IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY JACKSON a/k/a JEFFERY JACKSON — **APPELLANT**

VS. — **NO. 2007-KA-1782-COA**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-KA-1782-COA**

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STATEMENT OF THE CASE

The prosecutor's use of peremptory strikes against four (4) African American females, allegedly in violation of the so-called *Batson* rule, forms the centerpiece of this out-of-time appeal from a conviction of armed robbery.

We respectfully submit that findings by the circuit judge the prosecutor gave sufficient race-neutral reasons for challenging the four (4) women and, in so doing, the State did not exercise purposeful discrimination, was neither clearly erroneous, manifestly wrong nor against the overwhelming weight of the evidence.

The *Batson* issue is controlled by rules of law articulated in **Golden v. State,** No. 2005-KA-

00111-COA decided February 5, 2008 [Not Yet Reported]; **Harris v. State,** 901 So.2d 1277, 1281-82 (Ct.App.Miss. 2004), and **Avant v. State,** 896 So.2d 379 (Ct.App.Miss. 2005) citing **Lynch v. State,** 877 So.2d 1254 (¶46) (Miss. 2004).

JEFFREY JACKSON, a non-testifying 33-year-old African American male, prosecutes a criminal appeal from the Circuit Court of Hinds County, W. Swan Yerger, Circuit Judge, presiding.

Jackson, following an indictment returned on June 17, 2005 (C.P. at 4), was convicted of robbing Hal & Mal's Restaurant by taking, at gunpoint, approximately $4000 from the presence of Hal White. (C.P. at 4)

Jackson seeks a reversal of his conviction and a remand of his case for a new trial. (Brief of the Appellant at 30)

The defendant's indictment, omitting its formal parts, alleged

> " . . . [t]hat Jeffrey Jackson a/k/a Jeffery Jackson . . . on or about the 14th day of March, 2005[,] did wilfully, unlawfully and feloniously take or attempt to take the property of White Brothers, Inc., a Mississippi Corporation, D/B/A Hal & Mal's Restaurant, in the presence of Hal White, and from said persons and against said person's will by violence to his person, by putting Hal White in fear of immediate injury to his person by exhibition of a deadly weapon, to-wit: a handgun, said property being approximately $4,000.00 of good and lawful money of the United Sates of America . . . " (C.P. at 4)

Following a two (2) day trial by jury conducted on May 8-9, 2008, the jury returned a written verdict of, "We[,] the jury, find the Defendant guilty as charged." (C.P. at 37)

Immediately post-verdict (R. 247), Judge Yerger entered an order sentencing Jackson to serve a term of twenty-five (25) years in the custody of the MDOC. (R. 294; C.P. at 38)

Only one issue is raised on appeal to this Court: "Whether the trial court erred in denying defense counsel's *Batson* challenge regarding the State's unconstitutional striking of African-

American members of the venire and failure to provide adequate race-neutral justification." (Brief of the Appellant at ii, 1, 4)

STATEMENT OF FACTS

Appellant has articulated a fair and accurate summary of the prominent facts. Accordingly, there is no compelling need to plow that ground again in any detail here.

It is enough to say that during the morning hours of March 14, 2005, at approximately 9:00 or 9:15 a.m., Jackson police were summoned to Hal and Mal's restaurant on Commerce Street where they learned from Hal White, co-owner, a black male had just robbed him at gunpoint and absconded with money removed from the office safe. (R. 233-34)

Some time later White saw Johnson's picture in the Crimestopper's section of the Clarion Leger and notified the police after identifying him as the robber.

> Q, [BY PROSECUTOR:] You saw his picture in the paper and what happened after that? What did that cause you to do if anything?
>
> A. [BY WHITE:] I called the detective and told him, I said, you know, I found the picture of the guy that robbed me.
>
> Q. Okay. And later that day did he bring you a line-up?
>
> A. Yes, he did. (R. 239)

Seven (7) witnesses testified for the State during its case-in-chief, including the victim, Hal White, who made both an out-of-court photographic lineup identification and an in-court identification of Jackson as the robber. (R. 240-41, 242-43)

Zeta Pigott, cashier and bookkeeper at Hal and Mals, was present that morning and was both an ear and eyewitness to the robbery. She, likewise, made a positive photographic lineup identification as well as an in-court identification of Johnson as the robber. (R. 223-25)

Relevant portions of White's identification testimony are quoted as follows:

> Q. [BY PROSECUTOR:] Mr. White, do you see the man in the courtroom today who robbed you on March 14th, 2005?
>
> A. [BY WHITE:] Yes, sir, I do.
>
> Q. Would you point him out and describe what he's wearing, sir.
>
> A. The gentleman at the table, has on a blue shirt and blue tie.
>
> BY MR. MILES: Your Honor, I'd ask that the record reflect that the witness has identified the defendant as the man who robbed him on March 14th, 2005.
>
> BY THE COURT: The record may so reflect.
>
> Q. Are you absolutely sure, sir?
>
> A. Absolutely. (R. 242-43)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict of acquittal based upon the failure of the State to make out a *prima facie* case was overruled by Judge Yerger who stated, *inter alia,* the following: "It's the opinion of the Court based upon the evidence before the Court and applicable law that a *prima facie* case of armed robbery against this defendant has been proved by the State [and] the motion for directed verdict is denied." (R. 248)

After being fully advised of his right to testify or not, Jackson personally elected to remain silent and did not testify in his own defense. (R. 249-50)

Jackson's defense was essentially one of mistaken identification. (R. 88, 278-83)

Following closing arguments, the jury retired to deliberate at 3:41 p.m. (R. 291)

The jury subsequently returned with the following verdict: "We, the jury, find the defendant guilty as charged." (R. 293)

A poll of the jury reflected the verdict was unanimous. (R. 293)

Sentencing was meted out immediately, twenty-five (25) years in the custody of the MDOC. (R. 294-95)

On May 23, 2006, Jackson filed his "Motion For Judgment Notwithstanding a Verdict, or in the alternative, Motion for a New Trial." (C. P. at 40-42)

In an order signed March 28, 2007, the motion for a new trial, *et cetera,* was overruled. (C.P. at 43)

On August 21, 2007, Jackson's motion for an out-of-time appeal was granted by Judge Yerger. (C.P. at 56)

Robert Shuler Smith, formerly a practicing attorney in Jackson and presently the District Attorney for Hinds County, represented Jackson very effectively during the trial of this cause.

Justin T. Cook, an attorney with the Mississippi Office of Indigent Appeals, has been substituted on appeal. His representation has been equally effective.

SUMMARY OF THE ARGUMENT

Claudia Moncure was struck from the venire because of her 12th grade educational level. (R. 101)

Denise Brown was struck because of inattentiveness and hair dyed red. (R. 101-02)

Florese Wilson was struck because she was a teacher at a school maintained by a religious body. (R. 102)

Melinda Dixon was struck because of her 12th grade educational level and the fact she had voted not guilty in a criminal trial. (R. 70-71, 103)

Judge Yerger, on the record, found as a fact and concluded as a matter of law the prosecution had given race-neutral reasons for striking peremptorily the four (4) female African American

veniremen.

He found as a fact and concluded as a matter of law the reasons expressed by the prosecution were race-neutral and that Jackson had failed to sustain his burden of showing the race-neutral explanations given by the prosecution were merely a pretext for racial discrimination. (R. 112, 113-14, 122)

Put another way, the circuit judge found as a fact and concluded as a matter of law the prosecution was not guilty of purposeful discrimination.

These findings made by the circuit judge were neither clearly erroneous, manifestly wrong, nor against the overwhelming weight of the evidence. **Avant v. State,** *supra*, 896 So.2d 379 (¶5) (Ct.App.Miss. 2005); **Johnson v. State,** 792 So.2d 253, 256-57 (Miss. 2001); **Manning v. State,** 765 So.2d 516, 519 (Miss. 2000). Rather, they were supported by substantial and credible evidence and are entitled to great deference by a reviewing court. **Caston v. State,** 823 So.2d 473 (Miss. 2002); **Thomas v. State,** 818 So.2d 335 (Miss. 2002), reh denied; **Avant v. State,** *supra.*

ARGUMENT

THE TRIAL JUDGE FOUND AS A FACT AND CONCLUDED AS A MATTER OF LAW THE PROSECUTOR GAVE VIABLE RACE-NEUTRAL REASONS FOR STRIKING PEREMPTORILY FOUR (4) AFRICAN AMERICAN FEMALES.

THE FACT-FINDING BY THE CIRCUIT JUDGE WAS NEITHER CLEARLY ERRONEOUS, MANIFESTLY WRONG, NOR AGAINST THE WEIGHT OF THE EVIDENCE. NO ABUSE OF JUDICIAL DISCRETION HAS BEEN DEMONSTRATED.

First, some fast facts gleaned straight from the record.

The defendant is a member of the black race.

At least eight (8) of the twelve (12) peremptory strikes allotted to the State were exercised

against African Americans. (R. 99-100) Four (4) of the eight (8) challenges were used to strike four (4) African American females. (R. 98-99, 101-04)

A breakdown by race of the first twenty-three (23) veniremen from which the jury was selected reflects that fifteen (15) were black and eight (8) were white. (R. 99-100)

Of the twelve (12) veniremen accepted by the State and tendered to the defense, five (5) of the twelve (12) - 42% - were black. (R. 100, 117)

Sherry Ann Garner and Mary G. Anderson, both black females, were accepted by the State. (R. 102) Also accepted were John Alford, a black male and Belinda Williams, a black female. (R. 103)

The racial composition of the jury selected to try this case was " . . . five (5) whites and seven (7) blacks." (R. 124)

The race of the two alternate jurors is not reflected by the record. (R. 125)

The State's S-1 challenge was used to strike Claudia Moncure; S-2 was exercised against Denise Brown, S-3 against Florese Wilson, and S-6 reached Melinda Dixon. (R. 98-99)

Defense counsel invited the State to proffer its reasons for striking all black jurors (R. 99) and suggested that " . . . . it just raises a *prima facie* issue." (R. 100)

Judge Yerger found that a *prima facie* case of purposeful discrimination was "borderline" and "marginal." Nevertheless, he required the State to give its race-neutral reasons for striking the eight (8) jurors.

Our only concern here, of course, is with the strikes made against Moncure (S-1), Brown (S-2), Wilson (S-3), and Dixon (S-6). Jackson does not complain about gender discrimination. Rather, the target of his appellate complaint is purposeful discrimination based upon race. He argues "[t]he trial court erred in denying defense counsel's *Batson* challenges with respect to four (4)

[female] jurors: Claudia Moncure, Melinda Dixon, Florese Wilson, and Denise Brown." (Brief of the Appellant at 4)

Jackson contends, and vigorously so, the reasons given by the prosecution were merely a pretext for wanting to purposely discriminate against and eliminate African Americans from the jury box. He claims the trial judge committed reversible error when he accepted as race-neutral the reasons proffered by the State for excluding the four (4) black females. (Brief of the Appellant at 4)

We respectfully argue at the outset that a final jury composed of five (5) whites and seven (7) blacks is hardly indicative of purposeful discrimination in jury selection and detracts from any suggestion there existed a racially discriminatory motive underlying the State's articulated reasons. Obviously, the racial composition of the jury selected to try the defendant's case is a legitimate part of the "facts and other relevant circumstances" requiring scrutiny by **Batson**. *See* **Batson**, 90 L.Ed.2d 69, 87-88.

In ruling upon the credibility and ultimate validity of the race-neutral reasons given by the prosecutor, Judge Yerger, in each instance, articulated specific findings which must be given great deference by a reviewing court.

As an initial matter, we invite the Court's attention to the fairly recent case of **Avant v. State,** *supra*, 896 So.2d 379 (¶5) (Ct.App.Miss. 2005), where we find the following language:

> We are limited in our review of the trial court's decision accepting as race-neutral the explanations given by the State for striking particular veniremen in the face of a *Batson* challenge.
>
> We give great deference to the trial court's findings of whether or not a peremptory challenge was race-neutral .... Such deference is necessary because finding that a striking party engaged in discrimination is largely a factual

> finding and thus should be accorded appropriate deference on appeal . . . . . Indeed, we will not overrule a trial court on a *Batson* ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence . . . .
>
> *Lynch v. State,* 877 So.2d 1254 (¶46) (Miss. 2004) (quoting *Walker v. State,* 815 So.2d 1209, 1214 (¶10) (Miss. 2002)). "The trial judge acts as finder of fact when a *Batson* issue arises." *Id.* at (¶47) (citing *Walker,* 815 So.2d at 1215). "The race neutral explanations must be viewed in the light most favorable to the trial court's findings." *Id.* " '[A]ny reason which is not facially violative of equal protection will suffice . . . .' " *Lynch,* 877 So.2d at 1271 (¶49) quoting *Randall v. State,* 716 So.2d 584, 588 (¶16) (Miss. 1998)).

As stated previously, the specific targets of the prosecution's four (4) peremptory strikes complained about on appeal were Claudia Moncure (S-1); Denise Brown (S-2); Florese Wilson (S-3) and Melinda Dixon (S-6). (R. 98-99) Insofar as we can tell, the State only exercised ten (10) of its twelve (12) allotted strikes. (R. 99-124)

We concur with Johnson the record is somewhat ambiguous with respect to whether or not a *prima facie* case was established by the defendant. (Brief of the Appellant at 7)

No matter.

Mr. Miles, the prosecutor, proffered his race-neutral reasons for striking the eight (8) African American veniremen. (R. 101-111) Therefore, whether Johnson made a *prima facie* showing of purposeful discrimination is immaterial. **Golden v. State,** *supra,* No. 2005-KA-001110-COA (¶15) decided February 5, 2008 [Not Yet Reported], citing **Burnett v. Fulton,** 854 So.2d 1010 (¶9) (Miss. 2003).

Johnson suggests the State's explanations for four (4) of its peremptory challenges used to strike African American females did not meet the race-neutral requirements contained in

Snow v. State, 800 So.2d 472, 481 (Miss. 2000); **Taylor v. State,** 733 So.2d 251, 258 (Miss. 1999); **Collins v. State,** 691 So.2d 918, 926 (Miss. 1997) and **Griffin v. State,** 607 So.2d 1197, 1203 (Miss. 1992).

We contend, on the other hand, the reasons given by Mr. Miles, the assistant district attorney, were sufficiently race-neutral, and the trial judge made an on-the-record finding of fact and concluded as a matter of law the reasons passed muster under the **Batson** criteria.

Judge Yerger's determinations and findings of fact, based largely upon credibility, were neither clearly erroneous, manifestly wrong nor against the overwhelming weight of the evidence; rather, they were supported by substantial and credible evidence and are entitled to great deference by a reviewing court. **Caston v. State,** *supra*, 823 So.2d 473 (Miss. 2002); **Thomas v. State,** 818 So.2d 335 (Miss. 2002), reh denied; **Avant v. State,** *supra.*

" 'Great deference,' has been defined in the **Batson** context as insulating from appellate reversal any trial findings which are not clearly erroneous.' " **Hatten v. State,** 628 So.2d 294 (Miss. 1993). *See also* **Tyler v. State,** 911 So.2d 550, 553 (Ct.App.Miss. 2005).

We pause to examine each juror individually with particular attention to Judge Yerger's on-the-record factual determinations of the merits of the reasons cited by the State.

[1] Juror #2 - Claudia Moncure - S-1. (R. 98, 101)

> [BY PROSECUTOR MILES:] Claudia Moncure has a 12th grade education. It's our intent to put as well an educated jury together as we can. We have for the record - - and we can go down and name all 47 jurors' education if we need to, but that's one of the lower educated people on this jury. Nothing against Ms. Moncure, but she does not - - her - - she has a 12th grade education. She is a black female, and she was S-1. (R. 101)

[2] Juror Denise Brown - S-2. (R. 101-02)

[BY PROSECUTOR MILES:] S-2, Denise Brown, she was inattentive, what I determined to be inattentive. One of the race neutral reasons - - from what I understood, race neutral reasons have to be mutable. In other words, they have to be able to be changed.

One of the things I noticed about Denise Brown is that she had dyed her hair red. A race neutral reason is for males if they have a beard or not. I think that's also a race neutral reason whether she has colored her hair or not. (R. 101-02)

[3] Juror Florese Wilson - S-3. (R. 102)

[BY PROSECUTOR MILES: Florese Wilson is another black juror, that is S-3, would be S-3. She is a teacher at St. Peter's Academy, which is a parochial school. And we think that because she's a teacher at a parochial school that she would be potentially more lenient to the defendant because of that. (R. 102)

[4] Juror Melinda Dixon - S-6. (R. 103)

[BY PROSECUTOR MILES] * * * We exercised S-6 on Melinda Dixon which is a black female. She voted not guilty in a criminal trial. She also has a 12th grade education, which is in comparison not - - is not on the high end of education level in this venire. (R. 103)

We summarize.

Claudia Moncure was struck from the venire because of her 12th grade educational level. (R. 101)

The prosecutor expressed his desire to have a well educated jury, and Moncure was one of the least educated on the venire. (R. 101)

Denise Brown was struck because of inattentiveness and hair dyed red. (R. 101-02)

Judge Yerger's observations that Ms Brown's appearance "was a little different" and that the prosecution might feel she was "out of sync with society" were reasonable. After all,

how red was red?

Florese Wilson was struck because she was a teacher at a school maintained by a religious body. (R. 102)

The prosecutor felt that a teacher at a church school had the potential of generating more sympathy for a 30-year-old defendant than a non-teacher in a secular environment. This was reasonable and race-neutral.

Melinda Dixon was struck because of her 12th grade educational level and the fact she had voted not guilty in a criminal trial. (R. 70-71, 103)

This race-neutral reason was consistent with the reason given for the challenge to Moncure who also had a 12th grade education.

But in addition to this, Dixon, as well as several other members of the venire, was asked about prior jury service. (R. 66-76) Having voted not guilty in a criminal trial, Dixon was fair game for a race-neutral challenge. *See* **Jackson v. State,** 962 So.2d 649 (Ct.App.Miss. 2007), reh denied, cert denied 962 So.2d 38 (2007) [Prosecutor's reason for striking black prospective juror that she had voted not guilty on another criminal case was sufficiently race-neutral to rebut any presumption of race discrimination under **Batson**.]

Johnson attempts to manufacture disparate treatment as an indicia of pretext by pointing to incomplete voir dire. His assertion that ". . . the State should have sought to clarify the response given by Ms. Misurelli" and that "the failure to completely voir dire Ms. Misurelli indicates a pretextual striking of Ms. Dixon" (R. 71-72), is so farfetched it deserves no response. Likewise with respect to Johnson's other attempts to manufacture "disparate treatment" as indicia of pretext. (Brief of the Appellant at 13-14)

Following limited rebuttal proffered by defense counsel and brief arguments by the

litigants (R.103-111), Judge Yerger made the following observations on the record:

> BY THE COURT: Well, the Court has to look at this in overall context. Standing alone the 12th grade education of Claudia Moncure as the reason does raise a question by the Court. That's S-1. S-2, inattentive, hair dyed red, being inattentive, the Court doesn't know how inattentive she was or what the situation was.
>
> When a lawyer sees or notices that one of the jurors is inattentive, that lawyer should come to the bench and advise the Court to be aware of that juror being inattentive so the Court itself can look and see in its opinion whether that juror is inattentive, or just the way that they may be looking from right to left or above or below or whatever.
>
> But anyway, the Court finds it hard to make a determination when there's an issue raised about somebody being inattentive or not. But in any event, the dyed hair red is unusual, but the Court doesn't have any problem with that particular reason as to S-2.
>
> S-3. teacher at St. Peter's Academy, some - - well, it may or may not - - well, at least in the mind of the D. A. that they just don't want somebody who is a teacher, might feel more sympathetic presumably with the defendant, a fairly young defendant, but in any event with the defendant. So that's probably race neutral.
>
> S-6 voted not guilty in a criminal trial. Certainly that's a valid reason in the opinion of the Court. That's Melinda Dixon. * * * (R. 111-12)
>
> * * * * * *
>
> So even if S-1 is somewhat borderline, taken into context with all of these others, which in the opinion of the Court are race neutral, and the advice of the State's attorney that many of them - - of the other jurors educated, certainly the State would like as much education as possible.
>
> So for all of these reasons the Court denies the objections of being racially prejudicial in view of the reasons given by the State. All right. (R. 113-14)

Additional observations were made by Judge Yerger after the defendant proffered his own race-neutral reasons for striking white jurors. We quote:

> BY THE COURT: Number three, D-3, not complete eye contact. The Court doesn't believe that is acceptable. And the Court is going to - - the Court notes a difference with the S-2. That was just one of the reasons. And the Court would not have accepted that until there was a reference to the way she dyed her hair red, and I guess gave some idea to the State that she was out of sync with society or something. And of course, a lot of women do it, but I'm not saying it was a right or wrong conclusion, but the State evidently felt that way, that she was a little different. (R. 122)

See Appendix I attached to **Lockett v. State,** 517 So.2d 1346, 1356 (Miss. 1987), where one of the reasons found to be race-neutral by an appellate court in Minnesota was the fact the juror "slouched, wore gold chains, rings and watch."

Hair dyed red is no different. It can be equated with "body language" found to be acceptable in **Baldwin v. State,** 784 So.2d 148, 149 (Miss. 2001).

Judge Yerger found each of these reasons to be race-neutral and found as a fact and concluded as a matter of law the prosecutor's explanations were not a pretext for discrimination. In short, there was no *Batson* violation.

We concur.

Comparing favorably to the facts at bar is a similar **Batson** scenario found in **Harris v. State,** 901 So.2d 1277, 1281-82 (Ct.App.Miss. 2004), reh denied, cert denied, where we find this language:

> The state exercised five out of six peremptory strikes to exclude African American jurors, after which Harris raised a *Batson* objection The circuit court ruled that a *prima facie* case of discrimination had been established, and directed the state to provide race-neutral reasons for the peremptory strikes. The reasons offered by the State were (1) Juror 14 had never been

> gainfully employed and was not a student, and was believed to have concealed her knowledge of the defendant, (2) Juror 17 had grown up with the defendant, had a family member involved in a crime, and was believed to be mentally slow, (3) Juror 30 was unemployed and believed to be an alcoholic, and (4) Juror 24 responded to no questions. The circuit court accepted the State's reasons as race neutral. Upon appeal, Harris does not contend the circuit court erred in any procedural way, but contends that the race neutral reasons accepted by the court were "speculative or illusory."
>
> The supreme court has stated a number of reasons a challenge may be seen as race-neutral.
>
> > "Included among those reasons: age, **demeanor**, marital status, single with children, prosecutor distrusted juror, **educational background**, employment history, criminal record, young and single, friend charged with crime, unemployed with no roots in community, posture and demeanor indicated juror was hostile to being in court, juror was late, short term employment."
> >
> > *Davis v. State,* 660 So.2d 1228, 1242 (Miss. 1995).
>
> The reasons given by the State would appear to fall within the above noted group. Findings of fact concerning whether the stated reasons are race neutral are given great deference and will not be overturned unless clearly erroneous or against the overwhelming weight of the evidence. Tanner v. State, 764 So.2d 385, 393 (¶14) (Miss. 2000) **Among the facts to be considered is the service of four African Americans on this jury.** Under the facts of this case, we can not say that the trial court abused its discretion. [emphasis ours]

Obviously, "demeanor," and "educational background" come into play here with respect to Brown (red hair) and Moncure and Dixon (12th grade education.)

The evaluation of Johnson's claims involves a three step process.

(1) The opponent of the peremptory strike must make out a *prima facie* showing the

State has exercised peremptory challenges on the basis of race or gender.

(2) If the requisite showing is made, the burden shifts to the prosecution to articulate race and gender-neutral reasons or explanations for striking the juror in question.

(3) The trial court must next determine the persuasiveness of the race and gender-neutral reason and, in the end, whether the defendant has carried his burden of proving purposeful or intentional discrimination. **Puckett v. State,** 788 So.2d 752, 758 (2001).

Step (1). In the case at bar, the State offered explanations for its challenges. Therefore, whether Johnson made a *prima facie* showing of purposeful discrimination is immaterial. **Golden v. State,** *supra,* No. 2005-KA-001110-COA (¶15) decided February 5, 2008 [Not Yet Reported], citing **Burnett v. Fulton,** 854 So.2d 1010 (¶9) (Miss. 2003).

Step (2). The prosecution articulated its reasons for striking the four (4) jurors in question.

"The sole inquiry under step two is whether the explanation[s] given [were] facially violative of equal protection." **Puckett v. State,** *supra,* 788 So.2d at 760.

At this point in the process, " . . . the trial judge should accept the reason if it appears valid on it face. [citation omitted] The state's reason shall be deemed facially valid unless the prosecutor's explanation embodies inherent discriminatory intent." **Thorson v. State,** 721 So.2d 590, 593 (Miss. 1998), citing **Hernandez v. New York,** 500 U.S. 352, 367-68, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

In evaluating the trial court's acceptance of Mr. Miles's race-neutral reasons, the following language found in the federal case of **United States v. Williams,** 264 F.3d 561 (5th Cir. 2001), should be kept in mind:

> The second step in the *Batson* burden shifting analysis requires that the government provide a race-neutral reason for the strike. *Hernandez*, 500 U.S. at 360, 111 S.Ct. 1859. We analyze the Government's proffered racially neutral explanation as a legal issue *de novo*. *Hernandez v. New York*, 500 U.S. 352, 364-65, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *United States v. Bentley-Smith*, 2 F.3d 1368 (5th Cir. 1993). "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360, 111 S.Ct. 1859. **At the second stage, the explanation need not be persuasive, nor even plausible, but only race-neutral and honest.** *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995); *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1999). * * * Thus, our inquiry proceeds to the third step and the ultimate question of whether intentional discrimination motivated the government's peremptory strikes. [emphasis ours]

See also **Randall v. State,** 716 So.2d 584, 588 (Miss. 1998), quoting **Purkett,** 514 U.S. at 768, 115 S.Ct. at 1771.

In **Gibson v. State,** 731 So.2d 1087, 1096 (Miss. 1998), this Court said: "It [the reason given] need not be even 'minimally persuasive' and may indeed be even 'silly or superstitious.' *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769."

Thus, the reasons given by Mr. Miles pass step 2 with flying colors.

The next step of the three step analysis is to determine whether or not the State's explanation was a pretext for discrimination. **Randolph v. State,** 852 So.2d 547, 561 (Miss. 2002); **Puckett v. State,** *supra*, 788 So.2d 752, 758-59, 761-62 (Miss. 2001).

Step (3). Did the trial judge abuse his judicial discretion when he found as a fact these facially neutral explanations were persuasive and non-pretextual under step 3?

We respectfully submit he did not.

Given the totality of the relevant facts and circumstances, Judge Yerger's conclusion,

implicit if not explicit, that Johnson had failed to carry his overall burden of demonstrating intentional or purposeful discrimination was neither clearly erroneous, manifestly wrong, nor against the overwhelming weight of the evidence.

Scrutiny of the "facts and other relevant circumstances" (*Batson*, 90 L.Ed.2d 69, 87-88), leads to the conclusion that Judge Yerger was neither clearly erroneous nor manifestly wrong in concluding the prosecutor's reasons were race-neutral and were not a pretext for purposeful or intentional discrimination. We respectfully submit the record reflects that Johnson failed to carry his overall burden of establishing intentional discrimination.

This is especially true where, as here, the racial composition of the jury trying this case was five (5) white jurors and seven (7) black jurors. Johnson can hardly complain he was not tried and found guilty by a jury of his peers.

In the final analysis, no abuse of judicial discretion in jury selection has been demonstrated by Johnson who has, with minimal persuasiveness, hyper-analyzed the jury selection process.

Judge Yerger made sufficiently "clear and specific" rulings as to the State's use of its peremptory strikes of black jurors. **Hatten v. State,** *supra*, 628 So.2d 294 (Miss. 1993).

We are aware that a trial judge should make a clear and reasonably specific explanation for his ruling on a **Batson** related claim. **Edwards v. State,** 823 So.2d 1223 (Ct.App.Miss. 2002). The trial judge should " . . . make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors." **Hatten v. State,** *supra,* 628 So.2d 294, 298 (Miss. 1993).

He did. (R. 111-12, 122)

Judge Yerger's remarks and findings of fact satisfy the requirement found in **Hatten**

v. State, *supra*, that the trial judge make on-the-record findings. His resolution of the *Batson* issue was clearly within the range of discretion afforded the trial court in matters such as these.

A defendant is allowed to rebut the reasons which have been offered by the prosecution as race-neutral during a **Batson** hearing. **Walker v. State,** 815 So.2d 1209 (Miss. 2002). Johnson was given that opportunity in the case at bar. (R. 103-111) He claimed he did not hear any race-neutral reasons. (R. 103-04)

There was some rebuttal from the defense on each of the reasons given by the prosecutor. (R. 103-14) Judge Yerger did not err in finding it unpersuasive and rejecting Johnson's claim the State's reasons were pretextual in nature. (Brief of the Appellant at 10-14)

Judge Yerger did not abuse his judicial discretion in finding the defendant failed to successfully rebut the reasons offered by the prosecution. In the final analysis, the four (4) female jurors in question were challenged, not because of their race but for valid race-neutral reasons that had nothing to do with the color of their skin.

In **Batson v. Kentucky,** 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 87-88 (1986), the Supreme Court of the United States held that in order to make a *prima facie* showing of purposeful discrimination in the selection of a petit jury, a defendant must establish the following:

1) that he is a member of a cognizable racial group;

2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race;

3) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. **Randolph v. State,** 852 So.2d 547, 561 (Miss. 2002). *See also* **Caston v. State,** *supra*,

823 So.2d 473 (Miss. 2002), reh denied; **Thomas v. State,** 818 So.2d 335 (Miss. 2002), reh denied; **Walker v. State,** 740 So.2d 873 (Miss. 1999); **Fleming v. State,** 732 So.2d 172 (Miss. 1999); **Gibson v. State,** 731 So.2d 1087 (Miss. 1998); **Magee v. State,** 720 So.2d 186 (Miss. 1998); **Duplantis v. State,** 644 So.2d 1235 (Miss. 1994); **Benson v. State,** 551 So.2d 188 (Miss. 1989); **Conerly v. State,** 544 So.2d 1370 (Miss. 1989); **Wheeler v. State,** 536 So.2d 1347 (Miss. 1988); **Taylor v. State,** 524 So.2d 565 (Miss. 1988); **Lockett v. State,** 517 So.2d 1346 (Miss. 1987).

The **Batson** rational has also been extended to gender discrimination. **Bounds v. State,** 688 So.2d 1362 (Miss. 1997); **Jackson v. State,** 684 So.2d 1213 (Miss. 1996). *Cf.* **Powers v. Ohio,** 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) [White criminal defendant has standing to raise objection to prosecutor's race-based exercise of peremptory challenges to exclude black prospective jurors.]

It is only after the defendant (or the State) presents a *prima facie* showing of a **Batson** violation that the burden " . . . shifts to the State (or the defendant) to come forward with a race-neutral explanation for challenging the jurors." **Mack v. State,** 650 So.2d 1289, 1297 (Miss. 1994).

"[T]he trial court has no authority to initiate a *Batson* hearing without a *prima facie* showing of discrimination." **Hughes v. State,** 735 So.2d 238, 250 (Miss. 1999).

Stated somewhat differently, before the trial judge is required to conduct a *Batson* hearing, it must be shown that a *prima facie* case of purposeful discrimination exists. **Puckett v. State,** 737 So.2d 322 (Miss. 1999). "[I]t would seem appropriate to examine the *prima facie* case element prior to examining the reasons proffered by the State." **Hughes v. State,** *supra,*

735 So.2d at 250.

In **Collins v. State,** 691 So.2d 918, 926 (Miss. 1997), we find the following language applicable here:

> The "pivotal inquiry then is whether the State was able to present a race-neutral explanation for each of the peremptory strikes." *Griffin v. State,* 607 So.2d 1197, 1202 (Miss. 1992). **Determining whether there lies a racially discriminatory motive under the State's articulated reasons is left to the sole discretion of the trial judge.** *Lockett v. State,* 517 So.2d 1346, 1350 (Miss. 1987) Moreover, **"a trial judge's factual findings relative to a prosecutor's use of peremptory challenges on minority persons are to be accorded great deference and will not be reversed unless they appear to be clearly erroneous or against the overwhelming weight of the evidence."** *Id.* At 1350. [emphasis ours]

See also **Taylor v. State,** 733 So.2d 251, 258 (Miss. 1999).

When a **Batson** challenge is made, the trial judge sits as finder of fact. **Robinson v. State**, 726 So.2d 189 (Ct.App. Miss. 1998). Judge Yerger found as a fact and concluded as a matter of law the prosecutor's reasons were race-neutral and in compliance with the **Batson** decision.

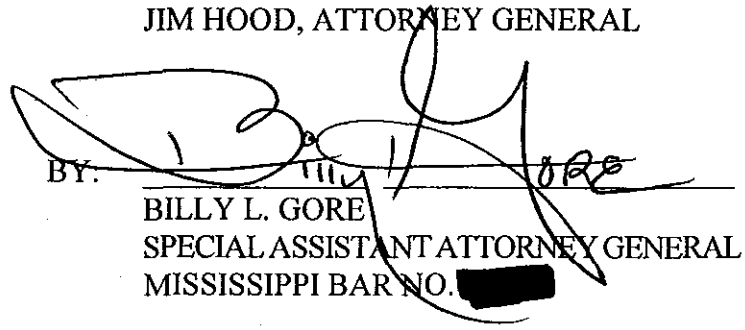
In the final analysis, the factual findings made by the circuit judge who saw with his own eyes, heard with his own ears, and placed his observations in the record, were not clearly erroneous; rather, his findings were supported by both substantial and credible evidence. No abuse of judicial discretion has been demonstrated by Johnson.

CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction of armed robbery, together with the twenty-five (25) year sentence imposed by the trial judge, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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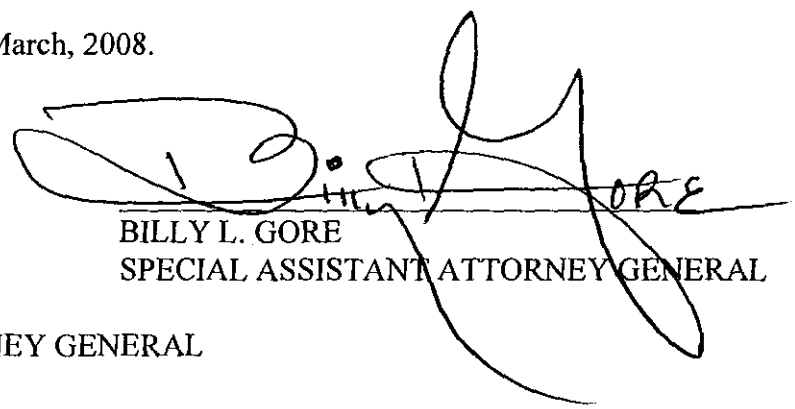
This the 7th day of March, 2008.



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