No. 93020

In the
Supreme Court of Missouri

STATE EX REL. WILLIAM J. SITTON,

Petitioner,

v.

JEFF NORMAN, Warden,
Jefferson City Correctional Center

Respondent.

On Writ of Habeas Corpus

RESPONDENT'S STATEMENT, BRIEF & ARGUMENT

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STATEMENT OF FACTS

The State charged Petitioner William Sitton with first-degree murder, §565.020, RSMo. 2000, and armed criminal action, §571.015, RSMo. 2000, from the March 21, 2004 stabbing death of his friend Tracy Dykes (Respondent's Exhibit B, page 10). The Pike County Circuit Court transferred venue to the Lincoln County Circuit Court where Circuit Judge Dan Dildine and a jury heard evidence on July 21 and 22, 2005 (Respondent's Exhibit B, pages 5, 8).

The Missouri Court of Appeals summarized the facts giving rise to Sitton's conviction.

> Appellant and Tracy Dykes (Victim) operated a back-yard car repair business together and spent almost every night together drinking. On March 20, 2004, the day before Victim's fortieth birthday, Appellant and Victim drove Appellant's father's minivan from Bowling Green, Missouri, to their friend Mike Castelli's (Castelli) house near Mexico, Missouri. Although Appellant and Victim had been drinking heavily and were intoxicated when they arrived, they convinced Castelli to drive them so they could buy more alcohol.
>
> During the trip, Appellant and Victim engaged in "play fighting" and wrestling. The fighting escalated when Appellant hit Victim in the chest and Victim asked him to stop. Appellant did

not stop, and Victim asked that the van be pulled over so he could "kick [Appellant's] ass." After Castelli gave Victim a "wedgy," everyone laughed. When the three men returned to Castelli's house, Castelli's brother-in-law was there. Appellant proceeded to smash the windshield and front end of Castelli's brother-in-law's car with a baseball bat because Castelli's brother-in-law had traded him a car that turned out to be damaged. Castelli's brother-in-law left, and the police soon arrived at Castelli's residence to investigate the matter. At one point, Appellant came to the door and threatened the officer.

The three men then left Castelli's house and Castelli agreed to drive Appellant and Victim home to Bowling Green. Appellant sat in the front passenger seat, and Victim sat in the back seat. Castelli and Victim were angry with Appellant for having damaged Castelli's brother-in-law's car, causing the police to come to the house. Appellant cursed Victim and said that he had a right to damage the car, and also said Victim was a "piece of shit" who "still lived with his parents," so his opinion "did not count." Victim grabbed Appellant by the throat and dragged him into the backseat, where they fought. Eventually the fighting stopped, though Castelli could still hear them cursing each other. They

became quiet, and Castelli continued to drive toward Bowling Green. Appellant remained in the back of the van.

Once they reached Bowling Green, Appellant directed Castelli to drive him straight to Appellant's father's house. Castelli noticed dark red, bloody spots in the back of the van and asked Appellant, who was holding a blue fold-up knife, what he had done. When Castelli said he was going to drive to a hospital, Appellant told him no, put the knife to his throat, and threatened to kill him and "everyone [he] love[d]." Castelli drove to Appellant's father's house. After they arrived, Appellant told his father that he had stabbed Victim. Appellant said he wanted to bury the body on Castelli's land. Appellant's father called the police.

When the police arrived, they found Victim's body covered in blood and lying in the back of the van. Appellant was also covered in blood. Appellant's father showed officers the bloody knife Appellant had used to stab Victim. Appellant claimed that he stabbed Victim in self-defense while they were sitting in Appellant's father's driveway. Appellant said that after he initially stabbed Victim twice, he resumed stabbing him until he stopped moving.

Although Appellant had a knot over his eye and red marks on his neck, he had no life-threatening injuries. Appellant was arrested. After Appellant was placed in the back of the patrol car, he knocked out the passenger-side window with his head. Appellant spit at the police officers and was verbally abusive toward them.

Appellant's spitting and cursing continued at the police station. He called the Pike County Sheriff several obscene names and asked him to "get within five feet" of him. Appellant told the sheriff, "You're next," and "Wait until I'm standing over your bed." He told another officer that he was going to kill him and that he would wait in the parking lot with a baseball bat and bash his head in. Appellant stopped this behavior when a video camera was brought in, but resumed being abusive when the camera was removed.

Victim suffered 41 stab and puncture wounds to and inside his buttocks. Some of the wounds were 4 to 4 ½ inches deep, and one penetrated all the way to the pelvic bone, nicking it near the joint between the hip and spine. The wounds were delivered with enough force to penetrate two layers of denim on Victim's jeans (through the pocket), Victim's underwear, and several inches of fat

and into skeletal muscle. Victim's death was caused by blood loss from the multiple stab wounds.

The medical examiner testified that it was not possible that Appellant was underneath Victim with Victim facing him when the stabbing occurred. The medical examiner said that someone stabbing from underneath and in front of Victim would be unable to generate enough force needed to create the depth of the stabbing wounds. In addition, the paths of the wounds were horizontal, not angled. This conclusion was further reinforced by the fact that the wounds were centered, and not incised, meaning that Victim was not resisting the attack or moving to get away. The medical examiner believed that Victim was "compromised" when he was stabbed. In addition, Victim suffered no defensive knife wounds to his hands. The medical examiner concluded that the stab wounds were delivered from behind Victim.

While Appellant was in jail awaiting trial, another inmate heard him brag about killing a guy on his birthday and state that Victim owed him money. The inmate heard Appellant say that he considered burying Victim's body or dumping it in the river. While Appellant was out on bond, Appellant's neighbor heard him in his backyard bragging about the murder, saying that he gave Victim

> "one hell of a present" for his birthday, and that Appellant was going to claim self-defense.
>
> Appellant testified at trial that he stabbed Victim in self-defense to stop Victim from choking him. Appellant said he believed that he was being choked to death. Appellant claimed that he stabbed Victim while Victim was on top of him. Appellant said that at first he "poked" Victim ten or twelve times with the knife, but that after Victim realized he was being stabbed he began choking Appellant with both hands. Appellant said he continued to stab Victim until Victim fell off him.

(Respondent's Exhibit E, slip op. at 2-5).

The jury found Sitton guilty of the lesser-included offense of first-degree involuntary manslaughter, §565.024, RSMo. 2000, and armed criminal action, §571.015, RSMo. 2000 (Tr. 501, 503; Respondent's Exhibit B, pages 53-54). The jury recommended a sentence of seven years on the manslaughter conviction and eighteen years on the armed criminal action conviction (Tr. 524; Respondent's Exhibit D, pages 53-54). The trial court followed the jury's sentencing recommendation with the sentences running consecutively (Tr. 529-30; Respondent's Exhibit B, pages 59-61). Sitton appealed, and the Missouri Court of Appeals affirmed. *State v. Sitton*, 214 S.W.3d 404 (Mo. App. E.D. 2007).

Sitton filed a Rule 29.15 motion in the Lincoln County Circuit Court, and the court denied the motion. *Sitton v. State*, No. 07L6-CC00066. The Missouri Court of Appeals affirmed. *Sitton v. State*, 294 S.W.3d 137 (Mo. App. E.D. 2009).

Sitton filed a petition for writ of habeas corpus in the Cole County Circuit Court (Pet. Exh. A-1). Sitton complained that the juror selection process did not comply with §494.400-.505, RSMo. (Pet. Exh. A-3). The circuit court denied the petition. Because Sitton did not raise the jury selection claim at trial and direct appeal, Sitton defaulted the claim (Pet. Exh. B-1). Sitton failed to show one of the limited exceptions that would allow review notwithstanding the default (Pet. Exh. B-2 to B-4). The Missouri Court of Appeals also denied the petition (Pet. Exh. C-1, D-1).

ARGUMENT

I.

The Court should decline review of the jury selection claim because Sitton defaulted on the claim by failing to present it to the trial court and, if necessary, on direct appeal.

Sitton contends that the jury selection procedure for the Lincoln County Circuit Court in July 2005 violated §§494.400-494.505, RSMo. (Petitioner's Brief, 12-13 citing *Preston v. State*, 325 S.W.3d 420 (Mo. E.D. 2010)). In particular, Sitton contends that the court's allowing a juror to perform community service instead of jury service was not in substantial compliance with the statutes; thus, the Court should order a new trial. Sitton does not contend his jury was unfair or a specific juror was biased. The Court should not set aside Sitton's conviction because 1) he defaulted on this claim and the default precludes habeas review; and 2) the claim does not warrant a new trial.

Sitton defaulted on this claim by failing to present it to the trial court and, if necessary, on direct appeal. Sitton acknowledges the procedural default (Petitioner's Brief, pages 11-12 citing *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001)), but he contends that he can overcome this default by showing good cause and actual prejudice (Petitioner's Brief, page 12 citing *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478

(1986)). Sitton's contentions do not show good cause and actual prejudice sufficient to over come his default.

1. Sitton defaulted on his jury selection claim.

Sitton acknowledges that he did not present his jury selection claim at trial or on direct appeal (Petitioner's Brief, pages 11-12; Respondent's Exhibit B, pages 8, 55). His failure to object to the procedures used to select a jury is default because an objection must be raised timely at trial and not in a post-conviction proceeding. *State v. Sumowski*, 794 S.W.2d 643, 647 (Mo. banc 1990); *Richardson v. State*, 752 S.W.2d 919, 921 (Mo. App. W.D. 1998). He contends that he cured this default by filing an "Amended Motion for New Trial" on October 25, 2010 (Petitioner's Brief, pages 16-19; Pet. Exhs. A-11 to A-15); long after the trial, direct appeal and post-conviction proceeding. Sitton suggest §494.465, RSMo. 2000 authorized the Amended Motion for New Trial because he filed the amended motion within fourteen days of his attorney's learning of the jury selection claim (Petitioner's Brief, page 16-18). The Court should rejected the theory for two reasons.

First, the court of appeals rejected the theory in *State ex rel. Koster v. McCarver*, 376 S.W.3d 46, 51-52 (Mo. App. E.D. 2012) because Rules 24.035 and 29.15 created a single unitary post-conviction remedy. *Id.* at 51; quoting *Brown v. State*, 66 S.W.3d 721, 725-26 (Mo. banc 2002). Just like Rule 29.07(d) did not create a second post-conviction remedy, neither did §494.465. *Id.* at 52.

Second, if the amended motion for new trial were proper, then Sitton did not notice up the motion for trial court consideration, did not present evidence in support of the motion under §494.465.2, RSMo. 2000, and did not appeal the denial of relief by the trial court. Sitton presents no allegations of cause and prejudice for that default.

In any event, the true default occurred when Sitton did not present his claim to the trial court. And he does not show cause and prejudice for that default.

2. Sitton does not show cause.

In *State ex rel. Nixon v. Jaynes*, the Court stated that it dealt with habeas corpus petitions "in a manner similar to that of the United States Supreme Court in dealing with successive federal habeas petitions or federal petitions that follow post-conviction default in state court." 63 S.W.3d at 215. The Court noted that petitioner could obtain review by demonstrating either 1) "cause and prejudice" or 2) "manifest injustice." *Id*. citing *Schlup v. Delo*, 513 U.S. 298, 315 (1995). Citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986), the Court said that the existence of "cause" for a procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id*. at 215.

Sitton contends that neither he nor his attorney knew about the *Preston* claim until October 18, 2010 (though the certification is dated October 15, 2010)

(Pet. Exh. E-1); thus, this lack of knowledge or ignorance constitutes sufficient cause to overcome the default (Petitioner's Brief, page 12). The contention is insufficient.

Lack of knowledge of the factual basis of a claim does not constitute cause for lifting a procedural bar to review. In *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000), the offender did not know that a court had expunged his prior conviction in time for him to object to the conviction's use to support a finding that Clay was a prior offender. This Court declined to review the claim that the trial court improperly sentenced him. *Id*. at 217.

In *Covey v. Moore*, 72 S.W.3d 204, 211 (Mo. App. W.D. 2002), the Court held that Covey failed to establish cause for his default because the claims "were known to him, or were at least reasonably discoverable by him," during the time period. The *Covey* court cited *Brown v. State*, 66 S.W.3d 721, 729 (Mo. banc 2002) and *Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App. W.D. 1997) for the proposition that cause could exist when an issue was unknown "or not reasonably discoverable to the inmate" during the time period for proper presentation. 72 S.W.3d at 211.

Decisions from the Eighth Circuit are similar. In *Greer v. Minnesota*, 493 F.3d 952, 957-58 (8th Cir. 2007), Greer complained that the trial judge was biased, based on law clerk affidavits that came into existence after trial. Nothing external to the defense kept Greer from raising the claim previously.

Id. at 958. The decision most similar to the present case is *Bell v. Lockhart*, 2 F.3d 293 (8th Cir. 1993). Bell asserted cause existed because a transcript did not exist. *Id*. at 297. But the court found alternative sources of information other than "trial records." There was no impediment to present the claim; thus, there was no cause. "Although Bell presumably did not know that a hearing had been held because, of course, he was not present, all of the people who participated in the motion hearing" had information supporting the claim; thus, there was no impediment to asserting the claim. *Id*.

So the lack-of-knowledge does not establish cause for a default. Instead, the offender must show an impediment to the factual basis of the claim. Sitton asserts the Lincoln County Circuit Court Clerk was aware of the jury selection process (Pet. Exh. E-1). The Circuit Judge was aware too. The individuals who requested excusal was aware as well. To take Sitton's assertion literally, he had cause for his default until October 18, 2010, when his counsel actually learned of the claim - - a date that differs by two years from other offenders who were represented by the Lincoln County Public Defender's Office who "discovered the existence of the opt-out program on or about July 8, 2008" (Petitioner's Brief, page 6, n.2). So the question of cause should be more than when does the offender or his counsel have subjective actual knowledge, it is a question of when they could reasonably have had knowledge. Phrased another way, Sitton does

not allege that he could not have reasonably discovered the jury selection process issue at the time of trial.

Sitton's failure to allege stands in contrast to the situation in *Amadeo v. Zant*, 486 U.S. 215, 222 (1987). In *Amadeo*, the offender reasonably did not know about the constitutional claim because of the prosecutorial misconduct. The Court stated that the existence of cause for a procedural default ordinarily turned on whether the prisoner can show some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. *Murray v. Carrier*, 477 U.S. at 488. In *Amadeo*, government officials concealed a memorandum by the district attorney, and that concealment was the reason the defendant's lawyer did not raise the claim to the trial court. That situation is the type of interference by officials contemplated by *Murray* to constitute cause.

In contrast, Sitton does not allege or demonstrate any governmental interference with the assertion of his claim. Instead, Sitton alleges the claim was knowable through the exercise of diligence by Sitton's public defender (Petitioner's Brief, page 12) and by the Lincoln County Public Defender's Office (Petitioner's Brief, page 6 n.2). In contrast to *Amadeo*, government officials freely gave Sitton the basis for his claim (Pet. Exh. E-1). Indeed, as noted in *Preston v. State*, 325 S.W.3d 420, 422 (Mo. App. E.D. 2010), the Clerk of the Lincoln County Circuit freely testified about the Lincoln County jury selection process. Further, §494.410.4, RSMo. Cum. Supp. 2003 provides that the master

jury list is an open record. No statute provides that these juror selection records are closed. Instead, the documents appear to be court records: "In re: Jury Pool: July through October 2005" (Pet. Exh. E-1); "In re: Jury Service" (Pet. Exh. E-2). In *State v. Henke*, 820 S.W.2d 94, 95 (Mo. App. W.D. 1991), the defendant called the Circuit Clerk and the County Clerk to testify about how they winnowed the master jury list. Sitton does not allege and the facts do not suggest that the jury selection claim was not knowable.

In *State ex rel. Koster v. McCarver*, 376 S.W.3d 46 (Mo. App. E.D. 2012), the court of appeals found cause for the default because the jury selection claim was not actually known by the offender. There was no finding by the court of appeals that the claim could not have been known. The court of appeals cited *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125-26 (Mo. banc 2010) for the proposition that there is cause if the claim was not known to the offender. The issue in *Engel*, however, was a *Brady* claim for which this Court interpreted *Strickler v. Greene*, 527 U.S. 263 (1999) as holding that the State's failure to disclose evidence is external to the defense or beyond his responsibility due to the constitutional duty of the State to disclose material exculpatory evidence. *State ex rel. Engel v. Dormire*, 304 S.W.3d at 125-26.

The *Koster* court also cites *State ex rel. Simmons v. White*, 366 S.W.2d 443, 446 (Mo. banc 1993) as suggesting that only known claims must be presented at trial or post-conviction proceedings. Of course, the *Simmons* court refers to

White v. State, 779 S.W.2d 571 (Mo. banc 1989). The *White* court said that an offender in state habeas would have to show that the claim was not "known to him." *Id*. at 572. But in context, Mr. White suffered from a brain tumor, *id*.; thus, the phrasing "known to him" had special meaning, which is probably why the Court used the phrase in quote marks in its decision. *Id*.

The Court has consistently required the offender to show that a claim was not factually available due to impediment or interference. And that consistency is true to the guidance given by the Supreme Court and the Eighth Circuit. Because Sitton does not show that the claim was unavailable due to an impediment by the state, he does not show cause for his procedural default.

3. Sitton does not show actual prejudice to overcome his default.

Not only must the offender show good cause to overcome a procedural default, he must also show actual prejudice from the default. To establish the prejudice necessary to overcome a procedural default, a habeas petitioner "bears the burden of showing, not merely that errors at his trial created a possibility of prejudice, but that they 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. banc 2001) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). In *Frady*, the defendant complained in a collateral proceeding that the trial court erroneously instructed the jury about the meaning of malice, an element of the offense. *Id*. at 162. Frady contended

that the instructional error was "per se" prejudicial. *Id*. at 170. The Supreme Court held that Frady's allegation of prejudice was insufficient.

> Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

Id. at 170.

After the *Frady* decision, two lines of cases developed concerning the meaning of actual prejudice in *Frady*. In order for "actual prejudice" to have meaning, the "actual prejudice" required to overcome the procedural bar must be higher than the *Strickland* prejudice required to establish an underlying constitutional claim such as *Strickland*. *See Zinzer v. Iowa*, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995); *United States v. Dale*, 140 F.3d 1054, 1056 n.3 (D.C. Circ. 1998); *Strickland v. Washington*, 466 U.S. 668 (1984).

And in the second line, this Court described the prejudice prong of the cause and prejudice test as requiring the offender to show "*Brady* prejudice." *Brady v. Maryland*, 373 U.S. 83 (1963); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011) quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126, 129 (Mo. banc 2011). That prejudice is described as the prejudice that creates a reasonable probability that the outcome of the proceeding would have

been different. *United States v. Bagley*, 473 U.S. 667 (1985) citing *Strickland v. Washington*, 466 U.S. 668 (1984).

To summarize, the actual prejudice component of the cause and prejudice test requires the offender to show at a minimal *Strickland/Brady* prejudice, or, at a maximum, an amount more than *Strickland/Brady* prejudice. Respondent does not believe the Court has to resolve the conflicting views of prejudice because under the most lenient form of prejudice - - *Strickland/Brady* prejudice - - Sitton does not demonstrate a reasonable probability that the outcome of the trial would have been different.

Sitton concedes that he cannot demonstrate prejudice, but he contends he should receive a new trial because the Court should presume prejudice (Petitioner's Brief, page 15 citing *State ex rel. Koster v. McCarver*, 376 S.W.3d at 54; *McGurk v. Stenburg*, 163 F.3d 470, 474-75 (8th Cir. 1998)). First, Sitton provides no authority for the proposition that presumed prejudice is the same thing as actual prejudice under *Frady*. Second, that proposition is rejected in *Frady* itself when the Supreme Court rejected Frady's request to equate a "per se" prejudicial claim with *Frady* prejudice. Third, this Court rejected the contention in *Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008). In *Strong*, the defendant claimed he received ineffective assistance of trial counsel because counsel failed to raise religious-based *Batson* challenges. Distinguishing *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002) and *Anderson v. State,* 196 S.W.3d 28

(Mo. banc 2006) because trial counsel's errors resulted in the impaneling of biased jurors, Strong did not make that showing. Accordingly, Strong had to demonstrate a reasonable probability that the outcome of the trial would have been different - - traditional *Strickland* prejudice. *Id*. at 648 citing *Young v. Bowersox*, 161 F.3d 1159 (8th Cir. 1998). The Court rejected Strong's argument that claimed structural defects in a trial, such as an underlying *Batson* claim, automatically fulfilled the *Strickland* prejudice requirement. *Id*. at 647. Without a demonstration that an unqualified persons actually served on the jury, a claim of ineffective assistance of counsel does not amount to a structural defect that entitled the movant to a presumption of prejudice. *Id*. at 648.

Fourth, the Supreme Court in *Francis v. Henderson*, 425 U.S. 536, 542 (1976), held that a showing of actual prejudice was necessary to overcome a procedural bar arising from the failure to object to what was a structural error at the trial level, the exclusion of African-Americans from the grand jury. Federal courts have concluded that even where the defaulted claim involves structural error, the habeas petitioner must still satisfy the prejudice component of the cause and prejudice test. *See Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006); *Ward v. Hinsley*, 377 F.3d 719, 726 (7th Cir. 2004); *Hatcher v. Hopkins*, 256 F.3d 761, 764 (8th Cir. 2001).

Fifth, non-compliance with Chapter 494 is not a structural error as the Supreme Court uses that term. *Arizona v. Fulminante*, 499 U.S. 279 (1991)

(listing the five structural errors). Nor have Missouri courts treated such non-compliance as a structural error. *E.g., State v. Davis*, 830 S.W.2d 469 (Mo. App. E.D. 1992) (court declining to set aside convictions even though juror was not technically qualified due to residence); *State v. Murray*, 744 S.W.2d 762, 771 (Mo. banc 1988) (no prejudice from hardship excusal). And in the context of ineffective assistance of trial counsel, Matthews claimed ineffectiveness from counsel's failure to challenge the jury selection from only one district from Marion County, not both. The Court looked for *Strickland* prejudice and found none. *Matthews v. State,* 175 S.W.3d 110, 115 (Mo. banc 2005).

Lastly, Sitton contends that the court of appeals resolved the "actual prejudice" issue in his favor (Petitioner's Brief, page 15 citing *State ex rel. Koster v. McCarver*, 376 S.W.3d at 54). The court of appeals decision in *Koster* is silent on the "actual prejudice" issue. *Id*. at 53-54. The State did request the court of appeals reconsider *Preston v. State*, 325 S.W.3d at 420. *Koster*, 376 S.W.3d at 54. That issue is distinct from the undecided issue of whether the offender in *Koster*, demonstrated actual prejudice.

In summary, the Supreme Court and this Court expect the defaulted habeas petitioner to show actual prejudice. Mr. Sitton does not make that showing.

II.

The Lincoln County Circuit Court substantially complied with the Missouri statutes.

Relying on *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010), Sitton asserts he should receive a new trial because the Lincoln County Circuit Court did not substantially comply with §494.400 - §494.505 in that five individuals performed community service instead of jury service (Petitioner's Brief, pages 12-13). The Lincoln County Circuit Court allowed these individuals to substitute six hours of community service for their jury service during the three month period between July 2005 and October 2005. While Sitton suggests that these individuals had to pay a $50 fee to pay for the administrative costs of the community service program (Petitioner's Brief, pages 12-13), the records Sitton attaches to the petition do not support the suggestion (Pet. Exh. E-1 to E-16).[1]

[1] Sitton alleges five people chose community service (Petitioner's Brief, page 13, lines 1-2). Sitton also alleges six people chose community service (Petitioner's Brief, page 13, line 9). It cannot be both. The documents Sitton attaches to the petition suggests that there were actually four because one did not choose the community service option until July 22, 2005, the day after voir dire (Pet. Exh. E-5).

1. Sitton cannot rely on the rule announced in *Preston*.

Sitton contends that he must receive a new trial because of the rule announced in *Preston v. State* (Petitioner's Brief, page 13). But the Court should not apply *Preston* retrospectively to vacate a conviction that became final three years before the *Preston* decision. The Lincoln County Circuit Court's compliance with the statutory jury pool selection process concerns procedural matters; thus, appellate courts should apply *Preston* prospectively only. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994) quoting *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981). But even if the *Preston* decision concerned a substantive matter and applied retrospectively, appellate courts should limit *Preston* only to those cases on direct appeal or pending cases that were not finally adjudicated. *State v. Ferguson,* 887 S.W.2d at 587. The Missouri Court of Appeals finally adjudicated Sitton's case when affirmed the conviction and sentence in February, 2007 (Respondent's Exhibit E), three years before the *Preston* decision. *Preston* cannot be the foundation to set aside Sitton's conviction.

2. The trial court substantially complied with the statutes.

Sitton asserts that the circuit judge excused five individuals from the "qualified jury list" - - §494.415, RSMo. 2000 - - from which the clerk summoned prospective jurors for Sitton's trial - - §494.420, RSMo. 2000 (Petitioner's Brief, page 16). The circuit clerk summoned prospective jurors from the list, and forty-

six people appeared at the beginning of voir dire (Tr. 6-7). Sitton does not allege that if the circuit judge had not excused the five prospective individuals, then they would have been among the 46 called by the circuit clerk on the first day of trial. Sitton demonstrates no actual error in the composition of the jury pool at the beginning of his trial.

Sitton complains that the circuit court excused these five individuals for reasons not listed in §494.430, RSMo. Cum. Supp. 2004. In *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002), this Court held that "exclusion of a prospective juror for reasons not listed in the statute is not grounds for reversal absent a showing that a defendant was actually prejudiced by failure to strictly observe the statutory provisions for excusal." *Id.* at 432. Sitton does not allege or demonstrate such prejudice. Not only does Sitton fail to show that the five individuals would have sat on his jury had they not been excused, he does not allege that their mere presence on the panel on the first day of trial (Tr. 6-7) would have made a difference.

Additionally, the statues do not prohibit the circuit court's actions. To the contrary, the legislature modified §494.450,[2] RSMo. Cum. Supp. 2004, in 2004 to

[2] Section 494.450, RSMo. Cum. Supp. provides: A person who is summoned for jury service and who willfully fails to appear and who has failed to obtain a postponement in compliance with section 494.432 or as an excuse pursuant to

allow for community service. So "in lieu of the fine," the court could order a period of community service. And that appears to be the action by the circuit court (Pet. Exh. E-1 to E-16). So Sitton's argument must be that §494.450 requires form over substance: that the summoned juror must not appear, followed by a civil contempt order, followed by a show cause order, followed by a hearing, culminating in a fine less than $500, and only then is community service an option. The legislature, however, could reasonably provide in 2004 that community service was an alternative to the formal. And it did so with the language "[in] addition to, or in lieu of, the fine;" thus, the court may order

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section 494.430, or to respond to the juror qualification form shall be in civil contempt of court, enforceable by an order directing him or her to show cause for his or her failure to comply with the summons and the juror qualification form. Following an order to show cause hearing, the court may impose a fine not to exceed five hundred dollars. The prospective juror may be excused from paying sanctions for good cause shown or in the interests of justice. In addition to, or in lieu of, the fine, the court may order that the prospective juror complete a period of community service for a period of no less than if the prospective juror would have completed jury service, and require that he or she provide proof of completion of such community service to the court.

community service. The circuit court substantially complied with the letter and intent of the statute.

Moreover, §494.450, RSMo. 2000 explicitly authorizes a judge to impose community service and/or a fine as a penalty for jurors who are summoned for service but fail to appear. So under Sitton's perspective, if the five prospective jurors who were excused after they accepted the community service option had instead decided just not to appear for service and then been penalized, Sitton could not colorably request a new trial based on the circuit court's asserted failure to comply with the jury selection statute. There should be no legal difference between penalizing a juror who refuses to appear for jury service and excusing a juror who claims that appearing for service will cause a hardship upon the condition that the juror performs community service.

The precedents discussed in *Preston v. State* are distinguishable. Those cases involve procedural irregularities that undermine the fairness of the trial. For example, in *State v. Gresham*, 637 S.W.2d 20 (Mo. banc 1982), the circuit clerk and jury commissioner sorted through the questionnaires and excused the jurors whom they believed were "too likely to convict or too likely to acquit." This Court concluded that this irregularity "readily lends itself to jury packing." *Id*. at 26. In *State v. Sardeson*, 174 S.W.3d 598 (Mo. App. S.D. 2005) and *State v. Hudson*, 248 S.W.3d 56 (Mo. App. W.D. 2008), computer errors caused the seating of the venirepersons in the courtroom from the oldest to the youngest

rather than randomly. In both cases, the appellate courts understandably found that the error was a fundamental and systematic violation of the jury selection procedures, emphasizing that the irregularity "destroyed the randomness of the jury selection." *Sardeson*, 174 S.W.3d at 601; *Hudson*, 248 S.W.3d at 60.

In contrast, the circuit judge's procedure in this case posed no risk of jury packing and did not interfere with the randomness of jury selection. Here, the circuit judge simply imposed an additional condition on excusing jurors who professed hardship that did not, in the judge's opinion, rise to the level of "undue or extreme hardship that would warrant excusal under §494.430." Unlike the irregularities in *Gresham*, *Sardeson* and *Hudson*, nothing about the judge's policy in this case could have had any impact on the fairness on Sitton's trial. Sitton does not claim that the persons who actually sat on his jury were biased.

The record Sitton provides the Court does not indicate how many people the jury commission summoned for jury duty for the July 2005 term. In *State ex rel. Koster v. McCarver*, 376 S.W.3d at 48, 1200 people were summoned and ten people participated in community service. *Id*. at 48-49. In *Preston v. State*, 325 S.W.3d at 422, 915 people were in the pool of potential jurors of whom seven performed community service. *Id*. Regardless of the number summoned to comprise the jury pool - - be it 1200 or 900 or some other number, the number of participants in the community service program was insignificant. In Sitton's

case, he claims five when his exhibits suggest only four. These numbers, without more, actually show substantial compliance with the statutes.

In *Preston*, seven of 915 members of the jury pool sought excusal from the qualified pool based on professed hardship. *Preston v. State*, 325 S.W.3d at 422. The presiding judge reviewed each request individually and determined that while the reason given did not qualify for excusal under the statute, the Court would nevertheless excuse the prospective juror from jury service if they would agree to perform community service. *Id.*

Under this system, the presiding judge, as a matter of discretion, decided to excuse the prospective jurors for a non-statutory reason (hardship was neither "undue" nor "extreme"), with the added condition that those individuals perform community service and pay a fee. Just as the excusal of venirepersons for non-statutory reasons did not require automatic reversal in *Anderson*, the excusal of venirepersons for non-statutory reasons with an additional community service requirement should not entitle a defendant to a new trial absent a showing of prejudice.

Failing to follow *Anderson*'s guidance will lead to absurd results. If the presiding judge in this case had simply excused the prospective jurors without imposing the community service requirement, there is no question that this action would not "substantially fail to comply" with the statutory provisions. In other words, the case would be indistinguishable from *Anderson*. Thus, the

existence of the community service obligation should not significantly distinguish this case or *Preston* (community service plus fee) from *Anderson* because, in both cases, the trial court excused potential jurors based on non-statutory reasons.

Moreover, §494.450, RSMo. 2000 explicitly authorizes a judge to impose community service and a fine as a penalty for jurors who receive a summons but fail to appear. If the four or five jurors here (or the seven jurors in *Preston*) who were excused after they accepted the community service option had instead decided not to appear for service and had then been penalized, neither defendant could have obtained a new trial based on the circuit court's failure to comply with the jury selection statute. There is no legal difference (and no difference to a criminal defendant or a civil litigant) between penalizing a juror who refuses to appear for jury service and excusing a juror who claims that appearing for service will cause a hardship upon the condition that community service is performed. To hold that a defendant receives no new trial in the former case, but will automatically obtain a new trial in the later situation, exhausts form over substance and grants some defendants an enormous and unjustified windfall.

CONCLUSION

The Court should deny Sitton's request for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 5,997 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 18 day of April, 2012, to:

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/s/ Stephen D. Hawke
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