IN THE
MISSOURI SUPERME COURT

TODD BEARDEN	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC96515**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
TRANSFERRED BY THE COURT OF APPEALS, EASTERN DISTRICT
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY, MISSOURI
24th JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE KENNETH WAYNE PRATTE, JUDGE, PLEA AND SENTENCING
THE HONORABLE SANDRA MARTINEZ, JUDGE, PROBATION VIOLATION, SENTENCE EXECUTION AND POST CONVICTION

APPELLANT'S SUBSTITUTE BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Books

JURISDICTIONAL STATEMENT

Todd Bearden pleaded guilty to two counts of possessing chemicals with the intent to manufacture methamphetamine. He was sentenced to five years of probation, then when his probation was revoked, to 14 years in prison. [Lf 99-104]. Todd timely filed his *pro se* Rule 24.035 motion to vacate, set aside or correct judgment or sentence on July 6, 2015, after delivery to the department of corrections on April 16, 2016. [LF 106-108, 109]. A transcript of the plea, sentencing and revocation proceedings in this case was filed in part on December 18, 2015, and completed on December 29, 2015 [LF 10-11], making the 60 day due date February 29, 2016 due to an intervening weekend. A thirty day extension was granted making this motion due today 30 March 2016. [LF 106-108] The amended motion was filed March 30, 2016. [LF 106-108]. All claims were denied without hearing. Todd timely filed an appeal in the Eastern District, and that court, after briefing, transferred the cause to this Court. Opinion, *Bearden v. State*, ED104464; Const., Art. V, § 3; Mo. Rev. Stat. § 477.050.

STATEMENT OF FACTS

Todd Bearden was charged with the possession of precursor chemicals to manufacture methamphetamine- lithium and ephedrine. [LF 12].[1] His charges did not include any specific isomer of methamphetamine, nor did they allege the isomer Todd supposedly intended to manufacture. [LF 12].

Todd pleaded guilty as part of a group plea procedure. [LF 19-33.] Todd pleaded guilty in a group of six other individuals. [LF 19-21.] This procedure was used because the Court expressed a desire to save time. [LF 19-21.] During the plea, his answer was to appear fourth. [LF 19]. However, due to the court reporter using columns, it is unclear which response actually belongs to Mr. Bearden- if one reads left to right, top to bottom it yields a different result than if one reads top to bottom, left to right though the two columns of answers. [LF 20].

During the plea process Todd was not asked what type of methamphetamine he intended to produce. [LF 19-33.] Despite the desire to save time, the proceeding was interrupted more than once to deal with the need for arraignment,

[1] In one earlier pleading, counsel accidently identified an additional charge of resisting arrest-- this charge belonged to one of the other parties to the group plea, and was an error by counsel. The correct charges appear on the amended motion. [LF 132].

amended charging documents or other issues. [LF 22-33.] The only times the defendants actually answered in a group in a manner that would save time was when they were asked *en masse* about their rights and satisfaction with their lawyers. [LF 22-33.] Todd eventually would individually answer some of these questions when his probation was later revoked, and he was questioned about the performance of trial counsel. [LF 102-3]. It is apparent on this later record which answers were actually Todd's own words. [Lf 102-3].

Todd's pleas were accepted for the possession of precursors counts. [LF 22-33.] He was placed on probation. Todd later was found to have violated his probation, and went to prison. [Lf 100-104].

Todd timely filed his *pro se* Rule 24.035 motion to vacate, set aside or correct judgment or sentence on July 6, 2015, after delivery to the department of corrections on April 16, 2016. [LF 106-108, 109]. The amended motion was filed March 30, 2016. [LF 106-108]. All claims were denied without hearing. Todd timely filed an appeal in the Eastern District, and that court, after briefing, transferred the cause to this Court. Opinion, *Bearden v. State*, ED104464; Const., Art. V, § 3; Mo. Rev. Stat. § 477.050.

To avoid needless repetition additional facts may be set out in the argument section of this brief.

FIRST POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Todd alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when Court accepted Todd's plea as part of an unconstitutional group guilty plea, which resulted in a lack of proper individual inquiry, and allowing a plea to charges with a highly suspect factual basis, and in an environment with a highly coercive factor not to disrupt the plea lest it injure the other men also attempting to attain their plea bargains. But for the lack of individual questioning, and the pressure not to disrupt the proceeding and risk the ire of other defendants, Todd would not have completed his plea.

Depriest v. State, 510 S.W.3d 331 (Mo 2017)

U.S. Const. Amends. VI, V and XIV

Mo. Const. Art. I§§2, 10 and 18(a)

SECOND POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Todd alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when the court accepted Todd's plea to possessing ephedrine and lithium with the intent to create a controlled substance, methamphetamine. This was error in that not all forms of methamphetamine are a controlled substance in Missouri. Only isomers of methamphetamine with a central nervous stimulant effect are controlled substances. Since it was never established what Todd intended to manufacture, and if it was a type of methamphetamine that is a controlled substance, there was no sufficient factual basis for his plea.

United States v. Acklen, 47 F.3d 739, 744 (5th Cir.1995)

RSMO §§195.400,195.017

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THIRD POINT RELIED ON

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FOURTH POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Todd alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when the court accepted Todd's plea to possessing lithium with the intent to create a controlled substance, methamphetamine. This was error in that Lithium is not a listed chemical under RSMO 195.400. Further, the state did not list any evidence it would have used to prove that lithium was a reagent, solvent or precursor able to be established by an expert witness as a chemical that is in anyway "manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered" to make a controlled substance. Lithium does not play any of these roles in the reduction of ephedrine used to create methamphetamine. Its chemical role is different, and not within the limited definitions set forth by the statute.

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ARGUMENT FOR FIRST POINT RELIED ON

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Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly

erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id*. Appellant carries the burden to proving this by a preponderance of the evidence. *Id.*

Missouri law favors granting an evidentiary hearing, allowing its denial only when the record *conclusively* refutes the allegations of the Movant. Missouri Supreme Court Rule 24.035(h) [emphasis added]. This includes situations where the record unambiguously rebuts the movant's version of events. For instance in *Franks v. State*, 783 S.W.2d 437, 439 (Mo.App. E.D. 1990 the movant contested that he did not know he would be sentenced as a prior and persistent offender. Despite this, the record of his plea included explicit information and questioning on the fact that he was, going to be sentenced as a prior and persistent offender. *Id*. These are cases in which the issues raised by the movant were, by their very nature, on the record, and also clearly refuted therein.

In contrast, where there are facts that could merit relief which inherently would not be on the record, an evidentiary hearing is likely to be required. *See e.g., Webb v. State*, 334 S.W.3d 126, 127 (Mo. *banc* 2011) (evidentiary hearing required to determine if counsel affirmatively misrepresented parole requirements); *Conger v. State* 356 S.W.3d 217, 219 (Mo.App. E.D. 2011) (evidentiary hearing

required to determine if financial conflict of interest led plea counsel to pressure movant to enter plea of guilty). Reviewing the caselaw, the denial of an evidentiary hearing is appropriate only in those cases where the claims are limited to facts which would be on the record, and the record is so unambiguous that on its own it defeats the claim presented by the movant, or where the claimant fails to properly plea his claim by asserting conclusions instead of facts, not claiming prejudice, or otherwise procedurally defaulting. *See e.g. Webb* 334 S.W.3d at 128; *Asher v. State,* 390 S.W.3d 917, 917 (Mo.App. E.D.,2013) (Failure to timely file denies all claims to hearing or relief under rule 24.034)

Timing

Todd timely filed his pro se Rule 24.035 motion to vacate, set aside or correct judgment or sentence on July 6 2015, after delivery to the department of corrections on April 16, 2016. [LF 106-108, 109]. A full transcript in this case was filed on December, 29, 2015 [LF 10-11], making the 60 day due date February 29, 2016 due to an intervening weekend. A thirty day extension was granted making the amended motion sue March 30, 2016. [LF 106-108] The amended motion was filed March 30, 2016. [LF 106-108]

Analysis

Todd was denied his right to due process of law pursuant the United states constitution's Fifth and Fourteenth Amendments, and the Missouri Constitution, as well as his right to effective assistance of counsel as guaranteed to him by the Sixth Amendment to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when his plea was entered as part of an unconstitutional group guilty plea, which resulted in a lack of proper individual inquiry, and acceptance of a plea with a highly suspect factual basis, and an environment with a highly coercive factor not to disrupt the plea lest it injure the other accused individuals also attempting to attain their plea bargains. But for the lack of individual questioning, and the pressure not to disrupt the proceeding and risk the ire of other defendants, Todd would not have completed his plea.

Both in Missouri and other United States' jurisdictions, group guilty pleas have been met with suspicion. The Eastern District of Missouri recently ruled that the long disfavored group plea practice violated the rights of defendants in *Miller v State* Ed103323 (cause transferred in SC95805, but rendered moot by the death of the movant). The Court found that group guilty pleas called into doubt the voluntariness of the pleas, and that such pleas always merited an evidentiary hearing. ("We find the practice so abhorrent and antithetical to the idea of justice and due process and fairness that the mere use of such a practice infringes on the

voluntariness of a defendant's plea"). *Miller v State* ED103323. The Court noted that it had cautioned one lower court at least ten times to stop using such a practice. See, generally, *Briley v. State*, 464 S.W.3d 537 (Mo. App. E.D. 2015); *Snow v. State*, 461 S.W.3d 25 (Mo. App. E.D. 2015); *Wright v. State*, 411 S.W.3d 381 (Mo. App. E.D. 2013); *Roberts v. State*, 2008 WL 222503 (Mo. App. E.D. Jan. 29, 2008) (overruled by *Roberts v. State*, 276 S.W.3d 833 (Mo. banc 2009)); *Castor v. State*, 245 S.W.3d 909 (Mo. App. E.D. 2008); *Elverum v. State*, 232 S.W.3d 710 (Mo. App. E.D. 2007); *Adams v. State*, 210 S.W.3d 387 (Mo. App. E.D. 2006); *Guynes v. State*, 191 S.W.3d 80 (Mo. App. E.D. 2006). This same lower court took Todd's group plea. [LF 19].

Further, This Court has also long looked at this practice with disproval. In *Roberts v. State* this Court warned that group guilty pleas "unnecessarily increase the opportunities for mistakes or confusion." 276 S.W. 3d 833, 837 (Mo. 2009). Although the Court went on to note "[a]lthough this Court is not persuaded … that group pleas should be deemed automatically invalid or declared impermissible, group pleas are not preferred procedure and should be used sparingly." *Id.* at 836, fn. 5. The subsequent near decade of confusion and easily avoidable litigation generated by this procedure offers the Court the additional proof needed to show that the practice of group pleas should be consigned to the dust bin of history. This Court has noted that very fact- in *David Depriest v. State* the Court noted that it

could not be entirely certain if the group plea was to blame for inquiry not being made as to a conflict of interest claim; however, it noted "The possibility that the group plea procedure contributed to the trial court's failure to inquire into and make findings about these issues on the record, however, should be added to the long and growing list of reasons why this practice should be consigned to judicial history." *Depriest v. State,* 510 S.W.3d 331 (Mo 2017).

Other states have also rejected or avoided this practice. In a search of United States Jurisdictions, counsel was only able to find the practice of group pleas mentioned in ten states. Outside of Missouri, these states included Georgia, Tennessee, Louisiana, Ohio, Kentucky, Mississippi, Florida, Nebraska and Indiana. Although correlation is not causation, it should be noted at Louisiana, Georgia, Missouri, Mississippi, Florida and Kentucky are all united by another factor- incarcerating their populations at a rate above the United States as a whole. http://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR (compiling US bureau of Justice Statistics for number of individuals in state prison per 100,000 residents as of 2015). They are among only eleven states to do so. *Id.*

Even within this minority of states willing to entertain the possibility of practicing group pleas, it has been met with suspicion and skepticism. The Georgia Court of Appeals has "warned against mass plea hearings involving general plea-related questions asked of the defendants as a group." *Lamb v. State,*

628 S.E. 2d 165, 168 (Ga. Ct. App. 2006). The Tennessee Supreme Court "caution[ed] trial courts against conducting group plea hearings," going as far to say at one point that "en masse guilty plea hearings do not comply with our state's mandates." *Howell v. State*, 185 S.W. 3d 319, 332 (Tenn. 2006). Florida courts have expressed "grave reservations" over whether group guilty pleas can be made freely and intelligently. *K.E.N. v. State*, 892 So. 2d 1176, 1179 (Fla. Dist. Ct. App. 2005). The Supreme Court of Mississippi "note[d] with disapproval the practice of simultaneously hearing more than one guilty plea," stating that "the better practice would be to hear each plea individually, except in cases where several defendants are charged under the same set of facts." *Hodgin v. State*, 702 So. 2d 113, 116 (Miss. 1997). The Court of Appeals of Ohio has also stated that "taking multiple pleas on unrelated cases in a single hearing is likely to lead to confusion by the defendants or even the judge, producing invalid pleas, and the practice is highly discouraged." *State v. Martin*, Nos. 92600, 92601, 2010 WL 320475, 1 (Ohio Ct. App. Jan. 28, 2010)(not reported). Group guilty pleas have been allowed in Kentucky where there have been only three defendants because "there were not so many participants as to create confusion or chaos." *Rigdon v. Commonwealth*, 144 S.W. 3d 283, 288 (Ky. Ct. App. 2004). Even then, the Court still felt that an individualized plea would have been "preferable." Id. The Court of Appeals of Louisiana has agreed that "a personal colloquy between the trial court and the

defendant is preferred…" *State v. Domino*, 60 So. 3d 659, 669 (La. Ct. App. 2011).

It is Todd's position that these group pleas fundamentally violate due process, and fundamentally violated his right to due process of law. There is no assurance that his plea was knowing, intelligent, and voluntary under this procedure. The fact that there was a group plea alone should be enough to render this plea invalid, or highly suspect to the point an evidentiary hearing is needed. However, even if this Court requires a showing or prejudice, Todd believes the pressure on him from the sheer number of defendants and the court was enough to render the plea involuntary.

Todd's group plea featured a long list of defendants. [LF 19] Several needed the plea to go well in order to revive a sentence that would avoid prison. [LF 18-33]. Todd, who had to live with these individuals in jail, had every incentive to make sure the plea was not disrupted.

This was also an issue because multiple defendants suffered c confusion about their offers or what they were charged with during the group plea. [LF 22-33]. Despite this, each time the group was asked questions, all defendants gave nearly identical answers. [LF 19-33]. The Court reporter, in noting the order in which the answers were to be read, never even specified if her two columns of

answers were to be read top down then left to right, or just left to right. [LF 19-22]. No one inquired as to the potential issues with the factual basis in Todd's case. *Id.* An issue was noted in another case, resulting a rapid *nolle prosquendii* verbally, mid-proceedings. [Lf 28-9]. This issue was noticed by the prosecutor, not the court or defense counsel. *Id.*

Todd requests that he be allowed a hearing on this matter to demonstrate that his plea did not meet the dictates of due process

ARGUMENT FOR SECOND POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Todd alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when the Todd's attorney failed to investigate or inform him of the potential defense that not all methamphetamine is a controlled substance. This was error in that not all forms of methamphetamine are a controlled substance in Missouri. Only isomers of methamphetamine with a central nervous stimulant effect are controlled substances. Since it was never established what Todd intended to manufacture, and if it was a type of methamphetamine that is a controlled substance, there was no sufficient factual basis for his plea.

Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and

conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id*. Appellant carries the burden to proving this by a preponderance of the evidence. *Id.*

Missouri law favors granting an evidentiary hearing, allowing its denial only when the record *conclusively* refutes the allegations of the Movant. Missouri Supreme Court Rule 24.035(h) [emphasis added]. This includes situations where the record unambiguously rebuts the movant's version of events. For instance in *Franks v. State,* 783 S.W.2d 437, 439 (Mo.App. E.D. 1990 the movant contested that he did not know he would be sentenced as a prior and persistent offender. Despite this, the record of his plea included explicit information and questioning on the fact that he was, going to be sentenced as a prior and persistent offender. *Id*. These are cases in which the issues raised by the movant were, by their very nature, on the record, and also clearly refuted therein.

In contrast, where there are facts that could merit relief which inherently would not be on the record, an evidentiary hearing is likely to be required. *See e.g., Webb v. State,* 334 S.W.3d 126, 127 (Mo. *banc* 2011) (evidentiary hearing required to determine if counsel affirmatively misrepresented parole requirements); *Conger v. State* 356 S.W.3d 217, 219 (Mo.App. E.D. 2011) (evidentiary hearing required to determine if financial conflict of interest led plea counsel to pressure

movant to enter plea of guilty). Reviewing the caselaw, the denial of an evidentiary hearing is appropriate only in those cases where the claims are limited to facts which would be on the record, and the record is so unambiguous that on its own it defeats the claim presented by the movant, or where the claimant fails to properly plea his claim by asserting conclusions instead of facts, not claiming prejudice, or otherwise procedurally defaulting. *See e.g. Webb* 334 S.W.3d at 128; *Asher v. State,* 390 S.W.3d 917, 917 (Mo.App. E.D.,2013) (Failure to timely file denies all claims to hearing or relief under rule 24.034)

Timing

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Argument

Todd was denied his right to due process of law pursuant the United States' Constitution's Fifth and Fourteenth Amendments, and the Missouri Constitution,

as well as his right to effective assistance of counsel as guaranteed to him by the Sixth Amendment to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when his plea was entered without a sufficient factual basis. His plea specified only that he intended to manufacture Methamphetamine. However it failed to note whether this was L-methamphetamine- the non prescription active ingredient in non prescription vicks inhalers, or D-methamphetamine, a prescription only controlled substance and street drug. Nothing in the lab report or police reports indicated if the substance produced was d-methamphetamine. Without specifying that the methamphetamine was an isomer with an stimulant effect on the central nervous system, there was no sufficient factual basis for the court to find Todd guilty of possessing precursor chemicals to create a controlled substance.

Missouri law renders methamphetamine a controlled substance in the following cases:

> (3) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:... … c) Methamphetamine, its salts, isomers, and salts of isomers

RSMO §195.017

Methamphetamine has two commonly produced isomers- D-methaphetamine, and L-methamphetamine. These two isomers are enantiomers- mirror images of each other. Both are, in fact, methamphetamine, and share the same chemical formula. Only D-methamphetamine, however, is the strong central nervous system stimulant targeted by 195.017. See, *United States v. Acklen*, 47 F.3d 739, 744 (5th Cir.1995)(Discussing L- methamphetamine's lack of psychotropic effect, but noting federal statute prohibits all typos of methamphetamine without differentiation). L methamphetamine is a vasoconstricter used to unclog the sinuses. See, Smith et al, *Methamphetamine And Amphetamine Isomer Concentrations In Human Urine Following Controlled Vicks Vapoinhaler Administration*, http://www.ncbi.nlm.nih.gov/pubmed/25217541. Nothing in the record indicates if the charged chemical was to be used to D or L methamphetamine on either count. The plea is silent, the police report is silent, the information is silent. [Lf *passim*]. It does not specify the isomer in question. It does not specifiy if an enantiomer specific inquiry was made. [Lf *passim*]. It does not specify that the form of methamphetamine to be produced was a central nervous system stimulant. [Lf *passim*]. This was not sufficient.

Missouri only recognizes methamphetamine as a controlled substance when it has a stimulant effect on the central nervous system. RSMO §195.017. The word "Methamphetamine", alone, does not state whether or not Todd actually possessed

or manufactured a controlled substance. RSMO §195.017 requires it not only be methamphetamine, but that it be a central nervous system stimulant. Here, the criminal conduct was possessing certain chemicals with the intent to create a controlled substance- Not a non-prescription decongestant sold at the drug store down the street from the court house. There was no factual basis for this charge as pleaded. Although the motion court points to the fact that Missouri methamphetamine and it's isomers, it ignored, completely, the requirement that there be a central nervous system stimulant effect. [LF 146].

Todd requests this cause be remanded for an evidentiary hearing on this claim in which to prove that his plea was without a sufficient factual basis. He has pleaded that he will procure expert testimony, his own testimony and the testimony of plea counsel. Combined with the above discussion, he should have been permitted an evidentiary hearing.

ARGUMENT FOR THIRD POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Andrew alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when the Todd's attorney failed to investigate or inform him of the potential defense that not all methamphetamine is a controlled substance. This was error in that not all forms of methamphetamine are a controlled substance in Missouri. Only isomers of methamphetamine with a central nervous stimulant effect are controlled substances. Since it was never established what Todd intended to manufacture, and if it was a type of methamphetamine that is a controlled substance, there was no sufficient factual basis for his plea.

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record, is left with the definite and firm impression that a mistake has been made. *Id*. Appellant carries the burden to proving this by a preponderance of the evidence. *Id.*

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Todd timely filed his pro se Rule 24.035 motion to vacate, set aside or correct judgment or sentence on July 6 2015, after delivery to the department of corrections on April 16, 2016. [LF 106-108, 109]. A full transcript in this case was filed on December, 29, 2015 [LF 10-11], making the 60 day due date February 29, 2016 due to an intervening weekend. A thirty day extension was granted making the amended motion sue March 30, 2016. [LF 106-108] The amended motion was filed March 30, 2016. [LF 106-108

Analysis

For the reasons discussed in point two, infra, counsel should have, but unreasonable failed to, investigate the issue of methamphetamine chemistry being a defense to this charge.

Todd's right to assistance of counsel is guaranteed by the Sixth Amendment to the Constitution of the United States and by Article I, §§ 10 and 18(a) of the Missouri Constitution and is a fundamental right mandated to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). The Fourteenth Amendment mandates that the assistance provided is effective assistance. *Strickland v. Washington*, 466 U.S. 66 (1984). To establish that his conviction or sentence must be set aside due to ineffective assistance of counsel, Todd must show counsel did not demonstrate the customary skill and diligence a reasonably competent attorney would display, and that he was prejudiced thereby. *Id*.; *Seales v. State*, 580 S.W.2d 733, 736-37 (Mo. banc 1979). This analysis extends not only to the trial stage, but also to plea bargaining and pleas of guilty

Had Todd known about the issues discussed in Point Two, *infra*, , he would not have pleaded guilty. Reasonably competent counsel would have investigated this issue before advising a plea of guilty.

ARGUMENT FOR FOURTH POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Todd alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when the court accepted Todd's plea to possessing lithium with the intent to create a controlled substance, methamphetamine. This was error in that Lithium is not a listed chemical under RSMO 195.400. Further, the state did not list any evidence it would have used to prove that lithium was a reagent, solvent or precursor able to be established by an expert witness as a chemical that is in anyway "manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered" to make a controlled substance. Lithium does not play any of these roles in the reduction of ephedrine used to create methamphetamine. Its chemical role is different, and not within the limited definitions set forth by the statute.

Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id*. Appellant carries the burden to proving this by a preponderance of the evidence. *Id.*

Missouri law favors granting an evidentiary hearing, allowing its denial only when the record *conclusively* refutes the allegations of the Movant. Missouri Supreme Court Rule 24.035(h) [emphasis added]. This includes situations where the record unambiguously rebuts the movant's version of events. For instance in *Franks v. State*, 783 S.W.2d 437, 439 (Mo.App. E.D. 1990 the movant contested that he did not know he would be sentenced as a prior and persistent offender. Despite this, the record of his plea included explicit information and questioning on the fact that he was, going to be sentenced as a prior and persistent offender. *Id*. These are cases in which the issues raised by the movant were, by their very nature, on the record, and also clearly refuted therein.

In contrast, where there are facts that could merit relief which inherently would not be on the record, an evidentiary hearing is likely to be required. *See e.g., Webb v. State,* 334 S.W.3d 126, 127 (Mo. *banc* 2011) (evidentiary hearing required to determine if counsel affirmatively misrepresented parole requirements); *Conger v. State* 356 S.W.3d 217, 219 (Mo.App. E.D. 2011) (evidentiary hearing required to determine if financial conflict of interest led plea counsel to pressure movant to enter plea of guilty). Reviewing the caselaw, the denial of an evidentiary hearing is appropriate only in those cases where the claims are limited to facts which would be on the record, and the record is so unambiguous that on its own it defeats the claim presented by the movant, or where the claimant fails to properly plea his claim by asserting conclusions instead of facts, not claiming prejudice, or otherwise procedurally defaulting. *See e.g. Webb* 334 S.W.3d at 128; *Asher v. State,* 390 S.W.3d 917, 917 (Mo.App. E.D.,2013) (Failure to timely file denies all claims to hearing or relief under rule 24.034)

Timing

Todd timely filed his pro se Rule 24.035 motion to vacate, set aside or correct judgment or sentence on July 6 2015, after delivery to the department of corrections on April 16, 2016. [LF 106-108, 109]. A full transcript in this case was filed on December, 29, 2015 [LF 10-11], making the 60 day due date February 29, 2016 due to an intervening weekend. A thirty day extension was granted

making the amended motion sue March 30, 2016. [LF 106-108] The amended motion was filed March 30, 2016. [LF 106-108]

Analysis

Todd was denied his right to due process of law pursuant the United states constitution's Fifth and Fourteenth amendments, and the Missouri Constitution, as well as his right to effective assistance of counsel as guaranteed to him by the Sixth Amendment to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when his plea was entered without a sufficient factual basis. He pleaded guilty to possession of lithium with the intent to make a controlled substance. However, Lithium is not a listed chemical under RSMO 195.400.

Further, the state did not list any evidence it would have used to prove that lithium was a reagent solvent or precursor able to be established by an expert witness as a chemical that is in anyway "manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered" to make a controlled substance. Lithium does not play any of these roles in the reduction of pseudo-ephedrine used to create methamphetamine. Its chemical role is different, and not within the limited definitions set forth by the statute.

The Chemical formula of methamphetamine is: C10H15N. Notably this formula contains no Lithium (Li). Depending on the reaction to make

methamphetamine, Lithium can serve such roles as a heat source, or as a catalyst. *See e.g.* "Uncle Fester", *Advanced Techniques of Clandestine Psychedelic & Amphetamine Manufacture*, 2nd edition. ISBN 1-55950-174-X; "Uncle Fester" *Secrets of Methamphetamine Manufacture*, Eighth Edition ISBN10: 0970148593. This is also the reason that entirely different alkali metals such as sodium can be substituted for lithium in many to most reactions. *Id.*

At a hearing, Todd pleaded he would call an expert on methamphetamine manufacture in order to explain that the lithium is not "manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered." Despite this being discoverable with an organic chemistry textbook, Todd's attorney never looked into this issue, nor did he inform Todd of it. Todd never would have pleaded if he knew of this issue, and the lack of a factual basis

This cause should be remanded for an evidentiary hearing on this claim.

ARGUMENT FOR FIFTH POINT RELIED ON

The motion court clearly erred when it denied Todd's motion for post-conviction relief without an evidentiary hearing because Todd alleged facts, supported by the record and the law, which entitled him to relief in that he was denied his rights to effective assistance of counsel due process of law, and protection from cruel and unusual punishment, as guaranteed to him by the Sixth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution when the court accepted Todd's plea to possessing lithium with the intent to create a controlled substance, methamphetamine. This was error in that Lithium is not a listed chemical under RSMO 195.400. Further, the state did not list any evidence it would have used to prove that lithium was a reagent solvent or precursor able to be established by an expert witness as a chemical that is in anyway "manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered" to make a controlled substance. Lithium does not play any of these roles in the reduction of ephedrine used to create methamphetamine. Its chemical role is different, and not within the limited definitions set forth by the statute.

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id*. Appellant carries the burden to proving this by a preponderance of the evidence. *Id.*

Missouri Law favors granting an evidentiary hearing, allowing its denial only when the record *conclusively* refutes the allegations of the Movant. Missouri Supreme Court Rule 24.035(h) [emphasis added]. This includes situations where the record unambiguously rebuts the movant's version of events. For instance in *Franks v. State*, 783 S.W.2d 437, 439 (Mo.App. E.D. 1990 the movant contested that he did not know he would be sentenced as a prior and persistent offender. Despite this, the record of his plea included explicit information and questioning on the fact that he was, going to be sentenced as a prior and persistent offender. *Id*. These are cases in which the issues raised by the movant were, by their very nature, on the record, and also clearly refuted therein.

In contrast, where there are facts that could merit relief which inherently would not be on the record, an evidentiary hearing is likely to be required. See e.g., *Webb v. State*, 334 S.W.3d 126, 127 (Mo. *banc* 2011) (evidentiary hearing

required to determine if counsel affirmatively misrepresented parole requirements); *Conger v. State* 356 S.W.3d 217, 219 (Mo.App. E.D. 2011) (evidentiary hearing required to determine if financial conflict of interest led plea counsel to pressure movant to enter plea of guilty). Reviewing the caselaw, the denial of an evidentiary hearing is appropriate only in those cases where the claims are limited to facts which would be on the record, and the record is so unambiguous that on its own it defeats the claim presented by the movant, or where the claimant fails to properly plea his claim by asserting conclusions instead of facts, not claiming prejudice, or otherwise procedurally defaulting. See e.g. *Webb* 334 S.W.3d at 128; *Asher v. State,* 390 S.W.3d 917, 917 (Mo.App. E.D.,2013) (Failure to timely file denies all claims to hearing or relief under rule 24)

Timing

Todd timely filed his pro se Rule 24.035 motion to vacate, set aside or correct judgment or sentence on July 6 2015, after delivery to the department of corrections on April 16, 2016. [LF 106-108, 109]. A transcript in this case was filed on Dec 29, 2015 [LF 10-11], making the 60 ay due date Feb 29 2016 due to an intervening weekend. A thirty day extension was granted making this motion due today 30 March 2016. [LF 106-108] The amended motion was filed March 30, 2016. [LF 106-108].

Analysis

For the reasons discussed in point four, infra, counsel should have, but unreasonable failed to, investigate the issue of lithium in methamphetamine synthesis chemistry being a defense to this charge.

Todd's right to assistance of counsel is guaranteed by the Sixth Amendment to the Constitution of the United States and by Article I, §§ 10 and 18(a) of the Missouri Constitution and is a fundamental right mandated to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Powell v. Alabama,* 287 U.S. 45 (1932). The Fourteenth Amendment mandates that the assistance provided is effective assistance. *Strickland v. Washington*, 466 U.S. 66 (1984). To establish that his conviction or sentence must be set aside due to ineffective assistance of counsel, Todd must show counsel did not demonstrate the customary skill and diligence a reasonably competent attorney would display, and that he was prejudiced thereby. *Id*.; *Seales v. State*, 580 S.W.2d 733, 736-37 (Mo. banc 1979). This analysis extends not only to the trial stage, but also to plea bargaining and pleas of guilty

Had Todd known about the issues discussed in point four, *infra*, , he would not have pleaded guilty. Reasonably competent counsel would have investigated

this issue before advising a plea of guilty. This cause should be remanded for an evidentiary hearing where Todd can prove his claim.

CONCLUSION

WHEREFORE, based on the argument as set forth in this brief, appellant Todd Bearden respectfully requests that this Honorable Court reverse the decision of the circuit court, vacate his convictions, remand for a hearing, or such other relief as this court sees fit.

Respectfully submitted,

/s/ Amy E. Lowe_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2017 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, shaun.mackelprang@ago.mo.gov, via the Missouri e-filing system, care of Mr. Shaun Mackelprang, Office of the Attorney General.

/s/ Amy E. Lowe
Amy E. Lowe

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font, and does not exceed the word and page limits for a brief in this court. The word-processing software identified that this brief contains 8577 words, and 46 pages including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free. It is in searchable PDF form.

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