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No. SC96515

IN THE
Supreme Court of Missouri

TODD BEARDEN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Francois County Circuit Court
Twenty-fourth Judicial Circuit
The Honorable Sandy Martinez, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Bearden appeals the denial of his Rule 24.035 motion, in which he alleged (1) that there was an insufficient factual basis for his guilty pleas (on two grounds), (2) that counsel was ineffective for failing to advise him that he had potential defenses to his charges, and (3) that his guilty plea was not voluntary because it was "entered as an unconstitutional group guilty plea" (L.F. 132-134). The motion court denied Mr. Bearden's motion without an evidentiary hearing (L.F. 145-147).

* * *

The State charged Mr. Bearden with two counts of the class C felony of possession of a chemical with the intent to create a controlled substance (L.F. 12). In Count I, the State alleged that he possessed lithium, and in Count II, the State alleged that he possessed ephedrine (L.F. 12).

On August 7, 2013, Mr. Bearden pleaded guilty to both offenses (*see* L.F. 19-31). At the guilty plea hearing, five other defendants also pleaded guilty in other cases (*see* L.F. 19).

Before questioning the defendants, the court explained the procedure that it was going to follow to determine whether they were pleading guilty knowingly, intelligently, and voluntary (L.F. 19). The court explained that questioning the defendants together would "save quite a bit of time" (L.F. 19). The court explained that it would question the defendants in the same order

each time, and that it would question them individually when it needed to talk to one of them "in more detail about [his or her] particular case" (L.F. 19). The court advised the defendants that, "[i]f at any time there is something you don't understand, you're confused about something, I want you to be sure to stop, get your attorney's attention, do whatever is necessary, and we'll be sure and stop and take the time to answer any questions that you might have" (L.F. 19).

The court asked defense counsel if he had any objection to proceeding with a group plea, and counsel said, "No, Your Honor" (L.F. 19). Mr. Bearden stated that he also had no objection, and that he had no questions about the procedure (L.F. 19).

The Court then questioned the defendants to ensure that their guilty pleas were knowing, intelligent, and voluntary (L.F. 19-30). During the questioning, Mr. Bearden assured the court that he fully understood the charges and that he had discussed his case with defense counsel approximately twenty times for a total of about ten hours (L.F. 20). He also stated that all available defenses had been explained to him to his full satisfaction (L.F. 21).

Mr. Bearden told the court that he was pleading guilty to both offenses, and he said that he understood each of the essential elements of his offenses (L.F. 21, 23). Specifically, he said that he understood that he possessed

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lithium and ephedrine with the intent to either process them or alter them to create methamphetamine (L.F. 23).

Mr. Bearden assured the court that no "threats or pressure of any kind" had been exerted against him to cause him to plead guilty (L.F. 25). Mr. Bearden stated that he understood his plea agreement (L.F. 26). Under the agreement, the State agreed to recommend consecutive seven-year sentences, a suspended execution of sentence, and a five-year term of probation (L.F. 26). In addition, the State agreed to dismiss another case (L.F. 26).

When asked to describe his offenses, Mr. Bearden said, with regard to Count I, that he "possessed lithium batteries with the intent to alter" (L.F. 28). The court asked if he had intended "[t]o use that chemical with others to create methamphetamine," and Mr. Bearden said, "Yes" (L.F. 28). He also stated that he knew methamphetamine was a controlled substance (L.F. 28). With regard to Count II, Mr. Bearden said that he "[p]ossessed pills with the intent to alter to manufacture methamphetamine" (L.F. 28). When asked if he had "possessed ephedrine pills . . . to use those with other things to make methamphetamine," Mr. Bearden said, "Yes, Your Honor" (L.F. 28).

After accepting Mr. Bearden's guilty pleas, the court sentenced Mr. Bearden to consecutive seven-year sentences in accordance with the plea agreement (L.F. 32). The court suspended execution of sentence and placed him on probation for a term of five years (L.F. 32).

On April 16, 2015, Mr. Bearden's probation was revoked after a hearing (*see* L.F. 34, 99). Mr. Bearden was delivered to the Department of Corrections that same day (L.F. 132).

On July 6, 2015, Mr. Bearden timely filed a *pro se* motion pursuant to Rule 24.035 (L.F. 106, 109). On July 15, 2015, the motion court appointed the public defender to represent Mr. Bearden (L.F. 106, 124). On December 18, 2015, the transcript of the guilty plea and sentencing was filed (L.F. 11, 18).[1] Thus, Mr. Bearden's amended motion was initially due by February 16, 2016. Rule 24.035(g). On March 4, 2016, the motion court granted Mr. Bearden a thirty-day extension of time (L.F. 107, 127), which extended the deadline until March 17, 2016.

On March 30, 2016, Mr. Bearden filed an amended motion (L.F. 108, 131). He alleged (1) that there was an insufficient factual basis for his guilty pleas (on two grounds), (2) that counsel was ineffective for failing to advise him that he had potential defenses to his charges, and (3) that his guilty pleas were not voluntary because he pleaded guilty at "an unconstitutional group guilty plea" (L.F. 132-134). Mr. Bearden's challenges to the factual

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[1] Mr. Bearden states in his Statement of Facts that "[a] transcript in this case was filed on Dec 29, 2015" (App.Br. 6). The transcript filed on December 29, 2015, was a transcript of the "Probation Revocation Proceedings" (L.F. 11).

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basis for his pleas, and his alleged defenses, were premised upon allegations that he failed to specify whether he intended to manufacture L-methamphetamine or D-methamphetamine and that lithium is not a precursor chemical used to manufacture methamphetamine (L.F. 132-134).

On April 27, 2016, the motion court denied Mr. Bearden's motion without an evidentiary hearing (L.F. 145-147). The motion court observed that, Schedule II under § 195.017.4(3)(c), RSMo, listed " '[m]ethamphetamine, its salts, isomers, and salts of its isomers' " (L.F. 146).[2] The motion court then observed that Mr. Bearden had not cited any authority for the proposition that the State had "to allege or prove anything more than the desired end product was 'methamphetamine' " (L.F. 146). The motion court found that Mr. Bearden "acknowledged the item he possessed precursors for was 'methamphetamine, a controlled substance' " (L.F. 146). The motion court observed that "[n]o further elaboration was required by statute," and it found that Mr. Bearden could not "credibly claim now he did not mean to refer to the drug controlled by statute" (L.F. 146). The court concluded that Mr. Bearden's "admission provides proof beyond a reasonable doubt to the Court

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[2] In his amended post-conviction motion, Mr. Bearden acknowledged that D-methamphetamine and L-methamphetamine are both isomers of methamphetamine (L.F. 137).

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he possessed chemicals with the intent to create a controlled substance" (L.F. 146). The motion court concluded that this factual basis claim and the related claim that he had a viable defense were without merit (L.F. 146).

The motion court observed that in *State v. Beggs*, 186 S.W.3d 306, 316 (Mo.App. W.D. 2005), the Court stated that "Pseudoephedrine and lithium are both precursor ingredients to the manufacture of methamphetamine" (L.F. 146). The motion court observed that, while the State would have been obligated to prove the charged chemicals were precursors at trial, "[t]his requirement of proof was dispensed with when [Mr. Bearden] pleaded guilty" (L.F. 146). The motion court concluded that this factual basis claim and the related claim that he had a viable defense were without merit (L.F. 146).

Finally, the motion court observed that the Court of Appeals in *Wright v. State*, 411 S.W.3d 381 (Mo.App. E.D. 2013), and this Court in *Roberts v. State*, 276 S.W.3d 833 (Mo. 2009), declined to hold that a guilty plea entered as part of a "group plea" procedure was *per se* invalid (L.F. 147).[3] The motion court found that Mr. Bearden's allegation that he was confused about the

[3] The motion court also observed that the cases relied on by Mr. Bearden—*David DePriest v. State*, 478 S.W.3d 494 (Mo.App. E.D. 2015), and *Natalie DePriest v. State*, 2015 WL 7455009 (Mo.App. E.D. 2015)—were rendered non-precedential after they were transferred to this Court (L.F. 147).

terms of his guilty plea was refuted by the record (L.F. 147). The motion court concluded that "[i]t appears from the record there was no confusion generated by the 'group plea' situation and no merit to [Mr. Bearden's] claim to the contrary" (L.F. 147).

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ARGUMENT

I.

The Court should remand Mr. Bearden's case to the motion court to determine whether Mr. Bearden was abandoned by post-conviction counsel.

Because the record arguably shows that Mr. Bearden's amended motion was not timely filed, the Court should not review the various claims Mr. Bearden has asserted on appeal. Instead, the Court should remand this case to the motion court to determine whether Mr. Bearden was abandoned by post-conviction counsel.

On July 6, 2015, Mr. Bearden timely filed a *pro se* motion pursuant to Rule 24.035 (*see* L.F. 106, 109, 132). On July 15, 2015, the motion court appointed the public defender to represent Mr. Bearden (L.F. 106, 124). On December 18, 2015, the transcript of the guilty plea and sentencing was filed (L.F. 11, 18). Thus, Mr. Bearden's amended motion was initially due by February 16, 2016. Rule 24.035(g). However, on March 4, 2016, the motion court granted Mr. Bearden a thirty-day extension of time (L.F. 107, 127), which extended the deadline until March 17, 2016.

Mr. Bearden did not file his amended motion until March 30, 2016 (L.F. 108, 131). Accordingly, the amended motion was not timely filed according to this timeline of events.

Mr. Bearden states that "[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" (App.Sub.Br. 5). Thus, he asserts that the amended motion was timely filed based on the date the transcript was completed (App.Sub.Br. 5). Respondent agrees that the amended motion was timely filed if the transcript filed on December 29, 2015, was the triggering event under Rule 24.035(g).[4]

But the transcript filed on December 29, 2015, was a transcript of the "Probation Revocation Proceedings" (L.F. 11). Under the rule, the pertinent triggering event for calculating the time to file an amended motion (in addition to the appointment of counsel) was the filing of "a complete transcript consisting of the guilty plea and sentencing hearing[.]" *See* Rule 24.035(g). Thus, transcripts of other proceedings were irrelevant to the time limit. And, here, as set forth above, the complete guilty plea and sentencing transcript was filed on December 18, 2015 (L.F. 11, 18).

Because the amended motion was not timely filed, this Court should

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[4] The motion court included similar language in its findings of fact, stating, "Movant's Amended Motion was filed March 30, 2016, on or within 90 days, considering weekend days, of the filing of the transcripts of the proceedings in his case" (L.F. 145).

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remand this case to the motion court to determine whether Mr. Bearden was abandoned by post-conviction counsel. *See Moore v. State*, 458 S.W.3d 822, 824-826 (Mo. 2015). "When an untimely amended motion is filed, the motion court has a duty to undertake an 'independent inquiry under *Luleff*' to determine if abandonment occurred." *Id*. "If the motion court finds that a movant has not been abandoned, the motion court should not permit the filing of the amended motion and should proceed with adjudicating the movant's initial motion." *Id*. "If the motion court determines that the movant was abandoned by appointed counsel's untimely filing of an amended motion, the court is directed to permit the untimely filing." *Id*. at 826.

Here, respondent did not find anything in the record showing that the motion court made an independent inquiry into whether Mr. Sanders was abandoned. A docket entry on April 1, 2016, stated, "Attorney for Movant to provide the court with documentation regarding timely filing of motion. Case is passed to May 6, 2016" (L.F. 108). However, Mr. Bearden's post-conviction motion was then denied on April 27, 2016, and, as noted above, the motion court seemingly concluded that the amended motion was timely in light of the date that the transcript of the probation revocation hearing was filed.

In light of the available record, and in light of this Court's decision in *Moore*, respondent is compelled to raise this issue for the Court's resolution. However, if this Court concludes that the filing of the revocation-hearing

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transcript on December 29, 2015, was the triggering event that started the clock for filing an amended motion, respondent agrees that the amended motion was timely filed. In the event the Court reaches that conclusion, respondent has addressed the merits of Mr. Bearden's claims.

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II.

The motion court did not clearly err in denying Mr. Bearden's claim that his guilty plea was not voluntary because it was "entered as an unconstitutional group guilty plea." (Responds to Point I of appellant's brief.)

In his first point, Mr. Bearden asserts that the motion court clearly erred in denying his claim that his plea was "part of an unconstitutional group guilty plea" (App.Sub.Br. 15). He asserts that the group plea procedure "resulted in a lack of proper individual inquiry, and allow[ed] 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" (App.Sub.Br. 15).

A. The standard of review

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

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

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

B. Mr. Bearden failed to allege facts warranting relief

1. Mr. Bearden's allegations

In his amended motion, Mr. Bearden alleged that group guilty pleas "fundamentally violate due process" (L.F. 141). He alleged that the group plea hearing "resulted in a lack of proper individual inquiry, and allow[ed] 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" (L.F. 140).

He alleged that several of the defendants who pleaded guilty "needed the plea to go well in order to receive a sentence that would avoid prison" (L.F. 140). He alleged that because he "had to live with these individuals in jail," he "had every incentive to make sure the plea was not disrupted" (L.F. 140). He also alleged that he "noted confusion about his offer during the plea" (L.F. 141). He alleged that "[h]e asked about the exact nature of his bargain, and received only short cursory answers as the court strove to save time" (L.F. 141). He also alleged that "[n]o one inquired as to the potential issues with the factual basis in this case" (L.F. 141). He alleged that he "believes the pressure on him from the sheer number of defendants and the court was

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enough to render the plea involuntary" (L.F. 141).

2. The motion court's findings and conclusions

In denying this claim, the motion court observed that the Court of Appeals in *Wright v. State*, 411 S.W.3d 381 (Mo.App. E.D. 2013), and this Court in *Roberts v. State*, 276 S.W.3d 833 (Mo. 2009), declined to hold that a guilty plea entered as part of a "group plea" procedure was *per se* invalid (L.F. 147). The motion court found that Mr. Bearden's allegation that he was confused about the terms of his guilty plea was refuted by the record (L.F. 147). The motion court concluded that "[i]t appears from the record there was no confusion generated by the 'group plea' situation and no merit to [Mr. Bearden's] claim to the contrary" (L.F. 147).

3. A group plea does not itself violate due process

The motion court did not clearly err. First, there is no *per se* rule that a group guilty plea is impermissible or violates due process, or that such a procedure automatically renders a guilty plea invalid. *See Roberts v. State*, 276 S.W.3d at 836 n. 5; *see also Wright v. State*, 411 S.W.3d at 387.

In *Roberts* this Court noted, "Group pleas are used as a time-saving mechanism in some of Missouri's circuit courts, although the use of group pleas has been criticized repeatedly by the court of appeals." 276 S.W.3d at 836 n. 5 (citing *Castor v. State*, 245 S.W.3d 909, 915 n. 8 (Mo.App. E.D. 2008); *Elverum v. State*, 232 S.W.3d 710, 712 n. 4 (Mo.App. E.D. 2007); *Guynes v.*

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State, 191 S.W.3d 80, 83 n. 2 (Mo.App. E.D. 2006)). Then, having noted the criticism leveled by the Court of Appeals, the Court stated that it was "not persuaded by Movant's arguments suggesting that group plea should be deemed automatically invalid or declared impermissible[.]" *Id.* The Court observed, however, that "group pleas are not preferred procedure and should be used sparingly." *Id.* The Court then observed that other jurisdictions "also have criticized the use of group pleas but also have not invalidated them." *Id.* (citing, *e.g.*, *Howell v. State*, 185 S.W.3d 319, 332-34 (Tenn. 2006) (cautioning against the use of group guilty pleas in the context of "package-deal" pleas but noting that such plea procedures are valid; noting other cases finding that package deal plea arrangements are not invalid per se); *Cazanas v. State*, 508 S.E.2d 412, 415 (1998) (Sears, J., concurring) (noting a belief "that a group guilty plea hearing is an inappropriate forum for a trial court to accept a defendant's plea of guilty to a serious charge" and that "a trial court should engage in a one-on-one colloquy with [the] defendant, thereby better ensuring the constitutional integrity of the plea-making process."); *State v. Verdin*, 845 So.2d 372, 376-77 (La.App. 2003) (noting the use of group pleas and stating that personal pleas are preferred but group pleas are not invalid)). Accordingly, while circuit courts should exercise care in saving time with group pleas—and perhaps should, as a matter of best practice, avoid them altogether—a group plea procedure does not itself violate due process.

Due process does not dictate that a specific procedure be employed in every plea hearing. As the Court has recognized, "the basic question is whether or not [the defendant's] pleas of guilty were in fact voluntarily made with understanding of the nature of the charge . . .; not whether the trial judge followed some particular procedure before accepting the pleas." *Flood v. State*, 476 S.W.2d 529, 533 (Mo. 1972). The fundamental question is whether "the defendant voluntarily and understandingly entered his pleas of guilty." *See Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

This Court has, of course, promulgated rules that are intended to ensure that a defendant's guilty plea is knowing, intelligent, and voluntary. Rule 24.02(b) requires a court taking a guilty plea to "address the defendant personally in open court, and inform the defendant of, and determine that defendant understands" the charge, the range of punishment, the right to counsel, the right to trial (and certain attendant rights), and the fact that a guilty plea waives the right to trial. Rule 24.02(c) requires a court to further ensure that the plea is voluntary by "addressing the defendant personally in open court" to ascertain whether "the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." The court must also "inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the prosecuting attorney and the defendant or defendant's attorney." Rule 24.02(c). Upon rejection of a plea agreement, the

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rule requires additional advice to the defendant. *See* Rule 24.02(d)4.

All of these procedures and inquires can be accomplished at a group plea hearing, and there is nothing in the rules prohibiting the use of a group plea hearing. Thus, while it might be preferable—or even the best practice—to conduct guilty plea hearings individually, the determination of whether a plea was validly entered should turn on whether the defendant's guilty plea was knowing, intelligent, and voluntary—and not simply on whether the circuit court questioned multiple defendant during a single hearing.

Respondent acknowledges that this Court recently observed that "group pleas are fraught with unnecessary risk and should be avoided." *DePriest v. State*, 510 S.W.3d 331, 342 (Mo. 2017). The Court observed in *DePriest* that there was a "possibility" that "the group plea procedure contributed to the trial court's failure to inquire into and make findings about" an alleged error in that case. *Id.* The Court then observed that the possibility that the group plea adversely affected the hearing was another reason "why this practice should be consigned to judicial history." *Id.* In short, the Court went a step beyond *Roberts*'s admonition that group pleas "should be used sparingly."

Importantly, however, the Court in *DePriest* did not hold that group pleas violate due process. *Id.* Rather, the Court indicated that, as a protective measure against "unnecessary risk," the practice of group pleas should be

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abandoned. *See id.* From a protective standpoint, this may be prudent, but the Court should decline to hold that the use of a group plea, standing alone, necessarily violates due process. Whether a defendant's guilty plea was knowing, intelligent, and voluntary should turn on the actual facts of a given case and not merely on the procedure that was employed during the hearing. The motion court did not clearly err in denying Mr. Bearden's claim that the group guilty plea violated due process.

4. The allegation of coercion was refuted by the record

In addition to alleging that the procedure itself violated due process, Mr. Bearden alleged that his guilty plea was not voluntary. As outlined above, Mr. Bearden's allegation of coercion was that he was "confused" about his plea offer, but that he felt unable to "disrupt" the proceedings to clear up his confusion because of the other defendants who "needed the plea to go well in order to receive a sentence that would avoid prison" (L.F. 140-41). He alleged that because he "had to live with these individuals in jail," he "had every incentive to make sure the plea was not disrupted" (L.F. 140).[5]

Mr. Bearden's allegation that he was "confused" about his plea agreement, however, was refuted by the record. The record shows that the

[5] Mr. Bearden's claims related to the "suspect factual basis" alleged in his motion are addressed in Points III and IV, below.

trial court inquired specifically about Mr. Bearden's plea agreement (L.F. 26). The prosecutor outlined the plea agreement and said that the State had agreed to recommend "seven years on Count I, seven years on Count II, run those two consecutive for a total of fourteen years" (L.F. 26). The prosecutor said that the State had also agreed to recommend that the sentences be suspended and that Mr. Bearden be placed on probation with standard terms and conditions, including standard drug conditions (L.F. 26). The State also dismissed another case (L.F. 26).

The record shows that defense counsel confirmed that the prosecutor had correctly outlined the terms of the plea agreement (L.F. 26). The court then asked Mr. Bearden individually if he understood the plea bargain, and Mr. Bearden said, "I do, Your Honor" (L.F. 26). The court asked Mr. Bearden individually if he had "[a]ny questions about it at all," and Mr. Bearden said, "No, sir" (L.F. 26). Thus, the record directly refuted Mr. Bearden's allegation that he was confused about the terms of his plea agreement.

Moreover, as outlined by the prosecutor, there was nothing inherently confusing about the plea agreement; and, tellingly, Mr. Bearden did not identify in his amended motion what aspect of his plea agreement was allegedly confusing to him (*see* L.F. 134, 140-41). He also did not allege that his responses to the court's questions were false or that he did not understand the questions directly posed to him at that point of the hearing

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(L.F. 134, 140-41). Thus, inasmuch as the plea agreement was outlined in plain terms, and inasmuch as Mr. Bearden expressly stated that he understood the agreement and had no questions about it, and inasmuch as Mr. Bearden did not allege that his answers to the court's questions were false or mistaken, the record directly refuted Mr. Bearden's claim that he was confused about the plea agreement.

The record also shows that the court expressly advised the defendants that they should halt the proceedings if they were confused about anything (*see* L.F. 19). In describing the plea process the court explained that it would question the defendants in the same order each time, and that it would question them individually when it needed to talk to one of them "in more detail about [his or her] particular case" (L.F. 19). The court then advised the defendants, "If at any time there is something you don't understand, you're confused about something, I want you to be sure to stop, get your attorney's attention, do whatever is necessary, and we'll be sure and stop and take the time to answer any questions that you might have" (L.F. 19).

Thus, while the court noted that the group plea procedure was intended to save time, the court also made plain that it wanted the defendants to stop the proceedings if there was anything any one of them did not understand. In short, there was no reason to believe that asking clarifying questions would derail the proceedings for anyone. To the contrary, the court made plain that

its questions were necessary to determine whether the defendants' pleas were knowing, intelligent, and voluntary, and the court stressed the need for understanding and clarity by inviting interruption (*see* L.F. 19).

In sum, the record refuted Mr. Bearden's allegation that he was confused about the plea agreement, and, consequently, the record refuted the allegation that Mr. Bearden was forced to smother his confusion and plead guilty in order to facilitate the guilty pleas of everyone else. The motion court did not clearly err in denying this claim. Point I should be denied.

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III.

The motion court did not clearly err in denying Mr. Bearden's claims of an insufficient factual basis and ineffective assistance of counsel based on the alleged distinction between two isomers of methamphetamine. (Responds to Points II-III of appellant's brief.)

In his second point, Mr. Bearden asserts that the motion court clearly erred in denying his claim that there was an insufficient factual basis for his plea on Counts I and II, creation of a controlled substance, § 195.420, RSMo 2000 (App.Sub.Br. 9). He asserts that "not all forms of methamphetamine are a controlled substance in Missouri" and "[o]nly isomers of methamphetamine with a central nervous stimulant effect are controlled substances" (App.Sub.Br. 9). He asserts, "Since it was never established what [he] 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" (App.Sub.Br. 9). In his third point, Mr. Bearden asserts that counsel was ineffective for failing to advise him that he had a defense on these grounds (App.Sub.Br. 39)

A. The standard of review

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

banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

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

B. Mr. Bearden failed to allege facts warranting relief

In his amended motion, with regard to the allegedly deficient factual basis, Mr. Bearden alleged that, although he admitted at the plea hearing that he intended to manufacture methamphetamine, the record did not state whether he intended to manufacture L-methamphetamine (L-meth) or D-methamphetamine (D-meth) (L.F. 136). He alleged that L-meth and D-meth are two commonly produced isomers of methamphetamine, and that both isomers "are, in fact, methamphetamine, and share the same chemical formula" (L.F. 137). He alleged, however, that only D-meth "is the strong central nervous system stimulant targeted by [section] 195.017" (L.F. 137). He alleged that nothing in the record specified "the isomer in question" (L.F. 137). Thus, he alleged that the factual basis was insufficient since "Missouri only recognizes methamphetamine as a controlled substance when it has a

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stimulant effect on the central nervous system" (L.F. 137).

In denying this claim, the motion court observed that, Schedule II under § 195.017.4(3)(c), RSMo, listed " '[m]ethamphetamine, its salts, isomers, and salts of its isomers' " (L.F. 146). The motion court then observed that Mr. Bearden had not cited any authority for the proposition that the State had "to allege or prove anything more than the desired end product was 'methamphetamine' " (L.F. 146). The motion court found that Mr. Bearden "acknowledged the item he possessed precursors for was 'methamphetamine, a controlled substance' " (L.F. 146). The motion court observed that "[n]o further elaboration was required by statute," and it found that Mr. Bearden could not "credibly claim now he did not mean to refer to the drug controlled by statute" (L.F. 146). The court concluded that Mr. Bearden's "admission provides proof beyond a reasonable doubt to the Court he possessed chemicals with the intent to create a controlled substance" (L.F. 146). The motion court concluded that this factual basis claim and the related claim that he had a viable defense were without merit (L.F. 146).

The motion court did not clearly err. Mr. Bearden was charged with creation of a controlled substance for possessing "chemicals proven to be precursor ingredients of methamphetamine or amphetamine, . . . with the intent to manufacture . . . a controlled substance," methamphetamine (*see* L.F. 12). *See* § 195.420, RSMo 2000. "Controlled substance" was defined as "a

drug, substance, or immediate precursor in Schedules I through V listed in sections 195.005 to 195.425." § 195.010(5), RSMo Cum. Supp. 2010.

Methamphetamine, including its salts, isomers, and salts of isomers, was listed as a Schedule II controlled substance at the time of the offense: "(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 its isomers." § 195.017.4(3), RSMo Cum. Supp. 2010.

As is evident, Schedule II includes methamphetamine and all of its isomers. Thus, by admitting that he intended to create methamphetamine (*see* L.F. 23), Mr. Bearden established a factual basis for his plea.

Mr. Bearden asserts that "[w]ithout specifying that the [intended] methamphetamine was an isomer with a stimulant effect on the central nervous system, there was no sufficient factual basis for the court to find [him] guilty of possessing precursor chemicals to create a controlled substance" (App.Sub.Br. 27). He argues that § 195.017 requires that the intended methamphetamine have a stimulant effect on the central nervous system (App.Sub.Br. 27). He asserts that "[o]nly D-methamphetamine . . . is the strong central nervous system stimulant targeted by 195.017" (App.Sub.Br. 28).

Mr. Bearden's allegations do not warrant relief. First, while Mr.

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Bearden alleged that L-meth is an "ingredient in non prescription vicks inhalers," he did not allege that L-meth has *no* "stimulant effect on the central nervous system" (*see* L.F. 132-133, 135-138). Rather, he merely alleged, without citation to any relevant authority, that "[o]nly D-methamphetamine . . . is the *strong* central nervous system stimulant targeted by [section] 195.017" (*see* App.Sub.Br. 28) (emphasis added). As quoted above, however, § 195.017 does not target only substances with a "strong" effect. It targets substances with "a stimulant effect on the central nervous system." Thus, even if L-meth does not have the same "strong" effect that D-meth has, it is still a controlled substance.

Second, § 195.017 does not distinguish between L-meth and D-meth, and the State is not required to prove that the methamphetamine had a stimulant effect on the central nervous system. The plain language of the statute indicates the legislature's determination that all types of methamphetamine are controlled substances and that all methamphetamine has a stimulant effect on the central nervous system:

> 4. The controlled substances listed in this subsection are included in Schedule II:
>
> . . .
>
> (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 its isomers.

§ 195.017.4(3)(c), RSMo Cum. Supp. 2010. The descriptive phrase applied by the legislature, "the following substances having a stimulant effect on the central nervous system," simply explains the legislative determination that all methamphetamine has a stimulant effect on the central nervous system. The phrase is not an element of the offense of possession of a controlled substance. Thus, the State was not required to prove that the substance Defendant possessed has a stimulant effect; rather, the legislature has simply determined that it does.

Other jurisdictions have rejected arguments similar to that which Mr. Bearden makes here. In *State v. Ali*, 613 N.W.2d 796, 798 (Minn. App. 2000), the Minnesota Court of Appeals interpreted a similar statute that included as a controlled substance "any material compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers." The defendant argued that "having a stimulant effect" modified the word "quantity," and so he must have been in possession of a quantity sufficient to have a stimulant effect in order to be convicted. *Id*. The court rejected this argument, listing cases from sixteen jurisdictions that had

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rejected similar arguments. *Id.* The court continued:

> Several of these jurisdictions have determined that phrases like the one at issue in Minn. Stat. § 152.02, subd. 2(6), were intended as legislative guidance for the classification and categorization of new controlled substances and were not an element required to be proven by the state. *See*, *e.g.*, *Picklesimer*, 585 F.2d at 1203; *Moran*, 983 P.2d at 147; *Collinsworth*, 539 P.2d at 267; *Sheffield*, 623 S.W.2d at 408. Similarly, courts have determined that phrases like the one used in Minn.Stat. § 152.02, subd. 2(6), represent a legislative determination about the effects of a substance and that further proof is therefore not required. *See*, *e.g.*, *White*, 560 F.2d at 789–90; *Nickles*, 509 F.2d at 811; *Light*, 852 P.2d at 1247. Additionally, several courts have found that the placement of the phrase near the word "substance" rather than the word "quantity" supports the construction urged by the state here. *See Hernandez*, 717 P.2d at 76 (adopting this view and citing other jurisdictions that have adopted similar rationale).
>
> We find the reasoning in these cases to be persuasive. . . . [W]e conclude that the phrase "having a stimulant effect" provides legislative guidance for classifying and categorizing additional substances.

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Id. at 799. The same conclusion is warranted here.

Lastly, because the State was not required to prove whether Mr. Bearden intended to manufacture L-meth or D-Meth (*i.e.*, because a conviction could have been predicated upon proof of either isomer), counsel was not ineffective for failing to advise Mr. Bearden about an alleged defense based on the alleged distinction between L-meth and D-meth.

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

Here, because a conviction could have been predicated upon either isomer of methamphetamine, it would have been unreasonable for counsel to advise Mr. Bearden to rely on a defense based on the State's failing to prove that he intended to manufacture D-meth. Additionally, even if the State had been required to prove that Mr. Bearden intended to manufacture D-meth, Mr. Bearden did not allege facts showing that the State would not have been able to meet that burden if he had insisted on going to trial; thus, there

would have been no reasonable basis for counsel to advise Mr. Bearden to rely on this alleged defense.

In sum, Mr. Bearden did not allege facts warranting relief. Missouri law makes no distinction between the L-meth and D-meth isomers of methamphetamine and the State is not required to prove that the intended methamphetamine will have a stimulant effect on the central nervous system. Additionally, Mr. Bearden failed to allege facts showing that L-meth has no stimulant effect, and he also failed to allege facts showing that the State would not have been able to prove that he intended to create D-meth if he had insisted on going to trial (*i.e*, he failed to allege facts showing that counsel had a reasonable basis for advising him to go to trial). Points II and III should be denied.

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IV.

The motion court did not clearly err in denying Mr. Bearden's claims of an insufficient factual basis and ineffective assistance of counsel based on the allegation that lithium is not a precursor chemical used to manufacture methamphetamine. (Responds to Points IV-V of appellant's brief.)

In his fourth point, Mr. Bearden asserts that the motion court clearly erred in denying his claim that there was an insufficient factual basis for his plea on Count I, creation (possession) of a controlled substance, § 195.420, RSMo 2000 (App.Sub.Br. 34). He asserts that the State did not outline the expert testimony it would have relied on to prove that Lithium is a chemical precursor to methamphetamine (*see* App.Sub.Br. 34). He asserts that the "chemical role" of Lithium in methamphetamine production is "not within the limited definitions set forth by the statute" (App.Sub.Br. 34). In his fifth point, Mr. Bearden asserts that counsel was ineffective for failing to advise him that he had a defense to Count I on these grounds (App.Sub.Br. 39).

A. The standard of review

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

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

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

B. Mr. Bearden failed to allege facts warranting relief

In his amended motion, Mr. Bearden alleged that "[h]e pleaded guilty to possession of lithium with the intent to make a controlled substance" (L.F. 139). He alleged that "Lithium is not a listed chemical under RSMO 195.400," and that "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 a expert witness as a chemical that is in any way 'manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered' to make a controlled substance" (L.F. 139). He alleged that "Lithium does not play any of these roles in the reduction of pseudo-ephedrine used to create methamphetamine" (L.F. 139). He alleged that he would call an expert at an evidentiary hearing "to explained that the lithium is not 'manufactured, compounded, converted, produced, processed, prepared, tested, or otherwise altered' " (L.F. 139). He alleged, "Its chemical role in the reduction reaction is

different, and does none of these things to the Lithium" (L.F. 139).

In denying this claim, the motion court observed that in *State v. Beggs*, 186 S.W.3d 306, 316 (Mo.App. W.D. 2005), the Court stated that "Pseudoephedrine and lithium are both precursor ingredients to the manufacture of methamphetamine" (L.F. 146). The motion court observed that, while the State would have been obligated to prove the charged chemicals were precursors at trial, "[t]his requirement of proof was dispensed with when [Mr. Bearden] pleaded guilty" (L.F. 146). The motion court concluded that this factual basis claim and the related claim that he had a viable defense were without merit (L.F. 146).

The motion court did not clearly err. At the plea hearing, Mr. Bearden admitted that he intended "[t]o use that chemical [Lithium] with others to create methamphetamine" (L.F. 28). This admission provided a sufficient factual basis for the plea, and, because Mr. Bearden was admitting his guilt, the State was not required to present the expert testimony it would have had to produce if the case had gone to trial.

" 'A factual basis for a guilty plea is necessary to ensure that the guilty plea was intelligently and voluntarily entered, thereby satisfying due process requirements.' " *Chipman v. State*, 274 S.W.3d 468, 471-72 (Mo.App. S.D. 2008). "Rule 24.02(e) serves as protection for 'an accused who may appear to be pleading voluntarily and with an understanding of the nature of the

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charge, but who does so without realizing that his conduct does not actually fall within the charge.' " *Id.*

"In other words, a movant's post-conviction constitutional challenge to the knowingness and voluntariness of his or her guilty plea based upon an insufficient factual basis must not only prove the insufficiency of a factual basis on the record before the plea court, *i.e.*, the lack of compliance with Rule 24.02(e), but also must demonstrate that such failure deprived him or her of the actual knowledge of the factual basis for the charge, thereby rendering his or her plea unknowing and involuntary and, thus, unconstitutional." *Id.*

Here, Mr. Bearden alleged that, as a matter of fact, Lithium is not a precursor ingredient because it is not manufactured, compounded, converted, produced, processed, prepared, tested, other otherwise altered in creating the controlled substance. But his allegations along those lines were merely conclusory and did not allege facts warranting relief.

As outlined above, Mr. Bearden alleged that an expert would have testified that Lithium's "chemical role in the reduction reaction is different, and does none of these things to the Lithium." But the actions included in the statute are very broad. As indicated above, the statute includes processing and preparing. To "prepare" means "to put in proper condition or readiness." http:// www. dictionary.com/ browse/prepare?s=t (accessed September 8, 2017). To "process" means "to treat or prepare by some particular series of

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actions, as in manufacturing." http://www. dictionary. com/browse/ process?s=t (accessed September 8, 2017).

The broad scope of these two actions refutes the conclusory allegation that Lithium's chemical role is "different" and does not fall within the language of the statute. Even if the Lithium is merely placed in a certain location relative to other substances, it is being put into "readiness" for the creation of methamphetamine.

Lastly, because Mr. Bearden failed to allege facts showing that the State would not have been able to carry its burden of proof with regard to the use of the Lithium, counsel was not ineffective for failing to advise Mr. Bearden that he had an alleged defense along those lines. Moreover, in light of the decision in *Beggs*, *supra*, reasonable counsel would have concluded that Lithium is a precursor ingredient in creating methamphetamine.

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

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Here, because Mr. Bearden admitted that he intended to use the Lithium with other chemicals to create methamphetamine, and because Mr. Bearden failed to allege facts showing that the State could not have carried its burden of proving that the Lithium was, for example, prepared or processed in order to create methamphetamine, there was a sufficient factual basis for the plea, and it would have been unreasonable for counsel to advise Mr. Bearden to go to trial based on this alleged defense. Points IV and V should be denied.

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CONCLUSION

The Court should remand this case to the motion court to determine whether post-conviction counsel abandoned Mr. Bearden or, alternatively, the Court should affirm the denial of Mr. Bearden's Rule 24.035 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 8,135 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word.

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