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 BRIEF

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JURISDICTIONAL STATEMENT

Harold Scott filed a motion for postconviction relief under Rule 29.15 in the Circuit Court of the City of St. Louis after the Eastern District of the Court of Appeals affirmed his convictions of two counts of first-degree robbery, Section 569.020, RSMo 1994;[1] three counts of armed criminal action, Section 571.015; and one count of first-degree assault, Section 565.050. The Honorable Thomas C. Grady denied the motion, without an evidentiary hearing, and the Court of Appeals affirmed. This Court granted Mr. Scott's transfer application pursuant to Rule 83.04. The Court has jurisdiction pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

[1] All further citations will be to RSMo 1994 unless otherwise noted.

QUESTION PRESENTED

Does a postconviction movant who alleges ineffective assistance of trial counsel in failing to raise a **Batson** challenge, when the record shows a prima facie case of race-based discrimination in the State's peremptory strikes, state a claim that would warrant relief if proved, an is thus entitled to an evidentiary hearing?

STATEMENT OF FACTS

A grand jury sitting in the City of St. Louis charged Howard Scott with acting in concert with others to commit two counts of first-degree robbery, Section 569.020; three counts of armed criminal action, Section 571.015; and one count of first-degree assault, Section 565.050 in January and April of 1997 (L.F. 5-7).[2]

The cause was heard in August 1998 before the Honorable Sherri B. Sullivan (L.F. 1-3). Following strikes for cause, each party made six peremptory strikes from the first twenty-six eligible veniremen on the jury roster; of the twenty-six, eleven were African-American and fourteen were white or Asian (L.F. 28-34). The State used five of its six peremptory strikes to strike African-Americans from the panel (L.F. 20, 22, 23, 28).

The jury found Mr. Scott guilty as charged (L.F. 57-62, Tr. 275). Judge Sullivan sentenced him as a persistent felony offender to five concurrent terms of imprisonment for thirty years (L.F. 69-73). The Court of Appeals, Eastern District, affirmed the convictions on direct appeal. **State v. Scott**, 9 S.W.3d 624 (Mo. App., E.D. 2000).

Appellant filed his pro se Rule 29.15 motion prematurely, in November of 1999 (PCR L.F. 1). Counsel was appointed in March 2003 and filed an amended motion with request for an evidentiary hearing (PCR L.F. 1, 18-30). The motion

[2] The record on appeal will consist of the record from the direct appeal, ED75006, (Tr., L.F.), and the legal file from the Rule 29.15 appeal (PCR L.F.).

alleged, in pertinent part, that trial counsel was ineffective for failing to require the State to show a race-neutral explanation for its peremptory strikes of the five African-American venirepersons, as shown by the record at trial, in accordance with procedure developed pursuant to **Batson v. Kentucky**, 476 U.S. 79 (1986) (PCR L.F. 19). The motion identified the remedy for counsel's inaction as reversal of his convictions or, alternatively, a remand for an evidentiary hearing on the issue (PCR L.F. 23).

The Honorable Thomas C. Grady denied the motion, without an evidentiary hearing, by Order with Conclusions of Law filed on June 9, 2004 (PCR L.F. 31-38). Judge Grady found that Mr. Scott did not have standing to raise the **Batson** issue pertaining to the excluded venirepersons because the claim is beyond the scope of a Rule 29.15 motion (PCR L.F. 32). The court denied Appellant's claim that his own constitutional rights were violated, reasoning that the presence of four African-Americans on the jury showed there was no prejudice (PCR L.F. 33-34).

Mr. Scott appealed, and the Eastern District affirmed the motion court's ruling. This Court granted his application for transfer on September 20, 2005.

POINT RELIED ON

The motion court clearly erred in denying Harold Scott's Rule 29.15 motion without an evidentiary hearing because that ruling violated his right to effective assistance of counsel as assured by the Sixth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, as well as the Equal Protection rights of Mr. Scott and any improperly excluded veniremen, as assured by the Fourteenth Amendment and Article I, Section 2 of the Missouri Constitution, in that Mr. Scott stated a claim that would have entitled him to relief if proved. Mr. Scott alleged that counsel was ineffective in failing to challenge the prosecutor's exercise of five of its six peremptory strikes to remove African-American veniremen because the strikes established a prima facie case of race-based discrimination in violation of his right to equal protection, and the record showed there was a reasonable probability that counsel's objection to one or more of the strikes would have been sustained.

Strickland v. Washington, 466 U.S. 668 (1984);

Batson v. Kentucky, 476 U.S. 79 (1986);

Arizona v Fulminante, 499 U.S. 279 (1991);

Knese v. State, 85 S.W.3d 628 (Mo. banc 2002);

United States Constitution, Amendments VI and XIV; and

Missouri Constitution, Article I, Sections 2 and 18(a).

ARGUMENT

The motion court clearly erred in denying Harold Scott's Rule 29.15 motion without an evidentiary hearing because that ruling violated his right to effective assistance of counsel as assured by the Sixth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, as well as the Equal Protection rights of Mr. Scott and any improperly excluded veniremen, as assured by the Fourteenth Amendment and Article I, Section 2 of the Missouri Constitution, in that Mr. Scott stated a claim that would have entitled him to relief if proved. Mr. Scott alleged that counsel was ineffective in failing to challenge the prosecutor's exercise of five of its six peremptory strikes to remove African-American veniremen because the strikes established a prima facie case of race-based discrimination in violation of his right to equal protection, and the record showed there was a reasonable probability that counsel's objection to one or more of the strikes would have been sustained.

The case below

A City of St. Louis grand jury indicted Harold Scott on two counts of first degree robbery, one count of first degree assault, and three counts of armed criminal action based on two robberies occurring early in 1997 (L.F. 5-7). The case was tried in August 1998 (L.F. 1). Following strikes for cause, each party made six peremptory strikes from the first twenty-six eligible veniremen on the

jury roster; of that group, eleven were African-American and fourteen were white or Asian (L.F. 28-34). The prosecutor used five of the allotted six peremptory strikes to disqualify African-Americans (L.F. 28, 31, 33).[3] The jury found Mr. Scott guilty on all counts, and the Court of Appeals affirmed his convictions on direct appeal in March of 2000. **State v. Scott**, 9 S.W.3d 624 (Mo. App., E.D. 2000).

Mr. Scott filed a Form 40 prematurely, in November of 1999 (PCR L.F. 1). The court appointed counsel in March 2003 (PCR L.F. 1). Counsel timely filed an amended motion with request for evidentiary hearing, alleging in pertinent part that trial counsel was ineffective for failing to require the State to show a race-neutral explanation for its use of five out of six peremptory strikes to remove African-Americans from the panel in accordance with procedure developed pursuant to **Batson v. Kentucky**, 476 U.S. 79 (1986) (PCR L.F. 19). Mr. Scott alleged prejudice in that, had counsel initiated the procedure by objecting that the strikes appeared to be race-based, there was a reasonable probability that one or more of them would have been disallowed (PCR L.F. 22-23). As a remedy, he asked for reversal of his convictions or, alternatively, a remand for an evidentiary

[3] The record consists of the work sheets of both parties and a list of the petit jury found in the legal file on direct appeal (L.F. 28-36). The peremptory strikes and discussion related to them, if any, were not included in the trial transcript.

hearing on the issue (PCR L.F. 23). The motion court denied the motion without an evidentiary hearing (PCR L.F. 31-38).

A postconviction relief movant is entitled to an evidentiary hearing if his motion meets three requirements: (1) the motion alleges facts, rather than conclusions, warranting relief; (2) the factual allegations are not refuted by the files and records of the case; and (3) the matters complained of prejudiced him. **Wilkes v. State**, 82 S.W.3d 925, 928 (Mo. banc 2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." ***Id***. (emphasis in original); **Rule 29.15 (h).**

Appellate review of the motion court's decision on a Rule 29.15 motion is limited to determining if the findings and conclusions of the motion court are clearly erroneous. **Cole v. State**, 152 S.W.3d 267, 268 (Mo. banc 2004)*;* **Rule 29.15(k).** Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite impression that a mistake has been made. ***Id.***

The motion court relied on two statements of law in denying the motion. First, the court stated that Mr. Scott did not have standing to raise the **Batson** issue pertaining to the excluded venirepersons because the claim is beyond the scope of a Rule 29.15 motion (PCR L.F. 32). It denied his claim that his own constitutional right to equal protection was violated on the grounds that the presence of four African-Americans on the jury showed there was no prejudice (PCR L.F. 33-34).

These rationales are clearly erroneous. This Court announced in **State v. Parker** that the presence of an African-American on the petit jury, or the fact that the State does not use all of its strikes to eliminate them, was no longer adequate to defeat a claim of race-based discrimination. 836 S.W.2d 930, 940 (1992) (*citing* **Powers v. Ohio**, 499 U.S. 400 (1991)). As to Mr. Scott's assertion that the equal protection rights of any improperly struck veniremen were also violated, the motion court dismissed the claim as beyond the scope of a postconviction relief motion "which is designed to provide a remedy only for violation of the movant's constitutional rights." (PCR L.F. 32). The court did not cite authority for that proposition, and it is not supported by the plain language of the Rule recognizing "claims that the conviction or sentence imposed violates the constitution and laws of this state or the Constitution of the United States." **Rule 29.15(a).** But as a practical matter, the allegations need not be considered separately. The claims are congruent—a peremptory strike is race-based violating the rights of all, or it is not, and there is no **Batson** violation.

Although the motion court did not reference other cases denying claims of ineffective assistance of counsel for failure to object in the face of an apparent **Batson** violation, Mr. Scott thinks it prudent to address them. The cases deny relief on the grounds that the movant did not show a **Batson** error affected the outcome of trial by impacting the impartiality of the jury. *See* **State v. Colbert**, 949 S.W.2d 932, 944 (Mo. App., W.D. 1997) (movant must show that a biased venireperson ultimately served on the jury); **State v. Young**, 844 S.W.2d 541, 548

(Mo. App., E.D. 1992) (movant must show that but for counsel's failure to make **Batson** objection, result of trial would have been different.)

This Court heard a postconviction movant's claim of ineffective assistance of counsel in failing to pose a **Batson** challenge in **Clemmons v. State**, deciding against Clemmons after finding it was not supported by the record. 785 S.W.2d 524, 529-530 (Mo. banc 1990). In contrast, the Court affirmed the motion court's denial of an allegation that trial counsel was ineffective for failing to make a gender-**Batson** objection when the State used nine of its eleven peremptory strikes to remove women from the panel. **Morrow v. State**, 21 S.W.3d 819 (Mo banc 2000). The Court agreed with the motion court's conclusion that Morrow could not demonstrate prejudice because he could not prove the excluded women would have voted for life in prison rather than imposing the death sentence. **Morrow**, 21 S.W.3d at 827. **Morrow** quoted the motion court, approvingly, as finding that even trying to prove such a claim would be 'to engage, at best, in mere speculation and, at worst, in the stereotyping that *Batson* and its progeny strive to prevent.' *See State v. Loazia***,** 829 S.W.2d 558, 570 (Mo.App. 1992)." ***Id.***

But examination of **Morrow's** ruling on this issue calls into question its value as precedent. In **Loazia**, the case cited, the movant alleged counsel was ineffective for failing to inquire of the panel about possible prejudice against people of Hispanic origin. 829 S.W.2d at 570. The **Loazia** motion court held an evidentiary hearing and considered counsel's testimony. ***Id.*** Although the Eastern District commented that Loazia's allegation of prejudice, that the population from

which the venire was drawn was racially biased, was no more than conjecture, the case does not mention **Batson**, its progeny, or the purpose of those cases.

However, language very similar to that quoted in **Morrow** is found in cases where it has used to argue that a defendant should not be required to show that the violation compromised the impartiality of the jury in order to prove prejudice. "If an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that *Batson* condemns." **Ex parte Yelder**, 575 So.2d 137, 139 (Ala. 1991) (failure of trial counsel to make timely **Batson** objection to prima facie case of purposeful discrimination is presumptively prejudicial to defendant.) In **Eagle v. Linahan**, the Eleventh Circuit reasoned "[I]n requiring a petitioner to make such a showing, we are asking that he convince us of the very conclusion that *Batson* prohibits: that the race of jurors affects their thinking as jurors." 279 F.3d 926, 943 (11th Cir. 2001) (appellate counsel ineffective in not briefing **Batson** error.) **Eagle** quoted Justice Kennedy in **J.E.B. v. Alabama**, 511 U.S. 127, 154 (1994), "[n]othing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice." 279 F.3d at 943.

Mr. Scott respectfully suggests that **Morrow**, as well as the Court of Appeals' cases stating that a claim of ineffective assistance of counsel must fail unless the movant can demonstrate the **Batson** violation affected the impartiality of the jury, were incorrectly decided.

The claim of error: ineffective assistance of counsel

The Sixth Amendment provides a right to effective assistance of counsel, applied to state prosecutions through the Fourteenth Amendment, which is violated when counsel fails to exercise the customary skill of a reasonably competent attorney, and the defendant is prejudiced thereby. **Strickland v. Washington**, 466 U.S. 668 (1984); **Wilkes**, 82 S.W.3d at 927. The protections provided by Article I, Section 18(a) of the Missouri Constitution are coextensive with those of the Sixth Amendment. **State v. Hester**, 801 S.W.2d 695, 697 (Mo. banc 1991).

While claims of ineffective assistance of counsel typically involve evidentiary matters, and prejudice is shown when "a review of the entire case shows that but for [counsel's] failure to perform competently, there is a reasonable probability that the result would have been different," **Strickland**, 466 U.S. at 689, 694, the case need not be read so narrowly. **Strickland** also cautioned:

> [M]ost important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although these principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding.

466 U.S. at 696.

As an example, in **Lockhart v. Fretwell**, the Court reviewed Fretwell's claim that counsel was ineffective for failing to make an objection in the penalty

phase of trial that would have been sustained. 506 U.S. 364, 366-367 (1993). The objection was based on an Eighth Circuit decision concerning aggravators, caselaw that was overruled after Fretwell's trial. ***Id.*** The Court found there was no prejudice—notwithstanding the fact that the objection would likely have resulted in a sentence of life imprisonment rather than death—because "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." 506 U.S. at 369-370.

A. Counsel's performance was deficient

Missouri law entitles the state and the defendant in a criminal trial to disqualify six veniremen without explanation. Section 494.480. However, the statutory right is subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. In **Batson v. Kentucky**, 476 U.S. 79, 89 (1986), the United States Supreme Court restated its earlier holding that a defendant in a state prosecution has a right under the clause to challenge the State's peremptory strikes when he believes they are based solely on the venireperson's race, and suggested a new procedure for assuring the right is observed. 476 U.S. 79 (1986). This Court clarified procedure for race-based **Batson** challenges in Missouri in **State v. Parker**, 836 S.W.2d 930, 939 (Mo. banc 1992), reiterated recently in **State v. Hampton,** 163 S.W.3d 903 (Mo. banc 2005).

Under **Batson** and its progeny, a defendant invokes procedure requiring the State to provide race-neutral explanations for peremptory strikes by demonstrating

that "the totality of relevant facts gives rise to an inference of discriminatory purpose." **Batson**, 476 U.S. at 97; **Johnson v. California**, 545 U.S. ___, 125 S.Ct. 2410, 2416 (2005). Significant statistical discrepancies alone are sufficient to create an inference of improper discrimination. **Miller-El v. Cockrell**, 537 U.S. 322, 342 (2003) (inference found where the state used ten of fourteen peremptory strikes to remove 91% of eligible jurors.) Here, the prosecutor's use of five of out of six peremptory strikes to disqualify African-American veniremen was sufficient to state a prima facie case of race-based discrimination.

The **Batson** court recognized that the requirements set out in **Swain v. Alabama**, 380 U.S. 202 (1965) to protect a defendant's equal protection rights in jury selection imposed a burden of proof on the defendant so onerous that it effectively insulated prosecutors' actions from constitutional scrutiny. 476 U.S. at 92-93. The Court envisioned that the new, improved process would "enforce the mandate of equal protection and furthers the ends of justice." **Batson**, 476 U.S. at 99, but the vehicle for that mandate is defense counsel.

Later, in extending the prohibition to purposeful discrimination by defendants, the Court recognized the harm of purposeful discrimination transcends the parties at trial and "undermine[s] public confidence in criminal justice system." **Georgia v. McCollum**, 505 U.S. 42, 49 (1992). The Court also emphasized the systemic value of the equal protection guarantee as applied to jury selection in granting standing to defendants to assert claims on behalf of wrongfully excluded vernirepersons in **Powers**, noting that race-based

discrimination in jury selection "casts doubt on the integrity of the judicial process." 499 U.S. at 410.

Accordingly, where the State's strikes raise a strong inference of discriminatory purpose, as shown by the record here, defense counsel has a duty to his client, to any juror struck on the basis of race, and to the criminal justice system. Trial counsel failed to exercise the customary skill of a reasonably competent attorney in failing to challenge prosecutor's use of peremptory strikes.

B. Prejudice: a **Batson** violation is prejudice under **Strickland**

"A prosecutor's wrongful exclusion of a juror by a race-based peremptory strike is a constitutional violation committed in open court at the outset of the proceedings "**Powers**, 499 U.S. at 412. A **Batson** violation is per se prejudicial and requires reversal. The **Batson** court remanded for an evidentiary hearing in light of a modified burden of proof, instructing that if there was a prima facie case which the prosecutor could not adequately rebut, "our precedents require that petitioner's conviction be reversed." 476 U.S. at 100. Earlier this year, the Court granted relief in a habeas case, without reviewing evidence of guilt, after finding the Texas state court clearly erred in denying the defendant's **Batson** challenge. **Miller-El v. Dretke**, 545 U.S. ___ , 125 S.Ct. 2317 (2005). In **State v. Hampton**, this Court likewise reversed without regard to the evidence of guilt, where the trial court recognized the state's **Batson** violation, but ordered a solution that did not remedy the error. 163 S.W.3d 903 (Mo. banc 2005).

Strickland recognized only three errors as presumptively prejudicial, thus not requiring proof of prejudice: actual or constructive denial of the assistance of counsel, state interference with counsel's assistance, and an actual conflict of interest. 466 U.S. at 692. However, **Strickland** did not state the list was exhaustive, and the case predated **Batson**, which declared that precedent required reversal. 476 U.S. at 100.

In addition, Supreme Court jurisprudence on the subject of reversible error since **Strickland** was decided is consistent with the presumption of prejudice attached to **Batson** errors. In **Arizona v Fulminante**, 499 U.S. 279 (1991), the Court considered whether admission of an involuntary confession should be subject to harmless-error analysis. **Fulminante** separated errors into two categories: trial errors, the impact of which can be "quantitatively assessed in the context of other evidence presented," and errors that are not amenable to contextual evaluation, which are "structural defects in the constitution of the trial mechanism." 499 U.S. 307-310. In reviewing structural errors, Justice Rehnquist used racial discrimination in the selection of a grand jury as an example of a structural defect. 499 U.S. at 310 (*citing* **Vasquez v. Hillery**, 474 U.S. 254 (1986)). **Vasquez** identified racial discrimination as a structural defect undermining the "integrity of the criminal tribunal itself." 474 U.S. at 263-264. Regarding errors identified as structural defects, Justice Rehnquist noted "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may

be regarded as fundamentally fair." **Fulminante,** 499 U.S. at 310 (citation omitted).

In his postconviction relief motion, Mr. Scott alleged prejudice in that, if counsel had objected to the strikes as race-based, there was a reasonable probability that her objections to one or more of the strikes would have been sustained (PCR L.F. 22-23). This statement of prejudice is adequate to merit an evidentiary hearing to prove the claim.

This claim is cognizable in a Rule 29.15 motion

"Preventing racial discrimination in jury selection is part of seeing that justice is done." **Smulls v. State**, 71 S.W.3d 138, 159 (Mo. banc 2002) (Wolff, J., concurring) (citation omitted). A defendant's right under the Fourteenth Amendment's Equal Protection Clause, to be tried by a jury that was not selected by a process that included impermissible discrimination, is no less fundamental because it is presented in the context of a claim of ineffective assistance of counsel. Because the right is effectuated through counsel, refusing to afford the postconviction movant a forum for the claim effectively prevents him from realizing either right.

Interpreting **Strickland** to require that counsel's deficient performance in failing to make a **Batson** challenge must have a demonstrable effect *on the verdict* is contrary to the Court's warning that the decision should not be applied mechanically, and to law developed pursuant to principles enunciated in **Strickland**. The remand with instructions in **Batson**, and grant of relief in **Miller-**

El v. Dretke, *supra*, show that if proved, a **Batson** violation requires reversal without regard to the error's effect on the outcome of trial.

Another postconviction case decided by this Court, where counsel's deficient performance was also in the jury selection phase of trial, is instructive. In **Knese v. State**, the Court reversed the penalty phase based on counsel's ineffectiveness in permitting two vernirepersons, whose questionnaires suggested they would be predisposed to impose the death sentence, to be seated. 85 S.W.3d 628 (Mo. banc 2002). Concerning counsel's failure to read the questionnaires and adequately voir dire the potential jurors, the Court commented "This complete failure in jury selection is a structural error." **Knese**, 85 S.W.3d at 633. The Court relied on **Gray v. Mississippi** , 481 U.S. 648 (1987), in which the United States Supreme Court affirmed a previously established per se rule requiring reversal of a death sentence when the composition of the jury is affected by a **Witherspoon-Witt** error. ***Id***.

After finding that counsel's failure manifested as a structural error, the Court defined prejudice in the context of Knese's claim of ineffective assistance as "show[ing] by a preponderance of the evidence that counsel's deficient performance prejudiced the defense." **Knese**, 85 S.W.3d at 633. The Court concluded that prejudice was shown in that there was a reasonable probability—one sufficient to undermine confidence in the outcome—that Knese was prejudiced by counsel's deficient performance. ***Id.*** Circularity aside, the analysis suggests the Court believes that structural error, defined in **Fulminante** as

constitutional error not subject to harmless error analysis, is sufficient to undermine confidence in the outcome of the trial, thus it constitutes prejudice under **Strickland.**

Knese's reliance on **Gray** provides another reason to recognize the analogous **Batson** violation as prejudice under **Strickland**. The error in **Gray** was the improper exclusion of a qualified juror, not the seating of one who was not impartial. "We reaffirm [**Davis v. Georgia**, 429 U.S. 122 (1976)] today in a case that brings into focus one of the real-world factors that render inappropriate the application of the harmless-error analysis to such erroneous exclusions for cause." 481 U.S. at 667. There was no allegation in **Gray** that those chosen to serve on the jury were not impartial, and Gray could not have proved that exclusion of the qualified venireman "prejudiced his defense." The **Batson** violation in the case at bar, if proved, satisfies the prejudice prong of **Strickland** for the same reason that the **Witherspoon-Witt** error in **Knese** constituted prejudice—it is per se reversible as structural error.

Mr. Scott is not arguing that counsel's failure to raise a **Batson** challenge merits reversal. There may have been a proceeding off the record wherein counsel challenged the strikes, and the prosecutor provided satisfactory, race-neutral explanations. Defense counsel could conceivably have waived the objections for strategic reasons.

But if the evidence shows that counsel did not object in these circumstances, a claim not refuted by the record, and did not have a strategic

reason for failing to do so, her performance was deficient under **Strickland**. This Court found counsel's performance in **Knese** to be deficient based in important part on his testimony at the evidentiary hearing. Mr. Scott is entitled to the same opportunity to prove his claim.

CONCLUSION

For reasons set out above, Harold Scott respectfully requests this Court to remand his case to the motion court with instructions to hold an evidentiary hearing on his claim that counsel was ineffective in failing to lodge a **Batson** objection when the record shows a prima facie case of race-based discrimination.

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, this certificate of compliance and service, and the appendix, this brief contains 4,837 words, which does not exceed the number of words allowed for an appellant's substitute 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 October 18, 2005. 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 **19th** day of October, 2005, to Richard A. Starnes, Assistant Attorney General, 221 West High Street, Jefferson City, Missouri 65102.

_____

Irene Karns

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APPENDIX TO APPELLANT'S SUBSTITUTE BRIEF

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