IN THE SUPREME COURT
OF MISSOURI

DAVID G. DePRIEST,	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95483**
	)	
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE ST. FRANCOIS COUNTY CIRCUIT COURT
THE HONORABLE KENNETH W. PRATTE,
JUDGE AT GUILTY-PLEA AND POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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[1] The designation "www" has been removed to prevent this being a hyperlink.

[2] *See* n.1.

JURISDICTIONAL STATEMENT

On August 16, 2013, Appellant David G. DePriest pleaded guilty to producing a controlled substance, a class B felony violating Mo. Rev. Stat. §195.211.3 (Cum. Supp. 2010) (Count I); possessing a controlled substance with intent to distribute, a class B felony violating Mo. Rev. Stat. §195.211.4 (Cum. Supp. 2010) (Count II); and unlawfully possessing a weapon, a class C felony violating Mo. Rev. Stat. §571.020.1 (Cum. Supp. 2010) (Count III), before the Honorable Kenneth W. Pratte, Judge, 24th Judicial Circuit.

The court sentenced David on November 12, 2013 to fifteen (15) years' imprisonment in Missouri Department of Corrections' (DOC) custody in Count I; fifteen (15) years' imprisonment in Count II; and seven years' imprisonment in Count III. The court further ordered that the sentences in Counts I and II were to run concurrently, but the sentence in Count III was to run consecutively to the sentences in Counts I and II, for a total twenty-two (22) years' imprisonment.

David was delivered to DOC on December 2, 2013.

David filed a Motion for Post-Conviction Relief under Missouri Supreme Court Rule 24.035 on May 14, 2014. On May 15, 2014, the motion court appointed the State Public Defender's Office, Appellate/PCR Division, to represent David and gave counsel an additional thirty (30) days in which to file an amended motion. Counsel filed an amended motion on August 28, 2014. Although the motion court accepted the late-filed amended motion as timely, it

denied David's request for post-conviction relief on October 22, 2014 without an evidentiary hearing.

On December 7, 2014, the Court of Appeals gave David leave to file a late Notice of Appeal within twenty (20) days of the St. Francois County Circuit Clerk's Office's receiving the order granting the late Notice. A Notice of Appeal was filed in the St. Francois County Circuit Court on December 12, 2014. David was also granted leave to file his appeal as a poor person.

The Court of Appeals issued an opinion on October 27, 2015. The state filed an Application for Transfer, which was granted on March 1, 2016. Thus, jurisdiction lies in this Court. Mo. Const. Art. V, § 10 (2000); Mo. Sup. Ct. Rules 83.04, .09.[3]

* * * * *

The legal file on appeal of post-conviction proceeding – including the legal file and guilty plea and sentencing transcript from St. Francois Co. Cause No. 11SF-CR01611-01 – will be cited as "L.F."; an excerpt from David's preliminary hearing will be cited as "1Supp.L.F."; the amended motion filed in Cause No. 11SF-CR01611-01 will be cited as "2Supp.L.F."; the unredacted guilty plea and sentencing transcript will be cited as "1Supp.Tr."; the transcript of the preliminary hearing and suppression hearings held on May 7, 2012 will be cited as

[3]All further statutory references are to Mo. Rev. Stat. 2000, unless otherwise indicated in the index.

"2Supp.Tr."; and the hearing on the suppression motion held on June 28, 2013 will be cited as "3Supp.Tr."

STATEMENT OF FACTS

On August 16, 2013, Appellant David G. DePriest pleaded guilty in St. Francois County Circuit Court to producing a controlled substance, possessing a controlled substance with intent to distribute, and unlawfully possessing a weapon (L.F. 16, 20-21, 34-42).

David's sister Natalie DePriest also pleaded guilty that day (3Supp.Tr. 25). Natalie had been charged with producing a controlled substance and possessing a controlled substance with intent to distribute at the same place and time as her brother (3Supp.Tr. 34-36).

David and Natalie pleaded guilty as part of a seven-defendant group (1Supp.Tr. 3-7).

The Court of Appeals determined that David had not pleaded guilty voluntarily because he had to plead guilty as part of this seven-defendant group. DePriest v. State, No. ED102307, slip op. at 2 (Mo. App. E.D. October 27, 2015)[hereinafter, Slip op.]. "This appeal concerns the fundamental constitutional risks involved when a court chooses to accept multiple defendants' pleas of guilty at the same time." Slip op. at 1. "If there was ever a time to condemn this group-plea procedure, it is now, in this case." Slip op. at 2.

Before beginning the group guilty plea, the court stated to the seven defendants:

> THE COURT: I want to explain this procedure to you just a little bit further. The reason you are up here in a group

like this, quite frankly, is to save a great deal of time.

So I am going to be addressing my questions and comments to you as a group. In order to keep the record, I will always start with you, first, Mr. Tiefanauer, for your response, and then move straight on down the line in order

(1Supp.Tr. 8).

The court asked each plea counsel if he or she objected to the group guilty-plea:

Now, as I have outlined this procedure, counsel, do you have any objection to the Court taking up your client's pleas of guilty in this manner?

(1Supp.Tr. 9). Mr. Dan Viets, David's and Natalie's attorney, answered once, "No" (1Supp.Tr. 9). After plea counsel answered no, so did David (1Supp.Tr. 9).

When David and Natalie pleaded guilty, the record showed that they either stood next to each other or with only counsel between them (1Supp.Tr. 6-7). Whenever the court asked a question of the group, David responded first, then Natalie immediately afterward (1Supp.Tr. 9, 10, 12, 15-16, 20-21, 24-25, 34-36, 40-41, 48-50, 53, 58-60, 64).

The plea court asked the defendants the following questions to which all seven defendants responded one right after the other: if they fully understood the charges filed against them; if their attorneys had investigated their cases to their full satisfaction; if their attorneys had interviewed all the witnesses they knew of

in the case; if they knew of any witnesses their attorneys had not interviewed; if there were any alibi witnesses; if their attorneys had done everything they had asked; and if their attorneys had refused to do anything they had asked (1Supp.Tr. 10, 16, 17, 18).

The plea court continued to ask all seven defendants about their attorneys' services (1Supp.Tr. 22). The defendants responded one right after the other when asked if they thought they had sufficient opportunity to discuss the case with their attorney; if all defenses available to them had been discussed and explained to their full satisfaction by counsel; and if they had any complaints about their attorneys' handling of their cases (1Supp.Tr. 22).

All seven defendants responded one right after the other to the court's questions about the rights they waived by pleading guilty: the right to have a jury determine their guilt or innocence at a speedy and public trial; to be confronted by the witnesses against them or hear their testimony or be permitted to question them about the defendants' alleged participation in the offenses charged; to be presumed innocent until proven guilty; to have guilt proved by evidence which convinces a unanimous jury of their guilt beyond a reasonable doubt; to have all twelve jurors agree as to guilt; not to say anything which might incriminate them with regard to the charges against them; and to have persons summoned to testify as witnesses in their behalf (1Supp.Tr. 28-31).

The court also elicited from all the defendants by asking once if no threats or pressure had been exerted against them to cause them to plead guilty (1Supp.Tr.

42). The court also elicited that there were no other promises or agreements other than what had been discussed on the record (1Supp.Tr. 51).

The court also received responses one right after the other when asking about the defendants' capacity to understand what was going on at the hearing (1Supp.Tr. 60-61). The defendants told the court at the same time that they had not had anything intoxicating to drink, and had not taken any pills, drugs, or medications within seventy-two (72) hours before pleading guilty (1Supp.Tr. 61).

At the end of the guilty-plea hearing, the court asked the following questions and received responses from the seven defendants one right after the other: if they were aware they could withdraw their guilty pleas; if they still desired to plead guilty; if they knew of any reason why the court should not accept their guilty pleas; if their attorneys had told them to answer any questions untruthfully; if anyone had told them there were any "special deals" not mentioned on the record; and if all their answers at the hearing had been truthful (1Supp.Tr. 62-63).

Because of the group guilty plea, the plea court made "no attempt to discern the presence of an actual conflict" of interest even where the court knew from presiding at the suppression hearing that David was more culpable than Natalie. Slip op. at 10-11.

Nor did the court protect the institutional interest in administering justice. Slip op. at 12. Because Natalie was "right there" with David, David would have been loath to complain about the procedure. Slip op. at 12. That might have

adversely affected Natalie. Slip op. at 12. It may also have adversely affected the five other defendants pleading guilty, who wanted a "lenient and placated judge." Slip op. at 12.

The Court of Appeals decided the plea court had compounded the usual risks of the group guilty-plea procedure because 1) David and Natalie were co-defendants; 2) they are brother and sister; 4) they were charged with the same drug offenses because of drug evidence found primarily in David's bedroom; 5) they were represented by the same attorney; and 6) Natalie could only receive the benefit of a plea agreement with the state if David pleaded guilty without one. Slip op. at 2.

The Respondent does not dispute that David and Natalie were co-defendants, are siblings, and were charged with the same drug offenses. Petition for Writ of Mandamus at 2, David DePriest v. State, No. SC95483 (Mo. filed January 19, 2016)[hereinafter Petition for Writ of Mandamus].

The record established David and Natalie were charged because of drug evidence primarily found in David's bedroom (3Supp.Tr. 51). Farmington, Missouri Police Detective Jason Stacy testified at a suppression hearing held before the same judge who heard David's and Natalie's guilty pleas (L.F. 18; 3Supp.Tr. 1, 24). In a bathroom that was part of David's bedroom suite, Det. Stacy found eight marijuana seedlings (L.F. 27; 3Supp.Tr. 31, 38). The plants were watered by an irrigation system (3Supp.Tr. 42). They were from three- to-fourteen (14) inches tall (3Supp.Tr. 17).

On the floor of a closet in David's bedroom were twelve (12), four-foot-tall marijuana plants in buckets (L.F. 27; 3Supp.Tr. 18-20, 51). To grow the plants, there were high-output capacitors,[4] high-output heat lamps, and a filtration system to water them (3Supp.Tr. 42).

There were no marijuana plants outside David's bedroom (3Supp.Tr. 51). Outside the bedroom, police found two bags of marijuana buds (Tr. 40, 51). Another bag held marijuana stems and leaves (3Supp.Tr. 41). Police also found marijuana seeds in a spare bedroom (3Supp.Tr. 37). Police collected fertilizer marketed for marijuana cultivation, cellophane bags, and a weight scale (3Supp.Tr. 37).

The Respondent also does not dispute that David and Natalie were represented by the same plea counsel. Petition for Writ of Mandamus at 2.

Lastly, the guilty-plea hearing record established that Natalie could not plead guilty with the state's bargain unless David pleaded guilty without one:

> MR. VIETS: David's plea is an open plea, except . . .
>
> that it was contingent on both defendants pleading guilty.
>
> So he's relying on the agreement in her case.
>
> . . .
>
> [ASSISTANT PROSECUTING ATTORNEY

[4] A capacitor stores electrical energy. Brain & Bryant, How Capacitors Work, http: //electronics.howstuffworks.htm.

PATRICK] KING: [St. Francois County Prosecuting Attorney Jerrod] Mahurin wanted both defendants dealt with today

(L.F. 22)(material in brackets added).

Because of the above six factors, the Court of Appeals concluded the plea court had compounded the usual risks of the group guilty-plea procedure. Slip op. at 2.

The Court of Appeals also decided plea counsel had been ineffective because he had an actual conflict of interest in representing David and Natalie. Slip op. at 7. Counsel had an actual conflict of interest because he lost for David the opportunity to plead guilty to the state's least-harsh offer. Slip op. at 7.

In a letter to plea counsel dated March 26, 2012, the prosecutor advised counsel he would recommend a total ten (10) years' imprisonment, with the court retaining jurisdiction under §559.115 (Cum. Supp. 2010), if David pleaded guilty (L.F. 129).[5] The prosecutor told plea counsel in the same letter that that offer had

[5] Natalie stated in her brief that counsel had advised both her and David in a March 21, 2012 letter not to accept this offer. Brief for Appellant at 11, Natalie DePriest v. State, No. SC94615 (Mo. 2014), *transferred without opinion*, No. ED103349 (Mo. App. E.D. 2015). Undersigned counsel did not receive a copy of that letter when she received a copy of David's file from plea counsel.

been withdrawn because the defense had filed a Motion to Quash Search Warrant and to Suppress Evidence with a hearing notice on March 21, 2012 (L.F. 76, 128).

Conversely, the prosecutor advised plea counsel in a May 18, 2013 fax transmission that the offer had been withdrawn because David had not waived a preliminary hearing, which had been held on May 7, 2012 (L.F. 128). Before evidence was heard at that hearing, the prosecutor announced he had "extend[ed] a plea offer which would have entailed a plea to two counts pursuant to [§] 559.115. That has been rejected by both of the defendants in this case" (1Supp.L.F. 3)(material in brackets added).[6] Therefore, because counsel had proceeded to preliminary hearing, he had lost for David the opportunity to plead guilty to the state's least-harsh offer. Slip op. at 8.

Rejecting the state's offer and proceeding to preliminary hearing, and thus to trial, was in Natalie's best interest, but not David's, because he was more culpable. Slip op. at 8.

The record established that plea counsel considered David more culpable than Natalie (L.F. 115-16). Plea counsel wrote both David and Natalie on March 7, 2013, "I really do not see how the Prosecutor thinks he has any case against [Natalie] for cultivation. Even the charge of possession against Natalie may be rather weak . . ." (L.F. 115-16)(material in brackets added).

[6] A complete transcript of the May 7, 2012 proceedings will be filed with this Court.

Because there was an actual conflict of interest, the Court of Appeals presumed prejudice. Slip op. at 9. The Court also found prejudice because of the disparity between the state's least-harsh offer of ten years' incarceration (assuming David would not have completed the one-hundred-twenty- (120-) day treatment program) and the twenty-two- (22-) year disposition he did receive. Slip op. at 9.

The record established the disparity between the state's initial offer and what David received (L.F. 16-17, 129). At worst under the state's offer, David would have received a total ten (10) years' imprisonment (L.F. 129). David was sentenced to twelve (12) more years than that (L.F. 16-17). Therefore, the Court of Appeals decided David had been prejudiced by the conflict of interest. Slip op. at 9.

The Court of Appeals concluded that – because David pleaded guilty in a group with seven other defendants and counsel had an actual conflict of interest in representing David – David pleaded guilty involuntarily. Slip op. at 7, 13. Because it was clear from the record that David's guilty plea was involuntary, an evidentiary hearing was not necessary. Slip op. at 13.

Further facts will be stated as necessary in the Argument section.

POINTS RELIED ON

I.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[7] in that plea counsel failed to object to the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness. Had counsel not agreed to the group guilty-plea procedure, David would not have had to plead guilty when his sister did. If David's hearing had not been held at the same time as his sister's, he would not have been under the same pressure to plead guilty. Therefore, but for plea counsel's ineffectiveness, David would not have pleaded guilty, but would have proceeded to trial instead.

Helmig v. State, 42 S.W.3d 658 (Mo. App. E.D. 2001);

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[7] These rights are guaranteed by the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§ 10 and 18(a).

Jones v. State, 784 S.W.2d 789 (Mo. banc 1990);

Wright v. State, 411 S.W.3d 381 (Mo. banc 2013);

McNeal v. State, 910 S.W.2d 767 (Mo. App. E.D. 1995);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18; and

Mo. Sup. Ct. Rule 24.035.

II.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law[8] in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David in that he also represented David's co-defendant, his sister, Ms. Natalie DePriest.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692 (1988);

Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980);

LaFrance v. State, 585 S.W.3d 317 (Mo. App. W.D. 1979);

State ex rel. Kinder v. McShane, 87 S.W.3d 256 (Mo. banc 2002);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

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[8] *See* n.7.

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18;

Mo. Sup. Ct. Rule 4-1.7;

Mo. Sup. Ct. Rule 24.035;

Mo. Rev. Stat. §559.115 (Cum. Supp. 2010); and

Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977).

III.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[9] in that plea counsel failed to advise David that – if a preliminary hearing were held or the defense filed a notice to have a suppression motion heard – the state's offer would be withdrawn.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because he would have accepted the state's ten- (10-) year offer. Instead, he had to plead guilty without an offer and was sentenced to twenty-two (22) years' imprisonment.

Missouri v. Frye, – U.S. – , 132 S. Ct. 1399 (2012);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18; and

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[9] *See* n.7.

Mo. Sup. Ct. Rule 24.035.

IV.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel, due process, and equal protection of law[10] in that plea counsel failed to object to David's court proceedings being closed to the public.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because public scrutiny of court proceedings 1) enhances the quality and safeguards the integrity of the fact-finding process, fostering an appearance of fairness; 2) heightens public respect for the judicial process; and 3) provides David with the support of loved ones.

Helmig v. State, 42 S.W.3d 658 (Mo. App. E.D. 2001);

In the Matter of Presta v. Owsley, 345 S.W.2d 649 (Mo. App. K.C.D. 1961);

[10] These rights are guaranteed by the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§ 10, 14, and 18(a).

Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 102 S. Ct. 2613 (1982);

State v. Moore, 366 S.W.3d 647 (Mo. App. E.D. 2012);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §14;

Mo. Const., Art. I, §18;

Mo. Const., Art. I, §32;

Mo. Sup. Ct. Rule 24.02;

Mo. Sup. Ct. Rule 24.035;

Mo. Rev. Stat. §476.170; and

Mo. Rev. Stat. §595.200.

V.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law[11] in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David because plea counsel used the charges against David to "speak about marijuana legalization" and use David as a "martyr" to legalize marijuana in Missouri.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

Yoakum v. State, 849 S.W.2d 685 (Mo. App. W.D. 1993);

State v. Chandler, 698 S.W.2d 844 (Mo. banc 1985);

Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

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[11] *See* n.7.

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18;

Mo. Sup. Ct. Rule 24.035;

Mo. Rev. Stat. § 1.160 (Cum. Supp. 2010);

Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977);

P. Courchaine, Meet Dan Viets: Marijuana's Leading Man, *Vox*, November 24, 2011;

Find a Lawyer, http: //norml.org;

Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone, The Huffington Post (April 15, 2014);

http: //norml.org;

http: //danviets.com;

http: //hightimes.com;

Pozner, *Lessons Learned*, The Champion (June 1999); and

Meeting Sparks Marijuana Debate, Farmington Daily Journal (January 25, 2014)

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VI.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his right to due process of law[12] in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum sentences consecutively for the offenses to which David had pleaded guilty.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by the prosecutor's vindictiveness toward plea counsel. Because of it, the prosecutor's sole purpose in asking for the harshest sentencing disposition was to penalize David for exercising his right to hire counsel of his choice. There was a reasonable probability that – had the state not asked for the maximum sentences running consecutively – the court would not have sentenced David to the maximum and ordered two sentences to run consecutively.

Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692 (1988);

United States v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982);

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[12] These rights are guaranteed by the United States Constitution, Fifth and Fourteenth Amendments and the Missouri Constitution, Article I, §10.

State v. Potts, 181 S.W.3d 228 (Mo. App. S.D. 2005);

Harden v. State, 415 S.W.3d 713 (Mo. App. S.D. 2013);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18;

Mo. Sup. Ct. Rule 24.035;

Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone, The Huffington Post (April 15, 2014); and

The Prosecutor Discusses the State's Position, The Farmington Daily Journal (November 14, 2013).

VII.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[13] in that plea counsel failed to advocate that David receive a more favorable sentencing disposition. Counsel failed to introduce into evidence at the sentencing hearing data compiled by the St. Francois County Circuit Clerk's Office showing that most defendants pleading guilty to an offense under §195.211 (Cum. Supp. 2010) in St. Francois County since 2000 received a less harsh disposition than David did.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because – had counsel used the Circuit Court's data to advocate for a less harsh sentencing disposition than the state's – there is a reasonable probability the court would have ordered the less-harsh disposition.

Griffin v. State, 937 S.W.2d 400 (Mo. App. E.D. 1997);

U.S. Const., Amend. V;

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[13] *See* n.7.

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18;

Mo. Sup. Ct. Rule 24.035;

Mo. Rev. Stat. §195.211 (Cum. Supp. 2010);

Mo. Rev. Stat. §557.036 (Cum. Supp. 2010); and

Mo. Rev. Stat. §559.115 (Cum. Supp. 2010).

ARGUMENT

I.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[14] in that plea counsel failed to object to the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness. Had counsel not agreed to the group guilty-plea procedure, David would not have had to plead guilty when his sister did. If David's hearing had not been held at the same time as his sister's, he would not have been under the same pressure to plead guilty. Therefore, but for plea counsel's ineffectiveness, David would not have pleaded guilty, but would have proceeded to trial instead.

Preservation Statement

David argued in his amended motion he was denied his rights to effective assistance of counsel and due process of law in that plea counsel failed to object to

[14] *See* n.7.

the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's (L.F. 100-05). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d at 152.

Review Standard

The motion court clearly erred in denying David an evidentiary hearing and post-conviction relief because Missouri Supreme Court Rule 24.035(h) requires an evidentiary hearing be held when the motion pleads facts, not conclusions, warranting relief, not refuted by the record, and the matters complained of resulted in prejudice to the movant. Burroughs v. State, 773 S.W.2d 167, 169 (Mo. App. E.D. 1986).

Appellate review is limited to determining whether the motion court's findings and conclusions are clearly erroneous. Id. Findings of fact and conclusions of law are clearly erroneous if an appellate court, upon reviewing the record, is left with the definite and firm impression a mistake has been made. Id.; Richardson v. State, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986).

General Case Law

The United States Constitution, Sixth Amendment and the Missouri Constitution, Article I, §§10 and 18(a) guarantee the right to counsel's assistance. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 782 (1963); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932). The Fourteenth Amendment mandates the

assistance be effective. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

To establish that a conviction must be set aside due to ineffective assistance of counsel, a movant must show counsel did not demonstrate the customary skill and diligence a reasonably competent attorney would display when rendering similar services under the existing circumstances, and movant was prejudiced thereby. Id.; Seales v. State, 580 S.W.2d 733, 736-737 (Mo. 1979). A person who pleads guilty is as entitled to effective assistance of counsel as one who has had a trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985). To establish prejudice, a movant must show, but for counsel's error, he would not have pleaded guilty but would have insisted on going to trial. Hill, 466 U.S. at 59, 106 S. Ct. at 370.

Analysis

Counsel was ineffective for not objecting to the group guilty-plea hearing (L.F. 102). Counsel acts ineffectively where the objection would have been meritorious, and counsel's overall performance falls short of established norms. Helmig v. State, 42 S.W.3d 658 (Mo. App. E.D. 2001); Jones v. State, 784 S.W.2d 789 (Mo. banc 1990).

An objection to the group guilty-plea hearing would have been meritorious because "[d]efense lawyers agreeing to such a procedure may well be presumptively ineffective." Wright v. State, 411 S.W.3d 381, 388 (Mo. banc 2013)(Richter, J., concurring)(material in brackets added). The procedure is discouraged because a "defendant pleading guilty to a felony and facing years in

prison should be addressed individually throughout the plea proceeding to assure that the defendant understands the proceeding." Id. In a group guilty-plea hearing, however, there is always the danger the defendant is not pleading guilty knowingly and voluntarily, but is merely "parroting the answers of the other defendants." Id. Thus, an objection would have been meritorious (L.F. 102).

An objection would also have been meritorious because David's having to plead guilty when his sister did caused him to plead guilty involuntarily (L.F. 102). He was under pressure to plead guilty because the prosecutor refused to offer Natalie anything in exchange for pleading guilty unless her brother also pleaded guilty (L.F. 102). For pleading guilty, Natalie received several benefits (L.F. 102). The state 1) dismissed Count III; 2) dismissed some passing-bad-check charges; 3) agreed not to file any other check charges; and 4) agreed Natalie's bond should be reinstated (L.F. 22-23).

David, on the other hand, got nothing at all from the state in exchange for pleading guilty (L.F. 22). Not only did he receive no benefit, the state recommended he receive the maximum punishment: "David has nothing coming whatsoever. He deserves the maximum punishment on all counts" (L.F. 27). And the state wanted those maximum sentences to run consecutively (L.F. 29). Despite receiving no benefit from pleading guilty, David was under pressure to do so because of his affection for his sister (L.F. 103). He pleaded guilty so his sister could enjoy the benefits of the state's offer, including having her bond reinstated

until sentencing (L.F. 103). Therefore, an objection would have been meritorious (L.F. 103).

David was prejudiced because counsel's failure to object to the group guilty plea hearings caused his performance to fall short of established norms (L.F. 103). Had counsel not agreed to the procedure, David would not have had to plead guilty when his sister did (L.F. 103). If his guilty-plea hearing had not been held at the same time as his sister's, he would not have been under the same pressure to plead guilty (L.F. 103). Had he not been under that pressure, he would not have pleaded guilty, but would have proceeded to trial instead (L.F. 103). Thus, counsel was ineffective and David was prejudiced by that ineffectiveness (L.F. 103).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 164, 166). The motion court ruled 1) the group guilty-plea procedure has not been held *per se* invalid, even though Missouri courts disapproved of it in Wright v. State, *supra*, and Roberts v. State, 276 S.W.3d 833 (Mo. banc 2009); 2) David did not allege he was confused when he pleaded guilty, which is the danger the Missouri Supreme Court feared was caused by the procedure; and 3) David did not object to it (L.F. 19, 164).

The motion court clearly erred in denying relief by deciding this Court and the Court of Appeals have not held the group guilty-plea procedure *per se* invalid. These courts instead have ruled this procedure is a "problematic practice," "should

be discontinued," is "not preferred practice," and "should be used sparingly." Wright v. State, 411 S.W.3d at 387(citations omitted).

The motion court erred in denying relief, even though the group guilty-plea procedure has not been invalidated *per se*, because for David it was invalid. Because of that procedure, David stood next to his sister – or with only conflicted counsel between – when he pleaded guilty.[15] He stood next to her, knowing she would not get the benefit of her agreement with the state unless he pleaded guilty without one. That increased the coercion against David. Therefore, the motion court clearly erred in denying relief because Missouri courts have not held the group guilty-plea procedure *per se* invalid.

The motion court also clearly erred in denying relief because David did not allege he did not plead guilty knowingly and voluntarily because he was confused when he pleaded guilty. David did not allege he was confused when he pleaded guilty. He did argue he did not plead guilty voluntarily because he was coerced into pleading guilty (2Supp.L.F. 51-52). He was coerced because his sister could not plead guilty to the state's offer unless David pleaded guilty without one. Therefore, no matter how the group plea procedure caused his guilty pleas to be involuntary, David pleaded guilty involuntarily.

[15] This can be established by the record because – during the group procedure – David was asked questions immediately before his sister (1Supp.Tr. 9, 10, 12, 15-16, 20-21, 24-25, 34-36, 40-41, 48-50, 53, 58-60, 64).

The motion court also clearly erred in denying relief because of David's not objecting to the group procedure. Immediately before the court asked David if he had any objection to the procedure, the court asked plea counsel, "[C]ounsel do you have any objection to the Court taking up your clients' pleas of guilty in this manner?" (L.F. 19). Counsel responded, "No, Your Honor" (L.F. 19). David was then asked if he had any objection (L.F. 19). He answered, "No, sir" (L.F. 19). David responded as he did because counsel had not objected.

David should have been able to rely on counsel's response that the group procedure was correct though it was not. *See* McNeal v. State, 910 S.W.2d 767, 769 (Mo. App. E.D. 1995). When counsel told the court he did not object to the procedure, David would have had every reason to think the procedure was proper. Because David should have been able to rely on counsel's response, his mistaken belief was reasonable. Thus, the motion court clearly erred in denying relief.

The Court of Appeals determined that David had not pleaded guilty voluntarily because he had to plead guilty as part of the seven-defendant group. Slip op. at 2. "This appeal concerns the fundamental constitutional risks involved when a court chooses to accept multiple defendants' pleas of guilty at the same time." Slip op. at 1. "If there was ever a time to condemn this group-plea procedure, it is now, in this case." Slip op. at 2.

Because of the group guilty plea, the plea court made "no attempt to discern the presence of an actual conflict" of interest even where the court knew from

presiding at the suppression hearing that David was more culpable than Natalie. Slip op. at 10-11.

Nor did the court protect the institutional interest in administering justice. Slip op. at 12. Because Natalie was "right there" with David, David would have been loath to complain about the procedure. Slip op. at 12. Doing that might have adversely affected Natalie. Slip op. at 12. It may also have adversely affected the five other defendants pleading guilty, who wanted a "lenient and placated judge." Slip op. at 12.

For the reasons cited above, the motion court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because plea counsel failed to object to the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

II.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law[16] in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David in that he also represented David's co-defendant, his sister, Ms. Natalie DePriest.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

David argued in his amended motion plea counsel had an actual conflict of interest in representing him because he also represented David's co-defendant, his sister Natalie (L.F. 54-67). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in amended post-

[16] *See* n.7.

conviction motion or tried by the parties' implicit consent at the evidentiary hearing).

The review standard and general case law set forth in Point I apply equally to this point and are adopted and incorporated herein.

Plea counsel was ineffective for failing to withdraw from representing David (L.F. 57). Plea counsel had an actual conflict of interest in representing both David and his sister Natalie (L.F. 57). The accused in all criminal prosecutions shall enjoy the right to assistance of counsel. U.S. Const. Amend. VI; Mo. Const., Art. I, § 18(a). The Sixth Amendment's "essential aim" is to guarantee a defendant "an effective advocate." Wheat v. United States, 486 U.S. at 159, 108 S. Ct. at 1697. Effective advocacy ensures criminal defendants receive a fair trial. 486 U.S. at159, 108 S. Ct. at 1697.

Where there is an actual conflict of interest that impairs counsel's ability to conform to ethical rules, the defendant is being represented ineffectively. State ex rel. Horn v. Ray, 325 S.W.3d 500, 510 (Mo. App. E.D. 2010). "Where counsel's representation of a defendant may be hampered by the duty of loyalty and care to two competing interests . . . the defendant is precluded from receiving the advice and assistance sufficient to afford the defendant the quality of representation the Sixth Amendment guarantees." Id.

The Court of Appeals has ruled that a conflict of interest can cause ineffective assistance if a movant can establish "something was done by counsel in trial, or something was foregone by counsel and lost to the movant, which was

detrimental to the movant's interests and advantageous to a person whose interests conflict with movant's." Yoakum v. State, 849 S.W.2d 685, 689 (Mo. App. W.D. 1993).

Counsel had an actual conflict of interest in representing both David and his sister because counsel's representing both DePriests caused David to lose the state's initial offer (L.F. 58). The state had initially offered that David receive a total ten (10) years' imprisonment and the court retain jurisdiction under Mo. Rev. Stat. §559.115 (Cum. Supp. 2010) (L.F. 58). But that offer would be withdrawn if a preliminary hearing were held (L.F. 58). After the preliminary hearing, the state was willing to recommend a total fifteen (15) years' imprisonment, with the court retaining jurisdiction (L.F. 58). But that second offer would be withdrawn if the defense had a suppression hearing held (L.F. 58). Although counsel communicated to David that the state was willing to recommend the court retaining jurisdiction under §559.115 (Cum. Supp. 2010) if David pleaded guilty, counsel did not advise David that the state's offer would be withdrawn if David exercised his rights to a preliminary hearing or a suppression hearing (L.F. 58-59).

Counsel did not advise David that the offers would be rejected if the preliminary and initial suppression hearings were held because he knew those hearings were beneficial to Natalie (L.F. 59). Those hearings would be beneficial to Natalie because it was in her best interest to prepare for trial (L.F. 59). Counsel knew it was in Natalie's best interests to prepare for trial because her culpability level was less than her brother's (L.F. 59).

Natalie's level of culpability was less because, according to discovery and what was adduced at the preliminary and suppression hearings, the marijuana plants both defendants were accused of cultivating were located in David's bedroom and nowhere else in the DePriest home (L.F. 59). Counsel admitted Natalie's lower level of culpability when he wrote David, "I really do not see how the Prosecutor thinks he has any case against her for cultivation. Even the charge of possession against Natalie may be rather weak . . ." (L.F. 115). Therefore, because counsel wished to protect Natalie's interest in proceeding to trial, he did not advise David that holding a preliminary or suppression hearing would cause the prosecutor's offer to be withdrawn (L.F. 59). Thus, because there was an actual conflict of interest between counsel and David, counsel ineffectively represented David (L.F. 59).

An actual conflict of interest causing ineffective assistance has also been defined as occurring when one attorney represents co-defendants and "the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." Cuyler v. Sullivan, 446 U.S. 335, 356 n.3, 100 S. Ct. 1708, 1722 n.3 (1980)(Marshall, J., concurring in part and dissenting in part)(quoting Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977)).

For example, in LaFrance v. State, the movant and three others had been accused of killing another inmate. 585 S.W.3d 317, 322 (Mo. App. W.D. 1979). The prosecutor offered to dismiss the charges against three defendants if the fourth

pleaded guilty. Id. The four inmates were represented by the same attorney and housed in the same cell. Id. at 319. Mr. LaFrance had an "obvious and viable claim of self-defense." Id. at 322. And there was evidence another co-defendant had actually "struck the fatal blow." Id.

The Court of Appeals decided Mr. LaFrance had been ineffectively represented (L.F. 60). The ineffectiveness resulted from counsel's representing all four co-defendants and the prosecutor's offer to discharge three defendants if one pleaded guilty. Id. Because of the offer, counsel would have had to decide which defendant was the most likely to be convicted. Id. But he could not share that conclusion with the other defendants; he also represented the defendant he had decided was the most likely to be convicted. Id.

And, in order to effectively represent the lesser-culpable defendants, he would have had to establish why their culpability was less. Id. But to do that, he would have had to explain why the fourth defendant was the most culpable, which would have violated his duty of loyalty to the fourth defendant. Id. "How one lawyer could perform that duty for the four individuals . . . is . . . impossible to discern." Id.

Another conflict of interest was caused by all four co-defendants being housed in the same cell. Id. at 319. Because of that, there had been "constant pressure" for one defendant to plead guilty to save the others. Id. To solve the problems caused by the conflict of interest, the Court of Appeals ordered Mr. LaFrance's sentence and conviction vacated. Id. at 323.

David's conviction and sentence should also be vacated (L.F. 61). Just as in LaFrance, the prosecutor's offer caused an actual conflict of interest between counsel and David (L.F. 61). Counsel advised David the prosecutor did not want Natalie to plead guilty and then exonerate her brother by testifying at his trial (L.F. 61). Because of that, the prosecutor would not offer anything to Natalie unless David also pleaded guilty (L.F. 61).

Before Natalie was charged with passing a bad check as well as the charges she shared with her brother, the state's offer caused an actual conflict of interest because it did not allow David to plead guilty (L.F. 61). David could not plead guilty unless his sister pleaded guilty as well (L.F. 61). But David knew the state's evidence showed his sister was less culpable than he (L.F. 61). Counsel had written him, "I really do not see how the Prosecutor thinks he has any case against her for cultivation. Even the charge of possession against Natalie may be rather weak . . ." (L.F. 115). Because of her lesser culpability, David, counsel, and Natalie knew she should not plead guilty (L.F. 61). Therefore, David could not plead guilty because he knew he could not without his sister's doing the same thing (L.F. 61). But that was against her best interests (L.F. 61). Thus, the prosecutor's offer caused a conflict of interest between counsel and David (L.F. 61).

The offer also caused a conflict of interest after Natalie had been charged with the passing-bad-check charges (L.F. 61). Because of the additional charges, Natalie's bond had been revoked in Cause No. 11SF-CR01612 (L.F. 61-62). She

desperately wanted out of jail, and her brother knew it (L.F. 62). He knew that – if she pleaded guilty – the prosecutor would not oppose her bond being reinstated until sentencing (L.F. 62). But Natalie could not plead guilty unless David pleaded guilty (L.F. 62). Knowing how desperately his sister wanted out of jail, David pleaded guilty (L.F. 62). Because he loved his sister and wanted her out of jail, he was – just as the movant in LaFrance – under "constant pressure" to plead guilty (L.F. 62). Therefore, the prosecutor's offer caused an actual conflict of interest between David and counsel (L.F. 62). Thus, David was represented ineffectively (L.F. 62).

The ineffective assistance of counsel caused by the actual conflict of interest was not waived by David's signing the Statement and Waiver of Conflict of Interest (L.F. 62). An actual conflict of interest, or even just a serious potential for one, may not be waived. State ex rel. Kinder v. McShane, 87 S.W.3d 256, 263 (Mo. banc 2002). This is because the court "has an institutional interest in protecting the truth-seeking function of the proceedings . . . by considering whether the defendant has effective assistance of counsel." Id. (quoting United States v. Stewart, 185 F.3d 112, 122 (3rd Cir. 1999)).

Missouri ethical rules allow an attorney to represent a client, even if there is a conflict of interest, if the client has consented to the conflict and the lawyer can reasonably conclude he or she will be able to provide competent and diligent representation. Mo. Sup. Ct. Rule 4-1.7(b)(1) comment 15. But this rule does not supplant the court's obligation to protect a defendant's Sixth Amendment rights.

State ex rel. Kinder v. McShane, 87 S.W.3d at 266. David's Sixth Amendment right to effective assistance of counsel was violated by the actual conflict of interest (L.F. 62-63). Therefore, the ineffectiveness could not be waived by his consenting to the conflict (L.F. 63).

Because of the actual conflict of interest between David and counsel, prejudice is presumed. Cuyler v. Sullivan, 446 U.S. at 348-50, 100 S. Ct. at 1718-19. Thus, David is entitled to post-conviction relief (L.F. 63).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 160-61, 166). The court denied relief because 1) David did not demonstrate what he lost by continuing to "hang with" plea counsel; 2) he was aware counsel represented Natalie; 3) he was informed the state's offer would be withdrawn if the preliminary hearing were held; 4) he pleaded guilty because he loves his sister, not because of counsel's actions; 5) counsel informed David about the "progress of Natalie's case and their respective culpability"; 6) Natalie was not advantaged by the dual representation because she "received a sentence with no bargain or leniency recommended" (PCR L.F. 160-61). In sum, David could not show "what disadvantage he suffered from the dual representation" (L.F. 161).

The motion court clearly erred in deciding David could not show he had been disadvantaged by counsel's representing both his sister and him. For the same reasons, the court clearly erred in deciding David did not demonstrate what he lost by continuing to "hang with" plea counsel. As David explained in the

amended motion, an actual conflict of interest existed because of the dual representation (L.F. 55-57). In the Waiver of Conflict of Interest form, plea counsel acknowledged an actual conflict of interest would result if "either [client] is offered a disposition that would harm the other's position" (L.F. 125)(material in brackets added).

Natalie was offered a disposition that harmed her brother's position because the prosecutor required David to plead guilty for her to receive an agreement. Before Natalie was charged with the passing-bad-check charges, it was in her interest to plead not guilty. It was in her interest to plead not guilty because the state had less evidence against her than David (L.F. 59). It was in David's best interests to plead guilty because the state had a stronger case against him. But plea counsel could not advise David to plead guilty because counsel knew the prosecutor would not offer anything to David unless Natalie pleaded guilty also, even though the state had a weaker case against her (L.F. 61). Because of that, David lost the state's offer to his sister and him to be sentenced to ten (10) years' total imprisonment with the court retaining jurisdiction under §559.115 (Cum. Supp. 2010).

That consequence was exactly what counsel meant in the waiver form when he acknowledged that an actual conflict of interest would exist if one co-defendant was offered a disposition that would harm the other's position. Therefore, David showed he had been disadvantaged by counsel's representing both him and his sister, before the state filed the passing-bad-check charges against Natalie.

The additional bad-check charges against Natalie changed how David was disadvantaged by the dual representation, but not that he was disadvantaged by it. Because of the additional charges, Natalie was incarcerated because she could not post the additional bond (2Supp.L.F. 11-12). After the additional charges were filed, the state offered to recommend Natalie be released on bond between pleading guilty and sentencing. Because she very much wanted to be released, it became advantageous to her to accept the state's offer. But, by that point, it was no longer advantageous for David to plead guilty. The state was no longer offering David anything because he had refused the state's previous offers. Nevertheless, the state still refused to offer Natalie anything unless David also pleaded guilty. But the only way David could plead guilty by that point was without an offer from the state, which was what he did.

That was not advantageous to David because it exposed him to the maximum sentences on the charged offenses, which was what the state recommended and what he received. There was a reasonable probability he would have fared better at trial, where the jurors would have recommended sentencing. That consequence was exactly what counsel meant in the waiver form when he acknowledged that an actual conflict of interest would exist if one co-defendant was offered a disposition that would harm the other's position. That is why David was still disadvantaged by the dual representation after the state filed the passing-bad-check charges against Natalie. Thus, the motion court clearly erred in deciding David could not show he had been disadvantaged by counsel's

representing both him and his sister and in deciding David did not demonstrate what he lost by continuing to "hang with" plea counsel.

The motion court also clearly erred in denying relief because of David's being aware counsel was also representing Natalie. David had to have been aware of that, because counsel wrote them joint letters and met with both of them at the same time (L.F. 112-24). But David was not aware that counsel's representing both Natalie and him caused a conflict of interest. It was counsel's responsibility, as the attorney, to have recognized the conflict:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. 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 one or more clients will be materially limited by the lawyer's responsibilities to another client.

Mo. Sup. Ct. Rule 4-1.7. Therefore, it was counsel's responsibility to recognize the conflict.

It was also counsel's responsibility because he recognized at the beginning of the representation that a conflict could occur. Counsel advised David and Natalie in the waiver that an actual conflict of interest would arise if "either is offered a disposition that would harm the other's position or require testimony

against the other" (L.F. 125). Once counsel became aware the prosecutor would only make an offer to Natalie if David pleaded guilty without one, or that Natalie was less culpable than her brother, he should have withdrawn from representing at least one of the co-defendants. Therefore, because it was counsel's responsibility and not David's to recognize the conflict of interest, the motion court clearly erred in denying relief because David was aware counsel also represented his sister.

The motion court clearly erred in denying relief by deciding David had been informed the state's offer would be withdrawn if the preliminary hearing were held. For this reasoning, the motion court depended on the state's placing on the record at the preliminary hearing that David had rejected the state's plea offer (1Supp.L.F. 3). But that announcement did not preclude post-conviction relief.

Firstly, what the state said at the preliminary hearing did not preclude post-conviction relief because it did not advise David that – if he proceeded with the preliminary hearing – the state's offer had been withdrawn. The statement only advised the court that David had already rejected the state's offer, but not how. Therefore, the prosecutor's statement did not inform David the state's offer would be withdrawn if the preliminary hearing were held.

Secondly, the prosecutor's statement at the preliminary hearing did not preclude relief because it was not the preliminary hearing being held that caused the state to withdraw its offer. On March 26, 2012, the prosecutor advised plea counsel the state had withdrawn its current guilty-plea offer and would make no more because counsel had filed a suppression motion with a hearing notice (L.F.

127). That had occurred on March 21, 2012, forty-seven (47) days before the preliminary hearing (L.F. 3, 86). It was the filing of the suppression motion and hearing notice that caused the prosecutor's offer to be withdrawn, not the preliminary hearing being held. By the time David heard at the preliminary hearing the prosecutor's announcement that he had rejected the state's offer, the offer had been off the table over a month. Therefore, the motion court clearly erred in denying relief by deciding David had been informed at the preliminary hearing the state's offer would be withdrawn if the hearing were held.

The motion court clearly erred in denying relief by deciding David pleaded guilty because he loves his sister, not because of counsel's actions. David does love his sister. And he did plead guilty without an offer from the state so his sister could plead guilty pursuant to an offer from the state.

But – because of plea counsel's conflict in representing co-defendants – David lost his ability to plead guilty pursuant to an offer from the state. Initially, the state offered both Mr. and Natalie ten- (10-) year sentences with the court retaining jurisdiction under §559.115 (Cum. Supp. 2010) (L.F. 75-76). This offer was advantageous to David because of the evidence the state had against him. But the offer was not advantageous to Natalie, as counsel knew, because she was less culpable than David (L.F. 59). It was not in her best interest to accept the state's offer. But the state refused to make an offer to one sibling if the other did not accept an offer, too (L.F. 123). David could not accept the state's offer unless his sister did, even though it was in Natalie's best interests not to plead guilty.

Therefore, counsel advised David to proceed with the suppression and preliminary hearings.

But, by doing so, the state withdrew the ten- (10-) year offer and did not make any others. At that point, the only way David could plead guilty was without an offer from the state, which was what he did. He pleaded guilty without an offer from the state, not only because of his love for his sister, but because he had lost the state's initial offer. David lost his ability to plead guilty pursuant to an offer because of plea counsel's conflict in representing David and his sister. Therefore, the motion court clearly erred in denying relief by deciding David pleaded guilty because he loves his sister, not because of counsel's actions.

The motion court clearly erred in deciding David's being notified of the progress of Natalie's case and his and her respective culpability precluded post-conviction relief. David was so informed because counsel wrote Natalie and him jointly and met with them jointly. The problem was that David was not informed that the prosecutor's ten- (10-) year-with-ITC offer would be withdrawn if the defense filed a suppression motion with a notice of hearing. *See* Point III. If David had known that, he would not have proceeded with either suppression hearing. Therefore, the motion court clearly erred in deciding David's being notified of the progress of Natalie's case and his and her respective culpability precluded post-conviction relief.

The motion court clearly erred in denying relief by deciding Natalie had not been advantaged by the dual representation because she "received a sentence with

no bargain or leniency recommended." Firstly, whether counsel had an actual conflict of interest with David did not depend on whether Natalie was advantaged or not by the conflict of interest. The issue is whether David was disadvantaged by the dual representation.

Secondly, the motion court clearly erred in deciding Natalie was not advantaged by the dual representation. When Natalie pleaded guilty, the state recommended that – in exchange for her pleading guilty in Counts I and II – the state would dismiss Count III, dismiss the passing-bad-check charges, not file any additional passing-bad-check charges, and agree that her bond be reinstated (L.F. 22). She received the advantages of having several criminal offenses against her being dismissed, the state's promise it would file no additional charges, and being released on bond until sentencing. On the other hand, David received no advantage; he had to plead guilty to all charged offenses (L.F. 22). Therefore, the motion court clearly erred in deciding Natalie was not advantaged by the dual representation. Thus, the motion court clearly erred in denying relief.

The Court of Appeals agreed with David that plea counsel had been ineffective because he had an actual conflict of interest in representing both David and Natalie. Slip op. at 7. Counsel had an actual conflict of interest because he lost for David the opportunity to plead guilty to the state's least-harsh offer. Slip op. at 7.

The Court of Appeals decided that plea counsel had lost for David the opportunity to plead guilty to the state's least-harsh offer because he had

proceeded to preliminary hearing. Slip op. at 8. Proceeding to preliminary hearing, and thus to trial, was in Natalie's best interest, but not David's, because he was more culpable. Slip op. at 8. Because counsel chose to continue representing both David and Natalie, and conducted the preliminary hearing, the Court of Appeals presumed prejudice. Slip op. at 9.

Even though prejudice is presumed with an actual conflict of interest, the Court also found prejudice because of the disparity between the state's least-harsh offer of ten years' incarceration (assuming David would not have completed the one-hundred-twenty- (120-) day treatment program) and the twenty-two- (22-) year disposition he did receive. Slip op. at 9.

For the reasons cited above, the motion court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because David was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law in that plea counsel failed to withdraw from representing David. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

III.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[17] in that plea counsel failed to advise David that – if a preliminary hearing were held or the defense filed a notice to have a suppression motion heard – the state's offer would be withdrawn.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because he would have accepted the state's ten- (10-) year offer. Instead, he had to plead guilty without an offer and was sentenced to twenty-two (22) years' imprisonment.

David argued in his amended motion he was denied his rights to effective assistance of counsel and due process of law in that plea counsel failed to advise him that – if a preliminary hearing were held or the defense filed a notice to have any suppression motions heard – the state's offer would be withdrawn (L.F. 85-92). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d at 152.

[17] *See* n.7.

The review standard and general case law set forth in Point I apply equally to this point and are adopted and incorporated herein.

Counsel was ineffective for erroneously advising David of the state's offer (L.F. 87). Counsel's explanation did not include the prosecutor's requirement that any offer would be withdrawn if 1) a preliminary hearing were conducted; 2) the case were set for trial; 3) the defense gave notice to hear any pre-trial motions; or 4) the defense deposed witnesses (L.F. 87-88).

In Missouri v. Frye, the state had made two guilty-plea offers to plea counsel. – U.S. – , 132 S. Ct. 1399, 1404 (2012). In the first offer, the state was willing to recommend Mr. Frye receive a three-year sentence; did not recommend probation, but would recommend Mr. Frye serve ten (10) days in the county jail if probation were granted. Id. Under the other offer, the state would be willing to reduce the felony charge to a misdemeanor and recommend ninety (90) days in the county jail. Id. The state also advised counsel the offers would expire by a certain date. Id. Counsel did not advise Mr. Frye about the offers and they expired. Id.

Mr. Frye pleaded guilty without an offer. Id. The state recommended Mr. Frye receive its first offer; a three-year sentence, no recommendation about probation, and ten (10) days in the county jail. Id. The court sentenced Mr. Frye to three years' incarceration. Id. at 1404-05.

The United States Supreme Court held that counsel had been ineffective for failing to advise Mr. Frye of the state's offers before they expired. Id. at 1409. The Court decided counsel had been ineffective because the "reality is that plea

bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process." Id. at 1407.

As in Frye, counsel was responsible to David not only to advise him of the state's offer, but what could cause the offer to be revoked (L.F. 88). In Frye, it was the expiration of a certain date. Id. at 1404. In David's case, it was the filing of a hearing notice for the suppression motion (L.F. 88). Because counsel did not advise David that the state's offer would be revoked if the suppression-motion notice were filed, counsel was ineffective (L.F. 88-89).

David was prejudiced by counsel's ineffectiveness (L.F. 89). To show prejudice from counsel's ineffectiveness in allowing a plea offer to lapse or be rejected, a movant has to show 1) he or she would have accepted the plea offer had he or she been afforded effective assistance of counsel; and 2) the state would not have cancelled the offer and the plea court would not have refused to accept it. Id. at 1409.

David was prejudiced by counsel's ineffectiveness because he would have accepted the state's ten- (10-) year offer (L.F. 89). David only countered with the SIS after the suppression hearing had been held in the associate division (L.F. 89). Further, the state would not have cancelled the offer if David accepted it before a hearing notice had been filed or the preliminary hearing had been held (L.F. 89). And the plea court would have accepted the plea offer had the state and defense

agreed to it (L.F. 89). Thus, counsel was ineffective and David was prejudiced by that ineffectiveness (L.F. 89).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 163, 166). The motion court decided this point was refuted by the record because of what the prosecutor said at the preliminary hearing (L.F. 163). At the hearing, the prosecutor had announced that David had rejected the state's plea offer that he be sentenced under §559.115 (Cum. Supp. 2010) (2Supp.L.F. 3).

The motion court clearly erred in denying relief because of what the prosecutor said at the preliminary hearing. Firstly, what the state said should not preclude post-conviction relief because it did not advise David that – if he proceeded with the preliminary hearing – the state's offer would be withdrawn. The statement only advised the court David had already rejected the state's offer. Therefore, the prosecutor's statement did not inform David the state's offer would be withdrawn if the preliminary hearing were held.

Secondly, the prosecutor's statement should not preclude relief because it was not the preliminary hearing being held that caused the state to withdraw its offer. On March 26, 2012, the prosecutor advised plea counsel the state had withdrawn its offer and would make no more because counsel had filed a suppression motion with a hearing notice (L.F. 127). That had occurred on March 21, 2012, forty-seven (47) days before the preliminary hearing (L.F. 3, 86). Counsel's filing of the suppression motion and hearing notice that caused the

prosecutor's offer to be withdrawn, not the preliminary hearing being held. By the time David heard at the preliminary hearing the prosecutor's announcement that he had rejected the state's offer, it had been off the table over a month. Therefore, the prosecutor's statement at the preliminary hearing did not timely advise David the state's offer would be withdrawn if he filed a suppression motion with hearing notice, or have the preliminary hearing held. Thus, the motion court clearly erred in deciding this point was refuted by the record.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because plea counsel failed to advise David that – if a preliminary hearing were held or the defense filed a notice to have suppression motions heard – the state's initial offer would be withdrawn. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

IV.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel, due process, and equal protection of law[18] in that plea counsel failed to object to David's court proceedings being closed to the public.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because public scrutiny of court proceedings 1) enhances the quality and safeguards the integrity of the fact-finding process, fostering an appearance of fairness; 2) heightens public respect for the judicial process; and 3) provides David with the support of loved ones.

David argued in his amended motion he had been denied effective assistance of counsel, due process, and equal protection of law in that counsel failed to object to court proceedings being closed to the public (L.F. 105-08). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d at 152.

[18] *See* n.7.

The review standard and general case law set forth in Point I apply equally to this point and are adopted and incorporated herein.

Counsel was ineffective for failing to object to David's court proceedings being closed to the public. Counsel acts ineffectively in not objecting where the objection would have been meritorious, and counsel's overall performance falls short of established norms. Helmig v. State, *supra*; Jones v. State, *supra*.

An objection to the courtroom's closure would have been meritorious because Missouri has made public court access a right (L.F. 106). Article I, Section 14 of the Missouri Constitution requires that the "courts of justice shall be open to every person." "The sitting of every court shall be public and every person may freely attend same." Mo. Rev. Stat. § 476.170 (2000). This right applies to non-trial proceedings. In the Matter of Presta v. Owsley, 345 S.W.2d 649 (Mo. App. K.C.D. 1961)(the public has a general right to be present when a witness needs to show a court that a question he was asked before the grand jury called for an answer that might tend to incriminate him). Thus, an objection would have been meritorious (L.F. 107).

Counsel's overall performance fell short of established norms in failing to object to the courtroom's closure (L.F. 107). The United States Supreme Court has found that defendants benefit from the enhanced quality and safeguarding of integrity resulting from public scrutiny. Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 606, 102 S. Ct. 2613, 2619 (1982). Public respect for the judicial process is heightened because public scrutiny fosters

an appearance of fairness. Id. at 606, 102 S. Ct. at 2620. And David would have benefitted from the support of people who care about him (L.F. 107). Thus, David was prejudiced by counsel's ineffectiveness (L.F. 107).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 164-65, 166). The motion court decided this point was without merit because 1) there was no record supporting David's allegation that certain named persons were excluded from the courtroom; 2) it was concerned that the Sixth Amendment guarantee of a public trial did not extend to guilty-plea hearings; 3) it cited State v. Moore, 366 S.W.3d 647 (Mo. App. E.D. 2012) for the rule that certain persons could be excluded from a courtroom without denying the right to a public trial; 4) David "tacitly concede[d]" the courtroom was not closed; 5) David did not bring to the court's attention that his loved ones were being excluded; 6) the court could conduct guilty plea proceedings *in camera* under Rule 24.02(d); and 7) the record demonstrated no facts from which the court could conclude certain individuals being excluded from the courtroom caused David to involuntarily plead guilty (L.F. 164-65).

The motion court clearly erred in deciding this point was without merit by deciding there was no record to support his allegation that certain persons had been excluded from the courtroom. Firstly, David argued counsel had been ineffective for not protecting his right to a public courtroom (L.F. 106-07). As part of objecting to the court's being closed to the public, counsel also should have

made a record that certain persons – such as David, Sr. and the Resengers – had not been allowed in the courtroom. Secondly, David listed in the amended motion which persons had been excluded from which court appearances (L.F. 106). David was not able to make a further record because the motion court did not grant an evidentiary hearing (L.F. 166). Therefore, the motion court clearly erred in deciding there was no record to support David's allegation that certain persons had been excluded from the courtroom.

The motion court clearly erred in being concerned about whether the public can be excluded from guilty plea hearings. Missouri law prohibits ***any*** court proceeding from being closed: "***courts of justice*** shall be open to every person" and "[t]he ***sitting of every court*** shall be public and every person may freely attend same." Mo. Const., Art. I, §14; Mo. Rev. Stat. §476.170 (emphasis added)(material in brackets added).

The United States Supreme Court has found that defendants have a Sixth Amendment right to other court proceedings being open besides criminal trials. The Court has required open courts for preliminary and suppression hearings. El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico, 508 U.S. 147, 113 S. Ct. 2004 (1993)(preliminary hearings); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210 (1984)(suppression hearings).

The court also clearly erred in not considering Rule 24.02(b), which requires the court, before accepting a guilty plea, to "address the defendant personally in open court." What would be the point in requiring the court to

conduct guilty-plea hearings in open court if that courtroom can be closed to the public? Therefore, the motion court clearly erred in determining that the public can be excluded from guilty plea hearings.

The motion court also clearly erred in citing State v. Moore, *supra*, for a rule that certain persons could be excluded from a courtroom without denying the right to a public trial. In Moore, the defense asked that the minor victim's father and grandmother be present during the trial. Id. at 650. The state wanted the two excluded because they were witnesses. Id. The defense argued the father and grandmother had a right to be present because they were the minor victim's family members. Id. As such, they had a right to be present under both Missouri Constitution and statute. Mo. Const., Art. I, §32; Mo. Rev. Stat. §595.200(6).

But this Court decided the defendant could not show how he had been prejudiced by the victim's father's and grandmother's absence from court. The defendant could not show he had been prejudiced because he did not have standing to assert the victim's rights. State v. Moore, 366 S.W.3d at 651. The constitutional amendment specifically does not authorize a court to set aside a finding of guilt. Id. And the defendant could not argue that his trial had not been public because other people had been in the courtroom. "The exclusion of Father and Grandmother is not synonymous with closure of the trial to the public." Id.

The motion court clearly erred in relying on State v. Moore to deny relief to David. Here, David did have standing. His father and friends wanted to be in the courtroom for ***his*** benefit. David could also raise this point because – although

there were other people in the courtroom – they were not members of the public. They were either parties with cases being heard that day, or their attorneys (L.F. 106). Therefore, the motion court clearly erred in relying on State v. Moore to deny relief.

The motion court clearly erred in denying relief by deciding David had tacitly conceded the courtroom was not closed. The motion court appeared to be referring to David's stating that – when his father and friends tried to enter the courtroom – they were turned away by a bailiff (L.F. 106). The bailiff told them the courtroom was closed to all but parties with cases being heard that day and their attorneys (L.F. 106).

That was not an admission by David that the courtroom was not closed. As stated above, because the courtroom was limited to parties and attorneys, it was not open to the public. It was definitely not open to the people who wanted to be there for David. But that is exactly what the Missouri Constitution and law require. Therefore, the motion court clearly erred in deciding David had admitted the courtroom was not closed.

The motion court also clearly erred in denying relief because David did not bring to the court's attention that his loved ones were being excluded. The issue was counsel's effectiveness, not David's. It was counsel who should have known the court had to keep the courtroom open to the public. David should not have had to bring the matter to the court's attention because he should have been able to rely on counsel's performing as a reasonably competent attorney. *See* Strickland

v. Washington, *supra*; McNeal v. State, *supra*. Therefore, the motion court clearly erred in denying relief because David did not bring to the court's attention that his loved ones were being excluded.

The motion court clearly erred in denying relief by deciding the plea court could conduct guilty plea proceedings *in camera* under Rule 24.02(d). That rule allows a plea agreement to be disclosed *in camera* on a showing of good cause. Rule 24.02(d). But section (d) does not allow for the actual guilty-plea hearing to take place *in camera*. The guilty-plea hearing itself is governed by section (b), which requires a court, before accepting a guilty plea, to "address the defendant personally ***in open court***." Rule 24.02(b)(emphasis added). Therefore, because Rule 24.02(b) requires guilty-plea hearings be conducted in open court, the motion court clearly erred in relying on Rule 24.02(d) to deny David post-conviction relief.

The motion court also clearly erred in denying relief by deciding the record demonstrated no facts from which the court could conclude certain individuals being excluded from the courtroom caused David to involuntarily plead guilty. Firstly, David did not need to prove he had been specifically prejudiced because his right to a public courtroom had been violated. Waller v. Georgia, 467 U.S. at 49, 104 S. Ct. at 2217 (1984).

Secondly, David did argue in the amended motion he had pleaded guilty involuntary because of counsel's ineffectiveness. David argued he had been prejudiced by counsel's failure because public scrutiny of court proceedings would

have 1) enhanced the quality and safeguarded the integrity of the fact-finding process, fostering an appearance of fairness; 2) heightened public respect for the judicial process; and 3) provided David with his loved ones' support (L.F. 105). Therefore, David did show how the courtroom's being closed to the public caused him to plead guilty involuntarily. Thus, the motion court clearly erred in denying relief.

The Court of Appeals noted that David would have been further intimidated by the courtroom's being closed. Slip op. at 13 n.19. The Court also decided that the motion court's deciding that the right to a public trial did not extend to guilty pleas was "not supported by case law." Slip op. at 13 n.19. And the Court concluded that the motion court had misinterpreted Rule 24.02(d). Slip op. at 13 n.19.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because plea counsel failed to object to David's court proceedings being closed to the public. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

V.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law[19] in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David because plea counsel used the charges against David to "speak about marijuana legalization" and use David as a "martyr" to legalize marijuana in Missouri.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

Plea counsel has been described as "Marijuana's Leading Man" in Missouri. P. Courchaine, Meet Dan Viets: Marijuana's Leading Man, *Vox*, November 24, 2011. He earned this title because of his efforts over the past forty-two (42) years to have marijuana legalized. Id.

Plea counsel has joined organizations working to legalize marijuana (L.F. 67). He has been the Missouri director of the National Organization for the

[19] *See* n.7.

Reform of Marijuana Laws. http: //danviets.com. He is a lifetime member of that organization, and serves on its Legal Committee. *Find a Lawyer*, http: //norml.org. He is also Chair of the Board of Show-Me Cannabis Regulation. http: //norml.org. That group intends to place an initiative on the November 2016 Missouri ballot to tax and regulate marijuana like alcohol. http: //norml.org. Plea counsel has also hosted a weekly radio program – *Sex, Drugs, and Civil Liberties*. http: //norml.org.

Plea counsel has also received awards for his efforts to legalize marijuana (L.F. 68). In March 2005, plea counsel received *High Times* magazine's Freedom Fighter of the Month award (L.F. 67). *High Times* describes itself as the "definitive resource for all things marijuana, from cultivation and legalization to entertainment and exposing the War on Drugs." http: //hightimes.com. Counsel received this award because he worked to pass municipal initiatives to decriminalize marijuana and medical marijuana in Columbia, Missouri. *Find a Lawyer*, http: //norml.org. Television talk show host Conan O'Brien awarded plea counsel the "Audiencey [sic] Award" for "looking most like the college professor who could always get you weed." Id.

Plea counsel has held all the above positions, and received the above awards, before representing David (L.F. 74). Despite that, counsel did not seek to withdraw from representing David because of a conflict of interest (L.F. 74).

The St. Francois County prosecutor discussed plea counsel with reporters after the DePriests were sentenced (L.F. 78). He told one reporter, "I made Viets

an offer where they would have served 120 days in jail, and then gotten out on three years of probation, probably, and he refused. . . . He just wanted a platform to speak about marijuana legalization and to use these people as martyrs." *Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone*, The Huffington Post (April 15, 2014)(material in brackets added). The prosecutor also told the reporter that David should have accepted his "early offers of clemency." Id. The prosecutor also told a local reporter that because of the amount of marijuana that David and Natalie were "moving," they were "affecting a lot of people across the county, so they got what they deserved." *The Prosecutor Discusses the State's Position,* The Farmington Daily Journal (November 14, 2013). The prosecutor also said that plea counsel had "turned down all plea offers." Id.

David argued in his amended motion plea counsel failed to withdraw from representing him because counsel had an actual conflict of interest in representing David in that plea counsel used the charges against David to "speak about marijuana legalization" and use David as a "martyr" to legalize marijuana in Missouri (L.F. 67-75). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d at 152.

The review standard and general case law set forth in Point I apply equally to this point and are adopted and incorporated herein.

Plea counsel was ineffective for failing to withdraw from representing David (L.F. 68). Counsel had an actual conflict of interest in representing David

because of his political advocacy to legalize marijuana (L.F. 68). An actual conflict of interest causing ineffective assistance has occurred when an attorney "either acted or failed to act in [a] way that was detrimental to the defendant's interests and was advantageous to a person whose interests conflicted with the defendant's." Yoakum v. State, 849 S.W.2d at 689.

For example, in State v. Chandler, Mr. Chandler was accused of murdering Attorney Joseph Langworthy. 698 S.W.2d 844, 845 (Mo. banc 1985). He was represented by Counsel J. L. Anding. Id. Before Mr. Chandler's trial, his brother had been tried as another participant in the murder. Id. A third brother had testified that he stood watch while Mr. Chandler and the brother on trial had killed Attorney Langworthy. Id. The third brother also testified that Counsel Anding had hired them for the killing. Id.

Counsel Anding had been indicted for the murder, but by the time he represented Mr. Chandler, the Indictment had been dismissed. Id. Counsel Anding had been represented by Attorney O'Brien, who – with Counsel Anding – represented Mr. Chandler. Id. Counsel Anding had paid Attorney O'Brien to represent both Mr. Chandler and himself. Id. And Counsel Anding had represented the brother who had testified against both Mr. Chandler and the other brother. Id.

The Missouri Supreme Court directed the trial court to vacate Mr. Chandler's sentence and judgment. Id. at 849. The Court decided Mr. Chandler

had been represented ineffectively by Counsel Anding because an actual conflict of interest had existed. Id.

An actual conflict of interest occurs when counsel actively represents conflicting interests. Id. at 848 (quoting Cuyler v. Sullivan, 446 U.S. at 350, 100 S. Ct. at 1722). The Supreme Court cited with approval the following definition of an actual conflict of interest: "There is an actual relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." Id. (quoting Cuyler v. Sullivan, 446 U.S. at 356 n.3, 100 S. Ct. at 1722 n.3 (Marshall, J., concurring in part and dissenting in part)(quoting Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977)).

The Chandler Court ruled there had been an actual conflict of interest (L.F. 69). The first conflict was Mr. Chandler's being represented by a co-suspect. Id. at n.11. The second was both Mr. Chandler and Counsel Anding being represented by Attorney O'Brien. Id. And the third conflict was Mr. Chandler's and Counsel Anding's interests diverging when Counsel Anding and Attorney O'Brien had decided not to call as a witness the brother who had testified at the other brother's trial. Id. Mr. Chandler had told counsel he wanted his brother to testify at his trial. Id. If his brother had testified at trial as he had in a deposition, he would have testified he had been hired by Counsel Anding to murder Attorney Langworthy, but Mr. Chandler had nothing to do with the murder. Id. at 846, 848

n.11. Counsel Anding's decision not to call the brother at Mr. Chandler's trial had been caused by his interest in not incriminating himself at the expense of exonerating Mr. Chandler (L.F. 70). Therefore, there had been an actual conflict of interest (L.F. 70).

The Court also decided the actual conflict of interest adversely affected counsels' performance. Id. at 848. The "actual conflict affected his lawyers' ability to exercise independent judgment" in representing Mr. Chandler. Id. at 849.

Because Mr. Chandler had demonstrated an actual conflict of interest that adversely affected his counsels' judgment, prejudice was presumed. Id.

With respect to David, there also existed an actual conflict of interest adversely affecting plea counsel's performance (L.F. 70). There was an actual conflict of interest because plea counsel's and David's interests diverged as to what was the case's best outcome (L.F. 70-71). Because plea counsel has long sought the legalization of marijuana, it was in his cause's best interests for David's case to garner as much publicity as possible (L.F. 71). As St. Francois County Prosecutor Mahurin put it, "[Plea counsel] just wanted a platform to speak about marijuana legalization and to use [David and Natalie] as martyrs." *Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone*, The Huffington Post (April 15, 2014)(material in brackets added). Therefore, counsel used David's criminal case to garner publicity for marijuana legalization (L.F. 71).

To garner as much publicity as possible, counsel knew it was in the cause's best interests for the DePriests to take their cases to trial (L.F. 71). As former National Association of Criminal Defense Attorneys (NACDL) President Larry S. Pozner warned his fellow criminal defense attorneys, "Don't ever take a case for the publicity. When press coverage becomes your pay, you will be tempted to make tactical decisions to 'get paid.'" Pozner, *Lessons Learned*, The Champion (June 1999). To garner publicity for marijuana legalization, counsel held a preliminary hearing (L.F. 71). Counsel also litigated the Motion to Suppress Evidence twice – once in the associate, and again in the circuit, divisions – in anticipation of taking the case to trial (L.F. 71). Therefore, it was in counsel's best interest to advocate for his cause by taking David's case to trial (L.F. 71).

Even though David did not have a trial, counsel was still able to use his case to garner publicity (L.F. 71). Because David received a lengthy sentencing disposition, the case received much publicity (L.F. 71). As Prosecutor Mahurin stated, the DePriests have become martyrs in the effort to legalize marijuana (L.F. 71). After the DePriests were sentenced, plea counsel, as Chair for Show-Me Cannabis, hosted a "town-hall style" meeting about legalizing marijuana. *Meeting Sparks Marijuana Debate*, Farmington Daily Journal (January 25, 2014). Plea counsel began the meeting by telling the audience about the DePriests' sentencing dispositions. Id. And when David was sentenced, plea counsel said, "In 27 years of representing people with marijuana charges, that is the longest sentence I have ever seen for people with no prior felony convictions for cultivating a few

marijuana plants." *Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone*, The Huffington Post (April 15, 2014). Therefore, counsel was able to use the charges against David to garner publicity for marijuana legalization (L.F. 72).

But counsel's interest in garnering publicity for marijuana legalization diverged with David's best interest (L.F. 72). It was in David's best interest to accept the offers the state made before and after the preliminary hearing (L.F. 72). As Prosecutor Mahurin stated, "I made Viets an offer where [David and Natalie] would only have served 120 days in jail, and then gotten out on three years' probation . . . and he refused." Id.(material in brackets added). Had David accepted the first offer, he would have been sentenced to only ten (10) years' imprisonment, and would have had the chance to be released on probation after one-hundred-twenty (120) days (L.F. 72). Even if he had not successfully completed probation, David would be serving twelve (12) years' less imprisonment than now (L.F. 72). It was in David's best interest to plead guilty to one of the state's offers instead of pleading guilty not pursuant to any offer (L.F. 72). Therefore, David's and counsel's interests – receiving the least-harsh disposition possible versus using a public trial to garner publicity – had diverged (L.F. 72-73). Thus, there was an actual conflict of interest because of plea counsel's advocacy for marijuana legalization (L.F. 73).

The actual conflict of interest between plea counsel and David adversely affected counsel's performance (L.F. 73). If counsel had not wanted to use the

charges against David to publicize marijuana legalization, he would have advised David to accept the state's offer because of the amount of evidence against David (L.F. 73). Counsel would not have had the preliminary or suppression hearings, because he knew that would have caused the prosecutor to withdraw the more-favorable offers (L.F. 73). If counsel had advised David to accept the state's offer, he, at worst, would be serving twelve (12) years' less imprisonment than he is now (L.F. 73). Therefore, the actual conflict of interest between plea counsel and David adversely affected counsel's performance (L.F. 73). Thus, David has demonstrated an actual conflict of interest deprived him of his right to effective assistance of counsel (L.F. 73).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 161-62, 166). The court denied relief by deciding 1) David could not show how he was adversely affected by plea counsel's political agenda; 2) it was "illogical and impossible" that plea counsel wanted David to receive a harsh sentencing disposition because he asked the court to suspend the imposition of sentences; 3) the prosecutor's remarks about plea counsel were "simply his point of view"; 4) David did not cite instances where plea counsel before David's sentencing "sought to draw attention" to David's possibly receiving a harsh sentence; and 5) if plea counsel is successful in decriminalizing marijuana, "such a result might benefit Movant in some way" (L.F. 161-62).

The motion court clearly erred in denying relief by deciding David could not show how he was adversely affected by plea counsel's political agenda. Firstly, David showed how plea counsel's political agenda alienated the prosecutor. The prosecutor's remarks to national and local newspaper reporters showed that. The prosecutor's dislike for plea counsel also caused the prosecutor to recommend that David – who should have received a more lenient sentence because he was pleading guilty – receive the maximum length on each sentence to run consecutively (L.F. 29). David did not receive that disposition, but the court did sentence David to the maximum sentence on each count, and did order one sentence to run consecutively (L.F. 29). Therefore, David did show how plea counsel's political agenda adversely affected his representation of David.

Secondly, David showed how plea counsel's desire to have marijuana legalized in Missouri caused him to publicize David's case. David pointed out that, because of counsel's desire for publicity, he filed the suppression motion and notice in both the associate and circuit divisions, and had the preliminary hearing held. Both of these events should have been open to the public, including reporters. Counsel had both hearings, even though that caused the prosecutor to withdraw any offers. Therefore, the motion court clearly erred in deciding David did not show how plea counsel's political agenda adversely affected his representation of David.

The motion court also clearly erred in denying relief by deciding it was "illogical and impossible" that plea counsel wanted David to receive a harsh

sentencing disposition because he asked the court to suspend the imposition of sentences. Counsel did ask the court to do that and place David on probation (L.F. 28). But that happened after David could no longer plead guilty to an agreement. David lost that chance because plea counsel did not advise him that filing the suppression motion and hearing notice would cause the state to withdraw its offers. *See* Point III. Holding a public preliminary/suppression hearing and another suppression hearing would have provided the publicity plea counsel wanted. The harsh sentencing disposition merely provided extra publicity.

Because plea counsel already received publicity from the public preliminary and suppression hearings, he could ask the court to suspend the imposition of sentences. He could also ask for a lenient disposition because he realized that – where the defense was asking for suspended imposition of sentences with probation, and the state was asking for the maximum sentences running consecutively – the court was not likely to suspend imposition of sentences. Therefore, the motion court clearly erred in deciding it was "illogical and impossible" that plea counsel wanted David to receive a harsh sentencing disposition because he asked the court to suspend the imposition of sentences.

The motion court also clearly erred in denying relief by deciding that the prosecutor's remarks about plea counsel were "simply his point of view." The prosecutor's remarks were his assessment of counsel's performance. As opposing counsel, he was in a unique position to do that. And the prosecutor's assessment was correct. The prosecutor's remarks could be both his point of view and a

correct assessment of plea counsel's performance. Therefore, the motion court clearly erred in denying relief by deciding the prosecutor's remarks about plea counsel were "simply his point of view."

The motion court clearly erred in denying relief by deciding David had not cited instances where plea counsel before sentencing "sought to draw attention" to David's possibly receiving a harsh sentence. David argued counsel had used the charges against him, not the sentencing disposition, to publicize marijuana legalization (L.F. 67). To gain publicity for David's case, and thus his cause, plea counsel scheduled the suppression and preliminary hearings (L.F. 71). Therefore, in the amended motion, David did cite instances where plea counsel sought to draw attention to marijuana legalization before David was sentenced.

When David later received lengthy and consecutive sentences, counsel did also use that to publicize marijuana legalization. After sentencing, counsel held the town-hall-style meeting and spoke to the Huffington Post reporter (L.F. 71-72). But that was merely icing on the cake. Plea counsel's cause had already been publicized before sentencing. Thus, the motion court clearly erred in denying relief by deciding David had not cited instances where plea counsel before sentencing "sought to draw attention" to David's possibly receiving a harsh sentence.

Finally, the motion court clearly erred in denying relief because – if plea counsel is successful in decriminalizing marijuana – "such a result might benefit

Movant in some way." Firstly, the motion court clearly erred in speculating about what benefit David might receive.

Secondly, even if marijuana is decriminalized in Missouri, that does not mean David would be benefited. Because the state charged him with committing offenses on August 25, 2011, even if marijuana cultivation and possession would be subsequently legalized, the punishment for those offenses would remain the same (L.F. 14-15). Mo. Rev. Stat. § 1.160 (Cum. Supp. 2010). Thus, the motion court clearly erred in denying relief on the basis that marijuana decriminalization might benefit David in some way.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because David was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David because plea counsel used the charges against David to "speak about marijuana legalization" and use David as a "martyr" to legalize marijuana in Missouri. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

VI.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his right to due process of law[20] in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum sentences consecutively for the offenses to which David had pleaded guilty.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by the prosecutor's vindictiveness toward plea counsel. Because of it, the prosecutor's sole purpose in asking for the harshest sentencing disposition was to penalize David for exercising his right to hire counsel of his choice. There was a reasonable probability that – had the state not asked for the maximum sentences running consecutively – the court would not have sentenced David to the maximum and ordered two sentences to run consecutively.

David argued in his amended motion he was denied due process of law in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum punishment consecutively on

[20] *See* n.12.

the offenses to which David had pleaded guilty (L.F. 85-92). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d at 152.

The review standard and general case law set forth in Point I apply equally to this point and are adopted and incorporated herein.

The prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum punishment consecutively after David pleaded guilty (L.F. 78). The accused in all criminal prosecutions enjoys the right to assistance of counsel. U.S. Const., Amend. VI; Mo. Const., Art. I, § 18(a). The Sixth Amendment presumes in favor of counsel of the accused's choice. Wheat v. United States, 486 U.S. at 154, 108 S. Ct. at 1694.

A defendant's due process right is violated if he is punished for doing what the law allows him to do. United States v. Goodwin, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488 (1982). Vindictiveness is presumed when there is a reasonable likelihood of vindictiveness (L.F. 79). A reasonable likelihood of vindictiveness exists because of 1) the prosecutor's stake in deterring the exercise of the right being asserted; and 2) the prosecutor's actual conduct. State v. Potts, 181 S.W.3d 228, 233 (Mo. App. S.D. 2005). Vindictiveness can also be established if a defendant can prove, through objective evidence, that the sole purpose of the state's action was to penalize him for exercising some right. Harden v. State, 415 S.W.3d 713, 718 (Mo. App. S.D. 2013).

Here, prosecutorial vindictiveness may be presumed (L.F. 79). The prosecutor had a stake in deterring David from being represented by counsel of his choice (L.F. 79). He did not want David to be represented by plea counsel because of his dislike for plea counsel (L.F. 79). He disliked plea counsel because of counsel's efforts to legalize marijuana (L.F. 79). The prosecutor's dislike was manifested in his interview in which he blamed plea counsel for the sentencing disposition David received (L.F. 79). Because of that dislike, the prosecutor asked the court to impose the harshest sentencing disposition possible – maximum sentences running consecutively – to penalize David (L.F. 79). Therefore, the prosecutor's disliking plea counsel caused him to deter David's Sixth Amendment right to counsel of his choice (L.F. 79). Thus, vindictiveness may be presumed (L.F. 79).

The prosecutor's vindictiveness may be presumed because his actual conduct demonstrated his vindictiveness because of David's choice of counsel (L.F. 79). David can also establish through objective evidence that the sole purpose of the state's recommending he receive the maximum sentences running consecutively was to penalize him for hiring counsel of his choice (L.F. 79-80).

Firstly, this Court must consider what the prosecutor said after David had been sentenced (L.F. 80). The prosecutor told a reporter, "I made Viets an offer where they would have served 120 days in jail, and then gotten out on three years of probation, probably, and he refused. . . . He just wanted a platform to speak about marijuana legalization and to use these people as martyrs." *Growing Pot*

Got These Siblings as Much Time as Driving Drunk and Killing Someone, The Huffington Post (April 15, 2014)(material in brackets added). The prosecutor also told the reporter that David should have accepted his "early offers of clemency." Id. The prosecutor also told a local reporter that because of the amount of marijuana David and Natalie were "moving," they were "affecting a lot of people across the county, so they got what they deserved." *The Prosecutor Discusses the State's Position,* The Farmington Daily Journal (November 14, 2013). The prosecutor also said that plea counsel had "turned down all plea offers." Id.

The prosecutor's remarks showed that he blamed plea counsel for David's not accepting any offer (L.F. 80). The remarks also proved the prosecutor felt plea counsel had represented David, not to ensure his Sixth Amendment right to counsel of his choice, but to use David's case as a platform to pursue his personal political agenda (L.F. 80). Therefore, the prosecutor's actual conduct demonstrated his vindictiveness (L.F. 80).

Secondly, the prosecutor's statements in his March 26, 2012 and May 18, 2013 communications to counsel also established a presumption of vindictiveness because the two communications cannot be reconciled (L.F. 80). On March 26, 2012, the prosecutor advised plea counsel that – because the defense had filed a Motion to Suppress Evidence with a notice for hearing – "the current offer has been revoked and no further offer will be conveyed" (L.F. 127). In the May 18, 2013 fax transmission, the prosecutor told plea counsel that he had been willing to recommend after David's preliminary hearing that David be sentenced to fifteen

(15) years' imprisonment with the possibility of probation under §559.115 (Cum. Supp. 2010) (L.F. 128).

But the prosecutor could not have been willing to recommend anything after David's preliminary hearing (L.F. 81). David's preliminary hearing was held on May 7, 2012 (L.F. 4). That happened after the prosecutor's March 26, 2012 letter in which he advised plea counsel no further offers would be made (L.F. 81). There was either an offer available to David after the preliminary hearing or there was not; both cannot be true (L.F. 81). Therefore, the prosecutor's actual conduct demonstrated his vindictiveness (L.F. 81).

Thirdly, the prosecutor's dislike of plea counsel was evidenced by the state's asking the court to sentence David to the harshest sentencing disposition possible (L.F. 81). The state not only asked for the maximum sentence length, but also that the court order those sentences to run consecutively (L.F. 29). The state told the court it was asking for that sentencing disposition even though the Probation & Parole Office had classified David as having a good chance to succeed on probation (L.F. 27). The state also asked for that disposition even though – while on bond – David had been regularly tested for drug use and had always tested negative (L.F. 28). The state also asked for the harshest sentencing disposition even though David had only one prior offense; a misdemeanor-level marijuana offense (L.F. 27). The state also made its recommendation after the defense had presented the court at sentencing letters about David's fine character and one letter with a job offer (L.F. 28). Finally, the state's characterized the

plants found in David's home as a "large scale" operation (L.F. 27). But the police had only found a "couple" pounds of marijuana, twelve (12) mature marijuana plants, and eight "baby sprout" plants (L.F. 27).

The above instances of the prosecutor's conduct demonstrated that his dislike of plea counsel caused him to deter David's Sixth Amendment right to counsel of his choice (L.F. 82). Therefore, David established a presumption the prosecutor acted vindictively in recommending the harshest sentencing disposition possible (L.F. 82). Thus, David also established the prosecutor's vindictiveness through objective evidence (L.F. 82).

David was prejudiced by the prosecutor's vindictiveness (L.F. 82). Because of that vindictiveness, the prosecutor asked for the harshest sentencing disposition to penalize David for exercising his right to counsel of his choice (L.F. 82). There was a reasonable probability that – had the state not asked for the maximum sentences running consecutively – the court would not have sentenced David to the maximum on each count and run two sentences consecutively (L.F. 82). Thus, David was prejudiced by the vindictiveness (L.F. 82).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 162-63, 166). The court denied relief by deciding 1) there was no evidence in the record that David's sentencing disposition was based upon a

"vendetta" the prosecutor had towards plea counsel[21]; 2) assuming the prosecutor did have a vendetta towards plea counsel, he did not act vindictively against David because his sentencing recommendation was caused by David's having refused the state's offers (L.F. 162-63).

The motion court clearly erred in deciding there was no evidence in the record that the prosecutor's sentencing recommendation was based on a vendetta towards plea counsel. Firstly, the prosecutor's recommendation was not in line with the drug evidence the police found. In David's home, police only found a "couple" pounds of marijuana, twelve (12) mature marijuana plants, and eight "baby sprout" plants in David's residence (L.F. 27). But the state recommended David receive the maximum length of sentence on each charge to run consecutively (L.F. 27, 29).

Secondly, the prosecutor's remarks about plea counsel ***after*** David's sentencing were evidence of his animus towards counsel ***before*** sentencing: "I made Viets an offer where they would have served 120 days in jail, and then gotten out on three years of probation, probably, and he refused. . . . He just wanted a platform to speak about marijuana legalization and to use these people as

[21] David did not use the word "vendetta" in either his *pro se* or amended motion (L.F. 34-42, 51-158).

martyrs";[22] because of the amount of marijuana David and Natalie were "moving," they were "affecting a lot of people across the county, so they got what they deserved";[23] and the prosecutor said that plea counsel – not David – had "turned down all plea offers."[24] Id. Therefore, there was evidence in the record that David's sentencing disposition was based upon a "vendetta" the prosecutor had towards plea counsel.

The motion court also clearly erred in deciding the prosecutor did not act vindictively against David because his sentencing recommendation was caused by David's having refused the state's offers. But, according to the record, the prosecutor recommended what he did because David's marijuana plants were a "large scale" operation, not because David had refused the prosecutor's offers (L.F. 27). And, when the prosecutor advised plea counsel that – because David had refused the prosecutor's previous offers – the state would no longer make any, the prosecutor did not advise counsel that David's refusing the state's offers would cause the prosecutor to ask for the maximum possible sentencing disposition. Therefore, David established that it was not his refusing the state's offers that

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[22] *Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone*, The Huffington Post (April 15, 2014)(material in brackets added).

[23] *The Prosecutor Discusses the State's Position,* The Farmington Daily Journal (November 14, 2013).

[24] Id.

caused the prosecutor to recommend the maximum possible sentencing disposition. Thus, the motion court clearly erred in denying relief.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because David was denied due process of law in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum terms of imprisonment consecutively. David's rights under the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, §10 were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision

VII.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[25] in that plea counsel failed to advocate that David receive a more favorable sentencing disposition. Counsel failed to introduce into evidence at the sentencing hearing data compiled by the St. Francois County Circuit Clerk's Office showing that most defendants pleading guilty to an offense under §195.211 (Cum. Supp. 2010) in St. Francois County since 2000 received a less harsh disposition than David did.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because – had counsel used the Circuit Court's data to advocate for a less harsh sentencing disposition than the state's – there is a reasonable probability the court would have ordered the less-harsh disposition.

For St. Francois County defendants convicted of producing a controlled substance since 2000, the average disposition was ten (10) years' incarceration

[25] *See* n.7.

(L.F. 93, 95). And most of those defendants had been placed in a treatment program under §559.115 (Cum. Supp. 2010) (L.F. 95). *See* Appendix. Counsel did not show the court the data that the Circuit Clerk's Office could have provided on the sentencing dispositions for those defendants who had pleaded guilty or been convicted under Mo. Rev. Stat. §195.211 in St. Francois County since 2000 (L.F. 95).

David argued in his amended motion he had been denied effective assistance and due process of law in that plea counsel failed to advocate he receive a more favorable sentencing disposition (L.F. 92-100). Because the claim was included in the amended motion, it has been preserved for appellate review. *See* Mouse v. State, 90 S.W.3d at 152.

The review standard and general case law set forth in Point I apply equally to this point and are adopted and incorporated herein.

Counsel was ineffective for failing to advocate David receive a more favorable sentencing disposition by introducing into evidence data showing how defendants in St. Francois County have been sentenced after being convicted of an offense under §195.211 (Cum. Supp. 2010). Griffin v. State, 937 S.W.2d 400, 401 (Mo. App. E.D. 1997). Firstly, counsel failed to present evidence to explain at sentencing why he was asking the court to sentence David to an SIS (L.F. 28, 95). Had counsel used the date, he could have shown the court that at least twelve (12) other defendants have been given an SIS and placed on probation after having

been convicted of an offense under §195.211 (Cum. Supp. 2010) since 2000 (L.F. 129-157).

Counsel could also have used the Circuit Clerk's information to demonstrate to the court why David should not have been sentenced to a total twenty-two (22) years' incarceration (L.F. 95). For people convicted of an offense under §195.211 (Cum. Supp. 2010), the average disposition was ten (10) years' incarceration (L.F. 93, 95). And most of those defendants had been placed in a treatment program under §559.115 (Cum. Supp. 2010) (L.F. 95). Ten (10) years' incarceration with the court retaining jurisdiction under §559.115 (Cum. Supp. 2010) was also the prosecutor's first offer to David (L.F. 128).

Counsel could also have demonstrated David should not have been sentenced to twenty-two (22) years' incarceration because – since 2000 – only six defendants have received the same amount of, or more, incarceration (L.F. 93, 94, 95). Of those defendants, four had been placed on probation (L.F. 95-96). Only two defendants were not (L.F. 96). Of those, one was sentenced to two, consecutive fifteen (15) year sentences after a jury trial (L.F. 93, 96). And the other defendant received four, six-year sentences totaling twenty-four (24) years' incarceration after pleading guilty (L.F. 93, 96).

But that defendant cannot be compared to David (L.F. 96). Firstly, that defendant pleaded guilty to the same felonies as David had in Counts I and II, plus two more – second-degree trafficking and possessing a chemical used to make a controlled substance (L.F. 96). Secondly, that defendant had originally had ten

(10) charges (L.F. 96). Six were dismissed because the defendant pleaded guilty (L.F. 96). Thirdly, the defendant had more previous convictions than David (L.F. 96). Before pleading guilty to manufacturing a controlled substance, felony possessing a controlled substance, second-degree trafficking, and possessing a chemical used to make a controlled substance, the defendant had been convicted of non-support, two counts of driving while revoked, and ten counts of passing a bad check (L.F. 96). http: //case.net.com. David, on the other hand, had been disciplined in the Army for a marijuana offense equivalent to a misdemeanor (L.F. 25). Therefore, David should not have been sentenced as harshly as the defendants who had received twenty-two (22) or more years' incarceration in St. Francois County (L.F. 96). Thus, counsel was ineffective in not advocating for a less harsh sentencing disposition by using the Circuit Clerk's Office data (L.F. 96).

David was prejudiced by counsel's ineffectiveness (L.F. 96). Had counsel used the data to advocate for a less harsh sentencing disposition, there is a reasonable probability the court would have ordered it (L.F. 96-97). Thus, David was prejudiced by counsel's ineffectiveness (L.F. 97).

The motion court's ruling

The motion court denied David post-conviction relief and an evidentiary hearing (L.F. 163-64, 166). The motion court denied relief because it 1) declined to "impose proportionality review"; and 2) was not "persuaded this point state[d] a claim for relief under Rule 24.035" (L.F. 163)(material in brackets added).

The motion court declined to impose proportionality review because "no two defendants are alike" (L.F. 163). But the motion court did not consider Missouri law, which directs courts – when deciding a disposition – to have "regard to the nature and circumstances of the offense." Mo. Rev. Stat. §557.036.1 (Cum. Supp. 2010). The statute allows the court to consider how the same offense committed by other defendants has been dealt with. The court would not have been required to sentence David as other defendants, but the statute did allow plea counsel to introduce such evidence. Therefore, because the motion court did not consider §557.036 (Cum. Supp. 2010), it clearly erred in deciding counsel had not been ineffective in not using evidence of how other St. Francois County defendants had been sentenced under §195.211 (Cum. Supp. 2010).

The motion court also clearly erred in deciding this point did not state a claim for relief under Rule 24.035. The court was concerned that – if counsel could be held ineffective for not presenting sentencing data – a court could be deemed to have erred if it sentenced defendants within statutory punishment ranges, but outside "certain other non-statutory guidelines"; presumably, sentencing data (L.F. 163).

The court clearly erred in deciding it would have to hold that a court had erred in sentencing a defendant if counsel had been ineffective in not presenting sentencing data. It is always the court's choice whether to accept the data or not. Under §557.036 (Cum. Supp. 2010), an offense's "nature and circumstances" is but one factor for the court to consider. What David argued in the amended

motion was that – in his particular circumstance – if the court had realized the prosecutor was recommending David serve approximately twelve (12) more years' imprisonment than the average defendant convicted under §195.211 (Cum. Supp. 2010), there was a reasonable probability the court would have sentenced David less according to the state's recommendation and more in tune with the average disposition for defendants convicted under §195.211 (Cum. Supp. 2010). Thus, the motion court clearly erred in denying relief.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because plea counsel failed to advocate David receive a more favorable sentencing disposition by introducing into evidence at sentencing data compiled by the St. Francois County Circuit Clerk's Office showing that the average person pleading guilty to an offense under §195.211 (Cum. Supp. 2010) in St. Francois County since 2000 received a less harsh sentencing disposition than David. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I-VII, Appellant David G. DePreist requests this Honorable Court affirm the Missouri Court of Appeals' decision in David G. DePriest v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 17th day of March, 2016, a copy of this Substitute Brief was served via the Court's electronic filing system to Assistant Attorney General Shaun Mackelprang, Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102 at shaun.mackelprang@ago.mo.gov.

/s/ Lisa M. Stroup
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CERTIFICATE OF COMPLIANCE

Under Mo. Sup. Ct. Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of 31,000 words for a Substitute Brief in this Court. The word-processing software identified that this brief contains 23,242 words and 2,005 lines. It is in text-searchable PDF form.

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