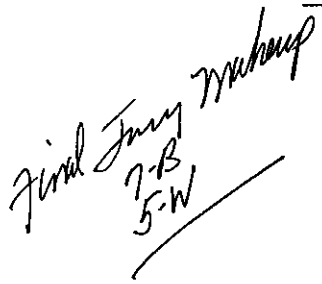
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY JACKSON — APPELLANT

V. — NO. 2007-KA-1782-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT



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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY JACKSON **APPELLANT**

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

STATE OF MISSISSIPPI **APPELLEE**

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. Jeffrey Jackson, Appellant
3. Honorable Eleanor Faye Peterson, District Attorney
4. Honorable W. Swan Yerger, Circuit Court Judge

This the 6 day of FEB, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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BRIEF OF THE APPELLANT

STATEMENT OF ISSUES

ISSUE ONE:
WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S *BATSON* CHALLENGE REGARDING THE STATE'S UNCONSTITUTIONAL STRIKING OF AFRICAN-AMERICAN VENIREPERSONS AND FAILURE TO PROVIDE ADEQUATE RACE-NEUTRAL JUSTIFICATION.

STATEMENT OF INCARCERATION

Jeffrey Jackson, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2004)***.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the First Judicial District of Hinds County, Mississippi, and a judgment of conviction for armed robbery against Jeffrey Jackson a/k/a Jeffery Jackson following a jury trial on May 8-9, 2006, Honorable W. Swan Yerger, Circuit Judge, presiding. Mr. Jackson was subsequently sentenced to twenty-five (25) years in the custody of the Mississippi Department of Corrections.

FACTS

According to testimony at trial, on the morning of March 14, 2005, police were called to Hal and Mal's restaurant on Commerce Street in Jackson, Mississippi. (T. 145). Upon arriving at the restaurant, police spoke with Hal White (hereinafter referred to as "Mr. White"), co-owner of the restaurant. (T. 145). Mr. White advised them that a black male had just robbed his business. (T. 145).

Mr. White testified that around 8:30 that morning, an individual entered the premises, asked for an employment application, and, upon receiving one, pulled out a gun and demanded money. (T. 233). Mr. White opened the safe, and emptied its contents into a garbage bag held by the subject. (T. 233). Upon receiving this money, the subject ordered Mr. White and Zeta Piggot (hereinafter referred to as "Ms. Piggot", an employee of the restaurant, to lie on the ground. (T. 234). Mr. White acquiesced, but claimed that Ms. Piggot was too old to be lying down on the floor. (T. 234). The subject allowed Ms. Piggot to be seated at a chair and left the scene. (T. 234). Mr. White waited for a short time and notified the police of the robbery when he felt it was safe. (T. 234).

Two employees of the Mississippi Archives and History Department, located nearby, reported seeing an individual matching the description of the subject in the parking lot before the incident. (T. 203, T. 211-13). The two employees further testified that after the incident, they observed the same subject running down the hill towards his vehicle and driving off abruptly. (T. 207-08, T. 241).

When police arrived, the spoke with Mr. White and attempted to gather evidence. (T. 156). No suspect was determined at that time. Months later, Mr. White, upon reading the Clarion Ledger Newspaper, identified a man pictured in the paper, Jeffrey Jackson (hereinafter referred to as "Mr. Jackson"), as the individual who robbed him. (T. 239). Police investigated, presented a photographic lineup to Mr. White and Ms. Piggot and both were able to pick out Mr. Jackson. (T. 224, T. 240). Mr. Jackson was subsequently arrested and charged with armed robbery. (T. 166).

During jury selection, the State used its first eight peremptory challenges to strike eight African-American members of the venire.[1] (T. 99). The defense objected, making a ***Batson*** challenge, asking the State to provide race-neutral reasons for striking the members of the venire. (T. 99). The State provided its reasons, and upon hearing the State's reasoning, the trial court expounded on the explanation and denied the defendant's objection. (T. 111-14). Eventually, a jury was empaneled and the action proceeded to trial.

After deliberation by the jury, Mr. Jackson was subsequently convicted of armed robbery. The trial court then handed down a sentence of twenty-five (25) years in the custody

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[1] There will be a more lengthy analysis of the ***Batson*** procedure *infra.*

of the department of corrections (C.P. 39, RE. 14). On May 23, 2006, the defendant filed a Motion for New Trial and J.N.O.V., claiming that the verdict was contrary to law, contrary to the overwhelming weight of the evidence, the trial court erred in admitting into evidence a suggestive photo lineup into evidence without authenticating a proper chain of custody, and that the trial court erred in overruling defense's ***Batson*** challenges. (C.P. 40-41, RE 21-23). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 58, RE 20).

SUMMARY OF THE ARGUMENT

During jury selection, the State used its first eight peremptory challenges to strike eight African-American members of the venire. After a ***Batson*** challenge by defense counsel, the State proffered its race-neutral reasons for striking the eight jurors. Upon hearing the State's reasoning, the trial court expounded on the explanation and denied defense counsel's objection under ***Batson***. The trial court erred in denying defense counsel's ***Batson*** challenges with respect to four (4) jurors: Claudia Moncure, Melinda Dixon, Florese Wilson, and Denise Brown.

ARGUMENT

ISSUE ONE: 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.

The Fourteenth Amendment of United States Constitution provides in pertinent part that "No State... [shall] deny to any person within its jurisdiction the equal protection of the laws." **U.S. Const. amend. XIV § 1.**

In ***Batson v. Kentucky***, the United States Supreme Court ruled that the Equal Protection Clause "prohibits all forms of purposeful racial discrimination in selection of jurors." ***Batson v. Kentucky***, 476 U.S. 79, 88 (1986). This prohibition is more than a simple protection of constitutional rights. Rather, the ***Batson*** court saw the "exclusion of black citizens from service as jurors [constituting] a primary example of the evil the Fourteenth Amendment was designed to cure." ***Id.***

In order to make a claim under ***Batson***, the defendant must make a *prima facie* showing sufficient to raise an inference that the peremptory strikes used by the State were exercised to exclude jurors on the basis of race. ***McFarland v. State***, 707 So. 2d 166, 171 (Miss. 1997)(citing ***Batson***, 476 U.S. at 96-97).

After the defendant has made a *prima facie* showing, the burden then shifts to the State to provide a race-neutral explanation for its challenges. ***Id.*** After the prosecutor has provided its reasons, defense counsel is given the opportunity to rebut the reasons provided by the State. Finally, the trial court must make a factual finding to determine whether the prosecution engaged in purposeful discrimination. *See* ***Berry v. State***, 802 So. 2d 1033, 1037-38 (Miss. 2001).

> "[The Mississippi Supreme 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." **Flowers v. State**, 947 So. 2d 910, 917 (Miss. 2007)(citations omitted.)

The trial court must make this determination in light of all relevant circumstances, essentially assessing whether the prosecutor's proffered reasons were credible under the circumstances. ***Miller-El v. Cockrell,*** 537 U.S. 322, 339 (2003). Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are" ***Id.***

In ***Miller-El v. Dretke***, the United States Supreme Court recently emphasized,

> "[A prosecutor must] stand or fall on the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." ***Miller-El v. Dretke***, 125 S. Ct. 2317, 2332 (2005) (emphasis added).

I. Standard of Review

"[A] trial court's determination of whether a showing of racial discrimination has been made will not be reversed unless it is 'clearly, erroneous, or against the overwhelming weight of the evidence.'" ***Johnson v. State***, 792 So. 2d 253, 256-57 (Miss. 2001)(citing ***Stewart v. State***, 662 So. 2d 552, 558 (Miss.1995)). The Court "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." ***Manning v. State***, 765 So. 2d 516, 519 (Miss. 2000)(citing ***Thorson v. State***, 721 So. 2d 590, 593 (Miss.1998)).

ii. There was a prima facie showing sufficient to raise an inference that the State used its peremptory challenges to exclude jurors on the basis of race.

It is ambiguous as to the record of whether the trial court made a ruling as to whether there was a *prima facie* case established by defense counsel. The trial court concluded that it was "borderline" and "marginal" despite the Hinds County District Attorney's office using all of its first eight challenges against African-Americans. (T. 100-01). After that conclusion, the State proceeded to give its race neutral justifications for its challenges.

"However, where the trial court does not explicitly rule on whether the defendant established a prima facie case under ***Batson*** but nevertheless requires the [opposing party] to provide race-neutral reasons for its challenges and the [opposing party] provides reasons for its challenges the issue of whether the [challenging party] established a prima facie case is moot." ***Perry v. State***, 949 So. 2d 764, 767 (Miss. Ct. App. 2006)(citations omitted).

Because, however, the strength of the *prima facie* case is relevant to the overall assessment of a ***Batson*** challenge, an in-depth analysis of the *prima facie* case in this appeal before this Honorable Court is necessary.

In order to establish a prima facie case of discrimination in the exercise of peremptory challenges, a party must demonstrate:

> "(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) and that the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose

of striking minorities." ***Walker v. State***, 740 So. 2d 873, 880 (Miss. 1999)(quoting ***Batson v. Kentucky***, 476 U.S. 79, 80(1986)).[2]

In the case at bar, the fact "[t]hat the prosecutor accepted other black persons as jurors is no defense to a ***Batson*** claim." ***Chisolm v. State***, 529 So. 2d 635, 637 (Miss.1988)(quoting ***Batson v. Kentucky***, 476 U.S. 79, 94-96, ns. 18 & 19 (1986)). *See also* ***Conerly v. State***, 544 So. 2d 1370, 1372 (Miss.1989). Indeed, "A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions." ***Id.***; *See also* ***McGee v. State***, 953 So. 2d 211, 214 (Miss. 2007).

In ***McGee***, Justice Dickinson, in a specially concurring opinion, stated that "the United States Supreme Court made it crystal clear that to prevail on a '***Batson*** challenge,' a defendant is not required to demonstrate a pattern or multiple instances of discrimination." ***McGee,*** 953 So. 2d at 217-18 (Dickinson, J., specially concurring). "[T]his Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case." ***Id.***

The fact that there are African-Americans on the jury panel tendered to the defense does not relieve the State from the ***Batson*** issue because ***Batson*** "is concerned exclusively with discriminatory intent on the part of the lawyer against

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[2] This test is somewhat outdated in that it has been held that the party opposing the use of the peremptory challenge is no longer required to show that he or she is a member of a cognizable racial group or that the juror and the party share the same race. ***Puckett v. State***, 737 So. 2d 322 (Miss.1999). However, the courts continue to quote these requirements to establish a prima facie case of discrimination. *See* ***Flowers v. State***, 947 So. 2d at 917.

whose peremptory strikes the objection is interposed." ***Johnson v. State***, 792 So. 2d 253, 256-57 (Miss. 2001)(citing ***Powers v. Ohio,*** 499 U.S. 400, 406 (1991); *See* ***Batson***, 476 U.S. 79, 93-94 (1986)).

In ***Walker v. State***, "[T]he prosecutor used seven out of nine peremptory challenges to exclude black persons. The final jury resulted in ten whites and two blacks. . . ." ***Walker v. State***, 740 So. 2d 873, 880 (Miss., 1999). The ***Walker*** Court determined "that an inference of racial discrimination was presented by Walker and that the lower court erred in failing to conduct a ***Batson*** hearing." ***Id.***

Furthermore, the United States Supreme Court has held that the evidence necessary to make a *prima facie* case can come from the pattern of the prosecutor's strikes, as well as from racially patterned differences in the questions posed by the State in voir dire. ***Cockrell*, 537 U.S. at 331-33.** The strength of the prima facie case of purposeful discrimination will influence the ***Batson*** inquiry. ***Sewell v. State***, 721 So. 2d 129, 136 (Miss. 1998); *See also* ***Mack v. State***, 650 So. 2d 1289, 1298 (Miss. 1994).

Of the state's eight initial peremptory challenges, all were used against African-American members of the venire. (T. 100).[3] Based on federal and Mississippi

[3] There is nothing in the record to indicate whether the State used its remaining peremptory challenges to strike African-Americans from the jury. It is still plausible, given the first eight strikes by the Hinds County District Attorney's office and the final make up of the jury, that S-9 and S-10 were used against African-Americans. Regardless, the use of all of the State's first eight strikes against African-American members of the venire is sufficient to establish a *prima facie* case of discrimination in the use of peremptory challenges on the part of the State.

case law, this fact plainly rises to the level of establishing a *prima facie* case of discriminatory strikes on the part of the State.

iii. The trial court erred in allowing the State to strike Claudia Moncure from the jury on the basis of her educational level.

The State exercised its first peremptory challenge on Claudia Moncure (hereinafter referred to as "Ms. Moncure"), an African-American female, giving her twelfth grade education as the race-neutral justification for the strike. (T. 101). When assessing whether the strike of Ms. Moncure was prejudicial, the trial court stated, "Standing alone the 12th grade education of Ms. Moncure as the reason does raise a question for the Court."(T. 111). However, the trial judge later concluded,

> "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 are 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." (T. 113-14)

In ***Flowers,*** the Mississippi Supreme Court concluded,

> "Though a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the State continues to exercise challenge after challenge upon members of a particular race." ***Flowers***, 947 So. 2d at 937.

In the case at bar, prosecutors used all of their first eight peremptory challenges to strike African-Members of the venire.

That fact, coupled with the reasoning from ***Flowers,*** should be used to assess the race-neutrality of all the strikes, even the ones given less credence by the trial court in its balancing of the relative merits of the race-neutral reasons proffered by the state.

Taking into consideration the strength of the *prima facie* case of discrimination on the part of the State when using its peremptory challenges, the reasons proffered by the State for striking Ms. Moncure stand on questionable grounds. The State's tenuous argument regarding Ms. Moncure's education level is significantly weakened by the its continual striking of African-American jurors from the venire.

One of the indicia of pretext is when a characteristic cited in a peremptory challenge has no relation to the facts of the case. ***Manning***, 765 So. 2d at 519. Allowing the State to use educational level as a blanket race-neutral reason for striking individuals is incompatible with the type of case that was being tried. There was no scientific evidence. There were no complex legal theories. There was no thorny expert testimony. This was simply a case involving eyewitness testimony.

Furthermore, a twelfth grade education involves and least some meritorious scholasticism. Ms Moncure was ably qualified to serve on this particular jury for this particular case.

Appellant concedes that there will be instances when an educated jury would be necessary to understand some facets of the State's case, but in such an instance as this, no such necessity exists. This merely intensifies substantiations that the Hinds County District Attorney's office was striking African-American members of the venire without proper race-neutral justifications.

iv. The trial court erred when it allowed the State to strike Melinda Dixon on the basis of her educational qualifications and the fact that she had previously voted not guilty in a criminal proceeding.

Melinda Dixon (hereinafter referred to as "Ms. Dixon"), an African-American female, was struck because she voted not-guilty in a criminal trial and because she had a twelfth grade education (T. 103). Without much consideration, the trial court simply concluded: "[Melinda Dixon] voted not guilty in a criminal trial. Certainly that's a valid reason in the opinion of the Court." (T. 112).

As noted *supra*, there are significant concerns with the State's purported race-neutral reason for striking jurors on the basis of education. The same considerations noted above are applicable in the case of Melinda Dixon, an African-American juror with identical educational status as Claudia Moncure.

The record is not clear on the response of Diane Misurelli (hereinafter "Ms. Misurelli"), another juror, who responded that she reached a guilty verdict in a trial in Michigan years before. (T. 72). The record is unclear however, with what happened regarding her serving on a jury in Hinds County.

The following discourse occurred during her voir dire:

"**BY THE STATE**: And in Hinds County, how far back was that, ma'am?

BY MS. MISURELLI: At least two years ago.

BY THE STATE: Okay, and was the jury reaching – did the –

BY MS. MISURELLI: No."

(T. 72).

The prosecutor then went on to voir dire another juror without any effort to clarify the response given by Ms. Misurelli. The response "No" could have referenced the jury being

unable to come to a verdict or a jury finding a criminal defendant not guilty. If a venire member's voting not guilty in a criminal trial is important enough to warrant striking someone from a jury, the State should have sought to clarify the response given by Ms. Misurelli.

As noted in ***Manning***, one indicia of pretext is disparate treatment, the presence of unchallenged jurors of the opposite race who share a characteristic given as the basis for the strike. ***Manning***, 765 So. 2d at 519. Because the State's voir dire was incomplete concerning the response given by Ms. Misurelli, it could be presumed that her "no" indicated that she voted not guilty in a criminal case. If so, then there would be disparate treatment between Ms. Misurelli, a juror not struck by the State on the basis of jury service and Melinda Dixon, a black juror struck by the State on the basis of her jury service.

Also noted in ***Manning*** is that another indicia for pretext is the failure to voir dire as to the characteristic cited. ***Id.*** Here, the Hinds County District Attorney's office did voir dire, but failed to fully voir dire Ms. Misurelli as to her previous history in serving on a jury trial. While the State may have voir dired Ms. Dixon fully regarding her jury experience, the failure to completely voir dire Ms. Misurelli indicates a pretextual striking of Ms. Dixon.

v. The trial court erred when it allowed the State to strike Florese Wilson from the jury because of her being a parochial school teacher.

The State exercised its third peremptory challenge on Florese Wilson (hereinafter "Ms. Wilson"), another African-American female, arguing that her teaching at a parochial school was a race neutral reason for striking the juror. (T. 102). The trial court accepted the State's proffered reason and concluded that the state "just [did not] want somebody who is

a teacher, [who] might feel more sympathetic presumably with the defendant, a fairly young defendant" (T. 112). The defendant, being born on August 27, 1972, was thirty-three (33) years old at the time of trial. (C.P. 39, RE 14).

The State's reasoning for striking Ms. Wilson from the jury was that she was a parochial school teacher, and, because of that, would be more sympathetic to the defendant. The trial court expounded on the State's proffered reason, stating that a parochial school teacher would be more likely to be sympathetic to a young defendant. The State provided no support for its proposition that a parochial school teacher would be more favorable to a criminal defendant. The only explanation and support for why such a teacher would be unfavorable to the State's case came from the trial court itself.

Assuming *argued*, that a parochial school teacher would be more likely to have sympathy for a young defendant, the appellant was fifteen years removed from high school age at the time of trial.

The appellant was thirty-three (33) years old at the time of trial, clearly not young by society's standards. Because the characteristic being cited for is unrelated to the facts of the case, there are strong indicia of discriminatory purpose in the striking of Ms. Wilson.

The trial court's error in allowing the State to strike Wilson is paralleled by the trial court's refusal to allow the defendant to strike Robert Sumrall (hereinafter "Mr. Sumrall") from the jury because he was employed with the State of Mississippi. The trial court's justification for restoring Mr. Sumrall to the jury panel was that striking on those grounds would excuse many prospective jurors in Hinds County. Furthermore, the Court reasoned

that without any further explanation by defense counsel, it could not find a sufficient race-neutral reason to excuse Mr. Sumrall.

However, in the case of Ms. Wilson, the trial court did not require the State to explain its proffer that a parochial school teacher would be more sympathetic to the defendant. Rather, the Court itself provided a reason, concluding that she would be more sympathetic because of the defendant's age.

This faulty reasoning by the trial court and the State, combined with the strong *prima facie* case show that the State's proffered race-neutral reason for striking Ms. Wilson from the jury was in violation of the Appellant's constitutional rights. The unrelated nature of the characteristic proffered by both the prosecution and trial court are strong indicia for the existence of prejudicial use of peremptory challenges.

Also, in order to be a teacher at a parochial school, one must be educated. The state consistently used education as its race-neutral justification for its peremptory challenge against African-American jurors; however, when the State was faced with African-American jurors with the education level it purportedly desired (see Denise Brown, *infra*), it maintained that there were other reasons warranting those individuals to be struck for the venire. This is further indication of the pretextual nature of the Hinds County District Attorney's office's peremptory challenges in the case at bar.

iv. The trial court erred when it allowed the State to strike Denise Brown on the basis of her being "inattentive" and having her hair dyed red.

The State's second peremptory strike was on Denise Brown (hereinafter "Ms. Brown"), another African-American female. The State argued that Ms. Brown was

"inattentive" and that she had her hair dyed red. The State remarked, "A race neutral reason is for males if they have a beard or not. I think that's also a neutral reason whether she has colored her hair or not." (T. 101-02). In assessing whether that State's proffered reason was race-neutral, the trial court concluded, "The dyed hair red is unusual, but the Court doesn't have any problem with that particular reason." (T. 112).

However, when the State challenged the peremptory strikes of the defense on *Batson* grounds, the trial judge did not allow the defense to strike a juror because of her lack of eye-contact with the defendant and defense counsel. The following dialogue between defense counsel and the trial court occurred:

> **BY THE COURT**: You could use that on almost any number of jurors. Will, I didn't – you know, he didn't look at me when I asked this question, or he didn't – you know, she didn't do this."
>
> BY ME. SMITH: Right. That's the same thing the State said when they said that someone else –
>
> **BY THE COURT**: I know it.
>
> BY ME. SMITH: Right.
>
> **BY THE COURT**: And I've got a problem with that and I may go back to it too. I'm very disappointed, frankly, at this jury selection process we're having today. (T. 120).

The trial court continued,

> "The Court doesn't believe [Defense Counsel's race-neutral reason for a peremptory challenge] is acceptable. And the Court is going to – the Court notes a difference with the S-2 [(Denise Brown)]. That [(inattentiveness)] 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." (T. 122).

As was noted by defense counsel at trial, Ms. Brown was an engineer who, in order to have such a profession, must be educated. (T. 114). The proffered reason, that her hair was dyed red, when taken in this context, is clearly unrelated to the facts of this case and directly flies in the face of the State's desire to have an educated jury.

Furthermore, it can be argued that there is a pretextual nature to the striking of Ms. Brown on the basis of her dyed hair based upon the fact that African-American women have naturally dark colored hair. Therefore, any deviation from that natural tone is noticeable. Women of other ethnic groups may have varying degrees of hair color, which, if dyed, may or may not be noticeable.

The Hinds County District Attorney's office did not choose to voir dire other members of the jury as to whether or not their hair had been dyed. Failure to voir dire for a particular characteristic cited as a race neutral reason is one of the indicia of pretext. ***Manning***, 765 So. 2d at 519.

The trial court's error in allowing the State to strike Ms. Brown is further paralleled by the trial court's refusal to allow the defendant to strike Mr. Sumrall from the jury because he was employed with the State of Mississippi. The trial court's justification for restoring Mr. Sumrall to the jury panel was that striking on those grounds would excuse many prospective jurors in Hinds County. The Court reasoned that without any further explanation by defense counsel, it could not find a sufficient race-neutral reason to excuse Mr. Sumrall.

There can be little argument that the dying of hair is common, if not widespread, among women in modern times. To allow prosecutors to strike on the basis of dyed hair is

to give prosecutors a free pass to exercise peremptory challenges on a percentage of the population far greater than the number of individuals employed by the State of Mississippi. For that reason, the striking of Ms. Brown cannot be reconciled with the trial court's refusal to allow defense counsel to strike Mr. Sumrall. The two rulings by the trial judge are incongruous and further indicate error in the trial judge's rulings as well as the pretextual striking of African-Americans from the jury.

As noted above, the trial judge is to assess whether the prosecutor's proffered reasons are credible under the circumstances. ***Cockrell***, 537 U.S. at 339. Furthermore, the credibility can be assessed in terms of how reasonable and probable the state's explanations are. ***Id.*** Taking into consideration the reasonableness and improbableness of the State's proffered reasons, it is apparent that they are merely pretext in the striking of Ms. Brown from the jury because she is African-American.

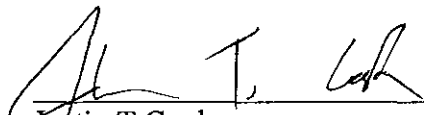
CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charge of armed robbery, with instructions to the lower court. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot

be harmless.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Jeffrey Jackson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable W. Swan Yerger
Circuit Court Judge
P.O. Box 23029
Jackson, MS 39205

Honorable Eleanor Faye Peterson
District Attorney, District 7
Post Office Box 22747
Jackson, MS 39225

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

This the 6 day of FEB, 2008.

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