, Ms. DePriest alleged that plea counsel was ineffective for failing to assert an equal protection challenge to § 195.017, which classifies marijuana as a schedule I controlled substance (*see* L.F. 45, 56). She alleged that the statute is "unconstitutional on its face" (L.F. 45). She alleged that the statute is "overinclusive" because marijuana was "placed within a prohibited class without rational distinction" (L.F. 45).

Ms. DePriest alleged that "strict scrutiny" should be applied to § 195.017 because the statue "operates to the disadvantage of a fundamental right explicitly protected by the Constitutions of the United States and Missouri," namely, "[t]he fundamental right . . . of liberty" (L.F. 46). She alleged that "the fundamental right of liberty is the right to be free from physical restraint" (L.F. 46). In other words, she alleged that, because she could potentially be incarcerated for a violation of § 195.211 (which prohibits production and possession of controlled substances), § 195.017 "in conjunction with Section 195.211, works to impinge the fundamental right of liberty through physical restraint" (L.F. 47).[12]

[12] Ms. DePriest's Point Relied On asserts only that counsel was ineffective for failing to challenge the constitutionality of § 195.017 (App.Sub.Br. 73).

In the alternative to her strict-scrutiny argument, Ms. DePriest alleged that, "[e]ven if subjected to 'rational basis' scrutiny, the categorization [of marijuana on schedule I] is unconstitutionally irrational and arbitrary" (L.F. 47). She alleged, in brief, that "[b]ecause marijuana's potential for abuse is low and it has safe and accepted medical uses, its classification as a schedule I controlled substance is arbitrary, irrational, and irrelevant to the statute's purpose" (L.F. 48).

The motion court did not clearly err in concluding that counsel was not ineffective for failing to challenge the constitutionality of section 195.017. As an initial matter, to show that counsel was ineffective, Ms. DePriest was obligated to allege facts showing that "counsel did not meet the standard of law in existence at the time of [her] guilty plea." *See Johnson v. State*, 103 S.W.3d 182, 186 (Mo.App. W.D. 2003). "Trial counsel's performance is evaluated by reference to the law existing at the time of trial; failure to predict a change in the law is not ineffective assistance." *State v. Parker*, 886 S.W.2d 908, 923 (Mo. 1994).

Here, when Ms. DePriest pleaded guilty, § 195.017 was "presumed constitutional." *See generally Johnson v. State*, 103 S.W.3d at 186 (holding that counsel was not ineffective for failing to challenge the constitutionality of § 558.018.5(2)). Moreover, this Court had repeatedly rejected constitutional challenges to statutes related to the distribution and possession of marijuana,

including equal-protection challenges to § 195.017's classification of marijuana as a schedule I controlled substance. *See State v. McManus*, 718 S.W.2d 130, 130-132 (Mo. 1986) (rejecting a claim that § 195.017 denied the defendant "equal protection and due process under the Missouri and United States Constitutions); *State v. Mitchell*, 563 S.W.2d 18, 21-26 (Mo. 1978) (rejecting an equal protection challenge to marijuana being classified as a schedule I controlled substance); *State v. Burrow*, 514 S.W.2d 585, 589-593 (Mo. 1974) (rejecting a claim that § 195.017 violated the defendants "rights under the due process and equal protection clauses of the Missouri and United States Constitutions"); *State v. Stock*, 463 S.W.2d 889, 894-895 (Mo. 1971) (rejecting a claim that § 195.010(17) which classified marijuana as a narcotic drug violated "due process and the equal protection of the laws"). Even now, Ms. DePriest does not cite a single case where a court invalidated a state statute criminalizing the production and intended distribution of marijuana. Accordingly, in light of this Court's controlling precedents, it cannot be said that plea counsel's performance fell below an objective standard of reasonableness.[13]

[13] Because § 195.017 has never been found unconstitutional, Ms. DePriest's case is distinguishable from cases like *State v. Burgin*, 203 S.W.3d 713

To be sure, an attorney might sometimes perceive the need to challenge existing law and argue for change. However, in determining whether counsel was constitutionally ineffective—as alleged in a post-conviction, collateral attack on a final conviction—counsel's performance must be gauged in light of the law existing at the time of trial. Counsel is not required to predict that the law will be changed, and it would be unwise in many cases for counsel to advise a client to pin hopes on an unrealized, potential change in the law. *See generally McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("uncertainty is inherent in predicting court decisions"; thus, the possibility of a favorable ruling on appeal "possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilt.").

In addition, there is no reasonable probability that a "strict scrutiny" challenge would have had any success on appeal. Sections 195.017 and 195.211 do not contain procedures to incarcerate a defendant; thus, those sections do not impinge on the fundamental right of liberty. *Cf. In re Care and Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. 2003) (stating that the civil commitment provisions of §§ 632.300 to 632.325 impinge on "the

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(Mo.App. E.D. 2006), and *State v. Hudson*, 386 S.W.3d 177 (Mo.App. E.D. 2012) (*see* App.Sub.Br. 77-78).

fundamental right of liberty"). Rather, § 195.017 sets forth the schedules of controlled substances and § 195.211 prohibits, [e]xcept as authorized by sections 195.005 to 195.425 and except as provided in section 195.222," the distribution, delivery, manufacture, or production of controlled substances; an attempt to distribute, deliver, manufacture, or produce controlled substances; and the possession with intent to distribute, deliver, manufacture, or produce controlled substances.[14] *See* § 195.211, RSMo Supp. 2014.

As such, the question is not whether a person could eventually be incarcerated for violating a criminal statute (here, incarceration may follow by application of a separate statute, § 558.011); rather, the question is whether the *conduct* prohibited by the statute defining the criminal offense impinges on a fundamental right. In other words, if conduct prohibited by a

[14] It should be noted that § 195.211 makes no reference to schedule I; rather, it refers to a "controlled substance" (which includes all schedules) and certain amounts of "marijuana." *See* § 195.211, RSMo Supp. 2014. Thus, arguably, even if marijuana would more readily fall under a different schedule (*e.g.*, schedule V, *see* § 195.017.9, RSMo Supp. 2014), a defendant could still be found guilty under § 195.211, since the statute plainly contemplates that "marijuana" is a "controlled substance."

criminal statute implicates a fundamental right, then the statute might be required to pass some sort of strict scrutiny.

Here, however, Ms. DePriest did not allege that producing marijuana or possessing marijuana with the intent to distribute it is a fundamental right. And even if she had, there is no reasonable probability that either activity would have been deemed a fundamental right. *See generally Raich v. Gonzalez*, 500 F.3d 850, 866 (9th Cir. 2007) ("federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering"); *United States v. Fry*, 787 F.2d 903, 905 (4th Cir. 1986) ("There is no fundamental right to produce or distribute marijuana commercially."). Thus, it cannot be said that plea counsel was ineffective for failing to assert a strict-scrutiny challenge to § 195.017.

Likewise, there is no reasonable probability that a rational-basis challenge would have been successful. "The rational basis test 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.' " *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901, 912 (Mo. 2015). "Under the rational basis test, this Court will uphold the law if it is 'rationally related to a legitimate state interest.' " *Id*.

In *McManus*, in rejecting essentially the same claim asserted here, the

Court stated, "Under the rational basis test the classification in question need not be perfect so long as it is not arbitrary and unreasonable." 718 S.W.2d at 130-131. "The challenger bears the burden of overcoming the presumption of a statute's constitutionality." *Id.*

In an effort to make the required showing, Ms. DePriest alleged that "[m]odern developments" since *McManus* show that the level of THC in marijuana can be controlled, inasmuch as "the federal government's National Institute on Drug Abuse (NIDA) has developed and provided three standardized research-grade potencies of marijuana" (L.F. 48). She also alleged that "the scientific community, general public, and 21 states and the District of Columbia have since accepted that marijuana has a legitimate medical application" (L.F. 48; *see also* L.F. 53-55). She alleged that an expert "will testify that marijuana has minimal potential for physical abuse, and low potential for psychological abuse" (L.F. 49). She alleged that an expert would "testify that marijuana is not lethal and that there have not been any confirmed deaths from marijuana overdose" (L.F. 50). She alleged that an expert would "testify that, according to researchers and mental health professionals, marijuana is far less addictive than most drugs, including alcohol, nicotine, and caffeine" (L.F. 50-51). She alleged that the expert would "testify that less than 9% of people who have used marijuana have become dependent" (L.F. 51). She also alleged that an expert would testify that there

were "no positive associations between marijuana use" and certain types of cancer (L.F. 55). She alleged that an expert would also testify that "studies show no substantial, systemic effect of long-term, regular cannabis consumption on the neurocognitive functioning of users who were not acutely intoxicated" (L.F. 55).

But even accepting these allegations as true, a variable identified by the Court in *McManus* still persists with regard to marijuana produced by private individuals outside the confines of research and medical facilities, namely, the level of THC present in homegrown marijuana. A substance is placed on a schedule according to the considerations set forth in § 195.015 and § 195.017. A substance is placed on schedule I if it "[h]as high potential for abuse; and . . . [h]as no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." § 195.017.1, RSMo Supp. 2014.

In *McManus*, the Court contrasted the standardized level of THC in synthetic THC with the level of THC in marijuana. 718 S.W.3d at 132. The Court observed that "[t]he level of THC in marijuana . . . is not standardized." *Id*. The Court observed that "[t]he level varies depending upon a variety of factors from where it was grown to the time of day it was harvested." *Id*. The Court then concluded, "Because the level of the THC cannot be standardized and controlled, the medical usefulness of the drug is limited. Until scientists

can control the level of THC in marijuana as required by the FDA's standards, marijuana will not have an accepted medical use but will remain an investigational drug properly continued in Schedule I." *Id*.

Here, even if NIDA "has developed and provided three standardized research-grade potencies of marijuana," that does not eliminate the rational basis for placing marijuana on Schedule I. The marijuana produced by private individuals in their homes is not "research-grade" marijuana with standardized levels of THC, and Ms. DePriest made no effort to show that private marijuana producers in Missouri have adopted standardized levels of THC in their production of marijuana. In other words, while some marijuana with standardized levels of THC might exist in limited research and medical settings, there is still a rational basis for keeping marijuana on schedule I—even if schedule I is not "perfect" fit. *See id*. at 130.

There is also substantial reason to question Ms. DePriest's allegations about the risks associated with marijuana use. According to the Office of National Drug Control Policy (ONDCP),[15] marijuana is classified as a

[15] The White House Office of National Drug Control Policy (ONDCP) is a component of the Executive Office of the United States, whose goal is to establish policies, priorities, and objectives to eradicate illicit drug use,

Schedule I drug under federal law, "meaning it has a high potential for abuse and no currently accepted medical use in treatment in the United States." *See* https://www .whitehouse.gov/ondcp/frequently-asked-questions-and-facts-about-marijuana (last accessed April 19, 2016). As stated by the ONDCP:

> • The main active chemical in marijuana, THC, acts upon parts of the brain that influence pleasure, memory, thinking, concentrating, sensory and time perception, and coordinated movement.
>
> • Marijuana can cause distorted perceptions, impairing coordination, causing difficulty with thinking and problem solving, and creating problems with learning and memory.
>
> • Research has demonstrated that among chronic heavy users these effects on memory can last at least seven days after discontinuing use of the drug.
>
> • Chronic marijuana use may increase the risk of schizophrenia and high doses of the drug can produce acute psychotic reactions.
>
> • Researchers have also found that adolescents' long-term use of marijuana may be linked with as much as an 8 point drop in IQ

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manufacturing, and trafficking, drug-related crime, and drug-related health consequences.

later in life.

• One study showed that marijuana users have a nearly five-fold increase in the risk of heart attack in the first hour after smoking marijuana.

• People who smoke marijuana frequently but do not smoke tobacco have more health problems, including respiratory illnesses, than non-smokers.

• In 2012, approximately 4.2 million people met the diagnostic criteria for abuse of or dependence on marijuana, more than pain relievers, cocaine, tranquilizers, hallucinogens, and heroin combined.

• In 2010, marijuana was involved in more than 461,000 emergency department visits nationwide.

• In 2011, approximately 872,000 Americas reported receiving treatment for marijuana use.

See id. The National Institute on Drug Abuse (NIDA) website provides the following information:

> Because marijuana impairs short-term memory and judgment and distorts perception, it can impair performance in school or at work and make it dangerous to drive an automobile. It also affects brain systems that are still maturing through

young adulthood, so regular use by teens may have a negative and long-lasting effect on their cognitive development, putting them at a competitive disadvantage and possibly interfering with their well-being in other ways. Also, contrary to popular belief, marijuana can be addictive, and its use during adolescence may make other forms of drug abuse or addiction more likely.

Whether smoking or otherwise consuming marijuana has therapeutic benefits that outweigh its health risks is still an open question that science has not resolved. Although many states now permit dispensing marijuana for medicinal purposes and there is mounting anecdotal evidence for the efficacy of marijuana-derived compounds, there are currently no FDA-approved indications for "medical marijuana." However, safe medicines based on cannabinoid chemicals derived from the marijuana plant have been available for decades and more are being developed.

http://www. drugabuse. gov/ publications/ research-reports/ marijuana/letter-director (last accessed April 16, 2015; page updated March 2016). Thus, it does not appear that there is "scientific consensus" that marijuana's potential for abuse is low or that "consuming marijuana has therapeutic benefits that outweigh its health risks."

In short, there are still substantial questions about the risks of addiction, the medical benefits, the accepted medical use, and the safe use of marijuana under medical supervision. Accordingly, it cannot be said that there is no rational basis for keeping marijuana on schedule I, particularly where private producers of marijuana like Ms. DePriest are not operating in research or medical settings. Thus, it cannot be said that plea counsel was ineffective for failing to assert a rational basis challenge to § 195.017. This point should be denied.

CONCLUSION

The Court should affirm the denial of Ms. DePriest's Rule 24.035 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 16,254 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 19th day of April, 2016, to:

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