No. SC86956

IN THE
MISSOURI SUPREME COURT

HAROLD SCOTT,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of the City of St. Louis, Missouri
22nd Judicial Circuit, Division 3
Honorable Thomas C. Grady, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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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 the City of St. Louis. The convictions sought to be vacated were for two counts of robbery in the first degree, § 569.020, RSMo 1994, one count of assault in the first degree, § 565.050, RSMo 1994, and three counts of armed criminal action, § 571.015, RSMo 1994, for which appellant was sentenced to concurrent terms of thirty years in the custody of the Department of Corrections on each count. The Missouri Court of Appeals, Eastern District, affirmed the denial of appellant's post-conviction motion. State v. Scott, ED84968, slip op. at 1-6 (Mo.App., E.D. May 3, 2005). On September 20, 2005, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant, Harold Scott, was charged by indictment with two counts of first-degree robbery, one count of first-degree assault, and three counts of armed criminal action (L.F. 5-7). This cause went to trial by jury on August 4, 1998, in the Circuit Court of the City of St. Louis, the Honorable Sherri B. Sullivan presiding (L.F. 1, 89).

In its memorandum opinion on direct appeal, the Eastern District Court of Appeals stated the facts of the underlying offenses and the result of appellant's trial as follows:[1]

> Viewed in the light most favorable to the verdict, the evidence at trial revealed that Michael Ely (Ely) was a manager at a Taco Bell restaurant. After preparing the cash deposit on January 17, 1997, Ely, following restaurant procedure, placed the deposit in a "to go" bag and gave it to the drive-thru

[1]The Eastern District granted appellant's motion to transfer the Court's file in appellant's direct appeal to it post-conviction appeal file, and therefore this memorandum opinion should be part of this Court's record on appeal.

attendant. Ely then left the building to go to the bank. On his way out, Ely held the door open for Defendant, who Ely assumed was a customer. Defendant wore a maroon and black plaid Tommy Hilfiger jacket. In accordance with the restaurant's standard security procedure, Ely got into his truck and, appearing to outsiders as a customer, proceeded through the drive-thru to pick up the deposit concealed in the "to go" bag. After picking up the deposit at the window, Ely drove around the corner of the building to the drive-thru exit, where he saw a driver in a black Ford Tempo blocking his way. Defendant, who wore a ski mask and carried a gun, approached Ely's car from the side of the parking lot. Defendant demanded the deposit and Ely gave the bag to him. Defendant got into the Tempo driven by his accomplice and fled the scene.

During his initial interview with police, Ely recalled that the robber had worn a maroon and black Tommy Hilfiger jacket as well as a homemade ski mask. The ski mask was distinctive: hand-made from a stocking cap, holes had been cut for the mouth and eyes, a slit cut up the back was held closed by twelve safety pins.

On April 21, 1997, Defendant, David Boxley and Tondell

Byrd prepared to rob Ely again. Byrd had not been involved in the previous robbery, but Boxley helped Defendant stage the first robbery and had been an employee at the Taco Bell when it occurred. Boxley drove the Tempo, owned by Defendant's girlfriend, to a drop point. Defendant and Byrd followed in Boxley's car. Boxley exchanged cars with the two men and drove away. Defendant and Byrd drove the Tempo to a parking lot adjacent to the Taco Bell. Defendant got out of the car, told Byrd to park the car at the drive-thru exit, and donned the ski mask he used in the first robbery.

At about 9:40 a.m., Ely left for the bank. After collecting the deposit at the drive-thru window, Ely rounded the corner of the building. Once again, a black Ford Tempo obstructed Ely's path. Recognizing a second robbery was about to occur, Ely jumped the curb of the drive-thru lane. As he swerved to miss an oncoming car, Ely found himself heading back towards the robbers. Ely braked as Defendant approached the vehicle with his gun drawn. When Ely's foot slipped off the brake, the car lurched forward and Defendant fired his gun into the driver's side window. Ely's lower body went numb. Defendant demanded the money, and when Ely said he could not move,

> Defendant opened the door, took the money, and made his getaway in the Tempo.
>
> On April 29, 1997, Detectives traced the Tempo to Lynell Smith (Smith), Defendant's girlfriend. With her permission, police searched her home, discovering a gun and the ski mask in a trash can. Smith admitted both items belonged to Defendant. Police arrested Defendant on May 8, 1997. Upon arrest, Defendant admitted involvement in both robberies. Ely later identified Defendant from a police lineup photo on May 20, 1997. After a jury trial, Defendant was found guilty and sentenced to six concurrent terms of thirty years' imprisonment.

State v. Harold Scott, ED75006, memo. op. at 2-3 (Mo.App.,E.D. September 28, 1999).

On direct appeal, the Eastern District Court of Appeals affirmed appellant's conviction and sentence pursuant to Rule 30.25(b). State v. Scott, 9 S.W.3d 624 (Mo.App., E.D. 1999).

On November 22, 1999, appellant timely filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 3-17). Appointed counsel later filed an amended motion raising four claims of ineffective assistance of counsel, including a claim that counsel was ineffective for failing to raise Batson challenges to the State's strikes of five African-American venire members (PCR L.F. 18-29). On

June 7, 2004, the motion court submitted findings of fact and conclusions of law denying appellant's motion without an evidentiary hearing (PCR L.F. 31-38). This appeal follows.

ARGUMENT

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's post-conviction claim that counsel was ineffective for failing to raise Batson challenges to five of the State's peremptory strikes made against African-American venire members because appellant failed to plead facts warranting relief in that he failed to plead that the State had no race-neutral reasons for the peremptory strikes, that any race-neutral reason the State would have had for the strikes would have been pretextual, and that there was a reasonable probability that the outcome of his trial would have been different had counsel made the Batson challenges, as he did not allege that any of the venire members who actually served on the jury were biased against him.

Appellant claims that the motion court clearly erred in denying his post-conviction claim that counsel was ineffective for failing to raise Batson challenges without an evidentiary hearing (App.Br. 8). Appellant claims that, because counsel "failed to follow Batson procedure in circumstances that raise a strong inference of race-based discrimination" and "there is no explanation of record" for those strikes, remand for an evidentiary hearing is required (App.Br. 12).

A. Amended Motion and Findings

In his amended motion, appellant alleged that counsel was ineffective for failing to raise Batson challenges to the prosecution's strikes of five African-

American venire members (PCR L.F. 19-20). He claimed that counsel should have raised such a claim because it violated his rights to due process and equal protection, as well as the equal protection rights of the stricken venire members (PCR L.F. 20-21). He alleged that a *prima facie* case of racial motivation for the strikes was established by the State exercising peremptory strikes against five of the remaining ten black members of the venire, while only striking one of the remaining thirteen white members of the panel (PCR L.F. 21-22). Appellant alleged that counsel had no strategic reason for not making the challenges, and that, had a proper objection been raised, the State would have been "forced to explain their actions" and that there was "a reasonable probability that some or all of the state's strikes would have been disallowed" (PCR L.F. 22-23).

The motion court denied this claim, finding that appellant could not raise the Batson claim in a Rule 29.15 motion on behalf of the stricken venire members because the purpose of a post-conviction motion is to remedy a violation of the movant's rights, and that appellant's rights had not been violated by counsel's failure to make the Batson challenges (PCR L.F. 32-34).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Lyons v. State, 39 S.W.3d 32, 36 (Mo. banc), cert. denied 122 S.Ct. 402 (2001); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are

clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Analysis

The motion court is not required to hold an evidentiary hearing where the motion and the files and records of the case conclusively show that the movant is not entitled to relief. Coates v. State, 939 S.W.2d 912, 914 (Mo. banc 1997); Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. State v. Brooks, 960 S.W.2d 479, 497 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998).

To properly plead and prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Bucklew v. State, 38 S.W.3d 395, 397 (Mo. banc), cert. denied 122 S.Ct. 374 (2001). To plead and prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Lyons, 39 S.W.3d at 36.

1. Appellant Did Not Plead Facts Demonstrating Counsel's Performance was Deficient

Appellant was not entitled to an evidentiary hearing because he failed to plead facts warranting relief. Using a peremptory challenge to strike a potential juror based solely on that juror's race violates the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For defendant to challenge the State's peremptory strike at trial, the defendant must object to the prosecutor's use of peremptory challenges and identify the racial or gender group to which the stricken person belongs. State v. Brown, 998 S.W.3d 531, 541 (Mo. banc), cert. denied 528 U.S. 979 (1999). The State then must provide explanations for the peremptory challenges which are race-neutral. Id. The State's reason need not rise to the level of a challenge for cause, nor need it even be a persuasive or plausible explanation. Id.; Purkett v. Elam; 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). The reason is deemed race-neutral unless discriminatory intent is inherent in the explanation. State v. Marlowe, 89 S.W.3d 464, 468 (Mo. banc 2002). Once the prosecutor articulates a reason, the burden shifts to the defendant to show the State's proffered reason was merely pretextual and that the strike was actually based on race. State v. Cole, 31 S.W.3d 163, 172 (Mo.banc), cert. denied 537 U.S. 865 (2002).

As shown above, to be entitled to relief on a Batson claim, the burden was on the defendant to show that race-neutral reasons given by the State were pretextual

and that the strike was actually based on race. Id. In his claim, appellant 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 (PCR L.F. 19-23). His claim that a reasonable probability existed that some or all of the strikes would have been disallowed is a mere conclusion, not a fact, and is completely unsupported by any facts showing that the State's explanations would not have been race-neutral or non-pretextual. Without pleading these essential facts, appellant has failed to properly plead that any Batson challenge would have had merit. Counsel is not ineffective for failing to make a meritless objection. Middleton v. State, 103 S.W.3d 726, 741 (Mo. banc 2003). Therefore, appellant failed to plead facts which would have warranted relief.

Respondent is not trying to nitpick appellant's motion or deprive appellant an evidentiary hearing based on a technicality, but is simply recognizing the importance placed on the specific pleading requirements that this Court has repeatedly held apply to motions for post-conviction relief. "As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." Morrow v. State, 21 S.W.3d 819, 822 (Mo. banc 2000), cert. denied 531 U.S. 1171 (2001); see also Barnett v. State, 103 S.W.3d 765, 769 (Mo. banc), cert. denied 540 U.S. 862 (2003); White v. State, 939 S.W.2d 887, 893 (Mo. banc), cert. denied 522 U.S. 948 (1997). As this Court stated in White:

> Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. (Citation omitted). Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings.

White, 939 S.W.2d at 893. These pleading requirements are not "merely technicalities," but recognize that the purpose of the post-conviction motion is to provide the motion court with allegations "to enable the court to decide whether relief is warranted." Morrow, 21 S.W.3d at 824. Thus, a movant must allege all facts necessary for the motion court to "meaningfully apply" the Strickland standard for ineffective assistance of counsel. Id.; Barnett, 103 S.W.3d at 770. As it was incumbent upon appellant to plead the facts demonstrating that a Batson challenge would have been successful if raised, appellant's failure to do so omits facts necessary to determine whether or not counsel was actually deficient. Because appellant's motion failed to properly allege all of the facts required for the motion court to consider whether he received ineffective assistance of counsel, appellant was not entitled to an evidentiary hearing.

2. Appellant Failed to Plead Strickland Prejudice

Further, even accepting appellant's claims as true that a *prima facie* case of racial motivation for the State's strikes was established and that counsel should have raised Batson challenges to those strikes, appellant still failed to plead how he was prejudiced by counsel's failure, i.e. how there was a reasonable probability that the outcome of appellant's trial would have been different had the strikes been made. "[T]o be entitled to a presumption of prejudice resulting from a defense counsel's ineffective assistance during the jury selection process, a post-conviction movant must show that a biased venireperson ultimately served as a juror." State v. Colbert, 949 S.W.2d 932, 944 (Mo.App., W.D. 1997), quoting State v. Pierce, 927 S.W.2d 374, 377 (Mo.App., W.D. 1996). In neither his motion nor his brief does appellant contend that a single juror who sat on his jury was biased against him. Without an allegation that a biased juror was actually on his jury, appellant cannot demonstrate prejudice from counsel's failure to raise a Batson challenge. Therefore, appellant failed to plead necessary facts that would entitle him to relief on his claim.

In his claim, the closest thing to a claim of prejudice was that, had counsel made the challenges, there was a reasonable probability that some of the State's strikes would have been disallowed (PCR L.F. 22-23). However, this does not establish Strickland prejudice, as the presence of more or less African-American jurors on the jury does not establish that any of the jurors who actually served were biased against him. To any extent that appellant's allegation assumes that, had more African-Americans been on appellant's jury, they would have been more likely

to vote for his acquittal, "is 'to engage, at best, in mere speculation and, at worst, in the stereotyping that Batson and its progeny strive to prevent.'" Morrow, 21 S.W.3d at 827.

Appellant appears to recognize that he failed to plead that a prejudiced juror actually sat on his jury or that he suffered Strickland prejudice from counsel's failure to raise Batson challenges to the State's peremptory strikes (App.Br. 14-15). Instead of realizing that this must defeat his claim, appellant instead asks this Court to ignore Strickland and hold that prejudice should be presumed from counsel's inaction (App.Br. 19-24). Appellant's primary support that Strickland does not require Strickland prejudice to be shown in this seems to stem from three different sources: 1) language in Strickland stating that its tenets should not be applied mechanically; 2) the recognition that Strickland allows prejudice to be presumed in certain circumstances, and that a Batson claim is not excluded from a consideration of presumed prejudice; and 3) a Batson violation should be considered "per se reversible as structural error" (App.Br. 16-17, 19-24). However, none of these rationales possess merit.

a. The Plain Language of Strickland

First, as to appellant's claim regarding the language of Strickland, appellant quotes the following from Strickland:

> Most 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 those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

(App.Br. 16). Strickland, 466 U.S. at 696. By selectively separating this quote from a larger paragraph, appellant has completely divorced this quote from its context. The sentence immediately preceding this one states, "A number of practical considerations are important for the application of the standard we have outlined." Strickland, 466 U.S. at 696. This begins a section devoted to concerns about adjudicating Strickland claims, including the differences in individual states' formulations of the performance standards, whether a court could dispose of a case where one of the two prongs showed no relief was available without determining the other prong, and how the ruling would apply to federal collateral and habeas proceedings. Id. at 696-98. Thus, the use of the words "[M]ost important" in front this language does not refer to this being the most important part of the application of Strickland, but just the most important of the limited list of procedural issues raised.

Further, and more importantly, the sentence immediately after the quoted sentence reads as follows:

> In every case the court should be concerned with whether,

> despite the strong presumption of reliability, ***the result of the particular proceeding is unreliable*** because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696 (emphasis added). Thus, the paragraph that appellant relies on to support his argument that Strickland prejudice is not related to the result of the proceeding actually supports the position that the "fundamental fairness" being mentioned ***is*** related to the result of the proceeding. This conclusion is further strengthened by the next paragraph, in which the Court permits the states to adopt or retain any of the various standards for the performance prong, but makes clear that the prejudice standard is result-oriented and not open for debate, declaring that "only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today." Strickland, 466 U.S. at 696-97. Thus, this language simply does not permit the departure from requiring a finding of Strickland prejudice that appellant suggests.

Even if the language quoted seemed to support appellant's contention, its place in the context of the whole opinion makes it clear that the language does not permit the excusing of demonstrating Strickland prejudice. Repeatedly throughout the discussion of prejudice, the opinion speaks in terms of the effect of counsel's performance on the judgment:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding ***if the error had no effect on the judgment***. (Citation omitted). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary ***to justify reliance on the outcome of the proceeding.*** Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland, 466 U.S. at 691-92 (emphasis added);

> Even if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they ***actually had an adverse effect on the defense***.

Id. at 693 (emphasis added);

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694 (emphasis added). Therefore, the isolated language of Strickland that

appellant relies on cannot be read as permitting relief from ineffective assistance of counsel where there is no allegation of Strickland prejudice.

Appellant cites to Lockhart v. Fretwell, 506 U.S. 364, 366-67, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), to support his contention that Strickland prejudice does not only apply to those errors of counsel that have a reasonable probability of affecting the outcome of the trial, but to any error which affect some more generalized concept of "fairness" (App.Br. 16-17). In that case, the Court held that appellant had not suffered Strickland prejudice due to counsel's failure to make an objection based on case law which was subsequently overturned, even if it may have affected the outcome, because the ***result*** was not unfair or unreliable. Fretwell, 506 U.S. at 366-71. Even in this context, however, the focus is still on the result of the proceeding, as the defendant in Fretwell did not suffer an unfair result due to the trial court not following bad law; in fact, the Court noted that such a claim was similar to a case claiming counsel ineffective for failing to introduce perjured testimony which, while being reasonably likely to have a different result, would be neither fair nor reliable, and would result in an unjust windfall. Id. at 369-71. This reasoning in Fretwell simply tracks similar language in Strickland, which states that it is not enough for a defendant to show that the errors had some conceivable effect on the outcome, as "[v]irtually every act or omission of counsel would meet that test,. . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland, 466 U.S. at 693. As Strickland

acknowledged, like Fretwell, that every outcome-determinative error did not necessarily affect the fairness of the trial, yet still placed a burden on the defendant to show that the error created a reasonable probability of a different result, this language from Fretwell obviously cannot be used to excuse an appellant from demonstrating Strickland prejudice.

This Court recently evaluated the language of the standard of Strickland prejudice in Deck v. State, 68 S.W.3d 418 (Mo. banc 2002). This Court noted that Strickland prejudice is not an outcome-determinative test, and that some errors by counsel could render the trial unfair, even if a preponderance of the evidence would fail to show that the outcome would have been different. Id. at 426. The language of Deck comes straight from Strickland, which also acknowledged that a defendant need not meet a strict outcome-determinative standard. Strickland, 466 U.S. at 693-94. Yet, like Strickland, Deck acknowledged that the test for ineffective assistance of counsel still requires a showing related to the outcome of the proceeding: a reasonable probability of a different result. Id. at 694; Deck, 68 S.W.3d at 426. Thus, this Court has confirmed that relief on a claim from ineffective assistance of counsel requires some showing of a reasonably probable effect on the outcome of the trial. Thus, Strickland's plain language, both as declared by the United States Supreme Court and as interpreted by this Court, requires a showing related to the result of the trial. Therefore, appellant's claim that Strickland itself permits such a departure is meritless.

b. Strickland's Presumed Prejudice "Exceptions"

Appellant argues that, although a showing of Strickland prejudice is generally required, Strickland actually allows prejudice to be presumed in certain situations, and posits that Batson claims should not be excluded from this list as Batson had not been decided at the time that Strickland was written (App.Br. 20). A review of those exceptions shows that this argument lacks merit. Strickland does not require a defendant to prove Strickland prejudice in three circumstances: 1) where there is an actual or constructive denial of the assistance of counsel altogether; 2) where there is state interference with the assistance of counsel; and 3) where counsel is burdened by an actual conflict of interest. Strickland, 466 U.S. 692. That counsel's failure to raise a Batson claim is not included in this list can be seen from the type of cases granted the exception: in each case, a defendant is effectively denied the help of counsel for all purposes while burdened by the denial or conflict. This complete denial of counsel is simply not the case where counsel fails to pursue an isolated claim of potential error at trial. Further, a review of these exceptions does not show that a defendant is entitled to relief where there is no showing of prejudice. As to the first two, the Court recognized that prejudice was required for reversal, but simply stated that the complete denial of counsel contained in those exception does not require a defendant to prove the prejudice that "so likely existed" that it would not be worth the cost meriting a case-by-case inquiry. Strickland, 466 U.S. at 692. Likewise, the court noted that a conflict of interest claim is not *per se* prejudicial, but

would only permit relief where the attorney actively represented conflicting interests and the conflict adversely affect the attorney's performance. Id. Thus, all of the exceptions to the requirement that appellant prove prejudice still require there to be prejudice leading to a reasonable probability of a different result, but merely excuse the defendant from proving it. Here, appellant requests a rule vastly different from the exceptions recognized which would allow him to receive relief even though he has made no allegation at all of a reasonable probability of a different result but for counsel's alleged error. Therefore, the fact that Strickland permits exceptions to the requirement that a movant prove Strickland prejudice does not support appellant's argument.

c. Strickland and "Structural Error"

Finally, appellant claims that a Batson violation is a structural error which is prejudicial *per se* (App.Br. 19-24). Structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). A structural error is not subject to harmless error review on direct appeal. Fulminante, 499 U.S. at 310. First, respondent 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. This issue, however, need not be decided, because the issue of structural error, while important to determinations on direct appeal, is simply inapplicable to post-conviction proceedings.

Appellant relies on Knese v. State, 85 S.W.3d 628 (Mo. banc 2002), to argue that this Court has previously suggested that a claim constituting structural error could be recognized in a post-conviction proceeding and that there is prejudice *per se* from counsel's failure to object to structural error (App.Br. 22-23). However, a review of the language in Knese shows this is simply not true. In Knese, this Court reversed the defendant's death sentence because counsel failed to read the questionnaires of two jurors whose answers suggested that they would automatically impose a sentence of death following a finding of guilt in the guilt phase. Id. at 631-33. In doing so, it concluded as follows:

> This complete failure in jury selection is a structural error. (Citation omitted). On direct appeal, the United States Supreme Court, as a "per se rule," requires vacating a death sentence imposed by a jury whose composition is affected by Witherspoon error. (Citation omitted).
>
> In this post-conviction proceeding, ***Knese must show by a preponderance of the evidence that counsel's deficient performance prejudiced the defense***. Deck v. State, 68 S.W.3d 418, 425 (Mo. banc 2002). Here, ***there is reasonable probability--sufficient to undermine confidence in the outcome--that Knese***

> ***was prejudiced*** by his counsel's failure to read the questionnaires and voir dire the two jurors.

Knese, 85 S.W.3d at 633. While noting that, had appellant's claim of error been raised on direct appeal, it would have required reversal without a consideration of prejudice, this Court clearly stated that, because this was a post-conviction proceeding, the movant still bore the responsibility of pleading and proving Strickland prejudice. Id. This is consistent with other Missouri cases showing that, even if an error would have required reversal without demonstrating prejudice on direct appeal, Strickland prejudice must be shown in a post-conviction proceeding. Moss v. State, 10 S.W.3d 508, 512-514 (Mo. banc 2000) (absent a showing that a biased juror served on the jury, counsel's failing to move for an automatic change of venue due to pre-trial publicity was not presumptively prejudicial in the Strickland context); Hamilton v. State, 31 S.W.3d 124, 126-127 (Mo.App. S.D. 2000) (involvement of prosecutor who had a conflict of interest did not result in Strickland prejudice even though prejudice would have been presumed on direct appeal); State v. Neal, 849 S.W.2d 250, 257 (Mo.App. W.D. 1993) (involvement of prosecutor who had a conflict of interest did not result in Strickland prejudice even though prejudice would have been presumed on direct appeal). This is also consistent with federal law rejecting a claim that alleged structural error does not permit presumed Strickland prejudice and stating that a defendant must show Strickland prejudice from counsel's failure raise a Batson challenge. Young v. Bowersox, 161 F.3d 1159, 1160-61 (8th Cir. 1998). Thus, Knese does not support appellant's argument, but

must defeat it.

Because appellant failed to plead how a Batson challenge would have been successful or that he was prejudiced by counsel's failure to raise Batson challenges at trial, appellant was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. Therefore, the motion court did not clearly err in denying appellant's post-conviction claim, and appellant's sole point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that the denial of his Rule 29.15 motion should 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) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 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 27th day of December, 2005, to:

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APPENDIX