IN THE
MISSOURI SUPREME COURT

HAROLD SCOTT,	)	
	)	
Appellant,	)	
	)	
vs.	)	S.C. 86956
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE THOMAS C. GRADY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

MISSOURI SUPREME COURT RULES

JURISDICTIONAL STATEMENT

The jurisdictional statement on page five of Appellant's substitute brief is incorporated herein by reference.

STATEMENT OF FACTS

The statement of facts appearing on pages seven and eight of Appellant's substitute brief is incorporated herein by reference, with one clarification. In addition to the claim of ineffective assistance of counsel for failing to lodge a **Batson** objection, Mr. Scott's amended motion alleged an equal protection violation by the State in exercising its peremptory strikes (PCR L.F. 20).

REPLY TO THE STATE'S ARGUMENT

The Pleadings Were Adequate

Harold Scott's amended Rule 29.15 motion alleged trial counsel was ineffective in failing to make a **Batson** objection when the State used five of its six peremptory strikes to remove African-American veniremen from a panel containing ten African-Americans after strikes for cause (PCR L.F. 19-21). He pled prejudice as a reasonable probability that had counsel done so, one of more of the peremptory strikes would have been disallowed (PCR L.F. 22-23). To make a *prima facie* case of impermissible discrimination, the objecting party need show only sufficient facts to raise "an inference of discriminatory purpose." **Johnson v. California**, 545 U.S. ___, 125 S.Ct. 2410, 2417, *citing* **Batson v. Kentucky**, 476 U.S. 79, 96 (1986). Significant statistical discrepancies alone are sufficient to create an inference of improper discrimination. **Miller-El v. Cockrell**, 537 U.S. 322, 342 (2003).

In urging this Court to affirm the motion court's denial without an evidentiary hearing, Respondent first argues that Mr. Scott did not state a claim warranting relief in that he "failed to allege either that the State did not have any race-neutral explanation for the strikes, or that he would have been able to establish that the reasons the State would give would have been pretextual." (Resp. Br. 13). But the allegation of pretext is implicit in movant's claim there was a reasonable probability some of the strikes would have been disallowed: they

would have been denied *only* if the trial court found the State's reasons were pretextual.

Respondent also asserts the claim was not supported by facts (Resp. Br. 13), disregarding Mr. Scott's claim that the State's use of five of its six its peremptory strikes, given the racial composition of the panel, established a *prima facie* case of impermissible discrimination (PCR L.F. 19). In cases like the one at bar, where the prosecutor was not required to offer any explanation at trial, requiring additional facts is contrary to the precept that a hearing should be denied only when the record "*conclusively* shows that the movant is not entitled to relief." **Wilkes v. State**, 82 S.W.3d 925, 928 (Mo. banc 2002) (emphasis in original); **Rule 29.15 (h).**

Respondent next avers the pleading was inadequate to merit a hearing, even if the record establishes a *prima facie* case, because it failed to allege there was a reasonable probability the outcome of trial would have been different if counsel objected. "In neither his motion nor his brief does appellant contend that a single juror who sat on his jury was biased against him." (Resp. Br. 15). That is correct, but the underlying claim is not one of juror bias, a Sixth Amendment violation. It is the act of excluding a venireman because of his race or gender that is unlawful, "a constitutional violation committed in open court at the outset of the proceedings," **Powers v. Ohio**, 499 U.S. 400, 412 (1991), that contravenes the Equal Protection Clause of the Fourteenth Amendment.

Respondent takes a wrong turn following its argument that Mr. Scott failed to plead prejudice in that he did not allege juror bias (Resp. Br. 15-16), when it continues "[a]ppellant instead asks this Court to ignore Strickland and hold that prejudice should be presumed from counsel's inaction (App. Br. 19-24)." That is not correct. In requesting an evidentiary hearing, Mr. Scott does not argue prejudice should be presumed from counsel's inaction, instead he requests an opportunity to prove the failure to object constituted deficient performance.

A postconviction movant must overcome a strong presumption that counsel was not ineffective. **State v. Tokar**, 918 S.W.2d 753, 761 (Mo. banc 1996). As Mr. Scott noted in his opening brief, an evidentiary hearing is necessary to determine if counsel's failure to challenge the strikes in the face of a *prima facie* case of impermissible discrimination was a strategic decision, or perhaps there was a proceeding off the record wherein counsel challenged the strikes, and the prosecutor provided satisfactory, race-neutral explanations. (*See* App. Br. 23). If counsel failed to act due to ignorance or inattention, she did not exercise the customary skill of a reasonably competent attorney. **Strickland v. Washington**, 466 U.S. 668, 688 (1984).

If Mr. Scott proves deficient performance at the hearing, the burden shifts to the prosecutor to make race-neutral explanations for its peremptory strikes. **Batson**, 476 U.S. at 97-98; **State v. Brown**, 998 S.W.2d 531, 541 (Mo. banc 1999). Mr. Scott's burden at the hearing is to show it is more likely than not that

the prosecutor intentionally discriminated in making at least one of them. **Johnson**, 504 U.S. ___, 125 S.Ct. at 2417.

*If Mr. Scott Proves Deficient Performance On Remand, The Motion Court Should Be Instructed To Hold A **Batson** Hearing, And Vacate the Judgment Unless the Court Finds Mr. Scott Has Not Established Purposeful Discrimination*

Respondent's procedural defenses attempt to forestall a decision on a deceptively simple question, which presents an issue that is the subject of disagreement among jurisdictions that have considered it.[1] A remand for hearing

[1] Most significant is this Court's opinion in **Morrow v. State**, 21 S.W.3d 819 (Mo. banc 2000) (see discussion at App. Br. 14-15); **Young v. Bowersox,** 161 F.3d 1159 (8th Cir. 1998) (denied where movant could not show a reasonable probability that the outcome of trial would have been different if counsel had objected); **Ringo v. Roper**, 2005 WL 2017439 (W.D.Mo. 2005) (movant failed to meet prejudice prong in failing to show any juror was not impartial). *But see*, **Eagle v. Linahan**, 279 F.3d 926 (11th Cir., 2001) (appellate counsel ineffective in not briefing **Batson** error where trial court did not follow **Batson** procedure); **Ex parte Yelder**, 575 So.2d 137 (Ala. 1991) (failure of counsel to make timely **Batson** objection to *prima facie* case of purposeful discrimination presumptively prejudicial); **Miller v. State**, 914 So.2d 800 (Miss.App., 2005) (claim of ineffective assistance of counsel in failing to make **Batson** objection denied on

by this Court will recognize that counsel can be found constitutionally ineffective in failing to assert a **Batson** objection in the face of a *prima facie* case. The Court should instruct that if Mr. Scott proves deficient performance by counsel, the judgment should be vacated unless the State can provide evidence that the strikes were not pretextual, and the motion court finds accordingly. **Batson**, 476 U.S. at 100.

The State argues **Strickland** restricts relief to those cases in which counsel's deficient performance results in both an unfair trial and affects the verdict (Resp. Br. 16-25). Mr. Scott advocated for a more expansive view of **Strickland** in his opening brief, reasoning it should be read to permit relief in cases where counsel's deficient performance does not prejudice the defense, and does not abandon that argument here. However, an alternative view is that **Strickland** is not controlling precisely <u>because</u> it contemplated only errors that impact the verdict.[2] "In giving meaning to the requirement [of effective assistance

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direct appeal due to insufficient record, but without prejudice on post-conviction review.)

[2] The only exceptions to the requirement that the movant prove the error prejudiced his defense are either actual or constructive denial of the assistance of counsel, which do not involve specific errors made by counsel. **Strickland**, 466 U.S. at 683, 692.

of counsel], however, we must take its purpose—to ensure a fair trial—as the guide." **Strickland**, 466 U.S. at 686.

Strickland ignored **Swain v. Alabama**, 380 U.S. 202 (1965), and its predecessors. Perhaps the Court did not think "reasonably competent counsel" could be held to a standard it described two years later as "a crippling burden of proof." **Batson**, 476 U.S. at 92. Or maybe the Court simply restricted the examination to claims of the nature of the one presented by the case, failure to investigate. Whatever the reason, **Strickland** addressed only due process violations, those that impinge on the defendant's right to a fair trial.

The State contends "[R]espondent is aware of neither any United States Supreme Court case nor Missouri opinion holding that a Batson violation is a structural error which always permits the presumption of prejudice." (Resp. Br. 23). Although Judge Rehnquist did not list a **Batson** violation as a "structural error" in **Arizona v. Fulminante**, 499 U.S. 279 (1991), he identified constitutional errors that were subject to harmless error analysis as those occurring "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence[.]" 499 U.S. at 307-308, a definition that clearly does not fit **Batson** violations. And he listed racial discrimination in the selection of a grand jury as an example of a structural defect, observing that it undermines the "integrity of the criminal tribunal itself." **Fulminante**, 499 U.S. at 310, *citing* **Vasquez v. Hillery**, 474 U.S. 254, 263-264 (1986). **Batson** had

previously noted the same equal protection principles apply in the selection of petit juries as in grand juries. 476 U.S. at 84 n. 3 (citation omitted.)

Even if there is not a case classifying **Batson** errors as structural, the label would not add anything. The procession of Supreme Court cases beginning with **Strauder v. West Virginia**, 100 U.S. 303 (1879) (conviction reversed without regard to the evidence where state statute found unconstitutional in that it precluded "colored" citizens from serving on the jury at the trial of a "colored" man), through **Miller-El v. Dretke**, 545 U.S. ___, 125 S.Ct. 2317 (2005) (conviction reversed without regard to the evidence due to a **Batson** error by the Texas trial court), illustrates the Court's conviction that equal protection violations in jury selection are not subject to harmless error analysis. **Batson** itself was remanded for a hearing with instructions that the conviction be reversed if the trial court found the strikes were race-based. 476 U.S. at 100. This Court recently reversed without harmless error analysis when the trial court imposed an incorrect remedy for a **Batson** violation. **State v. Hampton**, 163 S.W.3d 903 (Mo. banc 2005).

Criminal trials are important to society for reasons beyond the determination of guilt and punishment in individual cases. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." **Johnson**, 545 U.S. at ____, 125 S.Ct. at 2418 (*citation omitted*.) Purposeful discrimination "undermine[s] public confidence in the fairness of our system of justice." *Id.* The Equal

Protection Clause protects the defendant, the State, and the veniremen from discrimination based on race or gender in jury selection. (*See* **Batson**, *supra*; **Powers v. Ohio**, 499 U.S. 400 (1991); **Georgia v. McCollum**, 505 U.S. 42 (1992); **J.E.B. v. Alabama ex rel. T.B.**, 511 U.S. 127 (1994)

The United States Supreme Court has invoked the Equal Protection Clause of the Fourteenth Amendment to bar racial discrimination in the selection of juries since Congress passed the Civil Rights Act of 1875, seven years after the Amendment was adopted. **Strauder**, *supra*. In contrast, law pertaining to the Sixth Amendment right of criminal defendants to effective assistance of counsel is relatively recent and undeveloped. If Mr. Scott is denied the opportunity to seek the protection of the Equal Protection Clause by **Strickland's** rule requiring verdict-affecting prejudice, it is a rule that does not serve the principle of a defendant's constitutional right to effective assistance of counsel. Accordingly, **Strickland** should be reexamined, as argued in Mr. Scott's opening brief—or the courts should recognize it does not apply where counsel's deficient performance results in structural error, as in the equal protection violation here.

The Equal Protection Clause authorizes reversal without harmless error analysis, relief that is independent of Mr. Scott's Sixth Amendment right to effective assistance of counsel, the means by which his claim is presented.[3] In

[3] Mr. Scott also pled the error as an equal protection violation by the State (PCR L.F. 20).

choosing a jury, defense counsel is a state actor bound to follow procedure designed to safeguard the guarantee of equal protection. **Georgia v. McCollum**, 505 U.S. 42, 50-55 (1992). In **McCollum**, the Court held the prohibition against race-based discrimination applied to defense counsel's actions during jury selection, notwithstanding the fact that counsel's motive was to protect the defendant. 505 U.S. at 55.

The only difference between the facts in **McCollum** and those in the case at bar is the mental state of the respective defense attorneys. A finding of deficient performance of Mr. Scott's trial counsel presumes the failure to invoke **Batson** was not intentional, thus the prohibition against purposeful racial discrimination would not seem to apply. But if counsel's deficient performance was a conduit for race-based discrimination by the State, the injury is the same.

The Fourteenth Amendment's guarantee of equal protection has been the constitutional authority on which the principle of race neutrality in jury selection has been enforced since 1879. While the rules have changed over the years, the Court has been resolute in enforcing the principle. The fact that inaction by defense counsel forced Mr. Scott to assert his right in the context of a challenge to counsel's effectiveness should not void the guarantee.

CONCLUSION

Denying Mr. Scott an opportunity to prove purposeful discrimination when the record shows a *prima facie* case creates an insurmountable barrier to enforcing his right to equal protection under the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Missouri Constitution. For this reason and others previously argued, this Court must remand Mr. Scott's case for an evidentiary hearing.

Respectfully submitted,

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Certificate of Compliance and Service

I, Irene Karns, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 2,599 words, which does not exceed the number of words allowed for an appellant's reply brief in this Court.
- ✓ The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, SP1, updated on January 4, 2006. According to that program, these disks are virus-free.
- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were shipped by United Parcel Service this 5th day of January, 2006, to Richard Starnes, Assistant Attorney General, 221 West High Street, Jefferson City, Missouri 65102.

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