No. 86784

IN THE
MISSOURI SUPREME COURT

ECCLESIASTES MATTHEWS

Appellant

v.

STATE OF MISSOURI

Respondent.

Appeal from the Circuit Court of Marion County, Missouri
The Honorable Ronald R. McKenzie, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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494.505, and thus counsel was ineffective for failing to object to the jury selection process (App.Br. 25). **A. Standard of review.** The motion court is not required to grant a movant an evidentiary hearing unless (1) the movant pleads facts, not conclusions, which if true would warrant relief, (2) the facts alleged are not refuted by the record, and (3) the matters complained of resulted in prejudice to the movant.....17
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State v. Tokar, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.....13
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Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as having produced a just result. 13
Supreme Court Rule 32.03, which allows for an automatic change of venue from counties with a population of less than 75,000 (PCRLF 17). Appellant pled that transferring from one district to another in Marion County was not an actual change of venue (PCRLF 18-19). Appellant alleged that he was *per se* prejudiced by the lack of a change of venue to another county because he was entitled to the change as a matter of right (PCRLF 19). Appellant alleged that appellate counsel was ineffective for failing to raise this claim as plain error on appeal (PCRLF 20). Alternatively, appellant pled that trial counsel was ineffective for failing to object to the transfer from Hannibal to Palmyra, and that had counsel objected, he would have secured an appropriate change of venue or adequately preserved the issue for review (PCRLF 21). **3. Motion court findings.** The motion court found no ineffectiveness in failing to file another venue change motion, noting that venue had been changed (PCRLF 32). **C. Analysis.** Appellant contends that he filed a motion for change of venue under Rule 32.03 although the record is silent as to what type of motion it was, in that the motion is not part of the record on appeal. In any event, Supreme Court Rule 32.03 provides that a change of venue shall be ordered in any criminal proceeding triable by a jury pending in a county having 75,000 or fewer inhabitants upon timely filing of a written application by the defendant. If a timely application is filed, the court shall immediately order the case transferred to some other county, or secure a jury from another county as provided by law. 13
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Supreme Court Rule 33.02 from the Hannibal to the Palmyra district within Marion County, trial counsel cannot be deemed ineffective for failing to object to this because appellant has failed to show that he was prejudiced. In.....15
Supreme Court Rule 51.04(e) (.....15
Taylor v. Louisiana, 419 U.S. 522, 527-28, 95 S.Ct. 692, 696-97, 42 L.Ed.2d 690 (1975). In order to establish a prima facie violation of the right to select a jury from a fair cross section of the community, the appellant must show: 20
Taylor v. State, 126 S.W.3d 755, 769 (Mo.banc 2004). Given, in the present case, that appellant waived the claim and was tried by a fair and unbiased jury, it cannot be said that appellate counsel's failure to raise this unpreserved and unmeritorious claim did not fall within the wide range of reasonable professional assistance. In sum, the motion court did not err in denying appellant's claim because trial counsel was not ineffective for failing to object to venue in that appellant has made no argument of prejudice and the record rebuts any claim of prejudice in that appellant was tried by a fair and impartial jury. Nor was appellate counsel ineffective for failing to raise this claim, given that appellant waived the claim and was not prejudiced. Appellant's claim is thus without merit and should be denied. **II. The motion court did not**

clearly err in denying, without an evidentiary hearing, appellant's Rule 29.15 motion in which he alleged that counsel was ineffective for failing to challenge the jury selection process prior to trial because the jury selection process did substantially comply with the jury selection statutes and in any event, appellant has not alleged facts showing that he was prejudiced. Appellant contends that the jury pool selection process in Marion County does not comply with....17
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White v. State, 939 S.W.2d 887, 904 (Mo. banc 1997), *cert. denied*, 522 U.S. 948, 118 S. Ct. 365, 139 L. Ed. 2d 284 (1997). To show ineffective assistance of counsel, appellant must show that his counsel....13
Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion, but is to determine if the facts alleged in the motion are true. 13

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Marion County. The conviction sought to be vacated was for two counts of sale of a controlled substance, §195.211, for which appellant was sentenced to two terms of 25 years in prison. The Missouri Court of Appeals, Eastern District, reversed the motion court's denial of appellant's Rule 29.15 motion and remanded for an evidentiary hearing. Ecclesiastes Matthews v. State, No. ED 84656 (Mo.App.E.D., March 1, 2005). It denied appellant's motion for rehearing on April 11, 2005.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On May 31, 2005, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Ecclesiastes M.D. Matthews, was charged by information with two counts of distribution, delivery, or sale of a controlled substance near a school (LF 1, 7-8). An amended information was later filed amending the charges to sale of a controlled substance and charging appellant as a prior drug offender (LF 3, 9-10; Tr. 12). On January 3, 2002, this cause went to trial before a jury in the Circuit Court of Marion County, the Honorable Ron McKenzie presiding (LF 3; Tr. 10).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

On December 9, 1999, a confidential informant named Craig Haley contacted Michael Beilsmith, an investigating special agent with the Northeast Missouri Narcotics Task Force (Tr. 134-135). As a result of Haley's information, Beilsmith and other officers decided to conduct a controlled narcotics purchase (Tr. 135). They checked out the equipment, picked up Haley, and searched him for any contraband, finding none (Tr. 136, 137, 165-166). They then took Haley to a location near Fitz's Lounge, where the officers supplied Haley with surveillance equipment, including a body wire and transmitter, and $100 buy money he would need to make the purchase (Tr. 136, 138, 166). The buy money had previously been photocopied (Tr. 136).

The police then released Haley, who walked a block to Fitz's Lounge (Tr. 139). When Haley got in the lounge, he saw appellant in the back of the tavern (Tr. 166). Haley approached him and asked appellant if he had "anything." (Tr. 166). Appellant

said yes, and the two men went in the bathroom (Tr. 166). Haley asked appellant what he had (Tr. 166). Appellant said he had a $40 piece and a $50 piece (Tr. 166). Haley said he would take the $50 piece, and appellant opened his mouth and took out the cocaine (Tr. 167). Appellant gave Haley the $50 piece in exchange for Haley's $50 (Tr. 166).

The men walked out of the bathroom, spoke a little bit more, and then Haley walked out of the tavern back to the location of the police officers (Tr. 166-167). The police heard Haley exit the building and then observed Haley walk back to the officer's location a block away (Tr. 141-142). Haley handed Ofc. Beilsmith a cellophane package containing a white chunky substance Beilsmith believed to be crack cocaine (Tr. 142, 167). Haley was searched again for contraband and none was found (Tr. 143, 168). Haley returned $50 of buy money that he did not use (Tr. 143, 167). The other $50 of buy money used by Haley was never recovered (Tr. 146). Haley later picked appellant's picture out of a photographic lineup as the man who had sold him the crack cocaine (Tr. 146-147).

On May 23, 2000, as a result of a confidential informant's tip, the police decided to make a controlled drug buy (Tr. 176-177, 232). About 8:00 p.m., they met the confidential informant, Dennis Thomas (Tr. 177, 180). Having previously photocopied the buy money and obtaining the monitor and body wire, the officers searched the confidential informant and his car and then put the body wire on the informant (Tr. 177, 178-179, 202). The officers gave the informant $100 in buy money (Tr. 177). Two officers then left to set up near the area where the buy would take place, while another

tailed the informant, Thomas, as he drove in his own car to the site where the buy was to be made (Tr. 179-180, 202, 219).

Thomas saw appellant's car outside of Fitz's Lounge and so Thomas entered the bar (Tr. 183, 201). Thomas found appellant and asked for a "sixteenth", but appellant said he had no crack cocaine (Tr. 201, 203). Thomas left the bar (Tr. 201, 203). Appellant and Fitzpatrick came out of the bar and Fitzpatrick asked Thomas what he wanted (Tr. 204). Thomas said he wanted a sixteenth (Tr. 204). At that point, a patrol car came down the street so Fitzpatrick went back inside the bar (Tr. 204). Thomas again asked appellant if he could get some crack cocaine, and appellant said he could get some and that Thomas should meet him in 30 minutes (Tr. 185, 201, 204, 205). Appellant told Thomas it would cost $110 (Tr. 205).

Thomas then left Fitz's and returned to the prearranged meeting place to meet the police officers (Tr. 185, 205). The officers gave Thomas new buy money because he had spent some of it on a beer in the tavern (Tr. 186, 205-206). Thomas returned the remainder of the initial buy money to the police (Tr. 186, 206).

Thomas was to return to Fitz's Lounge to meet appellant in a half an hour (Tr. 188). The police searched Thomas again before he returned to the lounge, and nothing was found (Tr. 189, 206, 220).

Thomas returned to Fitz's Lounge and found appellant (Tr. 189). Appellant told Thomas to go to the back of the bar (Tr. 207). There, Thomas handed appellant the

money and appellant took drugs in a baggie out of his mouth and set them on a speaker (Tr. 207, 208). Thomas picked up the drugs and thanked appellant (Tr. 208).

A few minutes later, Thomas left the bar and returned to the prearranged meeting place (Tr. 190, 208, 221). Thomas gave the officers crack cocaine and gave a written statement to the officers (Tr. 190, 208, 222). Thomas was searched and no contraband or money was found (Tr. 208). Thomas later picked appellant out of a photographic lineup as the person from whom he purchased cocaine (Tr. 192).

Later lab tests revealed that the drugs purchased at both buys were cocaine (Tr. 251, 253).

Appellant testified in his own defense. He claimed that Craig Haley never asked him for drugs (Tr. 267). Appellant also stated that Dennis Thomas never asked him for drugs and that he never even saw Thomas that night, let alone spoke to him (Tr. 269-270).

After the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of both counts (LF 4, 32-33; Tr. 308). The trial court, having previously found appellant to be a prior drug offender (Tr. 16), sentenced appellant to 25 years on each count, the terms to be served consecutively (LF 5, 42-43; Tr. 321).

The Court of Appeals, Eastern District, affirmed appellant's conviction and sentence on direct appeal. State v. Matthews, 99 S.W.3d 494 (Mo.App.E.D. 2003). Appellant timely filed a *pro se* motion for postconviction relief under ***Coates v. State***, 939 S.W.2d 912 (Mo. banc 1997)***State v. Tokar***, 918 S.W.2d 753 (Mo. banc 1996),

cert. denied 117 S.Ct. 307 (1996)***State v. Taylor***, 929 S.W.2d 209 (Mo. banc 1996),

cert. denied 117 S.Ct. 1088 (1997)***Wilson v. State***, 813 S.W.2d 833 (Mo. banc 1991)***White v. State***, 939 S.W.2d 887 (Mo. banc 1997),

cert. denied, 522 U.S. 948, 118 S. Ct. 365,

139 L. Ed. 2d 284 (1997)***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)***State v. Miller***, 935 S.W.2d 618 (Mo.App.W.D. 1996)***Franklin v. State***, 24 S.W.3d 686 (Mo.banc 2000),

cert. denied, 531 U.S. 951 (2000)Supreme Court Rule 32.03Supreme Court Rule 32.03(c).

Section 478.720 provides that there are two geographical districts of circuit courts within Marion County – District Number 1 in Palmyra and District Number 2 in Hannibal. Appellant's case was initially filed in District 2. In the present case, venue of appellant's case was changed from Hannibal to Palmyra.

Appellant, however, argues that this was not an actual change of venue because it was not from one county to another. In fact, the General Assembly intended that moving a case from one district to another in Marion County *is* a change of venue. Section 508.320 provides for a change of venue from District 2 to District 1:

> 1. Any case which may be pending in district number 2 of the circuit court of Marion County, Missouri, may be removed by change of venue for the following causes:

(1) That the inhabitants of Mason and Miller townships, Marion County, Missouri, are prejudiced against the applicant;

(2) That the opposite party has an undue influence over the inhabitants of said townships.

2. The change of venue may be awarded to any circuit court, including district number 1 of the circuit court of Marion County, Missouri, in the same manner that changes are taken from other circuit courts, and the court to which such cause may br removed shall have power and jurisdiction to dispose of the same as in causes taken by change of ve nue from circuit courts.

Section 508.330 provides for changes from District 1 to District 2. Section 508.340 provides for a change of venue in any civil or criminal case from Marion County to any circuit court outside of Marion County, where the defendant alleges that the inhabits of Marion County are prejudiced against him. Section 545.440 provides that in all counties wherein terms of courts are held at more places than one and provision has been made by law for the taking of changes of venue in criminal causes from one of such places to another, applications for changes of venue shall be subject to the same rules as for the taking of changes of venue from one county or circuit to another. While the aforementioned statutes are addressed to change of venue for cause, as opposed to change of venue as a matter of right, they are instructive as to what constitutes a "change of venue" – regardless of the reason which prompted the change.

The Court of Appeals, Eastern District, in its opinion, did not consider the change from District 2 to District 1 to be a change of venue as required by §508.320 and ***State v. Jaco***, 156 S.W.3d 775 (Mo.banc 2005)***State v. Kenney***, 973 S.W.2d 536 (Mo.banc 1998)Supreme Court Rule 32.04Supreme Court Rule 51.04 Supreme Court Rule 33.02***State v. Weaver***, 912 S.W.2d 499 (Mo.banc 1995)***Jones v. State***, 824 S.W.2d 441 (Mo.App.E.D. 1991)***Hightower v. State***, 1 S.W.3d 626 (Mo.App.S.D. 1999)Rule 32.03. The Court of Appeals found that Hightower was not entitled to relief because Hightower did not show that the result of the trial would have been different had a change of venue been sought. The Court in ***Weaver***, and ***Moss v. State***, 10 S.W.3d 508 (Mo.banc 2000)***State v. Cella***, 976 S.W.2d 543 (Mo.App. 1998)***Moss.*** The Court noted that plain error was found in ***Cella*** because the trial court had no jurisdiction to conduct the trial. The Court found ***Cella*** to be unpersuasive, observing that ***Cella*** did not involve an issue of prejudice. *Application* for a change of venue does not deprive the original court of jurisdiction, and a refusal to grant a change of venue on a proper application is a mere matter of error that may be waived. Ex parte Ross, 269 S.W. 380 (Mo.banc 1925).

Moreover, ***Cella*** was a direct appeal case, while the present case requires appellant to prove prejudice under the dictates of ***Strickland*** does not contemplate presumed prejudice outside the realm of conflict of interest cases. This, of course, is not a conflict of interest case, and thus, under ***Strickland***, appellant must prove prejudice. He has failed to do so.

Therefore, because appellant has not even alleged facts demonstrating that he was prejudiced by the failure to change venue to another county, and because the record reflects that appellant's jury was fair and unbiased, it cannot be said that trial counsel was constitutionally ineffective for failing to object to the trial court's failure to change venue to another county as opposed to another district.

D. No ineffective assistance of appellate counsel.

Nor was appellate counsel ineffective for failing to raise on direct appeal a claim that the trial court erred in failing to change venue to another county as opposed to another district within the county.

A right to change of venue under Rule 32.03 can be waived by failure to object. State v. Bradshaw, 81 S.W.3d 14, 28 (Mo.App.W.D. 2002). A defendant's failure to object to the action of the court in ordering a change of venue acts to waive the defendant's right to a particular venue. ***Id.*** A defendant waives his right to a change of venue by proceeding to voir dire without objection. ***Id.*** at 30. ***See also*** State v. Barnes, 942 S.W.2d 362 (Mo.banc 1997).

In the present case, defendant requested and received a change of venue from Hannibal to Palmyra. Even if this was an insufficient change of venue under the Supreme Court Rules, appellant waived his right to a change by proceeding to trial without objection. Even if appellate counsel had raised this claim on appeal, appellant would not have been entitled to relief since he waived his right to a change of venue by proceeding to trial. ***Holman v. State***, 88 S.W.3d 105 (Mo.App.E.D. 2002)***Helmig v.***

State, 42 S.W.3d 658 (Mo.App.E.D. 2001)***Smith v. Robbins***, 528 U.S. 259, 233, 120 S.Ct. 746,

145 L.Ed.2d 756, 782 (2000)***Taylor v. State***, 126 S.W.3d 755 (Mo.banc 2004)§494.400 §494.505***Coates v. State***, 939 S.W.2d 912, 913 (Mo. banc 1997). Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Taylor***, 929 S.W.2d 209, 224 (Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***White v. State***, 939 S.W.2d 887, 904 (Mo. banc 1997), *cert. denied*, 522 U.S. 948, 118 S. Ct. 365, 139 L. Ed. 2d 284 (1997).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***State v. Miller***, 935 S.W.2d 618, 624 (Mo.App.W.D. 1996).

B. Relevant facts.

1. Appellant's postconviction pleadings.

Appellant alleged that trial counsel was ineffective in that he failed to challenge the jury on the grounds that there had been a "substantial failure to comply with the declared policies of Sections 494.505," which provides the general provisions as to how juries are to be selected (PCRLF 23).

Per the dictates of §478.720, RSMo 2000, Marion County is divided into two judicial districts: District 1 at Palmyra and District 2 at Hannibal. Appellant, in his pleadings, alleged that it is the practice of the jury commission in Marion County or the designated officer of the Marion County Circuit Court to select potential jurors for each district from their respective district (PCRLF 27). Thus, the jury pool for cases tried in the Palmyra district is selected from citizens residing in the Palmyra district, while the jury pool for cases tried in the Hannibal district is drawn from citizens residing in the Hannibal district (PCRLF 27).[1] Appellant alleged that this selection process is not

[1]Respondent has spoken with the Marion County prosecutor who has confirmed that it is the practice that juries in District 2, Hannibal, which consists of the Mason and Miller townships, are drawn from within the District 2 borders, while juries in District 1, Palmyra, are drawn from District 1, which consists of all of Marion County except the Mason and Miller townships (District 2 - Hannibal).

authorized by §478.720***State v. Nunley,*** 923 S.W.2d 911 (Mo. banc 1996)***State v. Gilmore***, 661 S.W.2d 519 (Mo.banc 1983),

cert. denied, 466 U.S. 945 (1984)***State v. Gresham,*** 637 S.W.2d 20 (Mo. banc 1982)494.400, RSMo provides as follows with reference to jury selection in Missouri:

> All persons qualified for grand or petit jury service shall be citizens of the state and shall be selected at random from a fair cross section of the citizens of the county... and all such citizens shall have the opportunity to be considered for jury service and an obligation to serve as jurors when summoned for that purpose. A citizen of the county or of a city not within a county for which the jury may be impaneled shall not be excluded from selection for possible grand or petit jury service on account of race, color, religion, sex, national origin, or economic status.

§478.720, RSMo 2000. According to appellant's pleadings, jurors for each district are selected from the district of the court and not the whole of Marion County. Thus, the jury in appellant's case was selected from Circuit Court District 1 at Palmyra (venue having been changed from Hannibal) and venire persons from which the jury was selected were residents of District 1 which was made up of all of Marion County except Mason and Miller townships. §478.720.3, RSMo 2000. Thus residents of Mason and Miller townships (District 2) were presumably not included.

While appellant has alleged that the venirepersons were not drawn from the entire county, but rather only from District 1, this did not constitute a substantial failure to

comply with the underlying statutory policy and provisions embodied by Chapter 494. In State v. Cross, 887 S.W.2d 789, 792 (Mo.App.W.D. 1994), the master jury list in Cass County left out citizens from two zip codes in the county. The Court of Appeals, Western District, found that this did not constitute a substantial failure, noting that the jury panel was selected from a "fair" cross section of the citizens of Cass County, and there was no evidence that individuals omitted from those zip codes were excluded on account of the reasons spelled out in ***State v. Alexander***, 620 S.W.2d 380 (Mo. banc 1981) U.S. Const. amends. VI and XIVArt. I, §§ 18(a) and 22(a), Mo. Const. (as amended 1982) ***Taylor v. Louisiana***, 419 U.S. 522, 95 S.Ct. 692,

42 L.Ed.2d 690 (1975) ***State v. Vinson***, 834 S.W.2d 824 (Mo.App. E.D. 1992) ***Alexander***, 620 S.W.2d at 385.

There is nothing in appellant's pleadings distinguishing residents of District 2 from those of District 1. Appellant did not plead that residents of District 2 possess any special quality or attribute, share specific attitudes or experiences that make them special in some way, or have any particular interest not represented by residents of District 1. The only difference lies in geographical location. It has been held that exclusion of venire persons from a geographical area is not *per se* violative of the Sixth Amendment to the United States Constitution. ***See*** United States v. Young, 618 F.2d 1281, 1288 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 126 (finding no constitutional right to have jurors drawn from the entire district). ***See also State v. Smith***, 681 S.W.2d 518 (Mo.App.S.D. 1984) ***Moss***, 10 S.W.3d at 511. Instead, the record shows that the jury consisted of

twelve impartial and unbiased citizens. ***See id***. at 513. (defendant's claim of prejudice was "refuted by the record, which shows the twelve persons on his jury were impartial"). Therefore, appellant suffered no actual prejudice.

In conclusion, because appellant can establish neither that counsel's performance was deficient, nor that he suffered any prejudice, appellant's ineffective assistance of counsel claim must fail.[2]

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[2]In addition to claiming ineffective assistance of counsel, appellant asserted in his 29.15 motion that the venire panel selection process resulted in equal protection and due process violations. These claims of trial court error are not cognizable in a Rule 29.15 proceeding because they could have been raised on direct appeal. ***See State v. Redman***, 916 S.W.2d 787 (Mo. banc 1996)State v. Redman, 916 S.W.2d 787, 793 (Mo. banc 1996) (finding that allegations of trial error are not cognizable unless exceptional circumstances are shown which justify not raising the constitutional grounds on direct appeal). Appellant raises no claim that appellate counsel was ineffective for failing to raise this claim.

III.

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's Rule 29.15 motion in which he alleged that counsel was ineffective for failing to introduce evidence of possible alternative sources of the cocaine sold to Craig Haley because appellant failed to allege that the witnesses would have been available to testify or that their testimony would have provided a defense.

Appellant contends that his trial counsel was ineffective for failing to introduce evidence of possible alternative sources of the cocaine which was sold to Craig Haley.

A. Standard of review.

The motion court is not required to grant a movant an evidentiary hearing unless (1) the movant pleads facts, not conclusions, which if true would warrant relief, (2) the facts alleged are not refuted by the record, and (3) the matters complained of resulted in prejudice to the movant. ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion, but is to determine if the facts alleged in the motion are true. ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to

competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as having produced a just result. ***State v. Jones***, 979 S.W.2d 171 (Mo.banc 1998), *cert. denied* 119 S.Ct. 886 (1999)***State v. Twenter***, 818 S.W.2d 628 (Mo. banc 1991)***State v. Middleton***, 854 S.W.2d 504 (Mo.App. W.D. 1993)***State v. Harris***, 868 S.W.2d 203 (Mo.App. W.D. 1994)***Twenter, supra***, at 635.

In the present case, appellant has failed to plead facts showing that any of these witnesses would have actually provided a viable defense. As for Deena Haley, appellant failed to plead that Deena would have been available and willing to testify.[3]

Nor would Deena's testimony – assuming that it would have been that she had stolen crack from appellant's brother and had a large amount of crack cocaine herself – been admissible. "Evidence that another person had an opportunity or motive for committing the crime is not admissible without proof that the other person did some act directly connecting that person with the crime." State v. Davidson, 982 S.W.2d 238, 242 (Mo.banc 1998). "The evidence must be of the kind that directly connects the other person with the corpus delicti and tends clearly to point to someone other than the

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[3]And given that Deena's testimony would have necessarily implicated her in a crime, it is highly unlikely that Deena would have been willing to testify.

accused as the guilty person. [citation omitted] Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Rousan, 961 S.W.2d 831, 848 (Mo.banc 1998), *cert. denied*, 118 S.Ct. 2387 (1998).

Appellant has pointed to no evidence and has alleged no facts that would directly connect Deena to the sale of crack cocaine to Craig Haley on the night in question. Appellant's allegations do nothing more than "cast a bare suspicion" or "raise a conjectural inference," and thus Deena's testimony would be inadmissible. ***Rousan, supra.***

Finally, Deena's testimony would not have provided appellant a defense. Appellant has alleged no facts showing that Deena was, in fact, the source of the crack cocaine Craig Haley handed over to the police on the night of the sale. Appellant's allegations raise no more than gross speculations. Thus appellant has failed to allege facts showing that counsel was ineffective for failing to either call Deena Haley or cross-examine Craig Haley about his relationship with Deena.

While appellant alleged that counsel could have called appellant's brother, Euron Matthews, appellant again failed to allege that Euron Matthews would have been

available and willing to testify.[4] And, like Deena's testimony, Euron's testimony would not have been admissible and would not have provided a defense.

While appellant did allege that defense counsel knew about Tina Haley and that she was available and willing to testify, her testimony would not have provided a defense. Tina allegedly would have testified that during December, 1999, Craig Haley possessed, used, and sold crack cocaine (PCRLF 22). This would not establish that Craig Haley was the source of the cocaine on the night in question, especially given that the police searched Craig Haley before and after the sale and found no controlled substances on his person. Appellant's allegations are, at best, mere speculation, and do not allege facts which, if true, would have warranted relief.

In his brief, appellant asserts that he should have had an evidentiary hearing in order to establish that any of the aforementioned witnesses would have been able to establish a defense (App.Br. 36). The purpose of a motion for post-conviction relief is to provide the motion court with factual allegations sufficient to enable the court to decide

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[4]Given that Euron Matthews's testimony would have implicated him in possession of a controlled substance, it is unlikely that he would have been willing to testify. Respondent further notes that Euron Matthews himself was convicted of two counts of delivery of a controlled substance prior to appellant's trial. ***State v. Euron Matthews***, 95 S.W.3d 115 (Mo.App.E.D. 2002)State v. Euron Matthews, 95 S.W.3d 115 (Mo.App.E.D. 2002).

whether relief is warranted. Morrow v. State, 21 S.W.3d 819, 824 (Mo. banc 2000), *cert. denied* 121 S. Ct. 1140 (2001). The requirement that a movant directly allege these facts is more than a technicality; requiring timely pleading containing reasonably precise factual allegations is not an undue burden on a movant and is necessary to bring about finality. White v. State, 939 S.W.2d 887, 896 (Mo. banc), *cert. denied* 522 U.S. 948 (1997). Further, appellant can not rely on an evidentiary hearing to establish these vital facts. "The purpose of an evidentiary hearing is to determine whether the facts alleged in the motion are accurate, not to provide appellant with an opportunity to produce new facts." ***Morrow***, 21 S.W.3d at 827. Because appellant did not allege facts necessary to establish his claim, he was not entitled to post-conviction relief.

In sum, because appellant failed to allege that the witnesses in question would have been available and willing to testify, because the witnesses' testimony, to the extent known, largely would have been inadmissible, and because in any event, the witnesses' testimony would not have provided a defense, appellant failed to allege facts showing that counsel was ineffective and that he was entitled to an evidentiary hearing on his claim. The motion court thus did not err in denying his claim without an evidentiary hearing. Appellant's claim is without merit and should be denied.

IV.

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's Rule 29.15 motion in which he alleged that counsel was ineffective for failing to introduce and play for the jury the surveillance tape recordings of the alleged drug transactions because appellant did not plead facts showing what conversations the jury could have actually heard on the tapes and the trial record shows that trial counsel made a strategic decision not to play the tapes.

Appellant contends that counsel was ineffective for failing to introduce and play for the jury the surveillance tapes of the drug transactions.

A. Standard of review.

The motion court is not required to grant a movant an evidentiary hearing unless (1) the movant pleads facts, not conclusions, which if true would warrant relief, (2) the facts alleged are not refuted by the record, and (3) the matters complained of resulted in prejudice to the movant. ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion, but is to determine if the facts alleged in the motion are true. ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to

competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as having produced a just result. ***Morrow v. State***, 21 S.W.3d 819, 824 (Mo. banc 2000), *cert. denied* 121 S. Ct. 1140 (2001). The requirement that a movant directly allege these facts is more than a technicality; requiring timely pleading containing reasonably precise factual allegations is not an undue burden on a movant and is necessary to bring about finality. ***Matthews***, slip op. at 10. That is not the fault of the motion court. That is the fault of appellant not alleging in his postconviction motion what was in fact audible on the tapes. It is his burden to plead these facts, not to rely on a subsequent evidentiary hearing to establish what could be heard on the tapes. ***Morrow, supra.*** Just as appellant must allege what a proposed witness's testimony would actually be, he must allege what would actually be heard if the tapes were played.

In the present case, failure to directly allege facts that would have been heard on the tapes is sufficient grounds to affirm the motion court's denial of appellant's Rule 29.15 motion without an evidentiary hearing. ***Taylor v. State***, 126 S.W.3d 755, 762 (Mo.banc 2004). The mere choice of trial strategy is not a foundation for ineffective assistance of counsel. Ringo v. State, 120 S.W.3d 743 (Mo.banc 2003). The trial record here demonstrates that defense counsel knew about the tapes but determined that he would not play them for the jury. This was a strategic decision on his part and appellant

has alleged no *facts* which would demonstrate that this was not a reasonable strategic decision.

In sum, appellant failed to plead facts as to what could be heard on the tapes and what the jury would have heard had they been played, and trial counsel made a strategic decision not to play the tapes. The motion court did not err in denying appellant's claim without an evidentiary hearing. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 29.15 motion without an evidentiary hearing be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of August, 2005.

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RESPONDENT'S APPENDIX

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