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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ATIBA PARKER — APPELLANT

V. — NO.2007-KA-00490-COA

STATE OF MISSISSIPPI — APPELLEE

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REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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ISSUE NO. 3 THE TRIAL COURT ERRED IN REFUSING A DEFENSE PEREMPTORY CHALLENGE AFTER COUNSEL GAVE A RACE NEUTRAL FOR THE STRIKE.

In its brief, the State argued, "While it is not clear from the record what the case on the previous Tuesday was, the Trial Court clearly found that had her reason been nothing more than his military background and his previous service on a civil jury, that Parker's counsel would have stricken him in the previous case." Appellee brief at 6. That is precisely why refusing the strike was error. There is nothing contained in the record to indicate counsel's reasons were not valid. The court merely ruled, "I'm going to keep 32 on the panel. Because I think 32 was kept on the panel Tuesday that you picked and I'm going to leave 32 on there."

Counsel provided at least two valid race neutral reasons to strike Juror No. 32. The trial judge made no finding that the reasons were pretexual. There could be hundreds of reasons why Juror No. 32 was appropriate for the previous case, but not someone counsel wanted in Parker's case. We do not know anything about the other defendant, much less what he was indicted for or his theory of defense. Juror No. 32 could have been prefect for that case, but not for a sale of cocaine case. Disallowing the strike simply because the juror was not stricken in a totally unrelated case was clearly erroneous[1]. The prosecution failed to show purposeful discrimination by Parker's counsel. *Miller-El v. Dretke*, 545 U.S. 231,

[1] The trial judge allowed an earlier strike on Juror No. 13, a older white male juror based on his past service on a grand jury. Tr. 97-98.

277 (2005). There is nothing in the record which suggests trial counsel's reasons should not be believed. See *Hernandez v. New York*, 500 U.S. 352, 365 (1991)(plurality opinion).

Furthermore, there is nothing in the record to suggest counsel left any older African-American jurors on the panel who had served in the military and served on civil juries. The court could not have found disparate treatment. The basis of the strike was not something like demeanor, which requires the trial judge be given much deference in deciding an attorney's credibility in exercising a strike. See *Snyder v. Louisiana*, 2008 WL 723750, No. 06-10119 (March 19, 2008), slip opinion at 4, citing *Hernandez*, 500 U.S. at 366. The reasons given by counsel were apparent in the record. Therefore, the trial court is not entitled to great deference. Counsel's race neutral reasons were based on fact supported by the record.

Appellant asserts that the trial court's ruling was clearly erroneous as trial counsel gave two valid race neutral reasons for striking the juror. The lower court did not base its decision on the credibility of defense counsel, but rested his decision solely on the fact that counsel did not strike the juror in a prior panel. Parker's case should be remanded for a new trial.

ISSUE NO. 5 APPELLANT'S SENTENCE WAS VINDICTIVE AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT GIVEN APPELLANT'S MENTAL ILLNESS.

In its brief, the State argued that this issue is procedurally barred for failing to cite relevant authority. Appellee brief at 10. In our original brief, we cited *Kimbrough v. United States*, 128 S.Ct. 558 (2007), in support of this claim. In *Kimbrough*, the United States

Supreme Court quoted with favor the Sentencing Commission's findings that Federal Sentencing Guidelines caused disproportionately harsh sanctions in crack cocaine cases. *Id.* at 575. As stated in our original brief, a claim of cruel and unusual punishment under the Eight Amendment to the United States Constitution and Miss. Const. Art. 3 § 28, can be raised for the first time on appeal, as it affects appellant's fundamental rights. *Bush v. State*, 667 So.2d 26, 28 (Miss. 1996), citing *Gallion v. State*, 469 So.2d 1247, 1249 (Miss. 1985). The issue is not barred.

Parker received a total of thirty-four (34) years for two sales of small rocks of cocaine a day apart. Parker was a first time offender. All the prior offenses referred to by the court occurred in the same week period in July of 2005. The court failed to take into consideration his mental illness and the fact that Parker had been hospitalized in the past. Appellant brief at 22. Contrary to the State's assertion that Parker argued that the lower court should have been lenient because he sought treatment for his drug addition, Parker instead correctly pointed out that the trial judge did not take into consideration his mental health problems. Appellant brief at 22. Given the unique circumstances in this case, Parker's sentence was clearly an abuse of discretion.

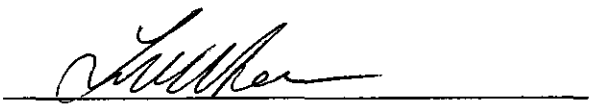
Finally, the State argues in its brief that "there is no indication in the record that the Trial Court used Parker's belated candor to enhance his sentence, but rather the Trial Court noted that it lacked credibility as a mitigating factor because it was offered so late in the process and after Parker had given disingenuous explanations for his behavior." Appellee brief at 10. However, Parker cited countless examples in his original brief demonstrating that

the trial court handed down an extremely harsh sentence because Parker decided to go to trial instead of asking for mercy prior to trial. Appellant's brief at 20-24. Parker was diagnosed with Schizoaffective Disorder, yet the trial court failed to consider this when sentencing him. At the very least, Parker is entitled to a new sentencing hearing.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Atiba Parker, contends that he is entitled to a new trial. The appellant would stand on his original brief in support of issues not responded to in this reply brief.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Atiba Parker, Appellant

By: 
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CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 25th day of March, 2008, mailed a true and correct copy of the above and foregoing Reply Brief Of Appellant, by United States mail, postage paid, to the following:

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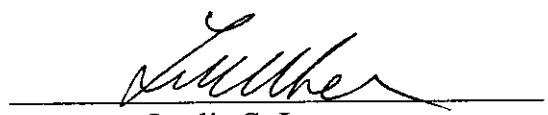

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