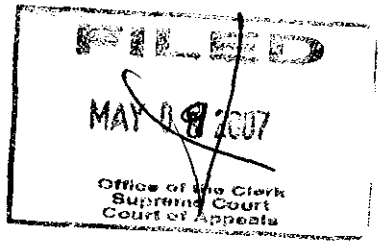
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK HICKS — APPELLANT

V. — NO.2006-KA-02086-SCT

STATE OF MISSISSIPPI — APPELLEE



BRIEF OF APPELLANT

ORAL ARGUMENT IS REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar [redacted]
Jenna Koger, Legal Intern
301 N. Lamar St., Suite 210
Jackson, MS 39201
601 576-4200

Counsel for Appellant

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Mark Hicks
3. Eddie Bowen and the Simpson County District Attorneys Office
4. Honorable Robert G. Evans

THIS 8th day of May, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Mark Hicks, Appellant

By: _____
Leslie Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Simpson County, Mississippi, and a judgment of conviction for the crime of possession of a firearm by a convicted felon against Mark Hicks following a jury trial on August 10, 2005, Honorable Robert G. Evans, Circuit Judge, presiding. (Mr. Hicks was acquitted by the jury of a charge of aggravated assault. Tr. 164). Mr. Hicks was subsequently adjudicated an habitual offender, and was sentenced to three (3) years to be served without the benefit of early release or parole. C.P. 40, Tr. 165-68. Mark Hicks is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According the trial testimony, on December 19, 2005, the Sheriff's Department was contacted about a shooting on Pea Ridge Road in Simpson County[1]. Tr. 67. Apparently the

[1]Since Mr. Hicks was acquitted of the aggravated assault charge, and to promote judicial economy, the Appellant will dispense with an extensive review of the facts regarding that charge.

appellant, Mark Hicks, thought that someone had broken into his house and stolen some bread, bologna and crackers. Tr. 74, 77. Upon finding out that someone had broken into his house he went across the street to his father's (Joseph Hicks), house and told members of his family that someone was going to get killed. Tr. 73, 89. Witnesses testified that Hicks then proceeded to his father's bedroom where he took possession of a 30/30 rifle and loaded it. Tr. 76, 110, Ex. 1. Hicks then walked out of the house with the weapon. Tr. 78.

A few minutes passed before Eric and Joyce McDonald left Joseph Hicks's house to go across the road to their house. Tr. 78, 111-12. (Hicks was Eric McDonald's uncle. Tr. 88). Shots were then fired. Tr. 78. Tambourine Hicks, appellant's sister, confronted Hicks and Hicks told her that he was shooting because Eric had broken into his house. Tr. 92. Hicks and Tambourine argued and she told him she had called police and that he was going to jail. Hicks said everyone was going to jail. Hicks then gave the rifle to his girlfriend after wiping the fingerprints off with a shirt from his girlfriend's car. Tr. 114. Eric McDonald testified that he was not sure Hicks was shooting directly at them. Tr. 100.

In order to prove Hicks was a prior convicted felon, the State called Simpson County Circuit Court Clerk Cindy Jensen to the stand. Tr. 124. She brought file No. 7532, which was a judgment from a criminal case with a defendant named Mark Hicks. She testified it was a certified true and correct copy of what was maintained in her office. The filed showed that one Mark Hicks had been convicted of grand larceny. Tr. 126, Ex. S-2. The conviction was from March 31, 1986. She also produced file No. 7688, which a judgment from another

case involving a Mark Hicks. Tr. 127. The judgment showed a conviction of burglary on March 13, 1987. Tr. 128. She also testified there was no pardon on file for Mark Hicks or any relief from disability that she could find, nor any certificate of rehabilitation. Tr. 129-30.

During cross-examination, Ms. Jensen admitted that she did not know Mark Hicks. Tr. 130. She admitted that it was common for some people to have the same first and last names. Tr. 130-31. She stated there was a social security number on the commitment order in Cause No. 7688, but no pictures in the file. Tr. 131. No one provided her with the appellant Mark Hicks's social security number or any other identifying information. Tr. 132.

> Q. So, all you can tell this jury today is there was a Mark Hicks convicted in those two cause numbers, but you don't know who or what Mark Hicks it was?
> A. Yes, that's right.
> Q. Once again, do you know if there's possibly another Mark Hicks out there?
> A. I do not know that.

Tr. 132.

After Ms. Jensen stated on re-direct that it was not her job to make positive identifications of criminals, the State rested. Tr. 133. The State then realized the judgment from Cause No. 7688 was not admitted into evidence. The circuit court allowed the State to reopen its case and admit the judgment as Exhibit S-3. Hicks's motion for a directed verdict was denied.

> **THE COURT:** All right. There's eyewitness testimony that this defendant had possession of a weapon and that his name is Mark Hicks. The jury can consider as a circumstance that a Mark Hicks was convicted in Cause Numbers 7532 and 7688. Whether or not that's sufficient to uphold the verdict, I'll reconsider if the verdict is adverse to you.

Tr. 138.

SUMMARY OF THE ARGUMENT

The verdict in this case was clearly based on insufficient evidence. The evidence presented failed to establish beyond a reasonable doubt that the prior convictions entered into evidence by the State were, in fact, the prior convictions of the defendant on trial, Mark Hicks. The trial court relied on old case law allowing a presumption that a prior conviction in the same name as the defendant was sufficient proof of identity. Although that may or may not be sufficient in the context of enhancing a sentence, it is clearly insufficient to prove an element of the offense beyond a reasonable doubt. Requiring a defendant to rebut such a presumption violates due process.

Additionally, the trial judge erred in peremptorily instructing the jury that the appellant had no pardon, no relief from disability, nor any certification of rehabilitation, thus improperly relieving the State of having to prove this element beyond a reasonable doubt, and clearly implying to the jury that Mark Hicks was indeed a prior convicted felon. Because of these errors, the Court should reverse and render Hicks's conviction for possessing a firearm by a convicted felon.

Finally, the trial judge also erred in overruling the defense counsel's *Batson* objection and accepting inattentiveness and answering questions too quickly as race neutral reasons to strike two jurors.

ARGUMENT

ISSUE NO. 1: THE TRIAL COURT ERRED BY NOT GRANTING A DIRECTED VERDICT OR A MOTION FOR A NEW TRIAL FOR THE DEFENDANT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MARK HICKS WAS A PRIOR CONVICTED FELON.

"When reviewing the sufficiency of the evidence, this Court looks at the lower court's ruling 'on the last occasion when the sufficiency of the evidence was challenged.'" *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss. 1995), (quoting *Green v. State*, 631 So.2d 167, 174 (Miss. 1994)). The last occasion when Mark Hicks challenged the sufficiency of the evidence was in his JNOV motion. Therefore, this Court is to consider all the evidence presented during the entire trial. *Gibson v. State*, 731 So.2d 1087 (¶12) (Miss. 1998).

"The Supreme Court will reverse the lower court's denial of a motion for new trial only if, by denying, the court abused its discretion." *Esparaza v. State*, 595 So.2d 418 (Miss.1992)(citing *Wetz v. State*, 503 So.2d 803, 812 (Miss. 1987); *Crenshaw v. State*, 520 So.2d 131, 135 (Miss.1988); *Leflore v. State*, 535 So.2d 68, 70 (Miss.1988); *Neal v. State*, 451 So.2d 743, 760 (Miss.1984), *cert. denied, Neal v. Mississippi*, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984)). "Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence." *Jefferson v. State*, 818 So.2d 1099, 1111 (Miss. 2002)(citing *Coleman v. State*, 697 So.2d 777 (Miss. 1997)). "If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render." *Id.* "On the

other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required." *Id.*

Under federal constitutional law, the test for determining a challenge to the sufficiency of the evidence asks whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, (1979). As set forth in the facts above, the State provided insufficient evidence to prove to the jury beyond a reason doubt that this appellant was a prior convicted felon. The State even realized during the hearing on jury instructions that they probably did not prove their case.

> MR. BOWEN: Your Honor, let me ask you a question.
> **THE COURT:** Sure.
> MR. BOWEN: This identification issue Mr. Ware brought up, now, we all know that he is the correct defendant on these past convictions. Do I need to reopen my case and put on some proof?
> **THE COURT:** I think you rested on that.
> MR. BOWEN. Okay.

Tr. 142.

Simply because the lawyers involved in a case may know a defendant has a prior conviction does not mean the jury knows it or it has been proven beyond a reasonable doubt. The jury can only go by the evidence presented to it. That evidence was clearly insufficient to show the Mark Hicks in Ex. S-2 and Ex. S-3 was the same as the defendant Mark Hicks. There is no doubt the jury was unsure, as they sent out a note and asked the court that very question during deliberations. "Does Mark Hick's [sic] social security number match circuit

clerk's files as to 1986 & 1987 indictments?" Ex. C-1, Tr. 163. The court responded that it could not admit any further evidence at that time.

During the hearing on Hicks's Motion for a JNOV or in the alternative a New Trial (C.P. 41), the State claimed the evidence created a presumption that the defendant was required to overcome.

> Mr. BOWEN: Okay. The records that the District Attorney furnished regarding the identification of the defendant as being the person convicted of two prior felonies, the records that we furnished did provide a presumption of his identity. And that presumption could have been overcome, if it were erroneous, but it were not erroneous.
>
> And there's a presumption which the State presented at trial that Mark Hicks was the same Mark Hicks as presented in the two prior convictions. That presumption stands unless the defendant gives proof otherwise. If that presumption had been false, the defendant could have easily overcome it, but the defendant failed to do that. The defendant could not overcome that presumption because the defendant was in fact the same Mark Hicks as was contained in the two prior convictions presented at trial.
>
> In Branning vs. State at 224 So.2d 579, the Supreme Court stated, "Moreover, it is a well-established rule of evidence and practice in this state that the identity or name of the defendant and the person previously convicted is prima facie evidence of identity of a person and in the absence of rebutting testimony supports a finding for such identity."

Tr. 178-79.

The trial judge was clearly concerned about this issue, telling counsel he was going to take the matter under advisement.

> ....And I'm going to review this Branning case and also the Clarence Course vs. State case. It seems to me that just the same name is mighty weak evidence to prove identity, and I would be surprised to learn that anything in Mississippi law transfers the burden of proof to the defendant, though your representations are that that's exactly what this does, Mr. Bowen, transfers the burden to the State – or pardon me – to the defendant to prove that he is not that person.

Tr. 180.

The trial judge did not elaborate on his reasoning, but denied the motion without comment. C.P. 56. The trial judge erred in not grantomg the motion.

The State was correct at trial that there exists case law that holds there is a presumption of identity from name alone. However, almost all of the cases dealing with this issue are all in the context of an enhancement to sentencing. In *Branning v. State*, 224 So.2d 579, 582 (Miss. 1969), the defendant was charged with a third offense of the Uniform Narcotic Drug Act. The fact that Branning had prior offenses simply increased the sentence for a conviction under the Act. In *Branning*, the Mississippi Supreme Court held there was no error in giving the following instruction to the jury[2]:

> The Court instructs the Jury for the State of Mississippi that under the law, identity of name of the Defendant and the person previously convicted is prima facie evidence of identity of person, and if you believe from the evidence in this, beyond a reasonable doubt that the name of the Defendant in this case and the name of the person previously convicted are the same, then you would be warranted in the presumption that they are in fact the same person.

Id. at 580.

The Court concluded by noting it was "a well established rule of evidence and practice in this State that the identity of name of the defendant and the person previously convicted is prima facie evidence of identity of person, and, in the absence of rebutting testimony,

[2] No such instruction was given in the case at bar.

supports a finding of such identity." *Id.* at 582, *citing McGowan v. State*, 26 So.2d 70 (Miss. 1946), and *Goldsby v. State*, 123 So.2d. 429, 439 (Miss. 1960)[3].

However, in the case at bar, whether or not Mark Hicks was a prior convicted felon was an element of the offense which the State had to prove beyond a reasonable doubt. In the context of proving an element of an offense, this is an issue of first impression in this State. The burden of proving each element of an offense always remains with the prosecution, and never shifts from the State. *Hedrick v. State*, 637 So.2d 834, 837 (Miss. 1994), *citing Heidel v. State*, 587 So.2d 835 (Miss. 1991), and *Brown v. State*, 556 So.2d 338 (Miss. 1990). As the Court of Appeals recently noted, the presumption of innocence stays with the defendant up until the jury determines otherwise. *McCoy v. State*, No. 2006-KA-00034-COA (¶29)(Miss.App. April 17, 2007).

The Appellant asserts that these prior Mississippi cases dealing with the presumption of identity, the latest being *Course v. State*, 461 So.2d 770 (Miss. 1984), are also called into question by the United States Supreme Court law. The appellant asserts that requiring a defendant to rebut such a presumption of identity is per se unconstitutional. The U.S. Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held the rights guaranteed

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[3] *Goldsby* was a death penalty case tried before bifurcated trials were mandated. The priors were admitted for impeachment purposes, not to prove an element of the offense. The other cases appellant counsel found on this issue are all in the context of enhancing a sentence of a subsequent offense. *See Jordan v. State*, 67 So.2d 371 (Miss. 1953) (second offense of possession of intoxicating liquor), *McGowan v. State*, 25 So.2d 131 (Miss. 1946) (second offense of possession of intoxicating liquor), and *Course v. State*, 461 So.2d 770 (Miss. 1984)(used to prove habitual offender status). *See also McLeod v. Bridges*, 178 So. 321 (Miss. 1938)(presumption of identity by name alone existed in the context of a civil case).

in the United States Constitution require proof beyond a reasonable doubt of each and every element of the offense and illustrates the point.

> ...[T]hese rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Winship*, 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Apprendi, 530 U.S. at 477.

The trial court violated Hicks's due process rights by allowing the State to create a presumption that Hicks was required to rebut. Appellant also cites the Mississippi Constitution's guarantee of due process under Article 3 Section 14. The State should never be relieved of the burden of proof by any presumption which the defendant must present evidence to rebut.

In *In re Winship*, 397 U.S. 358 (1970), the U.S. Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The Court noted that this requirement dates "at least from our early years as a Nation" and had been expressed in similar form "from ancient times." *Id.* at 361, 90 S.Ct. 1068. See also *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978), *citing* 9 J. Wigmore, Evidence § 2511 at 407 (3d ed. 1940)("It is now generally recognized that the 'presumption of innocence' is an inaccurate, shorthand description of the right of the accused to 'remain

inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion").

There is no doubt Hicks was charged with a separate crime of possessing a firearm by a convicted felon. This crime stands alone and is not simply a penalty provision like the habitual offender statute, where it can at least be reasonably argued such a presumption can be sustained. Such a presumption in Hicks's case is unconstitutional.

> *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), provides petitioner with stronger support. The Court there struck down a state homicide statute under which the State presumed that all homicides were committed with "malice," punishable by life imprisonment, unless the defendant proved that he had acted in the heat of passion. *Id.*, at 688, 95 S.Ct., at 1884. The Court wrote that "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect" just by redefining "the elements that constitut[ed] different crimes, characterizing them as factors that bear solely on the extent of punishment." *Id.*, at 698, 95 S.Ct., at 1889. It simultaneously held that the prosecution must establish "beyond a reasonable doubt" the nonexistence of "heat of passion"--the fact that, under the State's statutory scheme, distinguished a homicide punishable by a life sentence from a homicide punishable by a maximum of 20 years. *Id.*, at 704, 95 S.Ct., at 1892.

Almendarez-Torres v. United States, 523 U.S. 224, 240 (1998).

Other state and federal courts have considered this issue. In reversing a similar case, the Seventh Circuit Courts of Appeals explained the split in the federal courts.

> This circuit has specifically rejected the general argument that additional evidence is required to corroborate certified conviction records for purposes of establishing the defendant's status as a felon. See *United States v. Carraway*, 108 F.3d 745, 754 (7th Cir.1997) (per curiam). But neither *Carraway* nor any other case in this circuit has addressed whether a record of conviction identifying a defendant by name alone is sufficient to prove a

> defendant's status as a felon beyond a reasonable doubt and, if not, what additional evidence is required to carry the burden of proof.
>
> Other circuits have reached different conclusions in cases where the government has relied entirely on a judgment of conviction that bears the defendant's name but no other identifying information. The Fifth and Ninth Circuits have held that the government satisfies its burden by introducing a certified copy of a judgment containing the same name as the defendant, provided that the defendant makes no attempt to challenge the evidence. See *Pasterchik v. United States*, 400 F.2d 696, 701 (9th Cir.1968); *Rodriguez v. United States*, 292 F.2d 709, 710 (5th Cir.1961). The Second, Third, and Tenth Circuits have held that a conviction record containing the defendant's name as the sole source of identification is insufficient to meet the government's burden of proof due to the prevalence of common or identical names. *United States v. Jackson*, 368 F.3d 59, 68 (2d Cir.2004) (explaining, "[n]ames, of course, vary enormously in commonness, some names being shared by a great many users"); *United States v. Weiler*, 385 F.2d 63, 66 (3d Cir.1967); *Gravatt v. United States*, 260 F.2d 498, 499 (10th Cir.1958) ("It is common knowledge that in many instances men bear identical names.").
>
> Cases like this one are rare, perhaps because identifying a defendant to a prior conviction is usually a simple matter[4].

United States v. Allen, 383 F.3d 644, 647-48 (7th Cir. 2004).

It should be noted that the referenced Fifth Circuit case, *Rodriguez v. United States*, was decided before the U.S. Supreme Court cases of *Winship, Mullaney,* and *Apprendi*.[5] This fact was acknowledged by the Second Circuit in *United States v. Jackson, supra*, 368

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[4]The prosecution did submit a pen pack during sentencing, identifying Hicks as the person in the prior judgments. (See the exhibits attached to the Motion to Supplement the Record accompanying this brief.) It is clear the State could have presented such information to the jury during trial if it had chosen to do so. The jury was never presented with this evidence.

[5]In an unpublished opinion, the Ninth Circuit recently addressed the issue again and held they were bound by their prior precedent despite the criticism in the *Jackson* opinion. *United States v. Boyd*, 177 Fed.Appx. 721, 723 (9th Cir. 2006).

F.3d at 69. The court went on to state that the "majority of the courts to consider the question have agreed with our conclusion that a conviction certification in the same name as the defendant's is insufficient to prove that the defendant had a prior conviction as an essential element of the crime charged." *Id.* at. 71. The Fifth Circuit did subsequently cite the *Rodriguez* case, but noted that the evidence in *Rodriguez* was more than just the admission of the prior indictment. *United States v. McDonald*, 606 F.2d 552, 554 (5th Cir. 1979). In fact, Rodriguez's birth certificate was admitted into evidence at the district court trial. *United States v. Rodriguez*, 195 F.Supp. 513, 515 (D.C.Tex. 1960). Not one other piece of evidence or testimony was presented to the jury in the case *sub judice* to prove Hicks was a prior convicted felon except for Ex. S-2 and Ex. S-3.

As the *Jackson* court noted, several state courts have also found similar evidence to be insufficient. Massachusetts, Florida, Oregon, Arizona, West Virginia, Wyoming, Louisiana, Connecticut, Iowa, Washington, Pennsylvania, and the District of Columbia have all held in various situations that a name alone is insufficient to establish identity.[6] Other states have also rendered an opinion in agreement with the *Jackson* case, or were not cited in the *Jackson* case but support Hicks's position.[7]

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[6]The citations for these state cases are given in *United States v. Jackson*, 368 F.3d at 71-73.

[7]See *Hollander v. State,* 418 P.2d 802, 804 (Nev. 1966)("we reject that authority which considers the defendant's failure to rebut the presumption created. The responsibility of proof beyond a reasonable doubt remains with the State."), *State v. Lackey,* 120 P.3d 332, 362-64 (Kan.2005) (habitual offender case), *overruled on other grounds, State v. Davis,* 2007 WL 925916 (Kan. 2007), *Duncan v. State,* 409 N.E.2d 597, 601 (Ind. 1980)(mere document relating to a conviction of one with the same name as the defendant is insufficient), *Bullard*

Hicks would also note that there are several states that follow Mississippi's case law when considering the prior offense as a sentence enhancer.[8] Although there appears to be a split of authority on this issue, the appellant would assert that these cases only illustrate that

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v. State, 533 S.W.2d 812, 816 (Tex.Cr.App. 1976), *overruled on other grounds*, *Cooper v. State*, 631 S.W.2d 508 (Tex.Cr.App. 1982), (identity of names was not sufficient), *State v. Adair*, 222 P.2d 741, 741 (Idaho1950), and *People v. Johnson*, 293 N.W.2d 664, 666-67 (Mich.App. 1980)("the general common-law rule is that sufficient evidence is offered to discharge the prosecution's burden of proof where either direct or circumstantial evidence is offered to show that the person named in the former convictions and the defendant on trial are one and the same person").

[8]See *Lewis v. State*, 508 S.E.2d 218, 222 (Ga.App.1998), *State v. Johnson*, 567 S.E.2d 486, 488 (S.C.App. 2002), *State ex rel. Medicine Horn v. Jameson*, 100 N.W.2d 829, 832 (S.D. 1960)(habitual offender), *Higgins v. State*, 357 S.W.2d 499, 503-04 (Ark. 1962)(habitual offender), *Holmes v. Commonwealth*, 589 S.E.2d 11, 12 (Va.App. 2003)(third offense domestic assault case - evidence raised a permissible inference, which the fact finder could accept or reject), *State v. Wyckoff*, 99 A.2d 365, 367 (N.J.Super.A.D. 1953)(defendant acknowledged prior conviction - "we refrain from the expression of any opinion whether where the prior conviction is not admitted by an accused who is being prosecuted as a second or habitual offender, the mere presumption, if any such arises in a criminal case, is sufficient to establish the requisite identity beyond a reasonable doubt."), *State v. Woodson*, 705 S.W.2d 677, 679-80 (Tenn.Cr.App. 1985) (habitual criminal - evidence admitted under statute), *Lewis v. State*, 681 P.2d 772, 774 (Okla.Crim.App.1984), *State v. Taylor*, 745 S.W.2d 173, 176 (Mo.App. E.D. 1987) (identity of names is prima facie evidence to establish the defendant's identification for the purpose of showing a prior conviction to establish habitual offender status), *People v. Smith*, 593 N.E.2d 533, 538-538 (Ill. 1992), *State v. Mullis*, 260 N.W.2d 696, 699-700 (Wis. 1978), (operating vehicle under revoked license), *State v. Applegarth*, 246 N.W.2d 216, 218 (Neb. 1976)(record establishing a prior conviction of a defendant with the same name is *prima facie* sufficient to establish identity for the purpose of enhancing punishment), *Weeks v. State*, 473 So.2d 589, 591 (Ala.Cr.App. 1985)(in habitual offender proceeding, identity of name raises a prima facie presumption of the sameness of the person), and *State v. Alexander*, 521 P.2d 57, 59 (Wash.App. 1974) (defendant's name same as name on prior convictions prima facie identity of person in habitual offender hearing).

the split is in the context of proving a prior conviction for sentence enhancement. On the issue of proving an element of the offense beyond a reasonable doubt, only a minority of jurisdictions (Georgia, Illinois, and the Ninth Circuit) seem to hold that a document with the same name alone is sufficient evidence of identity. All other jurisdictions require at least some other evidence to be presented when the defendant does not concede the prior conviction belongs to him.

To affirm this conviction, this Court would have to endorse the principal that in Mississippi, a criminal conviction may rest on a presumption based on name alone, unless of course, the defendant is willing to put on some evidence. This would clearly violate basic Fifth Amendment law. The State may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 167 (1979).

Furthermore, there was absolutely no evidence presented that the two prior convictions were actually felonies. Although all counsel and members of this Court are undoubtedly aware that burglary and grand larceny are felonies, the jury can not be presumed to know that. During Ms. Jensen's testimony, the prosecution tried to use leading questions to establish this, but the objections to these questions were properly sustained.

> Q. Okay. So he was at least convicted twice of felonies before December 19th, 2005; is that correct?
> A. Yes, that's correct.
> Q. At the time he possessed that firearm.
> MR. WARE: Objection.
> **THE COURT:** Sustained.

BY MR. BOWEN:
Q. At the time he was alleged to have that firearm on January 19th, 2005, was he a convicted felon at that time?
MR. WARE: Again, objection.
THE COURT: Sustained.
MR. BOWEN: Your Honor, I don't understand his objection.
THE COURT: Your question is argumentative. All you need to ask the clerk is which date is earlier, that on the order of conviction or the date you allege in the current indictment. The jury can draw the conclusion as to whether or not the defendant had a gun in his possession on that date.
MR. BOWEN: Your Honor, the dates are on the documents anyway, so I don't guess it matters.
THE COURT: Yes, sir.

Tr. 128-29.

There was no evidence ever presented to allow the jury to come to the conclusion, beyond a reasonable doubt, that the prior convictions were felonies. No definition was ever given to the jury on what type of crimes constitute felonies. The exhibits did not state the crimes were felonies. It can not be presumed the jury inherently knew this just because the trial judge and lawyers know it.

> In the instant case, the right to a trial by jury has been violated. It is not consistent with the court's authority nor its role to make a finding of fact in a criminal case. Even if judicial notice were taken as to this element of the crime, the question of whether there was evidence beyond a reasonable doubt proving the age of the victim would still be for the jury to decide. M.R.E. 201(g) (even though the court may instruct the jury to conclude the existence of matters judicially noticed in a civil case, the jury may or may not accept a judicially noticed matter in a criminal trial). In the case sub judice, the trial court did not take judicial notice of the victim's age, nor instruct the jury accordingly. The trial court's conclusion of fact is an invasion of the jury's province, in violation of Washington's right to a fair trial.
>
> The State, as prosecutor, is bound by law to prove beyond a reasonable doubt every element of the crime. The State, as well as this Court, is as much bound

> by U.S. Const., Amend. V, as citizens such as Washington are bound by Miss. Code Ann. § 97-3-95 (Supp.1992). There is no question that the Constitution's supremacy precludes conviction under a criminal statute until the State, not the judiciary, meets the burden of proof, and until a jury, not the court, decides that the burden has been met.

Washington v. State, 645 So.2d 915, 919 (Miss.1994).

Due process demands that the State must prove each element in the indictment beyond a reasonable doubt. *Hennington v. State*, 702 So. 2d 403, 408 (¶16) (Miss. 1997). The State failed to carry its burden. Hicks's conviction should be reversed and rendered.

ISSUE NO. 2: THE TRIAL COURT COMMITTED PLAIN ERROR BY GIVING THE JURY A PEREMPTORY INSTRUCTION ON AN ELEMENT OF THE OFFENSE THAT MARK HICKS HAD NOT RECEIVED A PARDON, A RELIEF FROM DISABILITY OR A CERTIFICATE OF REHABILITATION.

Miss. Code Ann. § 99-17-35 (Supp.2000), states that when instructing the jury, a trial judge "...shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence..."As stated in the facts above, the State introduced evidence through the testimony of the circuit clerk that no records were found in Simpson County showing a pardon had been issued to Mark Hicks, or that there existed any relief from disability to allow Mark Hicks to carry a firearm, or that any certificate of rehabilitation was issued to Mark Hicks. Such proof is a required element of the offense under Miss. Code Ann. §97-37-5(1) (Supp. 2006). However, the instruction given to the jury (S-4) outlining the elements of the offense did not tell the jury they must find Hicks did not have a pardon or a relief from disability or a certification of rehabilitation. Instead, the instruction peremptorily told the jury none of those documents existed in Hicks's case. The instruction read:

The Court instructs the jury that it is unlawful for any person who has been convicted of a felony under the laws of the State of Mississippi, to possess any firearm unless such person has received a pardon, or has received a relief from disability pursuant to Section 925(c) of Title 18 of the United States Code or has received a certificate of rehabilitation from the Court in which he was convicted.

The Court further instructs the jury that the defendant has not received a pardon, he has not received a relief from disability pursuant to Section 9259(c) of Title 18 of the United States Code and he has not received a certificate of rehabilitation from this Court; therefore, if you find beyond a reasonable doubt that on or about December 19, 2005, in Simpson County, Mississippi:

1. the defendant was a convicted felon, having been convicted of grand larceny on March 31, 1986, in Cause Number 7532 in the Circuit Court of Simpson County, Mississippi, and that he was also convicted of burglary on March 13, 1987, in Count I of Cause Number 7688 in the Circuit Court of Simpson County, Mississippi, and that,

2. on or about December 19, 2005, in Simpson County, Mississippi, the defendant had in his possession a firearm, then, on your oaths as jurors, you shall find the defendant guilty of the unlawful possession of a firearm by a convicted felon, as contained in Count II of the indictment.

You are further instructed that if the State has failed to prove any one or more of the aforementioned elements beyond a reasonable doubt, then you shall find the defendant not guilty.

C.P. 24-26 [emphasis added].

Granting this instruction was plain error[9]. Although the State was required to prove this fact to the jury beyond a reasonable doubt, the court essentially instructed the jury that Hicks was a felon and did not have pardon, a relief from disability, or a certification of rehabilitation. This instruction improperly invaded the province of the jury, and therefore

[9]The Appellant concedes this issue must be addressed under the plain error doctrine as trial counsel did not object to the instruction at trial. Tr. 143.

affected a substantive right of the defendant. The instruction also peremptorily instructed the jury that the prior convictions entered into evidence were, in fact, felonies.

This error was similar to the one found by the Court of Appeals in *Russell v. State,* 832 So.2d 551 (¶5) (Miss. App. 2002). The trial judge in *Russell* instructed the jury in an aggravated assault case that a stun gun was a deadly weapon. The Court of Appeals found this to be an improper peremptory instruction. See also *Van v. State*, 477 So.2d 1350, 1351 (Miss. 1985) (instruction assumed as true material facts the truth of which should have been properly left for determination by the jury), and *Wilson v. State*, 451 So.2d 724, 726-27 (Miss. 1984) (judge's ruling in presence of jury that defendant's confession was voluntary was impermissible comment on the evidence and amount to peremptory instruction).

This Court has held the plain error exists when there is a violation of a substantive right of a defendant.

> A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State*, 794 So.2d 181, 187-88 (Miss.2001). To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." *Cox v. State*, 793 So.2d 591, 597 (Miss.2001) (relying on *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991); *Porter v. State*, 749 So.2d 250, 260-61 (Miss.Ct.App.1999)).

McGee v. State, No. 2003-CT-01686-SCT (¶8) (Miss. January 18, 2007).

Allowing the trial judge to peremptorily instruct the jury on an essential element of the offense is clearly a deviation from sound principal and constitutes reversible error. The

instruction was also an improper comment on the evidence, identifying the defendant as a prior felon, and instructing the jury that the prior offenses were felonies.

ISSUE NO. 3: THE TRIAL COURT ERRED IN ACCEPTING THE RACE NEUTRAL REASONS GIVEN BY THE STATE AFTER A *BATSON* OBJECTION REGARDING JURORS NO. 12 AND JUROR NO. 13.

Although Hicks asserts his case should be reversed and rendered on the issues above, it can not be ignored there was additional error during jury selection. After the prosecution tendered twelve jurors to Hicks, trial counsel objected under *Batson v. Kentucky*, 476 U.S. 79 (1986), because five of the six strikes were against African-Americans. Tr. 50. The State then began to give race neutral reasons for the strikes.

> **THE COURT:** All right. Good. Thank you. No. 12, Curtis L. Magee. Is that an African American?
> MR. WARE: Yes.
> **THE COURT:** Okay. What was your reason for striking him?
> MR. BOWEN: He's got a brother-in-law in the penitentiary, and when I was talking to him, he was inattentive to me. But I noticed, when Daniel was talking to him, he was looking at Daniel and looking at the defendant and grinning.
> **THE COURT:** Mr. Ware, anything to contradict that?
> MR. WARE: Yes, Your Honor. First of all, No. 10 Beverly Rainey has a son-in-law –
> **THE COURT:** Whoa, whoa. We're talking about 12 right now.
> MR. WARE: I understand that. But one of the reason – all right. Your Honor, there's clearly – first of all, he claims he struck him because he has a brother-in-law in jail. For the record, he allowed No. 9, who is a white juror who has an uncle in jail, to remain on the panel. He also allowed No. 10, who has a son-in-law in jail or has been in jail, to allow to stay on it. But we think that's definitely pretextual on that part. As to the fact he was inattentive, Your Honor, I was sitting here and he looked very attentive to Mr. Bowen and to myself. I think that's pretextual and he should be allowed to stay on.
> MR. BOWEN: Now, Your Honor, I gave two reasons for striking No. 12, not just for the fact that he had someone in the pen.

THE COURT: All right. Well, those two coupled together makes it a race gender neutral. The Supreme Court has said that inattentiveness alone is adequate to strike a juror or is a neutral reason for striking a juror. So I'll allow that one to stand. And No. 13, Barbara K. Berry. That's an African-American female.

MR. WARE: Correct.

THE COURT: All right.

MR. BOWEN: She's a black female. She stated that she had heard of a Defendant Hicks, and when she was asked would that affect her decision, she was shaking her head no before the question was even gotten out of the questioner's mouth. And she answered too quick to the fact that her opinion – I mean, she was not affected by – or her vote would not be affected by her having heard of Hicks.

Now, for the record, 14 is a black female, 15 is a black female, 11 is a black male. So I haven't struck all blacks.

THE COURT: Yeah. And there's a recent case just came out a couple of weeks ago that the defendant has to establish a systematic exclusion, and that's a little vague. I don't necessarily agree with the opinion, but that's what it is. And the fact that you left African-Americans on the panel works to your favor in that regard.

All right. Anything on No. 13, Mr. Ware?

MR. WARE: Yes, Your Honor. No. 2, who is a white male he left on the panel, said that he heard of Mr. Hicks. And Mr. Bowen left him, but yet he is striking No. 13 because he has heard of Mr. Hicks and he answered too quick. I don't recall him answering too quick, but I definitely think that is pretextual. She answered. She shook her head. And I think, for lack of a better term, it's bogus that you allow No. 3 to stay on, because he knew him, but yet you're striking No. 13. I think that's just clearly evident of a Batson violation.

MR. BOWEN: Yeah. But he did not start answering no until the question was finished asking him. And I've given my reasons, Your Honor. We can argue about this all day, but I stated my reasons for the record.

THE COURT: Well, I think answering too quickly could show a predisposition. So I'll give you the benefit of the doubt on that, Mr. Bowen, and will let the strike stand.

Tr. 52-55.

Once a *Batson* objection is raised, the trial judge is required to follow a simple four step process. First, the defendant must establish a *prima facie* case of discrimination in the

selection of jury members. Second, the prosecution then has the burden of stating a race neutral reason for the challenged strike. Third, the defendant is allowed to rebut the explanation. Finally, in the fourth step, the court must make a factual finding to determine if the prosecution engaged in purposeful discrimination. In making this decision, if the defendant fails to rebut the State's reasons, the trial judge must base his decision on the reasons given by the State. *See Berry v. State*, 802 So.2d 1033 (¶ 11-14) (Miss. 2001).

In the case at bar, a *prima facie* case was established, as five of the State's six strikes were against African-American jurors. Tr. 48-49, 50. Regardless, the prosecution did not wait for the court to make a ruling on this step, but proceeded to state race neutral reasons into the record. Therefore, the requirement for the trial to find a prima facie case was moot. *Snow v. State*, 800 So.2d 472 (¶ 8-11) (Miss. 2001), *citing Hernandez v. New York*, 500 U.S. 352, 359 (1991).

As the record indicates, trial counsel rebutted the reasons given by the State, showing the State's reasons were pretextual, as the explanations showed disparate treatment.

> This Court has recognized five indicia of pretext that are relevant when analyzing the race-neutral reasons offered by the proponent of a peremptory strike, specifically:
> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the characteristic cited; ... (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits. *Manning v. State*, 765 So.2d 516, 519 (Miss. 2000) (citations omitted). The burden remains on the opponent of the strike to show that the race-neutral explanation given is merely a pretext for racial discrimination. *Berry*, 802 So.2d at 1042.

Flowers v. State, 947 So.2d 910, (¶ 9) (Miss. 2007).

Regarding Juror 12, after the State gave its reasons, the defense pointed out the disparate treatment that a white juror also had a relative in jail, and the juror was not inattentive. The court just accepted the State's reasons, finding the relative in jail coupled with inattentiveness was a sufficient race neutral reason. Tr. 53. The court never made a finding of fact that Juror 12 was inattentive. As for Juror 13, the defense counsel pointed out a white juror who also knew Hicks but was not struck. A State added a second, rather lame reason for striking this juror, claiming the juror answered his voir dire questions too fast. Tr. 53-54. Again, the court did not make a finding of fact on rather or not this was true. Defense counsel disputed it. The court simply stated it would give the State the "benefit of the doubt." Tr. 55. Since the reasons given by the State were disputed, the court should have made a finding of fact on the record. *Robinson v. State*, 761 So.2d 209 (¶ 10) (Miss. 2000).

The trial judge also incorrectly noted that since the State left some African-Americans on the jury, this fact worked in the State's favor. However, this Court has held the fact the prosecutor accepted other black persons as jurors is no defense to a *Batson* claim. *Conerly v. State,* 544 So.2d 1370, 1372-73 (Miss. 1989), *citing Chisolm v. State*, 529 So.2d 635, 637 (Miss. 1988). A single violation of *Batson* is sufficient for reversal. *See McGee v. State*, No. 2003-CT-01686-SCT (¶7-11) (Miss. January 18, 2007).

The Appellant acknowledges that this Court has held that juror inattentiveness can be considered a race neutral reason for a peremptory strike. *Tanner v. State*, 764 So.2d 385 (¶24) (Miss. 2000). However, this Court has also held that lack of record support is one

indication of pretext. *Manning v. State*, 765 So.2d 516 (¶ 9) (Miss. 2000); *Mack v. State*, 650 So.2d 1289, 1298 (Miss. 1994). Under the totality of the circumstances, the reasons given by the State for these two jurors were not sufficiently race neutral and clearly evidence discriminatory intent. Appellant could find no case where answering questions too quickly was considered a race neutral basis for striking an otherwise fully-qualified juror. Again, defense counsel did not just assert he did not notice such conduct, he affirmatively disputed the inattentiveness and the quick answers. This should have obligated the trial judge to make a finding of fact.

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant ... or seemed "uncommunicative," ... or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," ...? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory. *Batson*, 476 U.S. at 106, 106 S.Ct. at 1728, 90 L.Ed.2d at 94 (Marshall, J., concurring) (citations omitted).

Hatten v. State, 628 So.2d 294, 300-01 (Miss. 1993) (Hawkins, Chief Justice, specially concurring).

Although trial judges are afforded great deference in their *Batson* rulings, as this Court stated in *Flowers*, neither prosecutors nor defense counsel should be allowed to manipulate *Batson* to the point where voir dire is simply a exercise is finding race neutral reasons. 497 So.2d at ¶69. The trial judge committed reversible error in allowing the State to strike Jurors 12 and 13. The prosecution clearly engaged in disparate treatment and the reason given for striking the jurors were insufficient.

CONCLUSION

The State introduced evidence only that someone named "Mark Hicks" had a prior conviction for burglary and a prior conviction for grand larceny, but no evidence at all that these convictions belonged to the defendant on trial, or that the convictions in Ex. S-2 and Ex. S-3 were actually felonies. These were both elements of the offense that were required had to be proven beyond a reasonable doubt. Reversible error was also apparent in a jury instructions which peremptorily instructed the jury on elements of the offense, and the trial judge's ruling on Hicks's *Batson* objection. Since the State failed to prove its case, Hicks's conviction for being a felon in possession of a firearm should be reversed and rendered. "We are left in the unhappy position of being required to reverse a conviction notwithstanding our knowledge that the defendant is guilty. That is the consequence of being governed by the rule of law." *Jackson, supra*, 368 F.3d at 77.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Mark Hicks, Appellant

By: 
Leslie S. Lee

CERTIFICATE OF SERVICE

I, Leslie S. Lee, do hereby certify that I have this the 8th day of May, 2007, mailed a true and correct copy of the above and foregoing **Brief Of Appellant**, by United States mail, postage paid, to the following:

Honorable Robert G. Evans
Circuit Court Judge
Post Office Box 545
Raleigh, MS 39153

Honorable Eddie H. Bowen
District Attorney, District 13
100 Court Avenue, Suite 4
Mendenhall, MS 39114

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

Mr. Mark Hicks, MDOC #41615
Mississippi State Penitentiary
P.O. Box 1057
Parchman, MS 38738

Leslie S. Lee
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar [redacted]
Jenna Koger, Legal Intern
301 N. Lamar St., Suite 210
Jackson, MS 39201
Telephone: 601-576-4200
Fax: 601-576-4205