IN THE
SUPREME COURT OF MISSOURI

NATALIE DEPRIEST,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC95484
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.		

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY
TWENTY-FOURTH JUDICIAL CIRCUIT, DIVISION TWO,
THE HONORABLE KENNETH W. PRATTE, JUDGE

APPELLANT'S SUBSTITUTE BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

In St. Francois County Cause No. 11SF-CR01612, the State charged Appellant Natalie DePriest with Count I of the class B felony of production of a controlled substance, § 195.211, RSMo Cum. Supp. 2010, Count II of the class B felony of possession of a controlled substance with intent to distribute, §195.211, RSMo Cum. Supp. 2010, and Count III of the class C felony of unlawful possession of a weapon, §571.070, RSMo Cum. Supp. 2010.[1] The State dismissed Count III.

On August 16, 2013, Natalie pleaded guilty to Counts I and II without a plea agreement. On November 12, 2013, the court sentenced Natalie to two concurrent 15-year terms of imprisonment in the department of corrections. Authorities delivered Natalie to the department of corrections to begin serving her sentence on or about December 4, 2013.

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[1] Appellant Natalie DePriest will cite to the appellate record as follows: Guilty Plea and Sentencing Transcript, "(Tr.)"; and Legal File, "(L.F.)." All statutory references are to RSMo 2000 unless otherwise stated.

Natalie timely filed her *pro se* Rule 24.035 motion on April 29, 2014. The motion court appointed counsel to represent her on the same date. Counsel entered an appearance and requested an additional 30 days to file Natalie's amended motion, which the motion court granted. Counsel timely filed Natalie's amended motion and request for evidentiary hearing on July 28, 2014.

On September 17, 2014, the motion court denied Natalie's Rule 24.035 motion without an evidentiary hearing. On October 22, 2014, Natalie timely filed her notice of appeal.

On March 1, 2016, this Court sustained the State's application for transfer, and transferred this case to this Court. Consequently, this Court has jurisdiction over Natalie's appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

On August 25, 2011, Natalie DePriest was 33 years old (L.F. 12). Natalie, who has her bachelor's degree, was working and sharing an apartment with her brother, David DePriest (Tr. 60, 70, 72; L.F. 31).

David, who was licensed to grow marijuana in the State of Colorado, had moved from Colorado to Farmington, Missouri (L.F. 40). He had lived in the apartment for about six months and Natalie had lived in the apartment for approximately 70 days (L.F. 40).

On August 25, 2011, an officer found marijuana growing in the bathroom and closet of David's apartment bedroom (L.F. 34). In David's bathroom, there were eight marijuana plants in incubation stage, heat lamps, and fans (L.F. 34). In David's closet, there were 12 marijuana plants, heat lamps, fans, and an irrigation system (L.F. 34). Also, in David's bedroom, there was an AR-15 assault rifle that was a fraction of an inch shorter than the length allowed by law (L.F. 34).

The officer also found two pounds of packaged marijuana in a common area, a water bong, a smoking pipe, two other glass pipes, and a portable digital scale (L.F. 34). Officers seized all of the items and arrested David and Natalie (L.F. 33-34).

At the time of her arrest, Natalie had a successful 15-year career and "no prior criminal history whatsoever, no prior criminal convictions, period" (Tr. 72).

The State charged David and Natalie with the class B felony of production of a controlled substance for cultivating more than five grams of marijuana, the class B felony of possession of a controlled substance, i.e., more than five grams of marijuana, with the intent to distribute, and the class C felony of unlawful possession of a weapon, a short barrel rifle (L.F. 12-13, 34). David and Natalie hired Columbia, Missouri attorney Dan Viets (hereinafter, "counsel") to represent them (L.F. 33). Natalie was released on bond and signed a "Statement and Waiver of Conflict of Interest" (L.F. 1, 33, 35).[2]

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[2] In a letter dated January 23, 2012, counsel explained that he believed there was no conflict of interest in representing both Natalie and David (L.F. 33). In that letter, he stated that he "often" represents codefendants (L.F. 33). He stated that in 25 years of practice, "I have never had an actual conflict of interest arise in a case where the defendants asked me to represent both of them" (L.F. 33). He further stated that "I might be forced to withdraw from both of your cases if one of you decides to take an action against the other which would harm the other's case" (L.F. 33). The waiver Natalie signed states that an actual conflict would

The prosecutor made a plea offer to David and Natalie of ten years of imprisonment, pursuant to § 559.115, which provides for the possibility of probation after 120 days (L.F. 34). Counsel communicated the offer to David and Natalie in a joint letter in which he informed them that he did not recommend acceptance of this offer (L.F. 34).

In associate circuit court, counsel scheduled a joint preliminary hearing and filed a motion to suppress evidence (L.F. 34). Afterwards, the prosecutor revoked the initial offer (L.F. 34). The prosecutor made another plea offer of 15 years of imprisonment pursuant to § 559.115 (L.F. 35).

On July 5, 2012, after a hearing, counsel received notice that the motion to suppress evidence had been denied in associate circuit court (L.F. 34). The case was then bound over to circuit court and there was a court date set for February 15, 2013 (L.F. 34). The case was later set for trial on March 7, 2013 (L.F. 35).

On March 6, 2013, counsel appeared and requested a continuance (L.F. 35). A second motion to suppress hearing was scheduled on June 28, 2013 (L.F. 35).

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arise, "if either is offered a disposition that would harm the other's position or require testimony against the other" (L.F. 34).

Counsel wrote to the prosecutor, making counteroffers for David and Natalie (L.F. 35). For David, he offered a plea to the class B felony of production of a controlled substance for the recommendation of a suspended imposition of sentence (SIS) (L.F. 35). For Natalie, he offered a plea to misdemeanor marijuana for dismissal of the gun charge and the recommendation of a suspended imposition of sentence (SIS) (L.F. 35).

Meanwhile, Natalie received another charge for the misdemeanor offense of writing a bad check (L.F. 35). She "had authorized a vendor her business worked with to automatically withdraw money from her account" (L.F. 35). Since the business was no longer in operation, they did not receive notice of the insufficient fund check, and they did not receive the letter the prosecutor's office sent offering to resolve the matter without prosecution (L.F. 35). Based on this bad check issue, the prosecutor immediately filed a motion to revoke Natalie's bond (L.F. 35). The prosecutor also rejected counsel's counteroffers (L.F. 35).

The State offered Natalie a plea agreement for 15 years on one of the marijuana charges and dismissal of the other two charges, as well as the motion to revoke bond (L.F. 36). The prosecutor further stated that if Natalie did not accept this offer, he would proceed with bond revocation, make an offer to have

Natalie testify against her brother, David, and file a motion to disqualify counsel due to the resulting conflict of interest (L.F. 36).

Counsel sent a letter to Natalie the next day, advising her to reject the offer and recommending that they ask the judge to grant a suspended imposition of sentence (SIS) (L.F. 36). The court revoked Natalie's bond (L.F. 5).

On June 17, 2013, counsel wrote the prosecutor, asking if he would consent to Natalie's release from jail if she entered an "open" plea (L.F. 36). On June 19, 2013, counsel sent Natalie, David, and their father a letter stating that the prosecutor agreed not to object to Natalie's release pending sentencing, if both David and Natalie pleaded guilty to all charges (L.F. 37). The prosecutor indicated that if Natalie and David pleaded guilty pursuant to an agreement for a 15-year sentence pursuant to § 559.115, he would agree to reinstate Natalie's bond and they would be free to ask for probation (L.F. 37). "He then said[,] however[,] that he would also want an assurance from Natalie that she would not then testify on behalf of David, trying to take all of the blame and get him off the hook" (L.F. 37).

David later offered to plead guilty to the charges if the prosecutor would agree to the suspended imposition of sentence for Natalie and the reinstatement of Natalie's bond (L.F. 37). On June 26, 2013, counsel wrote the prosecutor,

stating that David would enter an open plea and request the suspended imposition of sentence in exchange for the prosecutor's agreement to reinstate Natalie's bond (L.F. 37).

On June 28, 2013, the prosecutor offered to dismiss Natalie's bad check charge and to not object to reinstatement of Natalie's bond, if both Natalie and David pleaded guilty to all drug and gun charges (L.F. 37). Counsel called the prosecutor's office and told a woman in the prosecutor's office that David would plead guilty to all charges if the prosecutor would dismiss Natalie's drug and gun charges (L.F. 37). Counsel received no reply (L.F. 37).

On August 16, 2013, David and Natalie appeared in court with counsel to plead guilty before Judge Kenneth W. Pratte (Tr. 3, 48). As for Natalie, the State dismissed Count III of unlawful use of a weapon, dismissed the pending bad check charges, and agreed to reinstatement of her bond (Tr. 48-49). The State called this a "side agreement" (Tr. 48). The agreement was "only good if David also pleaded guilty"; the prosecutor "was afraid that Natalie would later testify favorably for David down the road" (L.F. 38).

In the courtroom with David and Natalie on the day of their pleas were five other criminal defendants and their attorneys (Tr. 4-7). The court advised the group of seven of their rights *en masse* and questioned them *en masse* "to save

a great deal of time" (Tr. 8). The court started with Justin Tiefenauer first, and then moved "straight on down the line in order" to Randal Lagemann, Kimberly Cassidy, Annette Burnia, David DePriest, Natalie DePriest, and Richard Smalley (Tr. 8). Neither the DePriests nor any other defendant objected to the plea procedure (Tr. 9).

At the plea, Natalie indicated that she understood the charges (Tr. 10). She acknowledged that counsel had represented her on the charges and stated that counsel had discussed her case with her ten or more times for a total of five hours (Tr. 12, 16).

The court asked Natalie and the other defendants, as a group, if counsel had investigated their cases to their satisfaction, interviewed all their witnesses, and done all the things they had requested, Natalie and the other defendants responded, "Yes, sir"(Tr. 16-17).

When asked, as a group, if there was anything counsel had refused to do, if there were alibi witnesses, and if there were witnesses counsel had not interviewed that they wanted interviewed, all of the defendants, including Natalie, responded, "No, sir," "straight on down the line in order" (Tr. 8, 16-17).

The court asked the group of defendants if they thought they had sufficient opportunity to discuss the case before the plea, and if their attorneys had discussed and explained the available defenses to their full satisfaction (Tr. 22). All of the defendants, including Natalie, who was sixth in line, answered, "Yes, sir," one after the other (Tr. 22). In the same manner, all of the defendants, including Natalie, responded, "No, sir," when asked if they had any complaints whatsoever about the handling of their cases (Tr. 22).

Natalie and David indicated that they wanted to plead guilty, despite that the court had not ruled on the motion to suppress evidence and statements (Tr. 21). When asked how they plead, Natalie and David said, "Guilty" (Tr. 24-25). They indicated that they were pleading guilty because they were, in fact, guilty (Tr. 54).

The plea court asked Natalie, David, and the other defendants if they understood the right to trial and the rights that they would have at trial (Tr. 28-31). Mr. Tiefenauer, Mr. Lagemann, Ms. Cassidy, Ms. Burnia, David, Natalie, and Mr. Smalley indicated that they did by responding, "Yes, sir," in turn (Tr. 28-31). A similar chorus of "Yes, sirs" followed when the court asked if understanding those rights, they still wished to plead guilty (Tr. 28-31).

When asked, Natalie indicated that no "threats or pressure of any kind [had] been exerted" against her to cause her to plead guilty (Tr. 42). She indicated that she understood and admitted all the essential elements of the charges (Tr. 35-36). She indicated that she understood the range of punishment for the charges of from five to 15 years, and that she understood the "side" agreement (Tr. 41, 49). She further indicated that no promises, other than that agreement, had been made (Tr. 51).

Natalie admitted her guilt (Tr. 54). She stated that she had aided in the cultivation of more than five grams of marijuana by watering and trimming marijuana plants (Tr. 59). She further stated that she had possessed marijuana with the intent of sharing it with others or distributing it (Tr. 60). The court accepted Natalie's plea, reinstated Natalie's bond, and ordered a sentencing assessment report (Tr. 64-66).

The sentencing assessment report that was later obtained indicated Natalie's "risk score was a five, which is a good risk" (Tr. 73). The report also indicated that "85.8% of people convicted of similar offenses receive probation," that "[o]nly 5.1% are sentenced to prison," and that "the average sentence is only 7.2 years" (L.F. 31).

At sentencing, counsel reminded the court that Natalie was not disputing her guilt and that she was remorseful, but minimized Natalie's role in the commission of the offenses (Tr. 72). He also stressed that Natalie was a successful career woman with a college degree, no priors, and the "potential to be employed at a much more productive job if she's given the opportunity" (Tr. 73).

Counsel presented the court with a letter from Natalie's former employer at KPLR in St. Louis and a letter from a Kansas City company offering Natalie a job (Tr. 72-73). Counsel then begged the court's mercy, and suggested that the suspended imposition of sentence was the appropriate disposition for a criminal defendant like Natalie, who has no prior convictions and had not threatened any member of the community (Tr. 74).

The prosecutor argued that "you can minimize it" or "you can marginalize it," but that Natalie was just as guilty as David (Tr. 70). He argued that growing marijuana was wrong and illegal, and that Natalie, who is older than David, should have been "even more sensitive to the fact" (Tr. 70-71). He stated that her name was on the lease, and that she knew what was going on and tended the plants (Tr. 70).

The court rhetorically asked: "How really do I differentiate between her and her brother, living there together, sharing the same apartment?" (Tr. 75). The court stated, "And she's admitted she participates in it. She may minimize it, but she knew and participated in it. I don't see how you differentiate one from the other" (Tr. 76). The court sentenced Natalie to two concurrent 15-year terms of imprisonment in the department of corrections (Tr. 76).

Natalie is currently incarcerated at the Women's Eastern Reception, Diagnostic and Correctional Center in Vandalia, Missouri (L.F. 30).

Natalie timely filed her *pro se* Rule 24.035 motion on April 29, 2014 (L.F. 10). The motion court appointed counsel to represent her on the same date (L.F. 10). Counsel entered an appearance and requested an additional 30 days to file Natalie's amended motion, which the motion court granted (L.F. 28-29). Counsel timely filed Natalie's amended motion and request for evidentiary hearing on July 28, 2014 (L.F. 30-62).

In her amended motion, Natalie alleged: (1) that counsel's dual representation of her and David created an actual conflict of interest that affected counsel's performance and prejudiced her, invalidating the guilty plea; (2) that the practice of pleading guilty as part of a group of unrelated criminal defendants exacerbated this issue and itself justifies withdrawing the guilty plea;

(3) that there is no rational basis to categorize marijuana as a schedule I controlled substance, invalidating § 195.017, and that medical and scientific opinion on the issue of marijuana's medical value and potential for abuse has changed materially since this Court last examined this issue, in *State v. McManus*, 718 S.W.2d 130 (Mo. banc 1986) and *State v. Mitchell*, 563 S.W.2d 18 (Mo. banc 1978); and, that (4) reasonable counsel would not have advised Natalie to plead guilty and would have raised this constitutional issue at the earliest opportunity (L.F. 30-62). Natalie requested an evidentiary hearing on her claims (L.F. 61-62).

On September 17, 2014, the motion court denied Natalie's Rule 24.035 motion without an evidentiary hearing (L.F. 63-66). On October 22, 2014, Natalie timely filed her notice of appeal (L.F. 67-68). This appeal follows (L.F. 67-68). Natalie will cite additional facts as necessary in the argument portion of her brief.

POINT – I.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute, and which warrant a hearing and post-conviction relief, in that Natalie pleaded that counsel was ineffective for representing Natalie while under an actual conflict of interest that adversely affected his performance and prejudiced Natalie. A conflict of interest existed because plea and sentencing counsel represented both Natalie and her brother David, who faced the same charges stemming from the marijuana cultivation system set up in David's closet, in their shared apartment. Their interests, however, were in no way aligned. Plea and sentencing counsel did a disservice to both clients, but particularly Natalie, in continuing to represent both of them even as this case became extremely adversarial and the interests of the defendants grew further apart. The motion court's error violated Natalie's rights to conflict-free, effective counsel, to due process, and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution.

State ex rel. Horn v. Ray, 325 S.W.3d 500 (Mo. App. E.D. 2010);

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

Holloway v. Arkansas, 435 U.S. 475 (1978);

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

U.S. Const., Amend. V, VI, & XIV;

Mo. Const., Art. I, §§ 10 & 18(a);

Rules 4–1.7 & 24.035.

POINT – II.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant a hearing and post-conviction relief, in that Natalie pleaded that there were seven criminal defendants who pleaded guilty at the same time in this case, including Natalie and David, and that this procedure invalidated her guilty plea; the use of the group plea procedure exacerbated the damage caused by the conflict of interest by causing the plea court to fail to make inquiry about the fact that Natalie and David were represented by the same lawyer, and by causing the plea court to fail to take adequate steps to ascertain whether the conflict of interest warranted separate counsel. The motion court's error violated Natalie's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Missouri Constitution, and Rule 24.02.

Boykin v. Alabama, 395 U.S. 238 (1969);

Roberts v. State, 276 S.W.3d 833 (Mo. banc 2009);

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

Holloway v. Arkansas, 435 U.S. 475 (1978);

U.S. Const., Amend. V & XIV & Mo. Const., Art. I, § 10;

Rules 24.02 & 24.035.

POINT – III.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant an evidentiary hearing and post-conviction relief, in that Natalie pleaded that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance and there is no rational basis for its categorization in schedule I; marijuana does not have a high potential for abuse relative to other controlled substances, and has accepted medical uses for treatment. Since this Court's decision in *McManus*, scientific consensus has emerged that marijuana's potential for abuse is low, and it has safe and accepted medical uses. The motion court's error violated Natalie's rights to equal protection of the law and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 10, and 18(a) of the Missouri Constitution.

State v. McManus, 718 S.W.2d 130 (Mo. banc 1986);

State v. Ewing, 518 S.W.2d 643 (Mo. 1975);

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

U.S. Const., Amend. V, VI, and XIV;

Mo. Const. Art. I, §§ 2, 10, and 18(a);

§§ 195.017 & 195.211;

Rule 24.035.

POINT – IV.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant an evidentiary hearing and post-conviction relief, in that Natalie pleaded that counsel was ineffective, resulting in an unknowing and involuntary plea, for advising Natalie to plead guilty and failing to make the challenge that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance at the earliest opportunity in the case as raised in Point III. The motion court's error violated Natalie's rights to effective assistance of counsel, to equal protection, to due process of law, and to a trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. McManus, 718 S.W.2d 130 (Mo. banc 1986);

State v. Burgin, 203 S.W.3d 713 (Mo. App. W.D. 2006);

U.S. Const., Amend. V, VI, & XIV

Mo. Const. Art. I, §§ 10 & 18(a);

§§ 195.017 & 195.211;

Rule 24.035.

ARGUMENT – I.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute, and which warrant a hearing and post-conviction relief, in that Natalie pleaded that counsel was ineffective for representing Natalie while under an actual conflict of interest that adversely affected his performance and prejudiced Natalie. A conflict of interest existed because plea and sentencing counsel represented both Natalie and her brother David, who faced the same charges stemming from the marijuana cultivation system set up in David's closet, in their shared apartment. Their interests, however, were in no way aligned. Plea and sentencing counsel did a disservice to both clients, but particularly Natalie, in continuing to represent both of them even as this case became extremely adversarial and the interests of the defendants grew further apart. The motion court's error violated Natalie's rights to conflict-free, effective counsel, to due process, and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution.

Facts and Preservation of the Error

This assignment of error is preserved for appellate review because Natalie included it in her amended motion (L.F. 31-45). *See, e.g., Comstock v. State*, 68

S.W.3d 561, 565 (Mo. App. W.D. 2001) (holding Rule 24.035 post-conviction claim was unpreserved for appellate review because it was not included in *pro se* and amended motions); *see also Gooden v. State*, 846 S.W.2d 214, 217 (Mo. App. S.D. 1993) (same).

In her amended motion, Natalie pleaded that counsel was ineffective for representing her while under an actual conflict of interest that adversely affected his performance and that prejudiced her (L.F. 31).

Specifically, Natalie pleaded that "[a] conflict of interest existed because plea and sentencing counsel represented both [her] and her brother David" and "[t]heir interests . . . were in no way aligned" (L.F. 31). She pleaded that she and David had different levels of culpability (L.F. 32, 40). Whereas David "was clearly guilty" and counsel "believed that David should plead guilty," "[c]ounsel believed Natalie was not guilty of the charged crimes" (L.F. 38, 40). Counsel "stated as much to Natalie numerous times in person and via letter" and to the prosecutor (L.F. 31, 40).

In her amended motion, Natalie mentioned letters that counsel wrote to the prosecutor in which he stated that he did not "see how the [p]rosecutor thinks he has a case against [Natalie] for cultivation" and that "there is no evidence of [Natalie's] involvement with felonious activity" (L.F. 35). She further

mentioned a letter that counsel wrote her in which he stated: "I believe that you are not guilty of the felony offenses you are charged with, but even if you were, I would recommend that we ask the [j]udge to grant an [SIS]" (L.F. 36).

Natalie pleaded that due to their different levels of culpability, their defenses at trial would never have been the same (L.F. 43). She pleaded that her defense would have been to argue and present evidence "that the illegal items belonged to David[,] and that she had no part in the cultivation of marijuana" (L.F. 43). She further pleaded that she "might have been found not guilty after a trial," but that "[t]he facts of David's case essentially meant that he had no choice but to plead guilty" (L.F. 42).

In her pleadings, Natalie specifically explained what counsel failed to do. She pleaded that "due to his concurrent duty of loyalty to David," "counsel was not able to use David's vulnerability and [greater relative] culpability in this case as leverage to secure a relatively favorable outcome for [her]" (L.F. 31).

Natalie specifically pleaded that prior to her plea, the prosecutor considered making an offer to her in exchange for her testimony against David (L.F. 36). Natalie pleaded that an attorney without a concurrent duty of loyalty to her brother "may have advised [her] . . . to testify against her brother in

exchange for a SIS [i.e., suspended imposition of sentence] or a reduced charge" (L.F. 40, 42).

The pleadings indicate, however, that counsel could not, and did not, advise Natalie of the wisdom of negotiating or accepting such an offer because of his duty of loyalty to David (L.F. 32, 36). "Due to the dual representation, she had no independent voice to advise her . . ." (L.F. 41).

Natalie gave another example of how the dual representation disadvantaged her. Natalie stated that although she and David had markedly different degrees of culpability in the charged offenses, due to counsel's dual representation of them, she continually received package plea offers (L.F. 36, 40). Those package plea offers required that she and David plead guilty and receive the same sentence, even though David was clearly more culpable than she (L.F. 36, 40). Natalie stated that but for the dual representation, she would not have been "dragged along with David" and she "would have had an advocate who could have more effectively represented her and drawn a distinction between her level of culpability, relative to her brother" (L.F. 40).

Natalie's pleadings additionally stated that "a trial [, as opposed to a plea,] might have been better" for her (L.F. 43). She "might have been found not guilty after a trial" and might have "been able to walk away from the case with a

relatively good outcome compared to David" (L.F. 42). Natalie pleaded, however, that counsel had "an incentive to steer [her] towards the disastrous open plea in this case, to help his other client David secure an outcome that was, essentially, David's only option, since a trial was out of the question for him" (L.F. 43).

Natalie pleaded that "no reasonable attorney would have represented those codefendants, because at numerous points the attorney had a conflict of interest from divided loyalties to both defendants that worked to the advantage of David, at the expense of Natalie" (L.F. 45).

Natalie further acknowledged that she had signed a waiver of conflict of interest that indicated she did not plan to take a position adverse to her brother (L.F. 33-34, 41). She argued, however, that her waiver was not knowing or voluntary (L.F. 33-34). She stated that the waiver form from January 23, 2012 did not constitute informed consent because "the conflict had not yet arisen" (L.F. 41). She wrote: "[A]t that early stage of the case, how can [she] possibly know what may later be in her best interest?" (L.F. 41). She stated that she "did not waive an unperceived conflict that was not brought to her attention" (L.F. 45).

She also stated that the document and the explanatory letter mischaracterized and narrowly defined "conflict of interest" (L.F. 41-43). It

suggested that "the only time a conflict would exist would be if one [defendant] decided to testify against the other," and stated that counsel would inform Natalie and David if a conflict developed (L.F. 41-43).

Natalie requested a hearing on her pleadings (L.F. 61-62). The motion court denied Natalie's claim in findings of fact and conclusions of law, issued on September 17, 2014 (L.F. 72). The motion court found that different levels of culpability alone do not entitle Natalie to post-conviction relief (L.F. 72). The motion court concluded that Natalie had not demonstrated how the dual representation had disadvantaged her or what was lost to her due to it (L.F. 72).

Standard of Review

Appellate review of a judgment entered under Rule 24.035 "is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Price v. State*, 422 S.W.3d 292, 294 (Mo. banc 2014). 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. *Webb v. State*, 334 S.W.3d 126, 128 (Mo. banc 2011). To be entitled to an evidentiary hearing, Natalie must (1) cite facts, not conclusions, that if true, would entitle her to relief; (2) the factual allegations must not be refuted by the

record; and (3) the claims of error must prejudice her. *Id.* (*citing Matthews v. State*, 175 S.W.3d 110, 113 (Mo. banc 2005)).

Argument

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute, and which warrant a hearing and post-conviction relief. Natalie pleaded that plea counsel was ineffective for representing Natalie while under an actual conflict of interest that adversely affected his performance and prejudiced Natalie (L.F. 31-55).

The Sixth Amendment to the United States Constitution establishes the fundamental right to counsel, which extends to State defendants through the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). The right to counsel's essential aim of ensuring an effective advocate for all criminal defendants necessarily guarantees defendants' rights to conflict-free counsel. *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Wood v. Georgia*, 450 U.S. 261, 271 (1981). This guarantee entitles the accused to a lawyer who can give faithful service and undivided loyalty. *Gordon v. State*, 684 S.W.2d 888, 890 (Mo. App. W.D. 1985).

A lawyer who attempts to serve conflicting interests cannot properly serve with loyalty either client. *State v. Crockett*, 419 S.W.2d 22, 29 (Mo. 1967). "There is an actual, relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." *Cuyler v. Sullivan*, 446 U.S. 335, 356 n. 3 (1980) (Marshall, J., concurring in part and dissenting in part). For example, "[a]n actual conflict exists when counsel representing codefendants cannot use his best efforts to exonerate one for fear of implicating the other." *Millican v. State*, 733 S.W.2d 834 (Mo. App. S.D. 1987).

A showing that "counsel actively represented conflicting interests" establishes the "constitutional predicate" for a claim of ineffective assistance of counsel based on a conflict of interest. *State v. Chandler*, 698 S.W.2d 844, 848 (Mo. banc 1985) (*quoting Cuyler,* 446 U.S. at 348). To prevail on a claim of ineffective assistance of counsel based on a conflict of interest, the post-conviction movant must show that an actual conflict of interest adversely affected counsel's performance. *Helmig v. State*, 42 S.W.3d 658, 680 (Mo. App. E.D. 2001) (*citing Chandler*, 698 S.W.2d at 848); *Cuyler*, 446 U.S. at 348. "[S]omething must have been done by counsel or something must have been forgone by counsel and lost to defendant, which was detrimental to the interests of defendant and

advantageous to another." *Lomax v. State*, 163 S.W.3d 561, 564 (Mo. App. E.D. 2005) (*citing Helmig*, 42 S.W.3d at 680). If the movant proves that counsel had an actual conflict of interest that affected counsel's performance, then prejudice is presumed. *Price v. State*, 171 S.W.3d 154, 157 (Mo. App. E.D. 2005) (*citing State v. Griddine*, 75 S.W.3d 741, 745 (Mo. App. W.D. 2002)).

Actual Conflict of Interest: This case presents an actual conflict of interest. Rule 4–1.7(a) forbids and defines concurrent conflicts of interest:

> (a) Except as provided in Rule 4–1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

In addition, "[t]he potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations." *United States v. Unger*, 700 F.2d 445, 454 (8th Cir. 1983).

Here, Natalie's lawyer represented both her and her codefendant, David, on the same charges, when she and David had different levels of culpability, different defenses, and diverging interests. David was the most culpable (L.F. 40). David was the licensed marijuana grower, not Natalie (L.F. 40). David had been living in the apartment months longer than Natalie and the marijuana plants that the State charged David and Natalie produced and possessed were in David's bedroom closet and David's bathroom (L.F. 34). Also, in David's bedroom was the AR-15 assault rifle that the State charged they both possessed (L.F. 34).

Due to the incriminating location of the illegal items, for David, conviction after a trial was a foregone conclusion. That the marijuana and rifle were in his bedroom, bathroom, and closet, respectively, gave rise to a reasonable inference that he was aware of their presence and illegal nature, and that he was, in fact, guilty as charged. *State v. Steward*, 844 S.W.2d 31, 34 (Mo. App. W.D. 1997).

Under the circumstances, it was in David's best interests to negotiate a plea deal to minimize the charges and punishment, and plead guilty. Pleading guilty was what counsel believed he should do (L.F. 38).

In contrast, Natalie stood a chance of acquittal at trial because she had an obvious, arguable defense – that the illegal items belonged to David and that she had no part in the production of marijuana (L.F. 43). The presentation of this defense at trial might have resulted in Natalie's acquittal of all of the charges (L.F. 42). But Natalie did not go to trial, though it was arguably in her best interests to do so (Tr. 54).

It would have been impossible for Natalie to go to a joint trial with David, counsel, and this defense. *Compare Odom v. State*, 783 S.W.2d 486, 488 (Mo. App. W.D. 1990) (no actual conflict existed because the codefendants sought to advance the same defense). A conflict arises where one codefendant attempts to exonerate herself by pointing the finger at the other. *Parker v. Parratt*, 662 F.2d 479, 484 (8th Cir. 1981).

Due to their different levels of culpability, different defenses, and divergent interests, counsel, under these facts, could not possibly fulfill his duty to Natalie and David of undivided loyalty, zealous advocacy, and independent judgment. "Even were the clients' interests not directly adverse, the

representation of one client's interest may well materially compromise counsel's responsibilities to the other." *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 506-07 (Mo. App. E.D. 2010). "[A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." *Horn*, 325 S.W.3d at 507 (*citing* Rule 4–1.7 cmt. [8]).

Here, there were occasions, almost from the beginning of the case, where counsel's duty of loyalty to David made competent and effective representation of Natalie impossible. First, counsel was not able to use David's culpability as leverage to secure a relatively favorable outcome for Natalie, due to his duty of loyalty to David.

Despite their vastly different levels of culpability, David and Natalie usually received the same plea offers from the State throughout the two years that counsel represented them (L.F. 33-38). The prosecutor presented coercive plea offers where both defendants had to plead guilty to the same amount of prison time in order for either to take advantage of a plea agreement. These plea offers were good for David, whom counsel believed should plead guilty, but

were not as favorable for Natalie, whom counsel believed was not guilty (L.F. 35, 36, 38, 40).

Once the prosecutor continued to make these package offers to both codefendants, counsel had an incentive to steer Natalie towards the disastrous open plea in this case to help his other client, David, secure an outcome that was, essentially, David's best option.

Further, as the case progressed, the question arose whether Natalie would testify against David (L.F. 32, 36, 38). The prosecutor considered making an offer to Natalie in exchange for her testimony against David, and given her relative culpability, an attorney without a concurrent duty of loyalty to her brother "may have advised [her] . . . to testify against her brother in exchange for a SIS [i.e., suspended imposition of sentence] or a reduced charge" (L.F. 36, 40, 42).

Counsel, however, could not and did not advise Natalie of the wisdom of negotiating or accepting such an offer because of his duty of loyalty to David (L.F. 32, 36). Due to his loyalty to David, counsel could not explore that option to secure a favorable result for Natalie at the expense of David, a strategy that any competent lawyer would employ under the facts of this case as the case progressed with no plea agreement in place.

Counsel was unable to provide Natalie with honest advice and vigorous advocacy that would benefit *only her* because he was limited by his duties as David's lawyer as well. This is a case where "[c]ounsel's duty of loyalty to [his other client] . . . prevented counsel from fairly presenting to [Natalie] all possible courses of action because some of those options—most notably testifying against [David]—would be detrimental" to David. *Horn*, 325 S.W.3d at 508. "Counsel's duty of loyalty [to David] thus plainly foreclose[d] alternatives that otherwise might have been recommended [to Natalie]." *Id.* "Especially in the context of plea negotiations, 'to assess the impact of a conflict of interest on the attorney's options, tactics, and decision in plea negotiations would be virtually impossible.'" *Plunk v. Hobbs*, 766 F.3d 760, 764 (8th Cir. 2014) (*quoting Holloway v. Arkansas*, 435 U.S. 475, 491 (1978)).

Had Natalie had her own lawyer, she would have had an advocate who could have more effectively represented her and could have drawn a distinction between her level of culpability, relative to her brother. Any lawyer who was focused only on Natalie's welfare would have done so.

Unknowing, Unintelligent, and Involuntary Waiver: At the beginning of the representation, Natalie agreed in the waiver she signed that she would not take a position adverse to her brother. However, at that early stage of the case,

Natalie did not know what conflicts would later develop and what her options were.

Natalie signed the waiver of conflict of interest with the understanding that there was no conflict, so long as she never testified against David, and that counsel would inform her if a conflict developed (L.F. 43). After the initial waiver, the question of a conflict never came up again (L.F. 44).

Rule 4–1.7(b) sets forth the conditions under which a client can consent to a conflict of interest. It states, "Notwithstanding the existence of a concurrent conflict of interest under Rule 4–1.7(a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing."

"Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Rule 4–1.7 cmt. [1]. "The duty of loyalty to his or her clients is one of the most basic responsibilities incumbent on a lawyer." *Horn*, 325 S.W.3d at 507. For this reason and others, some conflicts are not waivable,

meaning that counsel cannot properly ask clients to consent to the conflict, nor can the lawyer provide representation based on client consent. Rule 4-1.7 cmt. [14-17].

"Where an actual conflict of interest exists, as in this case, or even where the potential for a conflict of interest at trial is of the magnitude presented here, the defendant's waiver does not resolve the matter." *Horn*, 325 S.W.3d at 510. "The court's institutional interest in protecting the truth-seeking function of the proceedings over which it presides requires the court to consider whether the defendant has effective assistance of counsel, regardless of any purported waiver." *Id.* A defendant can, in rare cases, voluntarily consent to a dual representation of a codefendant. *Harris v. State*, 609 S.W.2d 723, 724 (Mo. App. E.D. 1980).

Natalie's "consent" to dual representation on January 23, 2012 could not waive actual conflicts that had not yet developed. It was not informed consent because the conflict had not yet arisen. *Horn*, 325 S.W.3d at 508. Also, the document and explanatory letter provided by counsel states that he would inform her if a conflict develops and suggests that the only time a conflict would exist would be if one codefendant decided to testify against the other (L.F. 33-34). In the letter, counsel stated that he would only be forced to withdraw if "one of

you decides to take an action against the other which would harm the other's case" (L.F. 33).

The letter is misleading. It mischaracterizes and too narrowly defines what a conflict of interest entails. Any waiver that Natalie made based on that letter and form could not have been knowing, intelligent, or voluntary. Natalie could not knowingly waive a conflict that the attorneys and court never acknowledged existed (L.F. 64). *Unger*, 700 F.2d at 452 (movant could not have been specifically warned of the dangers of joint representation because neither her counsel nor the court admitted being aware of any conflict of interest).

Conclusion: Counsel actively represented conflicting interests and this resulted in an unfavorable outcome for Natalie, who is incarcerated for the foreseeable future. *Yoakum v. State*, 849 S.W.2d 685, 690 (Mo. App. W.D. 1993). "The ethical pitfalls inherent to joint representation of codefendants in criminal cases demand the utmost prudence by attorneys accepting such employment." *Henderson v. State*, 734 S.W.2d 254, 257 (Mo. App. S.D. 1987). "Where the facts show a departure from 'prevailing professional norms' in multiple defendant cases, there is a sufficient showing that the conflict of interest actually affected the adequacy of the representation." *Id.*

Plea counsel was ineffective for representing Natalie while laboring under an actual conflict of interest that adversely affected his performance, and prejudiced Natalie. No reasonably competent attorney would have done as counsel did, and but for counsel's actions, there is a reasonable probability that the outcome of Natalie's criminal proceedings would have been different.

Further, Natalie "did not waive . . . [a] conflict that was not brought to her attention." *Unger*, 700 F.2d at 454 (*citing* Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J.Crim.L. & Criminology 226, 246 (1977)). "Her uninformed acquiescence to joint representation did not meet the standard required for a knowing and intelligent waiver." *Unger*, 700 F.2d at 454.

The motion court's error violated Natalie's rights to conflict-free, effective counsel, to due process, and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse the motion court's judgment and vacate Natalie's plea, or in the alternative, remand for an evidentiary hearing on this claim.

ARGUMENT – II.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant an evidentiary hearing and post-conviction relief, in that Natalie pleaded that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance and there is no rational basis for its categorization in schedule I; marijuana does not have a high potential for abuse relative to other controlled substances, and has accepted medical uses for treatment. Since this Court's decision in *McManus*, scientific consensus has emerged that marijuana's potential for abuse is low, and it has safe and accepted medical uses. The motion court's error violated Natalie's rights to equal protection of the law and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 10, and 18(a) of the Missouri Constitution.

Facts and Preservation of the Error

Natalie asserts that this assignment of error is properly preserved for appellate review because Natalie included it in her amended motion (L.F. 57-59). *See, e.g., Comstock v. State*, 68 S.W.3d 561, 565 (Mo. App. W.D. 2001) (holding a Rule 24.035 post-conviction claim was unpreserved for appellate review because

it was not included in *pro se* and amended motions); *see also Gooden v. State*, 846 S.W.2d 214, 217 (Mo. App. S.D. 1993) (same).

In her amended motion, Natalie pleaded that she, David, and five other criminal defendants pleaded guilty at the same time, and that the court's use of this group plea procedure "exacerbated the damage caused by the conflict of interest" by making it less likely that the court would make the inquiries necessary to recognize and address the conflict of interest (L.F. 58-59).

Natalie claimed use of this procedure should invalidate her plea (L.F. 58). She stated: "Had this plea not been taken as part of a line of unrelated criminal defendants, there is a reasonable likelihood at least some of the facts pleaded in this [amended] motion would have emerged[,] . . . the prosecutor and the court would have been alerted to the conflict[,] and the court would have been forced to order separate counsel at that point, or at a minimum would not have accepted the guilty plea at that time" (L.F. 58).

The motion court denied Natalie's claim in findings of fact and conclusions of law, issued on September 17, 2014 (L.F. 73-74). The motion court concluded that no conflict of interest existed (L.F. 74).

The motion court also noted that although courts had disapproved of the court's practice of using group pleas, no court has held the practice to be *per se*

invalid (L.F. 74). The motion court acknowledged criticisms that group pleas confuse the defendant or tempt the defendant to "parrot" the answers of the person next to him, but mentioned that Natalie had not alleged that she was confused or parroted any answers (L.F. 73-74).

Standard of Review

Appellate review is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Sadler v. State,* 965 S.W.2d 389, 390-391 (Mo. App. E.D. 1998); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Johnson v. State*, 962 S.W.2d 892, 894 (Mo. App. E.D. 1998).

Relevant Law

By pleading guilty, the criminal defendant waives not only her right to a fair trial, but also the following rights and privilege: the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Missouri Constitution; the right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 18(a) and 22(a) of the Missouri Constitution; the right to confrontation as guaranteed by the Sixth and

Fourteenth Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution; and the rights to "demand the nature and cause of the accusation" and to compel the attendance of witnesses in her defense as guaranteed by Article I, § 18(a) of the Missouri Constitution. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *see also State v. Shafer*, 969 S.W.2d 719, 731-732 (Mo. banc 1998).

"Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make the related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (*citing Brady v. United States*, 397 U.S. 742, 748 (1970)); *Shafer*, 969 S.W.2d at 732.

To ensure that the defendant is knowingly and voluntarily entering the plea, the trial court must question the defendant on record and determine that the defendant understands the rights that she is waiving. *Boykin*, 395 U.S. at 243-244. Rule 24.02(b) provides that "the court must address the defendant personally in open court" and inform the defendant of, and ensure she understands, certain rights.

If a defendant is prejudiced by the court's violation of Rule 24.02, she may make a legitimate claim for remedy under Rule 24.035. *Dean v. State*, 901 S.W.2d 323, 328 (Mo. App. W.D. 1995). To be entitled to an evidentiary hearing on her claim, Natalie must (1) state facts, not conclusions, that if true, would entitle her to relief; (2) show the factual allegations are not conclusively refuted by the record; and (3) show she was prejudiced by the factual allegations. *Moore v. State*, 974 S.W.2d 658, 659 (Mo. App. E.D. 1998).

Argument

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant a hearing and post-conviction relief. Natalie pleaded that there were seven criminal defendants who pleaded guilty at the same time in this case, including her and David, and that this group plea procedure invalidated her guilty plea (L.F. 58-59).

The Court of Appeals has repeatedly criticized the use of group pleas – the practice of addressing multiple defendants simultaneously at the same plea hearing. *Wright v. State*, 411 S.W.3d 381, 387 (Mo. App. E.D. 2013). On May 16, 2006, the Court of Appeals first called the practice of accepting group guilty pleas "far from ideal," and stated that it "should be discontinued." *Guynes v.*

State, 191 S.W.3d 80, 83 n.2 (Mo. App. E.D. 2006). The Court of Appeals reiterated this sentiment in *Elverum v. State*, 232 S.W.3d 710, 712 n. 4 (Mo. App. E.D. 2007) in 2007, and in 2008 in *Castor v. State* 245 S.W.3d 909, 915 n. 8 (Mo. App. E.D. 2008). In 2009, in *Roberts v. State*, 276 S.W.3d 833, 837 (Mo. banc 2009), this Court stated, "[G]roup pleas are not preferred procedure and should be used sparingly."

The court in question used the group plea procedure here, as it had done in previous cases. *Wright*, 411 S.W.3d at 388 (Richter, R.L., concurring). At her plea hearing, Natalie was joined by her brother, David, and five other criminal defendants and their attorneys (Tr. 4-7). The court advised the group of seven of their rights *en masse* and questioned them *en masse* "to save a great deal of time" (Tr. 8). The court started with the first defendant, and then moved "straight on down the line in order" (Tr. 8-9). Natalie was sixth in line (Tr. 8-10).

Here, due to the trial court's use of a group plea procedure, the court failed to recognize the conflict of interest that arose from counsel's joint representation of David and Natalie, and failed to inquire about the conflict. If the court "knows or reasonably should know that a particular conflict exists," it must initiate an inquiry about that conflict. *Cuyler v.*

Sullivan, 446 U.S. 335, 347 (1980). A court, alerted to possible conflicts of interests, must take adequate steps to ascertain whether the conflicts warrant separate counsel. *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 261 (Mo. banc 2002) (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988) and *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978)). But instead of inquiring about possible conflicts and waivers of any conflicts of interest, the court asked Natalie and David about their representation by Viets using the same rote questioning that was directed to the other, unrelated defendants standing in line (Tr. 11; L.F. 15).

Natalie acknowledges that the majority of her responses to the court's rote, general questions seldom differed from the basic, "Yes, sirs," and "No, sirs" parroted by David and the other defendants, and indicated her acquiescence to the plea and the plea procedure. That Natalie did not object, however, does not relieve the court of the requirements imposed by Rule 24.02, or discharge the court from any duty of inquiry under *Holloway*. *Holloway*, 435 U.S. at 489-90; Rule 24.02(c). When alerted to possible conflicts, such as those involving dual representation, the court has an affirmative duty to protect the rights of the unsuspecting defendant. *Id*.

Natalie did not object to the plea, the plea procedure, or the dual representation because Natalie had no reason to believe anything was amiss (Tr. 9; L.F. 33). Natalie, whose first experience this was with the criminal justice system, was not aware of the conflict or the impropriety of the plea procedure. Counsel had informed her that "he believed there was no actual conflict" and no one had informed her that there was anything wrong or unorthodox about the manner in which the court conducted her plea hearing (Tr. 9; L.F. 33). So, Natalie did what every other defendant did that day and went along with whatever procedures her lawyer and the court believed proper (Tr. 72).

The group plea procedure utilized by the court prejudiced Natalie. As argued in Argument I, *supra*, there was an actual conflict of interest that adversely affected counsel's performance and prejudiced Natalie. But for the court's use of the group plea procedure, there is a reasonable likelihood that the court would have recognized and addressed the actual conflict of interest, that Natalie would have had conflict-free, effective counsel, and that the outcome of the proceedings would have been different. A one-on-one plea is the preferred way of taking guilty pleas, and here, a more thorough and individual plea procedure would likely have exposed the

conflict of interest that led to the unfavorable outcome for Natalie. *Roberts*, 276 S.W.3d at 837.

Thus, the motion court erred and violated Natalie's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Missouri Constitution, and Rule 24.02. This Court should reverse the motion court's judgment and vacate Natalie's guilty plea, or in the alternative, remand for an evidentiary hearing.

ARGUMENT – III.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant an evidentiary hearing and post-conviction relief, in that Natalie pleaded that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance and there is no rational basis for its categorization in schedule I; marijuana does not have a high potential for abuse relative to other controlled substances, and has accepted medical uses for treatment. Since this Court's decision in *McManus*, scientific consensus has emerged that marijuana's potential for abuse is low, and it has safe and accepted medical uses. The motion court's error violated Natalie's rights to equal protection of the law and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 10, and 18(a) of the Missouri Constitution.

Preservation and Standard of Review

This assignment of error is preserved for appellate review because Natalie included it in her amended motion (L.F. 45-55). *See, e.g., Comstock v. State*, 68 S.W.3d 561, 565 (Mo. App. W.D. 2001) (holding Rule 24.035 post-conviction claim was unpreserved for appellate review because it was not included in *pro se* and

amended motions); *see also Gooden v. State*, 846 S.W.2d 214, 217 (Mo. App. S.D. 1993) (same).

Appellate review of a judgment entered under Rule 24.035 "is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Price v. State*, 422 S.W.3d 292, 294 (Mo. banc 2014). 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. *Webb v. State*, 334 S.W.3d 126, 128 (Mo. banc 2011). To be entitled to an evidentiary hearing, Natalie must (1) cite facts, not conclusions, that if true, would entitle her to relief; (2) the factual allegations must not be refuted by the record; and (3) the claims of error must prejudice her. *Id.* (*citing Matthews v. State*, 175 S.W.3d 110, 113 (Mo. banc 2005)).

Argument

Section 195.017 arbitrarily classifies marijuana as a schedule I controlled substance. Natalie's prosecution was based on this arbitrary classification in violation of her rights to equal protection of the law and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 10, and 18(a) of the Missouri Constitution.

A law is subject to equal protection challenge as over-inclusive where one item is placed within a prohibited class without rational distinction. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-154 (1938). The constitutionality of a statute, valid on its face, "may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the (particular) class, is so different from others of the class as to be without the reason for the prohibition." *Id.* "An accused may challenge the statutory scheme under the Equal Protection Clause by establishing that the facts which initially supported the inclusion of the challenged provision have ceased to exist." *Id.*

When determining if a statute violates the equal protection clause, this Court first looks at "whether the classification operates to the disadvantage of some suspect class or *impinges upon a fundamental right explicitly or implicitly protected by the Constitution.*" *In re Norton*, 123 S.W.3d 170, 173 (Mo. banc 2003) (internal quotations and citations omitted). If it does, "the classification is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest." *Id.* If not, review is limited to determining whether the classification is rationally related to a legitimate state interest." *Id.*

Section 195.017 operates to the disadvantage of a fundamental right explicitly protected by the Constitutions of the United States and the State of Missouri. The fundamental right at issue is the right of liberty. The Fourteenth Amendment to the United States Constitution states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Missouri Constitution similarly states "that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const., Art. I, § 2.

Included in the fundamental right of liberty is the right to be free from physical restraint. The Supreme Court has held that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). A review of its decisions on the topic makes it "clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983). This Court is in agreement with this ideal. In *Norton*, this Court concluded that "civil

commitment of persons . . . impinges on the fundamental right of liberty." *Norton*, 123 S.W.3d at 173.

Section 195.211 makes production and possession of a controlled substance a felony. An offender is subject to substantial sentences of incarceration that impinge on her fundamental right of liberty. Section 195.017 (which classifies marijuana as a schedule 1 controlled substance), in conjunction with Section 195.211, work to impinge the fundamental right of liberty through physical restraint. The law, therefore, must be subject to a strict scrutiny analysis.

Strict scrutiny is a stringent test. "[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' [ ] include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis in original).

The statute's purpose is clear: it is to strictly control and criminalize any substance that "(1) [h]as high potential for abuse; and (2) [h]as no accepted

medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." § 195.017.1, RSMo.[3]

But while this may be a compelling interest, the law is not narrowly tailored. Marijuana's potential for abuse is low and it has safe and accepted medical uses, yet it is arbitrarily included in this classification. It is an item that has been placed within a prohibited class without rational distinction. *Carolene*

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[3] Schedule II substances, in contrast, have (1) high potential for abuse, (2) currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and (3) the abuse of the substance may lead to severe psychic or physical dependence. § 195.017.3, RSMo Cum. Supp. 2010. Schedule II includes opiates and cocaine. A schedule III controlled substance means "(1) [t]he substance has a potential for abuse less than the substances listed in Schedules I and II; (2) [the] substance has currently accepted medical use in treatment in the United States; and (3) [abuse] of the substance may lead to moderate or low physical dependence or high psychological dependence." § 195.017.5, RSMo Cum. Supp. 2010. There are five categories of controlled substances in Missouri, which largely mirror the categories enumerated in the federal Controlled Substances Act.

Prods. Co., 304 U.S. at 153-154. If reason and science ever justified its inclusion in Schedule 1, those facts have ceased to exist. *Id.*

Even if subjected to "rational basis" scrutiny, the categorization is unconstitutionally irrational and arbitrary. A law is "arbitrary and unconstitutional if the classification rests upon a ground wholly irrelevant to the achievement of the state's objective or which is not based upon differences reasonably related to the purposes of the legislation." *State v. Ewing*, 518 S.W.2d 643, 646 (Mo. 1975) (*citing Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109, 117 (Mo. banc 1963); *Petitt v. Field*, 341 S.W.2d 106, 109 (Mo. banc 1960)). "A statute that creates arbitrary classifications that are irrelevant to the achievement of the statute's purpose may be struck down because the arbitrary classifications violate equal protection." *Kilmer v. Mun*, 17 S.W.3d 545, 552 n. 21 (Mo. banc 2000). Because marijuana's potential for abuse is low and it has safe and accepted medical uses, its classification as a schedule I controlled substance is arbitrary, irrational, and irrelevant to the statute's purpose.

Whether the drug or other substance has a high potential for abuse. In *State v. McManus*, 718 S.W.2d 130, 132 (Mo. banc 1986), examining the same equal protection challenge made in this case, this Court determined that "[b]ecause the

level of the THC cannot be standardized and controlled, the medical usefulness of the drug is limited."

But modern medical developments show that this is no longer true. If a hearing had been granted in this case, Natalie would have presented evidence that the federal government's National Institute on Drug Abuse (NIDA) has developed and provided three standardized research-grade potencies of marijuana (L.F. 48).

If a hearing had been granted in this case, Natalie would also have presented evidence that physicians examine the physical and psychological effect of a substance to determine if it has a high potential for abuse (L.F. 49). The amended motion pleaded that an expert witness would testify that marijuana has minimal potential for physical abuse, and low potential for psychological abuse (L.F. 49). The cessation of marijuana use causes minimal physiological symptoms of withdrawal and it has a notably low abuse potential (L.F. 50). Testimony would have shown that marijuana is not lethal and that there have not been any confirmed deaths from marijuana overdose (L.F. 50). The risk of serious harm or death from marijuana overdose is, as a practical matter, nonexistent (L.F. 50).

Natalie would have presented evidence that the Therapeutic Index is a widely used measurement of a drug's potential harmful effect (L.F. 50). It is determined by finding the ratio of the dose that produces toxicity in 50% of subjects and dividing that by the ratio of the dose that produces the desired result in 50% of subjects (L.F. 50). A low index indicates a small difference between a therapeutic dose and a toxic dose. The lower the index is, the higher the potential for toxicity or lethality (L.F. 50). Evidence at a hearing would have shown that marijuana's index is extremely high, estimated to be between 1,000 and 40,000 (L.F. 50). By comparison, the index for acetaminophen is less than three and aspirin is less than five (L.F. 50).

The risk of addiction is also low (L.F. 50). If a hearing had been granted, expert testimony would have established that according to researchers and mental health professionals, marijuana is far less addictive than most drugs, including alcohol, nicotine, and caffeine (L.F. 51). Experts analyze whether a substance is physically addictive and whether it causes damage to the health of the user (L.F. 51). Evidence would have shown that the medical community uses the Diagnostic and Statistical Manual of Mental Disorders (DSM) to determine addiction, which is published by the American Psychiatric Association and is the standard for classifying mental disorders (L.F. 52).

"The DSM defines addiction as: (1) tolerance to a substance that requires more of the drug over time to get the same effect, (2) withdrawal symptoms without the substance, (3) continued use of the drug despite psychological or physical harm, (4) loss of control or overindulgence, (5) increased amount of time engaged in the behavior to obtain or use the substance, (6) unsuccessful attempts to cut down use of the substance, and (7) reduced involvement in social, occupational or recreational activities due to the drug" (L.F. 52).

Evidence through expert testimony would have shown that less than 9% of people who have used marijuana have become dependent (L.F. 52). Studies have showed that marijuana is less addictive than the other substances in the survey (L.F. 52). For comparison, nicotine's dependence liability was 32%, alcohol's was 22.7%, and cocaine's was 20.9% (L.F. 52). One survey also found significant differences in probability of dependence based on racial-ethnic factors (L.F. 52). This suggests that other factors had an impact on the outcome, such as socioeconomic status and cultural differences (L.F. 52). Many participants in the study who became addicted showed signs of susceptibility to addiction unrelated to the substances (L.F. 52). The presence of such factors indicates that risk of addiction of marijuana may be even lower than results indicate (L.F. 52).

Further, expert testimony at a hearing would have shown that Columbia University laboratory is one of a handful of facilities in the country authorized by the federal government to conduct marijuana research on humans (L.F. 53). Expert testimony from that lab would have shown that withdrawal symptoms from marijuana are minor compared to other substances, such as alcohol and many prescription drugs (L.F. 53). Marijuana is believed to be psychologically, rather than physiologically, addictive (L.F. 53). This means withdrawal symptoms do not include the physical pain experienced during withdrawal from other substances (L.F. 53).

Whether the drug or other substance has no currently accepted medical use in treatment. It is no longer seriously debatable that marijuana has medicinal value. At the time Natalie filed her motion, the scientific community, general public, 21 states, and the District of Columbia had determined that marijuana has legitimate medical applications. Alaska Stat. §§ 11.71.090; Ariz. Rev. Stat. Ann. § 13-3412.01; Cal. Health & Safety Code §§ 11362.5, 11362.7 et. seq.; Colo. Const. Art. XVIII, § 14; Colo. Rev. Stat. § 18-18-406.3; Conn. Gen. Statute Ch. 420f, § 21a-408, et. seq.; D.C. Code § 7-1671.01, et, seq.; 16 Del. C. § 4901A, et. seq.; Haw. Rev. Stat. §§ 329-121, et. seq.; Illinois House Bill 1 (2013); Me. Rev. Stat. Ann., Tit. 22, § 2421, et. seq.; Md. Code Ann., Crim. Law §5-

601(c)(3)(II); 105 C.Mass.R. 725.000, et. seq; Mich. Comp. Law § 333.26424(j); Mont. Code Anno., § 50-46-301, et. seq.; Nev. Const., Art. 4, § 38; Nev. Rev. Stat. § 453A.010, et. seq.; New Hampshire House Bill 573-FN (July 2013); N.J. Stat. Ann. § 24:6I-3; N.M. Stat. Ann. § 26-2B et. seq; Ore. Rev. Stat. §§ 475.300, et. seq; R.I. Gen. Laws § 21-28.6-4; 18 V.S.A. § 4472, et. seq; Wash. Rev. Code §§ 69.51A.005, et. seq; L.F. 48.[4]

Expert testimony would have shown there is also overwhelming support for the medical use of marijuana in the medical community (L.F. 53). A survey by the *New England Journal of Medicine* that reported a vast majority, 76%, of clinicians favor the availability of marijuana for medical uses (L.F. 53). WebMD also conducted a survey in 2014 which reported that 69% of physicians surveyed

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[4] Several additional states passed measures allowing marijuana for treatment of medical conditions in 2014: Alabama, Florida, Iowa, Kentucky, Missouri, Wisconsin, South Carolina, New York, North Carolina, Utah, Tennessee, Minnesota, and Mississippi. "State Medical Marijuana Laws," National Conference of State Legislatures, http: //ncsl.org/research/health/state-medical-marijuana-laws.aspx (last accessed 03/20/16; www removed for hyperlink).

believe marijuana is useful in treating certain conditions and 67% agreed that marijuana should be a treatment option (L.F. 53).

Natalie would have also provided evidence that a myriad of medical practitioner associations have officially supported legalization of marijuana for medical use (L.F. 53). The list includes, but is not limited to: the Epilepsy Foundation of America, American Medical Student Association, American Nurses Association, American Preventive Medical Association, American Public Health Association, as well as various medical societies for the states of Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Mississippi, New Jersey, New Mexico, New York, North Carolina, Rhode Island, Texas, Vermont, and Wisconsin (L.F. 53). Still others, including the American Medical Association and the American Cancer Society, support more research into the medical benefits of marijuana (L.F. 53).

In 2000, the State of California began sponsoring research into the safety and medical efficacy of whole smoked marijuana (L.F. 53). The randomized, placebo controlled trials included patients suffering from multiple sclerosis, HIV, and chronic neuropathy (L.F. 54). Expert testimony would have shown that clinicians who reviewed the results of this 2012 study concluded that marijuana

has medical value, there is sufficient information regarding its safety, and that its classification as a schedule I controlled substance is untenable (L.F. 54).

Medical testimony would further have shown that physicians and scientists from around the world presented research at the Eighth National Clinical Conference on Cannabis Therapeutics in 2014 (L.F. 54). Research topics included the efficacy and danger of using cannabis to treat Alzheimer's disease, neuromuscular diseases, hepatitis C, cancer, and cardiovascular problems (L.F. 54). Expert medical testimony would have shown that studies overwhelmingly agree that marijuana can be used safely for medical treatment (L.F. 54). Expert testimony would have demonstrated that cannabis has therapeutic value in treating, for example, pediatric seizures (L.F. 54). Marijuana has been used to treat varieties of seizure disorders (L.F. 54). In one study, 9 of 11 children had a 90-100% reduction in seizures (L.F. 54). Further, marijuana is used to treat symptoms of Amyotropic Lateral Sclerosis (ALS) (L.F. 54). Natalie would present evidence that the National Institute on Drug Abuse [NIDA], the foremost governmental research institute has noted as recently as June 5, 2014, that marijuana has a medical use in treating glaucoma, nausea, AIDS-associated anorexia and wasting syndrome, chronic pain, inflammation, multiple sclerosis, and epilepsy (L.F. 54).

Whether there is accepted safety for use of the drug under medical supervision. Expert testimony would have established that the National Institutes of Health's National Institute on Drug Abuse (NIDA) funded a project at the University of California at Los Angeles (L.F. 55). The purpose of this project was to determine if smoking cannabis increased the risk of cancer similar to smoking tobacco (L.F. 55). The researchers concluded: "[C]ontrary to our expectations, we found no positive associations between marijuana use and lung or UAT [Upper Aerodigestive Tract] cancers (L.F. 55). The research found, "Although we observed positive dose-response relations of marijuana use to oral and laryngeal cancers in the crude analyses, the trend was no longer observed when adjusting for potential confounders, especially cigarette smoking (L.F. 55).

An expert witness would have testified that as a physician practicing in California following the passage of the Compassionate Use Act, he was easily able to monitor his patients' use of cannabis as medicine (L.F. 55). In fact, because marijuana has minimal toxicity and has limited side effects, patients using cannabis are much easier to care for than those taking routinely prescribed medications (L.F. 55). Further, studies show no substantial, systematic effect of long-term, regular cannabis consumption on the neurocognitive functioning of users who were not acutely intoxicated (L.F. 55).

These facts, pleaded in the amended motion, would demonstrate § 195.017 arbitrarily and with no rational basis classifies marijuana as a schedule I controlled substance, which is by definition one that "(1) [h]as high potential for abuse; and (2) [h]as no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." § 195.017.1, RSMo Cum. Supp. 2010. In *State v. Mitchell*, 563 S.W.2d 18, 26 (Mo. banc 1978), this Court pointed to split medical opinions on the "hazards involved in using marihuana" in rejecting this same challenge. Now, marijuana is no longer seriously considered to be among the most harmful drugs**,** and there is no debate whatsoever on its medicinal value.

Put simply, since the time this Court last encountered this question, in 1986, the facts and the consensus of the scientific and medical community on this issue has changed. There is no longer a rational basis for categorizing marijuana as a schedule I controlled substance. And, because Natalie's prosecution and current incarceration is based on this arbitrary and unreasonable classification in violation of her rights to equal protection of the law and due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 10, and 18(a) of the Missouri Constitution, this

Court must reverse the motion court's judgment and vacate her plea, or in the alternative, remand for an evidentiary hearing on this claim.

ARGUMENT – IV.

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant an evidentiary hearing and post-conviction relief, in that Natalie pleaded that counsel was ineffective, resulting in an unknowing and involuntary plea, for advising Natalie to plead guilty and failing to make the challenge that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance at the earliest opportunity in the case as raised in Point III. The motion court's error violated Natalie's rights to effective assistance of counsel, to equal protection, to due process of law, and to a trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

Facts and Preservation of the Error

Natalie asserts that this assignment of error is properly preserved for appellate review because Natalie included it in her amended motion (L.F. 56-58). *See, e.g., Comstock v. State*, 68 S.W.3d 561, 565 (Mo. App. W.D. 2001) (holding a Rule 24.035 post-conviction claim was unpreserved for appellate review because it was not included in *pro se* and amended motions); *see also Gooden v. State*, 846 S.W.2d 214, 217 (Mo. App. S.D. 1993) (same).

In her amended motion, Natalie claimed that counsel was ineffective for failing to challenge Natalie's conviction on grounds that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance and thereby, violates the due process and equal protection clauses of the United States and Missouri Constitutions (L.F. 56). Natalie averred that counsel unreasonably failed to raise this constitutional issue, and that under similar circumstances, a reasonably competent attorney would have raised the issue (L.F. 57).

She further stated that counsel's unreasonable failure prejudiced her (L.F. 57). She stated that had counsel raised the issue and preserved it, the matter would have been successfully raised on appeal and had the statute been declared unconstitutional, her judgment and sentence would have been vacated (L.F. 57).

Natalie requested an evidentiary hearing on her pleadings (L.F. 57). The motion court denied Natalie's request and her claim in findings of fact and conclusions of law, issued on September 17, 2014 (L.F. 73). In denying the claim, the motion court relied upon *State v. Mitchell*, 563 S.W.2d 18 (Mo. banc 1978) and *State v. McManus*, 718 S.W.2d 130 (Mo. banc 1986), in which this Court held that the classification of marijuana as a schedule I controlled substance has rational basis and does not violate the equal protection clause (L.F. 73).

Standard of Review

Appellate review is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Dudley v. State*, 903 S.W.2d 263, 265 (Mo. App. E.D. 1995).

Relevant Law

The Sixth Amendment to the United States Constitution establishes the fundamental right to counsel, which extends to state defendants through the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). To fulfill its role of assuring a fair trial, the right to counsel must be the right to "effective" assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

To prevail on her claim of ineffective assistance of counsel, Natalie must show that her plea attorney failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that she was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). To prove prejudice, she must show a reasonable probability

that, but for counsel's errors, the result of the proceeding would have been different. *Dodds v. State*, 60 S.W.3d 1, 3 (Mo. App. E.D. 2001).

Moreover, to be entitled to an evidentiary hearing of her claim of ineffective assistance of counsel, Natalie must have alleged facts, not conclusions, that if true would warrant relief; the record and files in the case must not refute these allegations; and Natalie must have been prejudiced by the matters of which she complained. *Simmons v. State*, 100 S.W.3d 143, 145 (Mo. App. E.D. 2003). If a motion under Rule 24.035 and the files and records of the underlying case conclusively show that movant is not entitled to relief, an evidentiary hearing is not required. *Loudermilk v. State*, 973 S.W.2d 551, 553 (Mo. App. E.D. 1998).

Argument

The motion court clearly erred in denying Natalie DePriest's Rule 24.035 motion without a hearing because Natalie pleaded facts, not conclusions, that the record does not refute and which warrant an evidentiary hearing and post-conviction relief**.** Natalie pleaded that counsel was ineffective for failing to make, at the earliest opportunity, the challenge that § 195.017 arbitrarily classifies marijuana as a schedule I controlled substance (L.F. 56-58).

Generally, the failure to challenge the constitutionality of a statute at the earliest opportunity waives the issue. *Feldhaus v. State*, 311 S.W.3d 802, 804 (Mo. banc 2010). "A constitutional claim must be raised at the earliest opportunity and preserved at each step of the judicial process." *State v. Sumowski,* 794 S.W.2d 643, 648 (Mo. banc 1990). The proper time to raise such issues must be done on motion before trial. *Feldhaus*, 311 S.W.3d at 804. Before Natalie's plea, counsel did not raise a challenge to the constitutionality of § 195.017 on the stated grounds. As a consequence, the constitutional challenge was waived. *Ross v. State*, 335 S.W.3d 479, 480 (Mo. banc 2011).

Counsel's failure to raise Natalie's constitutional challenge to § 195.017 was unreasonable because, as argued in Argument III, *supra*, the constitutional challenge was meritorious. (Natalie hereby incorporates Argument III by reference, as if set forth in full herein).

Consequently, under the same or similar circumstances, a reasonably competent attorney would have timely raised the constitutional challenge in the court before Natalie's plea. No reasonable trial strategy reason justified counsel's failure to do so, because a conviction entered on the basis of an unconstitutional statute is void. *State v. Burgin*, 203 S.W.3d 713, 716 (Mo. App. E.D. 2006) (*citing*

Ex Parte Smith, 36 S.W. 628, 629 (Mo. 1896)); *State v. Hudson*, 386 S.W.3d 177, 178 (Mo. App. E.D. 2012).

But for counsel's failure, there is a reasonable probability that the outcome of Natalie's criminal proceedings would have been different. There is a reasonable probability that but for counsel's failure, the court would have dismissed the charges, and that Natalie would have avoided conviction altogether.

The motion court's error violated Natalie's rights to effective assistance of counsel, to equal protection, to due process of law, and to a trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse the motion court's judgment and vacate Natalie's plea, or in the alternative, remand for an evidentiary hearing.

CONCLUSION

WHEREFORE, based on her arguments in Points I through IV of her brief, Appellant Natalie DePriest respectfully requests that this Court reverse the motion court's judgment and vacate Natalie's plea, or in the alternative, remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Karen Kramer of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 at Karen.Kramer@ago.mo.gov on **Tuesday, March 22, 2016**. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Book Antiqua 13-point font. The word-processing software identified that this brief contains 14,955 words.

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