No. SC95483

IN THE

Supreme Court of Missouri

DAVID G. DEPRIEST,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. DePriest appeals the denial of his Rule 24.035 motion, in which he alleged that his plea counsel was ineffective in several respects, including: (1) that plea counsel had a conflict of interest arising from his simultaneous representation of his sister who was charged with the same crimes; (2) that counsel had a conflict of interest arising from his using "the charges against Mr. DePriest to 'speak about marijuana legalization' and using "Mr. DePriest as a 'martyr' to legalize marijuana in Missouri"; (3) that counsel failed "to advise [him] that—if a preliminary hearing was held or the defense filed a notice to have any suppression motions heard—the state's initial offer would be withdrawn"; (4) that counsel failed "to advocate that [he] receive a more favorable sentencing disposition"; (5) that counsel failed "to object to the court's hearing Mr. DePriest's guilty pleas at the same time as six other defendants"; and (6) that counsel failed "to object to Mr. DePriest's court proceedings being closed to the public" (Supp.L.F. 4, 17, 35, 42, 50, 55).[1]

Mr. DePriest also alleged in his amended motion that his guilty pleas were involuntary, unknowing, and unintelligent "because he was denied due

[1] Respondent will cited to the "Supplemental Legal File" filed in the Court of Appeals as "Supp.L.F." Respondent will cite to the "First Supplemental Legal File" filed in this Court as "1st Supp.L.F."

process of law" when "the prosecutor penalized [him] for exercising his right to counsel of his choice by asking the court to impose the maximum punishment consecutively" (Supp.L.F. 25). The motion court denied these various claims without an evidentiary hearing (*see* L.F. 159-166).

* * *

On August 26, 2011, Mr. DePriest's criminal case commenced with the filing of a complaint (L.F. 1). On March 12, 2012, Mr. DePriest filed a motion to suppress (L.F. 3). On May 7, 2012, Mr. DePriest and his sister (Ms. Natalie DePriest) appeared for preliminary hearings and hearings on their motions to suppress (2nd Supp.Tr. 2; *see also* 1st Supp.L.F. 2).[2]

At that time, the State announced that it had extended a plea offer to both defendants, "which would have entailed pleading to two counts" (2nd Supp.Tr. 2-3; *see* 1st Supp.L.F. 3)). The prosecutor stated that the plea offers had been rejected (2nd Supp.Tr. 3; *see* 1st Supp.L.F. 3). Defense counsel stated, "I don't know that we explicitly rejected them, but I understand it's been withdrawn" (2nd Supp.Tr. 3; *see* 1st Supp.L.F. 3). After receiving evidence, the court denied the motion to suppress and found probable cause to believe that

[2] Mr. DePriest's sister had been charged with the same crimes in a separate case, and these preliminary proceedings in the two cases were taken up at the same time by agreement of the parties (2nd Supp.Tr. 2).

Mr. DePriest had committed a felony (*see* L.F. 4; *see also* 2nd Supp.Tr. 4-62).

On July 31, 2012, the State filed an information charging Mr. DePriest with the class B felony of producing a controlled substance, § 195.211, RSMo Supp. 2014, the class B felony of possession of a controlled substance with intent to distribute, § 195.211, RSMo Supp. 2014, and the class C felony of unlawful possession of a weapon, § 571.020, RSMo Cum. Supp. 2010 (L.F. 14-15). Almost a year later, on June 28, 2013, the court held another suppression hearing on the motions to suppress (L.F. 9; *see* 3rd Supp.Tr. 4-72). The court did not immediately (or thereafter) rule on the renewed suppression motion (*see* 1st Supp.Tr. 20-21).

On August 16, 2013, Mr. DePriest pleaded guilty to all of the charged offenses (L.F. 10-11, 19).[3] At the guilty plea hearing, six other defendants also pleaded guilty, including Mr. DePriest's sister, who was charged with the same offenses, and who pleaded guilty pursuant to a plea agreement (1st

[3] With regard to the guilty plea hearing, Mr. DePriest makes several factual assertions in his Statement of Facts and cites to the opinion of the Court of Appeals (*see* App.Sub.Br. 14-15, 17). But after transfer, that opinion has no precedential value; thus, except as demonstrated by other competent evidence in the record, the purported facts and inferences drawn from that opinion should be disregarded.

Supp.Tr. 3-7, 48-50). Mr. DePriest and his sister were represented in their respective cases by the same attorney, Mr. Dan Viets (1st Supp.Tr. 6-7, 11).

After identifying each defendant and each attorney in the various cases, the court advised the defendants that it needed to ask them "a number of questions in order to determine that your pleas of guilty are knowingly, intelligently, and voluntarily given, to be sure that you fully understand the rights that you'll be giving up by waiving your right to a jury trial, and to be sure that you fully understand the consequences of entering your pleas of guilty" (1st Supp.Tr. 7-8). The court explained that it was addressing them all together "to save a great deal of time" (1st Supp.Tr. 8). The court then explained that before it could accept a guilty plea, it needed "to advise the defendant of their legal rights and ask a number of questions" (1st Supp.Tr. 8). The court then explained that it would question the group beginning with one of the defendants and "then move straight on down the line in order" (1st Supp.Tr. 8).

The court explained that there would "be times when [it] need[ed] to talk to you in more detail about your particular case," and the court stated that it would "make it very clear to you at that time" when it needed to do that (1st Supp.Tr. 8). The court then stated, "If at any time there is something you do not understand, you're confused about something, I want you to be sure and stop me, get your attorney's attention, do whatever is necessary,

and we will be sure and stop and take the time and go over and explain anything to you that you have got questions about" (1st Supp.Tr. 8).

The court then asked if any of the attorneys had "any objection to the Court taking up [their] client's pleas of guilty in [that] manner" (1st Supp.Tr. 9). The attorneys advised the court that they did not (1st Supp.Tr. 9). The court then asked the defendants if they had any objections or "any questions about it at all," and each defendant said that he or she did not (1st Supp.Tr. 9). Mr. DePriest stated, "No, sir" (1st Supp.Tr. 9).

The court then questioned the defendants to ensure that their guilty pleas were knowing, intelligent, and voluntary, inquiring at times of the individual defendants about specific facts or circumstances (see 1st Supp.Tr. 10-64). For his part, Mr. DePriest assured the court that he fully understood the charges, that he had discussed his case with counsel "[m]any" times or "[t]en or more" times, that he had met with counsel for "[m]ultiple hours"—"Four or five, maybe more," and that counsel had investigated the case to his satisfaction (1st Supp.Tr. 10, 15-18).

When the court inquired about any confessions or statements made by the defendants, Mr. DePriest stated that he had not made any such statements (1st Supp.Tr. 20). The prosecutor stated that he thought that he had (1st Supp.Tr. 20). Defense counsel stated, "Well, Your Honor, that is a matter of dispute. But we understand that we're waiving any objection. We're

waiving a ruling on our Motion to Suppress" (1st Supp.Tr. 20). The court stated that the motion to suppress had been taken under advisement, and it observed that it had not yet ruled on the motion (1st Supp.Tr. 20). The court then addressed Mr. DePriest, explained that the motion to suppress had not been ruled on, and asked if he still wanted to plead guilty (1st Supp.Tr. 21). Mr. DePriest stated that he still wanted to plead guilty (1st Supp.Tr. 21). Mr. DePriest also assured the court that he had "had sufficient opportunity to discuss the case" with counsel, that he had discussed all available defenses with counsel, and that he did not have any complaints about counsel (1st Supp.Tr. 22).

Each defendant then entered a plea of guilty. When the court got to Mr. DePriest case, the prosecutor stated that Mr. DePriest was pleading guilty to "all the charges that he's charged with" (1st Supp.Tr. 24). Mr. DePriest then entered a formal plea of guilty to "the class B felony of producing a controlled substance, more than five grams of marijuana," "the class B felony of possession of a controlled substance with intent to distribute more than five grams of marijuana," and "the class C felony of unlawful possession of a weapon" (1st Supp.Tr. 24). The court then questioned the defendants about the rights they were giving up by pleading guilty, and Mr. DePriest assured the court that he understood those rights (1st Supp.Tr. 28-31).

The court then advised each defendant about the elements of the

charged offenses. The court addressed Mr. DePriest and advised him of the elements, and Mr. DePriest said that he understood and admitted those elements (1st Supp.Tr. 34-35). With regard to possessing a short barrel rifle, Mr. DePriest noted that it was "like, a half inch too short," but he admitted that he knowingly possessed the short barrel rifle (1st Supp.Tr. 35). The court also advised Mr. DePriest about the range of punishment for each offense, and Mr. DePriest said that he understood (1st Supp.Tr. 40-41). Mr. DePriest assured the court that no "threats or pressure of any kind [had] been exerted against [him] to cause [him] to plead guilty" (1st Supp.Tr. 42).

The court then inquired about plea agreements with the defendants.[4] When the court inquired about Mr. DePriest's case, plea counsel stated that Mr. DePriest was entering an "open plea," with the expectation that his sister would receive the benefit of her plea agreement, which was contingent on

[4] With regard to plea negotiations, Ms. DePriest makes several factual assertions in his Statement of Facts and cites to his amended motion and exhibits that were lodged with the motion court when he filed his amended motion (*see* App.Sub.Br. 17-19, citing L.F. 76, 128-129). There was no evidentiary hearing, however, and those exhibits were never authenticated or admitted into evidence; thus, at most, the exhibits are unproven allegations made in conjunction with the unproven allegations in the amended motion.

both DePriests pleading guilty (1st Supp.Tr. 48). Counsel stated, "So he's relying on the agreement in her case. There is no agreement as to disposition of his case" (1st Supp.Tr. 48). The prosecutor confirmed that there was "no plea bargain" as to the disposition (1st Supp.Tr. 48).

Mr. DePriest's sister pleaded "open to Counts I and II," and the State agreed to dismiss all other counts and cases against her (1st Supp.Tr. 48). The State also agreed that her bond in could be reinstated, so that she could be released from jail (1st Supp.Tr. 48). Plea counsel stated, "That is correct, Your Honor. It is our understanding that no new charge would be filed based on another check" (1st Supp.Tr. 48-49). The State clarified that, while no new charges would be filed, the State was "going to ask for any restitution of any checks that are out there," if Mr. DePriest's sister was granted probation at some point (1st Supp.Tr. 49).

The court asked if the defense wanted a sentencing assessment report (SAR) in the DePriests' cases, and defense counsel said that they did (1st Supp.Tr. 49). Mr. DePriest stated that he understood that he was entering an open plea on all three counts, and he stated that he had no questions about it (1st Supp.Tr. 49-50). Mr. DePriest assured the court that no other promises had been made to him (1st Supp.Tr. 51).

The court then inquired about collateral consequences of the pleas that counsel might have discussed with their clients. Defense counsel stated that

he had discussed possible parole with the DePriests (1st Supp.Tr. 53). He stated, "We have discussed the hope that if the Court chooses to order either defendants to serve time in the Department of Corrections, our hope that the Department of Corrections would parole them at some point in the near future" (1st Supp.Tr. 53). Defense counsel stated that he thought the DePriests understood that "there is no guarantees as to when or whether they will be paroled" (1st Supp.Tr. 53). Mr. DePriest confirmed his understanding of those circumstances (1st Supp.Tr. 53).

Mt. DePriest assured the court that he was pleading guilty because he was, in fact, guilty of the charged offenses (1st Supp.Tr. 54). The court then addressed Mr. DePriest and asked him to tell the court what he had done that led to the charges (1st Supp.Tr. 58). As to Count I, Mr. DePriest said, "I grew marijuana, sir" (1st Supp.Tr. 58). He admitted that cultivated it and had more than five grams of it, and he admitted that he knew it was a controlled substance and illegal (1st Supp.Tr. 58). As to Count II, he stated, "I intended to distribute it, sir" (1st Supp.Tr. 58). He admitted that he intended to distribute it to other people (1st Supp.Tr. 58). As to Count III, he stated, "I ow[n]ed an AR-15 rifle that turned out to be shorter than the legal limit" (1st Supp.Tr. 59). He admitted that he knowingly possessed a short barrel rifle (1st Supp.Tr. 59). The court asked the defendants about their level of education, and Mr. DePriest informed the court that he had an associate's

degree (1st Supp.Tr. 60).

Mr. DePriest assured the court that he was not under the influence of alcohol or drugs (1st Supp.Tr. 60-61). He assured the court that he understood that she could withdraw his plea at that time, but he stated that it was still his desire to plead guilty to the charges (1st Supp.Tr. 62). Defense counsel stated that he knew of no reason the court should not accept the guilty pleas, and Mr. DePriest assured the court that counsel had not told him to answer untruthfully, that no one had told him that there were any "special deals" that had not been mentioned, and that he had answered the court's questions truthfully (1st Supp.Tr. 62-63). The court then asked the DePriests if they understood that an SAR would be ordered "to help [the judge] determine what disposition to make in [their] cases," and Mr. DePriest said that he understood (1st Supp.Tr. 63-64).

The court then accepted the defendants' guilty pleas (1st Supp.Tr. 64-65). The court scheduled a later sentencing date for the DePriests and ordered an SAR (1st Supp.Tr. 65-66). The court then reinstated the bond for Mr. DePriest's sister (1st Supp.Tr. 66).

On November 12, 2013, Mr. DePriest appeared for sentencing (1st Supp.Tr. 68). The court asked if there were any corrections to the SAR, and counsel stated that there were "three points which we believe are factually incorrect" (1st Supp.Tr. 68). Counsel pointed out, and the court agreed, that

there was no "homemade explosive device" in this case (1st Supp.Tr. 69). Counsel also stated that, with regard to prior criminal history, Mr. DePriest was "certain that he has never been convicted of a prior felony offense" (1st Supp.Tr. 69). Counsel stated that the incorrect information about a prior felony conviction had been improperly factored into Mr. DePriest's "risk" score for succeeding on probation (1st Supp.Tr. 70). Counsel averred that the score should have been a four instead of three, and that Mr. DePriest was "well in to the good risk for succeeding on probation" (1st Supp.Tr. 70). Finally, counsel stated that Mr. DePriest "maintains that there were no records found relating to marijuana sales," and that the SAR wrongly stated that there "were ledgers of marijuana sales" (1st Supp.Tr. 71). The court stated that it recalled some testimony from the suppression hearing indicating that an officer found "something that could be construed as appearing to be records" or "a possible list of . . . contacts" (1st Supp.Tr. 72). The court concluded that "that's one of those things . . . that's just out there for the Court to consider" (1st Supp.Tr. 73).

In arguing for the maximum sentence, the prosecutor pointed out that the police "found, seized, and collected multiple plants, leaves, buds, and powders, an altered assault rifle, two semi-automatic pistols, ammunition, ballistic vests, drug paraphernalia, fertilizer, grow lamps, [and] timers" (1st Supp.Tr. 73-74). The prosecutor stated that it was "a large scale hydroponic

grow operation" that was "for his profit" (1st Supp.Tr. 74). The prosecutor asserted that Mr. DePriest had minimized "the seriousness of the offense from the moment of his capture," and that it appeared that "in Mr. DePriest's world, marijuana cultivation, sale, and use should all be legal" (1st Supp.Tr. 74). The prosecutor argued, "the fact of the matter is, this was a large scale, it appears a large scale hydroponic grow operation not for his own use. And so he deserves the maximum punishment" (1st Supp.Tr. 75). He argued that Mr. DePriest wanted "to profit from other people's desire for marijuana," and he argued that Mr. DePriest had vests and guns "to ward off either rivals or law enforcement officers" (1st Supp.Tr. 75). He argued that Mr. DePriest "deserves the maximum punishment on all counts" (1st Supp.Tr. 75).

Defense counsel argued that Mr. DePriest had been "evaluated by the probation officer and found to be a good risk to succeed on probation" (1st Supp.Tr. 76). He asserted that Mr. DePriest had a single prior misdemeanor, and he pointed out that only one of Mr. DePriest's guns was illegal, in that it was "one-quarter of an inch shorter than Missouri state statutes allow" (1st Supp.Tr. 76). Counsel disputed the prosecutor's characterization of the crime and argued, "This was a small scale operation in a closet, in his home, in his apartment. It was not a large scale operation by any measure" (1st Supp.Tr. 76-77). He also pointed out that the police did not find any money (1st Supp.Tr. 77). He further asserted that Mr. DePriest had not minimized his

culpability, and he pointed out that Mr. DePriest had pleaded guilty and acknowledged his guilt (1st Supp.Tr. 77). Defense counsel argued, "The fact is, Your Honor, that—that this man stands accused of non-violent offenses with no identifiable victims" (1st Supp.Tr. 78). He asserted, "The fact is that according to the most recent polls, most Americans think this shouldn't even be a crime. But the laws are what they are" (1st Supp.Tr. 78).

Counsel then provided to the court "letters from people who know Mr. DePriest and his family and who speak very well of him" (1st Supp.Tr. 79). The letters included letters from Richard Deweiss, Pastor Mike Harrison, and Lester Earl (1st Supp.Tr. 79-80). Counsel also presented "a large stack of the results of drug tests done on Mr. DePriest since the Court ordered that drug testing to begin," which showed that he had "never once tested positive for any illegal substance during the entire time that this case has been pending" (1st Supp.Tr. 80).

Counsel reiterated that Mr. DePriest was "a good risk for probation," and he asked the court to suspend imposition of sentence (1st Supp.Tr. 81). Counsel reiterated that Mr. DePriest had only one prior misdemeanor, and he pointed out that the misdemeanor was "about thirteen, fourteen years ago" (1st Supp.Tr. 81). Counsel reiterated that "[t]his offense is a non-violent and essentially a victimless offense" (1st Supp.Tr. 81). Counsel observed that "[i]t involved marijuana only, not methamphetamine, not crack cocaine, not

any of the far more dangerous substances" (1st Supp.Tr. 81).

Counsel argued that, if the court showed mercy, Mr. DePriest "will be placed in a position where he could indeed receive the sentence that the prosecution seems to be urging, the maximum sentence for each of these offenses, and they could run consecutively" (1st Supp.Tr. 81-82). Counsel argued:

> But if you grant him a suspended imposition of sentence, he also retains one last opportunity to avoid the lifelong stigma and disability of having a felony conviction on a public record. One last opportunity to maintain his potential to be a productive and tax-paying member of society. One last opportunity to avoid the lifelong stigma that will haunt him on every occasion when he applies for a job or a loan or for a place to live.

(1st Supp.Tr. 82).

Counsel assured the court that Mr. DePriest would "abide by whatever conditions the Court chooses to impose, including those recommended in the sentencing assessment report" (1st Supp.Tr. 82). Counsel then urged the court to suspend imposition of sentence (1st Supp.Tr. 82).

The court stated that it had considered all of the arguments and evidence, and it stated that "this sounded like a very large operation" (1st Supp.Tr. 82). The court observed that Mr. DePriest had "finally admitted . . .

that he was growing it for the purposes of distributing" (1st Supp.Tr. 82-83). The court then observed that the three sentences for Mr. DePriest's crimes could "be run different ways," and it asked the prosecutor for the State's "exact" recommendation (1st Supp.Tr. 83). The prosecutor stated, "I leave that up to you, Judge, as long as you impose the maximum sentences" (1st Supp.Tr. 83). The prosecutor stated that "because of his prior history . . . I think they should be run consecutively[, b]ut I can understand . . . why the Court may not" (1st Supp.Tr. 83). The court stated, "I am going to sentence in the way that I see that they, I think, should properly fall" (1st Supp.Tr. 83).

The court then sentenced Mr. DePriest to fifteen years' imprisonment for producing a controlled substance, fifteen years' imprisonment for possessing a controlled substance with intent to distribute, and seven years' imprisonment for unlawful possession of a weapon (1st Supp.Tr. 84). The court ordered the fifteen-year sentences to run concurrently (1st Supp.Tr. 84). The court ordered the seven-year sentence to run consecutively, for a total of twenty-two years' imprisonment (1st Supp.Tr. 84).

After imposing sentencing, the court questioned Mr. DePriest about counsel. Mr. DePriest stated that he had had sufficient opportunity to discuss his case with counsel, and that counsel had done everything he asked of him before he pleaded guilty (1st Supp.Tr. 87-88). He stated that counsel had not communicated "any threats or promises to [him] to induce [him] to enter [his]

plea of guilty" (1st Supp.Tr. 88). He stated that he was satisfied with counsel's services (1st Supp.Tr. 88).

On May 14, 2014, Mr. DePriest timely filed a *pro se* motion pursuant to Rule 24.035 (L.F. 31, 34).[5] On May 15, 2014, the motion court appointed counsel to represent Mr. DePriest (L.F. 31). (The transcript of the plea and sentencing had been filed previously on December 20, 2013 (L.F. 12).) On July 7, 2014, the court granted an additional thirty days to file an amended motion (L.F. 31); thus, Mr. DePriest's amended motion was due by August 13, 2014. *See* Rule 29.15(g).

On August 29, 2014, Mr. DePriest filed a motion requesting that the motion court permit the untimely filing of his amended motion under *State v. Sanders*, 807 S.W.2d 493 (Mo. 1993), due to abandonment by post-conviction counsel (L.F. 31, 47).[6] That same day, Mr. DePriest faxed an amended motion to the circuit court (L.F. 31). The amended motion was stamped "Filed" on

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[5] Mr. DePriest alleged in his *pro se* and amended motions that he was delivered to the department of corrections on December 2, 2013 (L.F. 34, 52).

[6] Respondent's review of the record does not reveal any ruling on the motion to permit the untimely filing of the amended motion; however, in his brief, Mr. DePriest asserts that "the motion court accepted the late-filed amended motion as timely" (App.Br. 8).

September 2, 2014 (L.F. 51; Supp.L.F. 1).

In his amended motion, Mr. DePriest alleged that his plea counsel was ineffective in several respects, including: (1) that plea counsel had a conflict of interest arising from his simultaneous representation of his sister who was charged with the same crimes;[7] (2) that counsel had a conflict of interest

[7] With regard to the alleged conflict of interest, Mr. DePriest states in his Statement of Facts that the Court of Appeals decided that counsel had an "actual conflict of interest," that rejecting a ten-year offer was in his sister's best interest but not in Mr. DePriest's best interest, and that Mr. DePriest lost "the opportunity to plead guilty to the state's least-harsh [plea] offer" and was prejudiced (App.Sub.Br. 17-19). But the opinion of the Court of Appeals has no precedential value, and, except as demonstrated by other competent evidence in the record, the facts found by the Court of Appeals should be disregarded. Mr. DePriest also makes factual assertions about plea counsel's estimation of the DePriests' relative culpability, and he cites to exhibits that were lodged with the motion court when he filed his amended motion (*see* App.Sub.Br. 18, citing L.F. 115-116). There was no evidentiary hearing, however, and those exhibits were never authenticated or admitted into evidence; thus, at most, the exhibits are unproven allegations made in conjunction with the amended motion.

arising from his using "the charges against Mr. DePriest to 'speak about marijuana legalization' and using "Mr. DePriest as a 'martyr' to legalize marijuana in Missouri"; (3) that counsel failed "to advise [him] that—if a preliminary hearing was held or the defense filed a notice to have any suppression motions heard—the state's initial offer would be withdrawn"; (4) that counsel failed "to advocate that [he] receive a more favorable sentencing disposition"; (5) that counsel failed "to object to the court's hearing Mr. DePriest's guilty pleas at the same time as six other defendants"; and (6) that counsel failed "to object to Mr. DePriest's court proceedings being closed to the public" (Supp.L.F. 4, 17, 35, 42, 50, 55). Mr. DePriest also alleged that his guilty pleas were involuntary, unknowing, and unintelligent "because he was denied due process of law" when "the prosecutor penalized [him] for exercising his right to counsel of his choice by asking the court to impose the maximum punishment consecutively" (Supp.L.F. 25).

On October 22, 2014, the motion court denied Mr. DePriest's post-conviction motion without holding an evidentiary hearing (L.F. 159-166).

ARGUMENT

I.

The motion court did not clearly err in denying Mr. DePriest's claim that counsel was ineffective for failing "to object to the court's hearing [his] guilty pleas at the same time as six other defendants', including his sister Natalie's."

In his first point, Mr. DePriest asserts that the motion court clearly erred in denying his claim that counsel was ineffective for failing "to object to the court's hearing [his] guilty pleas at the same time as six other defendants', including his sister Natalie's" (App.Sub.Br. 34). He asserts that, if his "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" (App.Sub.Br. 34). He asserts that, "but for plea counsel's ineffectiveness, [he] would not have pleaded guilty, but would have proceeded to trial instead" (App.Sub.Br. 34).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

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

B. Mr. DePriest failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice. *Id*. at 694. Generally, after a guilty plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In denying this claim, the motion court observed that Missouri courts have rejected arguments that group pleas are "*per se* invalid" (L.F. 164, citing *Wright v. State*, 411 S.W.3d 381, 387 (Mo.App. E.D. 2013), and *Roberts v. State*, 276 S.W.3d 833, 836-837 (Mo. 2009)). The court observed that group pleas have been criticized because "one defendant is tempted to simply 'parrot' the answers of the person next to [him]" (L.F. 164). The motion court observed that there was no allegation that "such an event occurred here"

(L.F. 164). The motion court observed that Mr. DePriest stated at the guilty plea hearing that he understood and answered the court's questions truthfully (L.F. 164). The motion court observed that the plea court had "addressed [Mr. DePriest] individually and asked him if he objected to pleading in a group which included his sister" (L.F. 164). The motion court observed that, while appellate courts have disapproved the practice of group pleas in *dicta*, the appellate courts had not "found the practice to be *per se* invalid" (L.F. 164). The motion court observed that another criticism of group pleas has been "the level of confusion the process generates in the mind of the defendant" (L.F. 164). The motion court observed that there was "no claim by [Mr. DePriest] he was confused about anything, and indeed no allegation that he was surprised or confused about any aspect of his guilty plea" (L.F. 164).

The motion court did not clearly err in denying this claim. First, there is no constitutional obligation to object to a group plea. None of the cases cited by Mr. DePriest held that a group plea is not permissible; thus, an objection to a group plea as an impermissible procedure would not have been meritorious. In *Roberts v. State*, this Court noted, "Group pleas are used as a time-saving mechanism in some of Missouri's circuit courts, although the use of group pleas has been criticized repeatedly by the court of appeals." 276 S.W.3d at 836 n. 5 (citing *Castor v. State*, 245 S.W.3d 909, 915 n. 8 (Mo.App. E.D. 2008); *Elverum v. State*, 232 S.W.3d 710, 712 n. 4 (Mo.App. E.D. 2007);

Guynes v. State, 191 S.W.3d 80, 83 n. 2 (Mo.App. E.D. 2006)). Having noted the criticism leveled by the Court of Appeals, however, the Court stated that it was "not persuaded by Movant's arguments suggesting that group plea should be deemed automatically invalid or declared impermissible[.]" *Id*. *See Wright v. State*, 411 S.W.3d at 387 (acknowledging that this Court "rejected the argument that group pleas should be deemed automatically invalid or declared impermissible, but it went on to state that group pleas 'are not preferred practice and should be used sparingly.' ").

Admittedly, the Court observed in *Roberts* that "group pleas are not preferred procedure and should be used sparingly." 276 S.W.3d at 836. The Court then observed that other jurisdictions "also have criticized the use of group pleas but also have not invalidated them." *Id*. Thus, while plea courts should exercise care in saving time with group pleas, a guilty plea entered at such a proceeding is not "*per se* invalid," and it should not give rise to any presumption that counsel is "presumptively ineffective" for failing to object, as urged by Mr. DePriest (App.Sub.Br. 36, citing *Wright v. State*, 411 S.W.3d 381, 388 (Mo.App. E.D. 2013) (Richter, J., concurring)). Rather, the relevant questions should be—as set forth in *Stickland* and *Hill*—whether counsel's performance fell below an objective standard of reasonableness, and whether the defendant would not have pleaded guilty, but for counsel's alleged error.

Here, Mr. DePriest failed to allege facts showing that plea counsel's

performance fell below an objective standard of reasonableness. There was no allegation in the amended motion that plea counsel or Mr. DePriest was unaware before the guilty plea hearing that his guilty plea would be taken as part of a group plea where his sister also pleaded guilty (Supp.L.F. 50-55).

There was no allegation that plea counsel failed to explain the group plea procedure to Mr. DePriest before the hearing, or that Mr. DePriest lacked the mental or intellectual capacity to understand the proceedings. To the contrary, it is apparent from the record that Mr. DePriest understood the proceedings, and the record showed that Mr. DePriest had earned an associate's degree (*see* 1st Supp.Tr. 10-64). There was no allegation that Mr. DePriest either could not, or did not, understand the proceedings.

Moreover, before proceeding with the guilty plea, the court paused and explained the group plea procedure to the defendants (1st Supp.Tr. 7-8). The court explained to the defendants that it was addressing them all together "to save a great deal of time" (1st Supp.Tr. 8). The court explained that before it could accept a guilty plea, it needed "to advise the defendant of their legal rights and ask a number of questions" (1st Supp.Tr. 8). The court explained that it would question the group beginning with one of the defendants and "then move straight on down the line in order" (1st Supp.Tr. 8).

The court also explained that there would "be times when [it] need[ed] to talk to you in more detail about your particular case," and the court stated

that it would "make it very clear to you at that time" when it needed to do that (1st Supp.Tr. 8). The court then stated, "If at any time there is something you do not understand, you're confused about something, I want you to be sure and stop me, get your attorney's attention, do whatever is necessary, and we will be sure and stop and take the time and go over and explain anything to you that you have got questions about" (1st Supp.Tr. 8).

The court then asked if any of the attorneys had "any objection to the Court taking up [their] client's pleas of guilty in [that] manner" (1st Supp.Tr. 9). The attorneys advised the court that they did not (1st Supp.Tr. 9). The court then asked the defendants if they had any objections or "any questions about it at all," and each defendant said that he or she did not (1st Supp.Tr. 9). Mr. DePriest stated, "No, sir" (1st Supp.Tr. 9).[8]

[8] Mr. DePriest asserts that he "responded as he did because counsel had not objected" (App.Sub.Br 40). But this factual assertion suggesting that Mr. DePriest was not truthful or completely forthcoming was not included in Mr. DePriest's amended motion, so it should not be considered. "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal." *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014). In any event, Mr. DePriest assured the court at the plea hearing that all of his responses were truthful (*see* 1st Supp.Tr. 62-63).

In light of the precautions taken by the court, plea counsel had no reason to believe that Mr. DePriest did not understand the proceedings, or that Mr. DePriest did not want to proceed in a group setting. To the contrary, in addition to any discussions that counsel had with Mr. DePriest in counseling with him about whether to plead guilty, the record shows that Mr. DePriest affirmatively stated that he had no objection to the group procedure. Thus, it was reasonable for counsel to proceed with the group plea without objection. *See generally Strickland v. Washington*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

In short, absent some reason for counsel to believe, for instance, that Mr. DePriest was unaware of, would be confused by, or was mentally incapable of understanding, a group guilty plea, it was not objectively unreasonable for plea counsel to refrain from objecting to the group plea procedure. There is no *per se* rule against group guilty pleas, and, in cases where the defendant has been fully informed about the group plea procedure (*i.e.*, where the defendant's rights have been safeguarded), there may even be strategic reasons to proceed with a group plea that will save the parties and the judge time (*e.g.*, to incline a judge toward acceptance of the plea agreement and favorable treatment of the defendant). *See generally Strickland v. Washington*, 466 U.S. at 695 (observing that "the idiosyncrasies

of the particular decisionmaker, such as unusual propensities toward harshness or leniency" can "enter[] into counsel's selection of strategies").

Mr. DePriest alleged, and he argues on appeal, that "[h]e was under pressure to plead guilty because the prosecutor was offering a joint plea offer to Mr. and Ms. DePriest" (Supp.L.F. 52; *see* App.Sub.Br. 37). He alleged that he "was under pressure to plead guilty because of his affection for his sister" (Supp.L.F. 53). He asserted that "[h]e pleaded guilty so his sister could enjoy the state's benefits from her pleading guilty, including having her bond reinstated until sentencing" (Supp.L.F. 53). He did not allege, however, that the pressure was caused by the group plea hearing or that he was reluctant to say anything because his sister was there, and he did not allege that he communicated any concern about the group plea procedure to counsel—either before or during the plea. Thus, it cannot be said that counsel was ineffective for failing to object based on undisclosed feelings.

Moreover, while Mr. DePriest might have been feeling pressure to plead guilty to help his sister in her criminal cases, the pressure was not caused by the group plea procedure. The circumstances giving rise to the joint plea agreement would have existed whether Mr. DePriest pleaded guilty at a group plea hearing or in successive plea hearings. His desire to help his sister existed under any circumstances, and it cannot be said that any "pressure" arising from a personal desire to assist his sister was due to the group plea

procedure employed by the court. By the time Mr. DePriest showed up at the group plea hearing, he had already decided during plea negotiations to accept the joint plea agreement in an effort to help his sister obtain more favorable dispositions in her criminal cases.

Additionally, the record refuted Mr. DePriest's claim that he was pressured by the group setting to plead guilty. At the outset of the hearing, Mr. DePriest assured the court that he had no objection to proceeding with a group plea hearing (1st Supp.Tr. 7-9). Mr. DePreist was questioned at length about his decision to plead guilty, and there was no allegation in the amended motion that he merely parroting responses he did not intend, or that he was confused by the questioning (L.F. 50-55). And, contrary to his post-conviction claim, Mr. DePriest assured the court that there were not "any threats *or pressure of any kind* . . . exerted against [him] to cause [him] to plead guilty here today" (1st Supp.Tr. 42) (emphasis added).

Lastly, citing to the opinion of the Court of Appeals, Mr. DePriest asserts that "[b]ecause 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 [Mr. DePriest] was more culpable than [his sister]" (App.Sub.Br. 40-41). He asserts further that the plea court did not "protect the institutional interest in administering justice" (App.Sub.Br. 41).

But this new claim—that the plea court committed error by failing to inquire about a conflict of interest—was not asserted in Mr. DePriest's amended motion (Supp.L.F. 50-55), and, accordingly, it cannot be asserted now on appeal. Under Rule 24.035, any claim not included in the amended motion is waived and cannot be raised on appeal. *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. 2010); *see McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) ("In actions under Rule 29.15, 'any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal.' "). "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal." *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014).

In sum, there was no meritorious basis for plea counsel to object to the group plea as an impermissible procedure, and Mr. DePriest failed to allege facts showing that counsel was aware of some need to object or that Mr. DePriest's pleas were rendered unintelligent or involuntary by counsel's failure to do so. This point should be denied.

II.

The motion court did not clearly err in denying Mr. DePriest's claims that counsel had a conflict of interest. (Responds to Points II and V of the appellant's brief.)

In his second and fifth points, Mr. DePriest asserts that the motion court clearly erred in denying his claims that counsel was ineffective due to a conflict of interest (App.Sub.Br. 42, 71).

In his second point, he asserts that counsel had a conflict of interest "in that [counsel] also represented [his] co-defendant, his sister, Ms. Natalie DePriest" (App.Sub.Br. 42). In his fifth point, he asserts that counsel had a conflict of interest "because plea counsel used the charges against [Mr. DePriest] to 'speak about marijuana legalization' and use [Mr. DePriest] as a 'martyr' to legalize marijuana in Missouri" (App.Sub.Br. 71). As to both claims, he asserts, "Because of the actual conflict of interest between [him] and counsel, prejudice is presumed" (App.Sub.Br. 42, 71).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression

that a mistake has been made." *Id.*

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

B. Mr. DePriest failed to allege facts warranting relief

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

The mere fact that counsel represented Mr. DePriest and his co-actor sister was not sufficient to show an actual conflict of interests. *See Smith v. State*, 972 S.W.2d 551, 555 (Mo.App. S.D. 1998); *see also State v. Kretzer*, 898 S.W.2d 639, 642-643 (Mo.App. W.D. 1995). "Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). "This principle

recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." *Id*. For instance, " 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.' " *Id*.

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

Generally, as a matter of professional conduct,[9] under Rule 4-1.7,

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

unless a client consents to concurrent representation and other conditions are satisfied, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 4-1.7(a). "A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." *Id.*

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

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* "[A] defendant who shows that a conflict of interest actually affected the adequacy of his

representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-350. "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350. In this context, " 'an actual conflict of interest' " means "a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. at 171.

1. Counsel's representation of co-actors (Point II)

In his second point, Mr. DePriest asserts that counsel had "an actual conflict of interest . . . in that he also represented [Mr. DePriest's] co-defendant, his sister, Ms. Natalie DePriest" (App.Sub.Br. 42). He asserts that "counsel's representing both DePriests caused Mr. DePriest to lose the state's initial [plea] offer" of ten years' imprisonment (App.Sub.Br. 44).

In denying this claim, the motion court observed that Mr. DePriest's allegation that counsel did not advise him that the initial offer would be withdrawn was "not supported by the record" (L.F. 160). The motion court observed that "the prosecutor placed on the record at preliminary hearing with both [Mr. DePriest] and [his sister] present that any previous plea offers were withdrawn, before that hearing began" (L.F. 160). The motion court observed that "[t]he State is under no obligation to offer a plea bargain or to refrain from canceling it in certain circumstances even if the defendant had

previously agreed to it, let alone a case like here where there was no agreed-to plea bargain" (L.F. 160).

The motion court also stated that Mr. DePriest "cannot with any specific allegation demonstrate what he 'lost' by continuing to hang in with [counsel] as his attorney" (L.F. 160). The motion court concluded that "since [Mr. DePriest] was in fact informed of the fact the plea offer was withdrawn as the preliminary hearing proceeded, he cannot claim that right or privilege or opportunity was 'lost' to him because of double dealing by [counsel]" (L.F. 160-161). The motion court observed that, when the offer was withdrawn, Mr. DePriest "did not protest" (L.F. 161). The motion court observed that Mr. DePriest stated in his amended motion that he pleaded guilty "because of his love for his sister and desire to spring her from jail" (L.F. 161). The motion court concluded, "Assuming that is so that is not due to actions on [counsel's] part but rather [Mr. DePriest's] loyalty and love for his sibling" (L.F. 161). The motion court concluded that Mr. DePriest "cannot show what disadvantage he suffered from the dual representation" (L.F. 161). The motion court did not clearly err.

In his amended motion, Mr. DePriest alleged that plea counsel wrote to him and his sister and told them, "Based on our previous discussions, it is my understanding that there is no such actual conflict [of interest] in your cases" (Supp.L.F. 5). The amended motion alleged that plea counsel also wrote,

"However, should such an actual conflict of interest arise between the two of you, I might be forced to withdraw from both your cases" (Supp.L.F. 5). The amended motion alleged that Mr. DePriest signed a "Waiver of Conflict of Interest," and that the waiver form stated that there was a potential conflict of interest due to the joint representation, and 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' " (Supp.L.F. 5).

The amended motion alleged generally that counsel sent the DePriests several "joint letters," and that counsel ultimately advised them about the State's final "joint plea bargain" (Supp.L.F. 5). The amended motion alleged that counsel's letters informed the DePriests that the prosecutor would not object to Mr. DePriest's sister being released on bond if both of the DePriests pleaded guilty (Supp.L.F. 5). The amended motion alleged that counsel's letter stated that the State wanted an assurance that Mr. DePriest's sister would not testify at Mr. DePriest's trial ("trying to take all of the blame and get him off the hook") (Supp.L.F. 5). The amended motion alleged that counsel wrote that the State would dismiss the weapon offense against Mr. DePriest's sister (Supp.L.F. 5).

With regard to other plea negotiations in the case, the amended motion also alleged that, "[i]n another letter, counsel advised Mr. DePriest that his sister had refused the prosecutor's plea offer" (Supp.L.F. 6). The amended

motion did not specify when that particular offer and refusal occurred, but the amended motion stated that the offer rejected by Mr. DePriest's sister would have resulted in the dismissal of "passing-bad-check charges" in another case, and the prosecutor's not objecting "to her bond being reinstated [in this case] between the guilty-plea and sentencing hearings" (Supp.L.F. 6). The amended motion did not specify what charges Mr. DePriest's sister would have been required to plead guilty to under that particular offer (Supp.L.F. 6).

The amended motion then alleged that in one of counsel's "joint letters," plea counsel told Mr. DePriest's sister that Mr. DePriest "would be willing to plead guilty to the charges if the prosecutor recommended a Suspended Imposition of Sentence (SIS) and dismissed the charges against her" (Supp.L.F. 6). The amended motion did not specify when that particular letter was written or when Mr. DePriest expressed his willingness to enter into an agreement along those lines (Supp.L.F. 6).

The amended motion alleged that plea counsel told the prosecutor that he had "met with both DePriests at the same time to discuss the prosecutor's respective plea offers" (Supp.L.F. 6). The amended motion alleged that, in another letter, counsel recommended "that neither defendant seek a change of venue" (Supp.L.F. 6). The amended motion alleged that plea counsel wrote in a letter to Mr. DePriest, "I really do not see how the Prosecutor thinks he

has any case against her for cultivation. Even the charge of possession against [sister] may be rather weak . . .' " (Supp.L.F. 6).

With regard to the "lost" plea offer, the amended motion alleged that plea counsel told Mr. DePriest about the State's initial plea offer of ten years' imprisonment (Supp.L.F. 8). The amended motion alleged that counsel "did not advise Mr. DePriest that the state's offer would be withdrawn if Mr. DePriest exercised his rights to a preliminary hearing or a suppression hearing" (Supp.L.F. 8-9). The amended motion alleged that counsel refrained from giving him that advice "because [counsel] knew those hearings were beneficial to [Mr. DePriest's sister]," in that it was in her "best interests to prepare for trial because her culpability level was less than [Mr. DePriest's]" (Supp.L.F. 9). The amended motion alleged that, "because counsel wished to protect [Mr. DePriest's sister's] interest in proceeding to trial, he did not advise Mr. DePriest that holding a preliminary or suppression hearing would cause the prosecutor's offer to be withdrawn" (Supp.L.F. 9).

The amended motion further alleged that "the state's offer caused an actual conflict of interest because it did not allow Mr. DePriest to plead guilty" (Supp.L.F. 11). The amended motion alleged that Mr. DePriest "could not plead guilty because he knew he could not plead guilty unless his sister pleaded guilty as well" (Supp.L.F. 11). The motion alleged,

Because of her lesser culpability, Mr. DePriest, counsel, and Ms.

> DePriest knew she should not plead guilty. Therefore, Mr. DePriest could not plead guilty because he knew he could not plead guilty without his sister's pleading guilty. But that was against her best interests. Thus, the prosecutor's offer caused a conflict of interest between counsel and Mr. DePriest

(Supp.L.F. 11).

The amended motion also alleged that his sister's bond in this case had been revoked because of an unrelated charge in another case (Supp.L.F. 11-12). The motion alleged that Mr. DePriest's sister "desperately wanted out of jail, and [Mr. DePriest] knew it" (Supp.L.F. 12). The motion alleged that "[k]nowing how desperately his sister wanted out of jail, Mr. DePriest pleaded guilty" (Supp.L.F. 12). The motion alleged that his love for his sister pressured him to plead guilty (Supp.L.F. 12).

While extensive, the allegations in Mr. DePriest's amended motion failed to allege facts warranting relief. First, Mr. DePriest's motion failed to satisfy the pleading requirements of Rule 24.035. In outlining in narrative fashion the various facts related to this claim, Mr. DePriest failed to identify who would testify to the alleged facts, and he failed to identify when some events occurred in relation to other events. Thus, it is not apparent what the DePriests interests were at given times in the case, and Mr. DePriest "did not connect a specific portion of [the] narrative to a particular witness." *Morrow*

v. State, 21 S.W.3d 819, 823 (Mo. 2000). "It is impossible, therefore, to determine whether any of the individual witnesses" listed in the motion would have supported the factual allegations set forth in the motion. *Id*. There was, for instance, no allegation that any witness would testify to fact supporting the allegation that counsel refrained from giving Mr. DePriest information about the State's initial plea offer because counsel knew that would benefit Mr. DePriest's sister (*see* Supp.L.F. 4-16).

In addition, Mr. DePriest failed to allege facts showing that counsel had an actual conflict of interest that affected counsel's performance to Mr. DePriest's detriment. Instead, Mr. DePriest's allegations were predicated on conclusory assumptions about the DePriests' "best interests" in either going to trial or pleading guilty at various points in time. But it appears from a review of the amended motion that those assumptions were based on nothing more than conjecture and a hindsight analysis in light of supposed interests and the eventual outcome in the case (namely, an open plea resulting in a total sentence of twenty-two years for Mr. DePriest). As the Court stated in *Strickland*, however, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

Here, it is possible, for instance, that Mr. DePriest initially told counsel

(after receiving advice about all available options) that he was absolutely intent upon going to trial. It is possible that Mr. DePriest believed that his motion to suppress would be successful and, consequently, that he would not plead guilty for any reason. Accordingly, to ascertain whether counsel was laboring under a conflict of interests, it was necessary to allege facts showing what the parties interests were at a given time, and when those interests might have changed in light of material changes in the case. Speculation and conjecture about interests and actions taken in supposed connection with those interests is not sufficient to show an actual conflict of interest. *See Smith v. State*, 972 S.W.2d at 556 (" 'Speculation, conjecture and surmise will not serve to fill' a void when a party fails to demonstrate why he was prejudiced by a claimed conflict of interest.").

Here, wholly absent from the amended motion was any allegation that Mr. DePriest had any interest in pleading guilty before preliminary hearing, that Mr. DePriest did not want a trial at the time the State made its initial ten-year offer (*i.e.*, that Mr. DePriest did not want to seek to suppress the evidence of his guilt and obtain an acquittal), or that Mr. DePriest wanted to maximize any benefit to himself even if it meant harming his sister. In short, the amended motion failed to allege any facts showing (1) that Mr. DePriest's interests actually diverged from his sister's interests before the preliminary hearing (which was held on May 7, 2012—more than two years before the

eventual guilty plea), and (2) that counsel, as a consequence of divergent interests, refrained from offering any advice to Mr. DePriest. In other words, while the amended motion alleged that counsel did not mention that the ten-year plea offer would expire if they went to preliminary hearing, there were insufficient facts alleged in the motion to prove that the alleged failure was attributable to any conflict of interest.

Moreover, the record shows that Mr. DePriest had no interest in accepting the State's initial offer. The record shows that Mr. DePriest knew about the State's initial plea offer, and that he was advised before the preliminary hearing and suppression hearing began that the offer had been withdrawn (*see* 2nd Supp.Tr. 2-3). He could have accepted that offer, and there was no allegation in the amended motion that counsel advised him not to do so,[10] that counsel failed to advise him of the advantages and disadvantages of

[10] In his Statement of Facts, Mr. DePriest notes that his sister alleged in her brief that "counsel had advised both her and [Mr. DePriest] in a March 21, 2012 letter not to accept [the ten-year plea] offer" (App.Sub.Br. 17). But in reviewing whether the motion court clearly erred in denying Mr. DePriest's amended motion, the Court should ignore factual allegations that were not made by Mr. DePriest in his case. "Pleading defects cannot be remedied by

accepting the offer, or that counsel otherwise precluded him from accepting the offer within the allotted time (Supp.L.F. 4-16). The fact that Mr. DePriest did not accept the offer after he was advised of it, the fact that he voiced no dismay at the preliminary hearing when he was told that the offer had been withdrawn, the fact that he later pleaded guilty without any agreement except the agreement made with his sister, the fact that he stated at the plea hearing that he had no "complaints whatsoever" about counsel (1st Supp.Tr. 22), and the fact that he again expressed satisfaction with counsel after he had been sentenced (1st Supp.Tr. 87-88), all refute any suggestion that Mr. DePriest's interests actually diverged from his sister's interests.

Mr. DePriest also alleged that the State's plea offer "caused an actual conflict of interest because it did not allow Mr. DePriest to plead guilty" (Supp.L.F. 11). He alleged that he "could not plead guilty because he knew he could not plead guilty unless his sister pleaded guilty as well" (Supp.L.F. 11). But according to the allegations in the amended motion, the State included a requirement that they both plead guilty in its final plea offer—not its original plea offer of ten years (*see* Supp.L.F. 11; *see also* L.F. 124).

Moreover, even if the initial offer was a joint offer requiring them both

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the presentation of evidence and refinement of a claim on appeal." *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014).

to plead guilty, the State's requirement that both defendants plead guilty did not create an actual conflict of interest; rather, it merely raised the possibility of a conflict if, for example, it was better for one of the defendants to accept the offer and, as a consequence, counsel actually failed to fully advise the other defendant about the advantages and disadvantages of accepting or rejecting the offer. In short, a plea offer from the State that requires two defendants to decide whether to align their interests does not produce an actual conflict of interest, *i.e.*, it does not show that there was "a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. at 171. And, importantly, the amended motion failed to allege any actual failure by counsel in advising Mr. DePriest about the advantages or disadvantages of the offer.

Likewise, with regard to the State's final offer that was accepted by the DePriests, there was no allegation that counsel did anything (or failed to do anything) to Mr. DePriest's detriment after this offer was made by the State. And, absent some failure by defense counsel, there was no actual conflict of interest that affected counsel's representation. In other words, the mere fact that the State made a joint plea offer did not create a conflict of interest, as the state could have made such an offer even if the DePriests had been represented by two attorneys. The relevant question is whether counsel actually failed to do something for Mr. DePriest as a result of the alleged

conflict, and there was no allegation that counsel failed to do anything to Mr. DePriest's detriment after the State's joint plea offer.

Mr. DePriest also alleged that he pleaded guilty to the State's final plea offer because he loved his sister and wanted to obtain for her the benefit of her plea agreement (Supp.L.F. 11-12). Again, however, the fact that Mr. DePriest loved his sister did not create an actual conflict of interest. There was no allegation that counsel did anything (or failed to do anything) to Mr. DePriest's detriment after the State made its final offer, and, absent some failure by defense counsel, there was no actual conflict of interest. There was also no allegation that Mr. DePriest did not want to plead guilty at that time (in August 2014), or that Mr. DePriest's best interests at that time lay in going to trial, as opposed to helping his sister, which was evidently something Mr. DePriest viewed as an advantage of pleading guilty. In short, there was no allegation that, at the time he pleaded guilty, his interests diverged from his sister's interest, or that counsel did anything to Mr. DePriest's detriment because of a conflicting interest.

Mr. DePriest asserts that his case is similar to *LaFrance v. State*, 585 S.W.2d 317 (Mo.App. W.D. 1979) (App.Sub.Br. 45-47). But *LaFrance* was analyzed under a standard that is not consistent with *Cuyler v. Sullivan* and *Mickens v. Taylor*. In *LaFrance*, the Court stated that "[t]he advice of counsel to a defendant with respect to the entry of a guilty plea must necessarily be

unhampered by a potential conflict with other representation." 585 S.W.2d at 322. In *Cuyler v. Sullivan*, however, the Court made plain that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. And, in *Mickens v. Taylor*, the Court made plain that " 'an actual conflict of interest' " means "a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." 535 U.S. at 171.

In any event, *LaFrance* is distinguishable from Mr. DePriest's case. In that case, a single attorney represented four co-defendants who were all charged with the same murder, and the record showed that at least one (and perhaps more) of the defendants had a viable claim of self-defense, and that all of the defendants had given statements that differed factually. 585 S.W.2d at 318-319, 322. The State in that case made an offer to defense counsel to dismiss the charges against *any three* of the defendants if *any one* of the defendants would plead guilty. *Id*. at 319.

Ultimately, the Court of Appeals concluded that it was difficult to discern how counsel could have effectively assisted the defendant who pleaded guilty given the differing factual accounts of the other defendants. *Id*. at 322. In addition, the State's offer to dismiss charges against three co-defendants if one would plead guilty made it "impossible to discern" how

counsel could have represented the defendant who pleaded guilty without serving the conflicting interests of the co-defendants to the defendant's detriment. *See id.* Here, by contrast, there was no allegation that Mr. DePriest had a defense that he could not employ if counsel also represented his sister, and the State's plea offer did not require one defendant to act against the defendant or accept responsibility for the defendant's conduct.

In short, while dual representation almost always carries a potential conflict of interest, Mr. DePriest failed to allege facts showing that counsel actually did anything, or failed to do anything, to Mr. DePriest's detriment as a result of a conflict of interest. Point II should be denied.

2. Counsel's efforts to legalize marijuana (Point V)

In his fifth point, Mr. DePriest asserts that "counsel had an actual conflict of interest in representing [him] because plea counsel used the charges against [him] to 'speak about marijuana legalization' and use [him] as a 'martyr' to legalize marijuana in Missouri" (App.Sub.Br. 71). In his amended motion, Mr. DePriest alleged that "[t]here was an actual conflict of interest because plea counsel's and Mr. DePriest's interests diverged as to what was the case's best outcome" (Supp.L.F. 20-21). He alleged, "Because plea counsel has long sought the legalization of marijuana, it was in his cause's best interests for Mr. DePriest's case to garner as much publicity as possible" (Supp.L.F. 21).

He alleged that "[t]o 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" (Supp.L.F. 21). He also alleged that the prosecutor opined in a press interview that counsel "just wanted a platform to speak about marijuana legalization and to use [Mr. and Ms. DePriest] as martyrs" (Supp.L.F. 21). He alleged that "[t]o garner publicity for marijuana legalization, counsel held a preliminary hearing" (Supp.L.F. 21). He alleged, "Counsel also litigated the Motion to Suppress Evidence twice . . . in anticipation of taking the case to trial" (Supp.L.F. 21). He alleged that "it was in counsel's best interest to advocate for his cause to take Mr. DePriest's case to trial" (Supp.L.F. 21). On the other hand, he alleged that "counsel's interest in garnering publicity for marijuana legalization diverged with Mr. DePriest's best interest" because "[i]t was in Mr. DePriest's best interest to accept the [plea] offers the state made before and after the preliminary hearing" (Supp.L.F. 22)

He alleged that these allegedly divergent interests "adversely affected counsel's performance" (Supp.L.F. 23). He alleged, "If counsel had not wanted to use the charges against Mr. DePriest to publicize marijuana legalization, he would have advised Mr. DePriest to accept the state's offer because of the amount of evidence against Mr. DePriest" (Supp.L.F. 23). He alleged, "Counsel would not have had the preliminary or suppression hearings held, because he knew that would have caused the prosecutor to withdraw the

more-favorable offers" (Supp.L.F. 23).

In denying this claim, the motion court concluded that Mr. DePriest "cannot show he was adversely affected by whatever political agenda [counsel] may have had, and further, he does not allege facts sufficient to support his claim" (L.F. 161). The motion court observed that counsel had advocated for "a suspended imposition of sentence, not a harsh sentence," *i.e.*, that counsel was not trying to make a "martyr" of Mr. DePriest (L.F. 161-162). The motion court observed that the prosecutor's "opinion of [counsel's] motives is not evidence of anything but rather simply his point of view" (L.F. 161-162). The motion court further observed that Mr. DePriest had not cited any "instances where, prior to sentencing, [counsel] held press briefings or otherwise sought to draw attention to the possibility [Mr. DePriest] might receive a harsh sentence" (L.F. 162). The motion court finally observed that counsel's efforts to decriminalize marijuana could "benefit [Mr. DePriest] in some way," *i.e.*, that counsel's interest was not actually divergent from Mr. DePriest's interests (L.F. 162).

The motion court did not clearly err in denying Mr. DePriest's claim. As with the previous claim, this claim failed to identify any witness who would testify to any of the alleged facts. The motion did not allege, for example, that counsel would testify that he prepared for trial and litigated motions to suppress merely to increase publicity, as opposed to seeking an acquittal in

accordance with his client's wishes. Rather, the allegations were predicated on conclusory assumptions about plea counsel's motives and Mr. DePriest's assumed interests at various times before the guilty plea.

Wholly absent from the amended motion, however, was any allegation that Mr. DePriest had any interest in pleading guilty before preliminary hearing, that Mr. DePriest did not want a trial at the time the State made its initial ten-year offer (*i.e.*, that Mr. DePriest did not want to seek to suppress the evidence of his guilt and obtain an acquittal), or that Mr. DePriest was willing to forgo trial before litigating a motion to suppress (and gauging the probability of success). Also absent was any allegation that counsel actually failed to advise Mr. DePriest about the advantages and disadvantages of the State's offer, that counsel advised Mr. DePriest *not* to accept the offer, or that counsel failed to advise Mr. DePriest to accept the offer.

In short, there were insufficient facts alleged in the motion to show either that plea counsel had a personal interest that diverged from Mr. DePriest's interests, or that counsel did anything, of failed to do anything, that was detrimental to Mr. DePriest as a result of the alleged conflict of interest. At most, the allegations showed a "theoretical division of loyalties" and not an actual conflict of interest. The fact that counsel litigated pre-trial issues was consistent with preserving Mr. DePriest's right to a fair trial (*i.e.*, it was consistent with providing effective assistance of counsel in accordance

with Mr. DePriest's interests), and there were no allegations of fact showing that counsel's pre-trial efforts were contrary to Mr. DePriest's interests at the time the State's ten-year offer was made. Point V should be denied.

III.

The motion court did not clearly err in denying Mr. DePriest's claim that counsel was ineffective for failing "to advise [him] 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."

In his third point, Mr. DePriest asserts that the motion court clearly erred in denying his claim that counsel was ineffective for failing "to advise [him] that—if a preliminary hearing were held or the defense filed a notice to have a suppression motion heard—the state's [ten-year plea] offer would be withdrawn" (App.Sub.Br. 58). He asserts that he was prejudiced because, but for plea counsel's error, he would have accepted the State's ten-year plea offer (App.Sub.Br. 58).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103

S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id*.

B. Mr. DePriest failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also "affirmatively prove prejudice." *Id*. at 693.

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012). "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id*. And, finally, "[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id*.; *Lafler v. Cooper*, 132 S.Ct. 1376, 1385 (2012).

In denying this claim, the motion court concluded that the claim was

refuted by the record made at the preliminary hearing (L.F. 163). The motion court found that, at the preliminary hearing, "the prosecutor placed on the record . . . with both [Mr. DePriest] and [his sister] present that any previous offers were withdrawn, before that hearing began" (L.F. 160). The motion court observed that "[t]he State is under no obligation to offer a plea bargain or to refrain from canceling it in certain circumstances even if the defendant had previously agreed to it, let alone a case like here where there was no agreed-to plea bargain" (L.F. 160). The motion court observed that "when the exchange was had between [defense counsel] and the prosecutor at the time of the preliminary hearing to the effect the prior plea offer was withdrawn, [Mr. DePriest] did not protest" (L.F. 160).

The motion court did not clearly err in denying Mr. DePriest's claim. The record shows that Mr. DePriest and his sister appeared for preliminary hearings and hearings on their motions to suppress (2nd Supp.Tr. 2; *see also* 1st Supp.L.F. 2). At that time, the prosecutor announced that it had extended a plea offer to both defendants, "which would have entailed pleading to two counts" (2nd Supp.Tr. 2-3; *see* 1st Supp.L.F. 3). The prosecutor stated that the plea offers had been rejected (2nd Supp.Tr. 3; see 1st Supp.L.F. 3). Defense counsel stated, "I don't know that we explicitly rejected them, but I understand it's been withdrawn" (2nd Supp.Tr. 3; see 1st Supp.L.F. 3).

At no point thereafter in the criminal case—and not until the filing of

his amended motion in his post-conviction case—did Mr. DePriest allege that he was either disappointed or surprised to learn that the State's ten-year offer had been withdrawn before the preliminary hearing began. The motion court did not clearly err, therefore, in concluding that the record showed that Mr. DePriest was aware of the plea offer and its subsequent withdrawal. And inasmuch as Mr. DePriest was aware of the offer and never made any complaint about losing it, it was apparent that Mr. DePriest never wanted to avail himself of the offer before the preliminary hearing and the hearing on the motion to suppress.

In addition, Mr. DePriest's claim was conclusory and failed to allege facts showing that he was prejudiced by counsel's alleged error. Mr. DePriest alleged in conclusory fashion that he would have accepted the State's ten-year offer, but he failed to allege any facts showing why he would have availed himself of that option before preliminary hearing, when the record otherwise showed that he twice litigated a motion to suppress in hopes of excluding evidence and, ostensibly, obtaining an acquittal. He also failed to allege facts showing that the State would not have withdrawn that particular offer, when the record otherwise shows that the State ultimately was not willing to permit a guilty plea unless Mr. DePriest's sister also pleaded guilty as part of a joint offer. Mr. DePriest did not allege, for instance, that his sister also would have accepted the ten-year offer at that time; thus, Mr.

DePriest failed to allege facts showing a reasonable probability that the ten-year offer would have come to fruition. Finally, while Mr. DePriest alleged that the trial court would have accepted the offer, he failed to allege any facts showing that it was customary in that jurisdiction for the trial court to accept similar offers agreed to by the parties. In short, Mr. DePriest's conclusory allegations fell short of alleging the requisite prejudice. This point should be denied.

IV.

The motion court did not clearly err in denying Mr. DePriest's claim that counsel was ineffective for failing "to object to [his] court proceedings being closed to the public."

In his fourth point, Mr. DePriest asserts that the motion court clearly erred in denying his claim that counsel was ineffective for failing "to object to [his] court proceedings being closed to the public" (App.Sub.Br. 63). He asserts that he was prejudiced "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 [Mr. DePriest] with the support of loved ones" (App.Sub.Br. 63).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103

S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id*.

B. Mr. DePriest failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice. *Id*. at 694. Generally, after a guilty plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In denying this claim, the motion court observed that, although alleged as a claim of ineffective assistance of counsel (*i.e.*, that counsel should have known to object), "there was no record made of which persons were not admitted to the proceedings, and to which proceedings" (L.F. 164). The motion court next questioned whether the right "to a 'public trial' extends to a guilty plea hearing," and the motion court observed that Mr. DePriest had not cited any case holding that it did (L.F. 165). The motion court observed that Mr. DePriest had tacitly conceded in his motion that the courtroom was not "closed" on the days alleged in the motion (L.F. 165). The motion court

further observed that, in light of Mr. DePriest's lack of objection, the plea court was not in a position to "take any corrective action to assist him in gaining admission for his loved ones" (L.F. 165). The motion court observed: "At best, he stood by silently as his loved ones were barred from the courtroom, neither raising the issue himself on the record nor asking for any relief at the time where it could have done the most good" (L.F. 165). The motion court further observed that the record of sentencing was "similarly devoid of any complaints regarding his supporters being barred from the courtroom" (L.F. 165). The motion court also observed that Rule 24.02(d) permits a plea court "to conduct guilty plea proceedings *in camera* upon a showing of good cause" (L.F. 165). Finally, the motion court concluded that "the record demonstrates no facts from which the Court can conclude the absence of certain individuals from the courtroom caused his plea to be involuntarily entered" (L.F. 165).

The motion court did not clearly err in denying this claim. A reviewing court "will not reverse when the motion court reached the right result, even if it was for the wrong reason." *Cox v. State*, 479 S.W.3d 152, 157 (Mo.App. S.D. 2015); *see Edgar v. Fitzpatrick*, 377 S.W.2d 314, 318 (Mo. 1964) ("The trial court did not base its judgment on these reasons . . . but a correct decision will not be disturbed because the court gave a wrong or insufficient reason therefor."). Here, the motion court reached the right result.

First, there was nothing in the record—and no allegation in the amended motion—that plea counsel was aware that any of Mr. DePriest's supporters were excluded from the courtroom, or that plea counsel was even aware that the courtroom had been closed to some people (*see* Supp.L.F. 55-58). There was no allegation that Mr. DePriest or any other person ever informed counsel that someone had been excluded from the courtroom (Supp.L.F. 55-58). Counsel cannot be faulted for failing to object to something counsel does not know about. *See generally Burton v. State*, 817 S.W.2d 928, 929-930 (Mo.App. E.D. 1991) ("Counsel cannot be held ineffective for failing to call witnesses about whom he or she has had little or no notice.").[11]

In short, there was nothing in the record—and no allegation in the amended motion—showing that counsel (or the plea court) was aware that any person was excluded from the courtroom. The sole allegation about

[11] Mr. DePriest takes issue with the motion court's finding that no record was made by asserting that he "was not able to make a further record because the motion court did not grant an evidentiary hearing" (App.Sub.Br. 66). But Mr. DePriest first had to allege that counsel *knew* people had been excluded. "The purpose of an evidentiary hearing is to determine whether the facts alleged in the motion are accurate, not to provide appellant with an opportunity to produce new facts." *Morrow v. State*, 21 S.W.3d 819, 827 (Mo. 2000).

"closure" of the courtroom was that a bailiff told some of Mr. DePriest's supporters that "the courtroom was closed to all but parties with cases being heard that day, and their attorneys" (Supp.L.F. 56). That allegation did not even allege that the court had ordered the closure of the courtroom. As such, the amended motion failed to allege facts warranting relief.

Mr. DePriest also failed to allege the requisite prejudice for his claim of ineffective assistance of counsel. There was no allegation that, but for counsel's alleged error, Mr. DePriest would not have pleaded guilty and would have insisted on going to trial (*see* Supp.L.F. 55-58). Instead, Mr. DePriest alleged that he was prejudiced because "defendants benefit from the enhanced quality and safeguarding of integrity resulting from public scrutiny" (L.F. 98). He alleged, "Public respect for the judicial process is heightened because public scrutiny fosters an appearance of fairness" (L.F. 98). And, finally, he alleged that he "would have benefitted from the support of people who care about him" (L.F. 98). But while these considerations are relevant to analyzing a claim that the right to a public trial was denied, they do not prove the requisite prejudice under *Strickland* and *Hill.*

In short, to show prejudice on this claim, Mr. DePriest had to allege facts showing that, but for counsel's alleged error, he would not have pleaded guilty and would have insisted on going to trial. There were, however, no allegations along those lines in his amended motion. Indeed, Mr. DePriest did

not allege that having anyone present was of any concern to him—he pleaded merely that some people "wished to attend at least some of [his] Circuit Court proceedings" (Supp.L.F. 56).[12] This point should be denied.

[12] In his brief, Mr. DePriest points out that the Court of Appeals stated that Mr. DePriest "would have been further intimidated by the courtroom's being closed" (App.Sub.Br. 70). Mr. DePriest did not allege in his amended motion, however, that he felt intimidated by the alleged closure.

V.

The motion court did not clearly err in denying Mr. DePriest's claim that "the prosecutor penalized [him] for exercising his right to counsel of his choice by asking the court to impose the maximum sentences consecutively[.]" (Responds to Point VI of the appellant's brief.)

In his sixth point, Mr. DePriest asserts that the motion court clearly erred in denying his claim that "the prosecutor penalized [him] for exercising his right to counsel of his choice by asking the court to impose the maximum sentences consecutively" (App.Sub.Br. 84). He asserts that "the prosecutor's sole purpose in asking for the harshest sentencing disposition was to penalize [him] for exercising his right to hire counsel of his choice" (App.Sub.Br. 84). He asserts that "[t]here was a reasonable probability that—had the state not asked for the maximum sentences running consecutively—the court would not have sentenced [him] to the maximum and ordered two sentences to run consecutively" (App.Sub.Br. 84).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review

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

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

B. Mr. DePriest failed to allege facts warranting relief

In denying this claim, the motion court stated, "There is no evidence in the record to support the allegation, but, assuming that is true, that does not amount to prosecutorial vindictiveness" (L.F. 162). The court noted that, generally, vindictive prosecution arises when a prosecutor increases charges against the defendant after the defendant has exercised some right (L.F. 162). The motion court concluded that the prosecutor made a plea offer and withdrew it, and that the resulting sentence "cannot be said to be the result of vindictiveness" (L.F. 162).

The motion court did not clearly err. While it violates due process to punish a defendant for exercising a constitutional right, *see State v. Potts*, 181 S.W.3d 228, 232 (Mo.App. S.D. 2005), that did not occur in this case. There was nothing in the record—and no allegation in the amended motion—that demonstrates that the prosecutor "punished" Mr. DePriest for hiring counsel

of his choice. The amended motion did not allege that the prosecutor ever made such a statement, or that the prosecutor requested the maximum sentence based on his dislike of defense counsel (*see* Supp.L.F. 25-35).

"There are two ways to prove prosecutorial vindictiveness: (1) 'if a realistic likelihood of vindictiveness is found, a presumption is erected in [the] defendant's favor[,] which the prosecutor must rebut'; or (2) 'a defendant can make a case for prosecutorial vindictiveness without the aid of the ... presumption if he 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). " 'Reasonable likelihood' is determined by weighing two factors: (1) the prosecutor's stake in deterring the exercise of the right being asserted; and (2) the prosecutor's actual conduct." *Id*.

Mr. DePriest asserts that various facts alleged in the amended motion give rise to a presumption that the prosecutor was being vindictive because of Mr. DePriest's decision to hire Mr. Viets as his attorney (*see* App.Sub.Br. 86-89). In his amended motion, Mr. DePriest outlined some of the plea negotiations that occurred in his case, some of the prosecutor's arguments at sentencing, the ultimate disposition of his case, and some comments made by the prosecutor to the media after the case was concluded (Supp.L.F. 25-27).

In support of the alleged presumption of vindictiveness, Mr. DePriest

alleged that a dislike of counsel could be gleaned from the comments the prosecutor made to the media (Supp.L.F. 29). But the prosecutor's comments pointed out that the DePriests had turned down plea offers that could have garnered them a shorter sentence, and the prosecutor merely opined about defense counsel's desire "to speak about marijuana legalization and to use these people as martyrs" (*see* Supp.L.F. 27, 29). That the DePriests had turned down offers was true, and there was no allegation that the prosecutor said that he disliked Mr. Viets, that the prosecutor blamed Mr. Viets for the rejected offers, or that the prosecutor asked for longer sentences because Mr. Viets had been hired by Mr. DePriest. Thus, Mr. DePriest failed to allege facts showing that the State had any "stake" in preventing Mr. DePriest from hiring Mr. Viets.

Mr. DePriest next alleged that the prosecutor was vindictive because at one point during plea negotiations he withdrew his offer and said "no further offer will be conveyed," but, later, the prosecutor said he would be willing to recommend fifteen years with the possibility of probation under § 559.115 (Supp.L.F. 29-31). Mr. DePriest alleged that this was vindictive because "[e]ither there was an offer available to Mr. DePriest after the preliminary hearing or there was not; both cannot be true" (Supp.L.F. 31). But these allegations show the opposite of vindictiveness. These allegations show that, while the prosecutor initially took a hard line of "no further offer," the

prosecutor later soften somewhat and renewed plea negotiations. In short, these allegations tended to refute any presumption of vindictiveness.

Mr. DePriest next alleged that the prosecutor's dislike of Mr. Viets was shown by the prosecutor's requesting the maximum sentences (Supp.L.F. 31-32). But the record refutes any allegation that the prosecutor requested the maximum sentence due to Mr. DePriest's decision to hire Mr. Viets. The record shows that the prosecutor requested the maximum sentence in light of the seriousness of the charges and other circumstances related to Mr. DePriest's character (*see* 1st Supp.Tr. 73-75).

As the record shows, in arguing for the maximum sentence, the prosecutor pointed out that the police "found, seized, and collected multiple plants, leaves, buds, and powders, an altered assault rifle, two semi-automatic pistols, ammunition, ballistic vests, drug paraphernalia, fertilizer, grow lamps, [and] timers" (1st Supp.Tr. 73-75). The prosecutor stated that it was "a large scale hydroponic grow operation" that was "for his profit" (1st Supp.Tr. 74). The prosecutor asserted that Mr. DePriest had minimized "the seriousness of the offense from the moment of his capture," and that it appeared that "in Mr. DePriest's world, marijuana cultivation, sale, and use should all be legal" (1st Supp.Tr. 74). The prosecutor argued, "the fact of the matter is, this was a large scale, it appears a large scale hydroponic grow operation not for his own use. And so he deserves the maximum punishment"

(1st Supp.Tr. 75). He argued that Mr. DePriest wanted "to profit from other people's desire for marijuana," and he argued that Mr. DePriest had vests and guns "to ward off either rivals or law enforcement officers" (1st Supp.Tr. 75). He argued that Mr. DePriest "deserves the maximum punishment on all counts" (1st Supp.Tr. 75). In short, the record refutes Mr. DePriest's claim that the prosecutor asked for the maximum sentence solely because he hired Mr. Viets, and the record does not support any presumption of vindictiveness.

Moreover, the fact that the prosecutor initially offered ten years before preliminary hearing and later argued for fifteen years does not give rise to any presumption of vindictiveness. The ten-year offer was made before the motion to suppress was litigated for the first time in the associate circuit court. The motion to suppress was then denied, and the case was bound over (L.F. 4). Thus, the strength and certainty of the State's case improved after the initial offer was withdrawn. This is a common phenomenon, and it does not give rise to a presumption of vindictiveness. *See State v. Sapien*, 337 S.W.3d 72, 79 (Mo.App. W.D. 2011) ("As a general proposition, a presumption of prosecutorial vindictiveness does not apply where enhanced charges are filed against a defendant in connection with pretrial plea negotiations."); *see generally Premo v. Moore*, 562 U.S. 115, 124 (2011) (observing that plea negotiations require counsel to weigh opportunities, including "pleading to a lesser charge and obtaining a lesser sentence, as compared with what might

be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve"); *State v. Fields*, 480 S.W.3d 446, 454 n. 3 (Mo.App. W.D. 2016) (noting in *dicta* that the discovery of new evidence after the withdrawal of an initial plea offer was a relevant consideration in determining whether the prosecutor was being vindictive by later arguing for a longer sentence).[13]

Finally, the punishment imposed in this case was imposed by the trial court (not the prosecutor), and it cannot be said that the trial court imposed a harsher punishment due to Mr. DePriest's decision to hire a particular attorney. The prosecutor made no such arguments at sentencing (*see* 1st Supp.Tr. 73-75), and the trial court imposed the sentences it did based on its view that Mr. DePriest's crime (and other relevant circumstances) warranted the particular sentence imposed (*see* 1st Supp.Tr. 82-84).

The record shows that the court stated that it had considered all of the arguments and evidence, and it stated that "this sounded like a very large

[13] One of the exhibits lodged by Mr. DePriest—a letter from counsel dated March 7, 2013—also suggested that defense counsel thought there might be evidentiary problems with Count III, possession of a short barrel rifle (*see* L.F. 116). Counsel allegedly wrote, "If they no longer have that firearm, they will have to admit to that or dismiss that charge" (L.F. 116).

operation" (1st Supp.Tr. 82). The court observed that Mr. DePriest had "finally admitted . . . that he was growing it for the purposes of distributing" (1st Supp.Tr. 82-83). The court then observed that the three sentences for Mr. DePriest's crimes could "be run different ways," and it asked the prosecutor for the State's "exact" recommendation (1st Supp.Tr. 83). The prosecutor stated, "I leave that up to you, Judge, as long as you impose the maximum sentences" (1st Supp.Tr. 83). The prosecutor stated that "because of his prior history . . . I think they should be run consecutively[, b]ut I can understand . . . why the Court may not" (1st Supp.Tr. 83). The court stated, "I am going to sentence in the way that I see that they, I think, should properly fall" (1st Supp.Tr. 83).

The court then sentenced Mr. DePriest to fifteen years' imprisonment for producing a controlled substance, fifteen years' imprisonment for possessing a controlled substance with intent to distribute, and seven years' imprisonment for unlawful possession of a weapon (1st Supp.Tr. 84). The court ordered the fifteen-year sentences to run concurrently (1st Supp.Tr. 84). The court ordered the seven-year sentence to run consecutively, for a total of twenty-two years' imprisonment (1st Supp.Tr. 84).

In sum, Mr. DePriest failed to allege facts showing that the prosecutor argued for maximum consecutive sentences solely to punish Mr. DePriest for hiring his counsel of choice, Mr. Viets, and he also failed to allege facts

showing any reasonable likelihood that the prosecutor was being vindictive at sentencing. This point should be denied.

VI.

The motion court did not clearly err in denying Mr. DePriest's claim that counsel was ineffective for failing "to advocate that [he] receive a more favorable sentencing disposition." (Responds to Point VII of the appellant's brief.)

In his seventh point, Mr. DePriest asserts that counsel was ineffective for failing "to advocate that [he] receive a more favorable sentencing disposition" (App.Sub.Br. 93). He asserts that 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 [Mr. DePriest] did" (App.Sub.Br. 93). He asserts that if counsel had done so, "there is a reasonable probability the court would have ordered the less-harsh disposition" (App.Sub.Br. 93).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

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

B. Mr. DePriest failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice. *Id*. at 694.

To show prejudice, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. When a movant challenges counsel's effectiveness at sentencing, the movant must prove that but for counsel's alleged error, there is a reasonable probability that the sentence would have been shorter. *Cherco v. State*, 309 S.W.3d 819, 829-830 (Mo.App. W.D. 2010); see *Rush v. State*, 366 S.W.3d 663, 666 (Mo.App. E.D. 2012).

In denying this claim, the motion court stated that it was not moved to conduct proportionality review based on sentences imposed in other cases (L.F. 163). It observed, citing *State v. Black*, 50 S.W.3d 778, 793 (Mo. 2001) (Wolff, J., dissenting), that "[r]egardless of similarities in criminal behavior,

no two defendants are alike" (L.F. 163). The motion court also stated that there was "no law or reason for the court to" conclude that "the Court erred in sentencing [Mr. DePriest] to sentences which were within the range of punishment, but outside certain other non-statutory guidelines" (L.F. 163). The motion court stated it was "not going to impose sentencing guidelines where none are required" (L.F. 164). The court concluded that Mr. DePriest's sentences "were within the Court's jurisdiction and the range of punishment authorized by law" (L.F. 164). The motion court did not clearly err in denying Mr. DePriest's claim.

First, Mr. DePriest failed to allege facts showing that counsel's performance fell below an objective standard of reasonableness. " 'Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable.' " *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. 2006).

Mr. DePriest alleged that counsel's performance was deficient because "counsel failed to present evidence to explain at sentencing why he was asking the court to sentence Mr. DePriest to an SIS" (Supp.L.F. 45). But this allegation was refuted by the record, which shows that, in support of his argument for an SIS, counsel made corrections to the SAR, directed the court to specific information included in the SAR, and presented letters from people who knew Mr. DePriest (*see* 1st Supp.Tr. 76-82).

More specifically, the record shows that counsel argued that Mr. DePriest had been "evaluated by the probation officer and found to be a good risk to succeed on probation" (1st Supp.Tr. 76). He asserted that Mr. DePriest had a single prior misdemeanor, and he pointed out that only one of Mr. DePriest's guns was illegal, in that it was "one-quarter of an inch shorter than Missouri state statutes allow" (1st Supp.Tr. 76). Counsel disputed the prosecutor's characterization of the crime and argued, "This was a small scale operation in a closet, in his home, in his apartment. It was not a large scale operation by any measure" (1st Supp.Tr. 76-77). He also pointed out that the police did not find any money (1st Supp.Tr. 77). He further asserted that Mr. DePriest had not minimized his culpability, and he pointed out that Mr. DePriest had pleaded guilty and acknowledged his guilt (1st Supp.Tr. 77). Defense counsel argued, "The fact is, Your Honor, that—that this man stands accused of non-violent offenses with no identifiable victims" (1st Supp.Tr. 78). He asserted, "The fact is that according to the most recent polls, most Americans think this shouldn't even be a crime. But the laws are what they are" (1st Supp.Tr. 78).

Counsel then provided to the court "letters from people who know Mr. DePriest and his family and who speak very well of him" (1st Supp.Tr. 79). The letters included letters from Richard Deweiss, Pastor Mike Harrison, and Lester Earl (1st Supp.Tr. 79-80). Counsel also presented "a large stack of the

results of drug tests done on Mr. DePriest since the Court ordered that drug testing to begin," which showed that he had "never once tested positive for any illegal substance during the entire time that this case has been pending" (1st Supp.Tr. 80).

Counsel reiterated that Mr. DePriest was "a good risk for probation," and he asked the court to suspend imposition of sentence (1st Supp.Tr. 81). Counsel reiterated that Mr. DePriest had only one prior misdemeanor, and he pointed out that the misdemeanor was "about thirteen, fourteen years ago" (1st Supp.Tr. 81). Counsel reiterated that "[t]his offense is a non-violent and essentially a victimless offense" (1st Supp.Tr. 81). Counsel observed that "[i]t involved marijuana only, not methamphetamine, not crack cocaine, not any of the far more dangerous substances" (1st Supp.Tr. 81).

Counsel argued that, if the court showed mercy, Mr. DePriest "will be placed in a position where he could indeed receive the sentence that the prosecution seems to be urging, the maximum sentence for each of these offenses, and they could run consecutively" (1st Supp.Tr. 81-82). Counsel argued:

> But if you grant him a suspended imposition of sentence, he also retains one last opportunity to avoid the lifelong stigma and disability of having a felony conviction on a public record. One last opportunity to maintain his potential to be a productive and

> tax-paying member of society. One last opportunity to avoid the lifelong stigma that will haunt him on every occasion when he applies for a job or a loan or for a place to live.

(1st Supp.Tr. 82).

Counsel assured the court that Mr. DePriest would "abide by whatever conditions the Court chooses to impose, including those recommended in the sentencing assessment report" (1st Supp.Tr. 82). Counsel then urged the court to suspend imposition of sentence (1st Supp.Tr. 82).

In short, the record shows that counsel advocated strenuously for an SIS, and that counsel presented evidence and argument in support of his request. Thus, Mr. DePriest's allegations that counsel failed to advocate for a more favorable disposition, and that counsel failed to present evidence in support of his argument, were flatly refuted by the record.

Moreover, Mr. DePriest failed to allege facts showing that it fell below an objective standard of reasonableness for counsel to forgo presenting the statistics about sentences imposed on other defendants guilty of possession of a controlled substance with intent to distribute. There is no constitutional obligation to present such statistics to the sentencing court, and the Court should decline to attach constitutional significance to a particular sort of evidence at sentencing. Rather, counsel is merely required to provide reasonable representation, which counsel did. "It is not ineffective assistance

of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Anderson v. State*, 196 S.W.3d at 33.

In addition, Mr. DePriest failed to allege facts showing that he was prejudiced by counsel's alleged error. It is evident from the motion court's findings and conclusions that it was not persuaded that the statistical information about other sentences imposed in St. Francois County would have had any effect on the sentences imposed in Mr. DePriest's case (*see* L.F. 163-164). Thus, there is no reasonable probability that the statistical evidence would have produced a shorter sentence.

As the Court of Appeals stated in *Cherco v. State*, "it is difficult to envision a scenario where the weighty burden of establishing prejudice [at sentencing] can be sustained . . . given the indeterminate nature of sentencing." 309 S.W.3d at 831. Here, inasmuch as the motion court examined the evidence alleged in the amended motion and apparently concluded that it would not have been persuasive, it cannot be said that the motion court clearly erred. *See id.*; *see also Wills v. State*, 321 S.W.3d 375, 384 (Mo.App. W.D. 2010) (where the motion court considered the evidence and stated that the defendant's sentence would not have changed if counsel had presented it, this Court stated, "it is difficult to discern how Wills was even plausibly prejudiced by the failure to present the evidence pertaining to his mental health at the sentencing hearing").

Finally, Mr. DePriest's claim of prejudice was also flawed. He alleged that the statistical information showed that "[f]or people convicted of an offense under § 195.211 (Cum. Supp. 2010), the average disposition was ten (10) years' incarceration" (Supp.L.F. 45). He alleged, "Counsel could also have demonstrated Mr. DePriest 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" (Supp.L.F. 45).

But Mr. DePriest was not sentenced to twenty-two years' imprisonment for violating § 195.211. For violating that statute (twice), he was sentenced to fifteen years' imprisonment (1st Supp.Tr. 84). The seven-year sentence that was ordered to run consecutively to those sentences (for a total of twenty-two years) was for the separate offense of unlawful possession of a firearm (1st Supp.Tr. 84).

Thus, had counsel presented the statistical information, the court would have seen that ten other defendants had also been sentenced to fifteen years' imprisonment for distribution of a controlled substance (*see* Supp.L.F. 43). The court also would have seen that four other defendants had been sentenced to longer terms of imprisonment, including terms of seventeen, eighteen, twenty-four, and thirty years (*see* Supp.L.F. 43). (A potential shortcoming of the statistical information was that the chart purported to show "Sentence Lengths in St Francois County for Distribution of a

Controlled Substance" (Supp.L.F. 43). Mr. DePriest was sentenced for producing a controlled substance and possessing a controlled substance with intent to distribute.)

In short, there is no reasonable probability that the statistical information would have persuaded the court to impose a shorter sentence. Statistical information alone is of little or no relevance, in that it does not reveal anything about the particular defendants who were sentenced or the crimes they committed. Here, the sentencing court imposed the sentences it imposed because of the seriousness of the drug offenses (as indicated by the size of the marijuana-growing operation), Mr. DePriest's possession of an unlawful firearm, and other relevant factors presented to it. This point should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 18,837 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 20th day of April, 2016, to:

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