IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BILLY JOE ANDERSON — APPELLANT

VS. — NO. 2007-KA-2137-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 4, 2007, Billy Joe Anderson, "Anderson" was tried for armed robbery before a Hinds County Circuit Court jury, the Honorable Bobby B. Delaughter presiding. R. 1 Anderson was found guilty and given a thirty five year sentence in the custody of the Mississippi Department of Corrections. R. 347; C.P. 31. From that conviction, Anderson appealed to the Mississippi Supreme Court. C.P. 40.

ISSUES ON APPEAL

I.

DID THE TRIAL COURT ERR IN ADMITTING IN COURT IDENTIFICATION?

A.

BECAUSE OF ALLEGED TAINT FROM THE SHOWING OF EXHIBIT 8 TO THE WITNESSES?

B.

BECAUSE EXHIBIT 4, THE SET OF PHOTOS OF SUSPECTS, WAS NOT WHAT IT PURPORTED TO BE?

STATEMENT OF FACTS

On July 8, 2006 Anderson was indicted for armed robbery on or about September 10, 2002 at Jerry's Appliance Center in Utica, Hinds County, Mississippi. C.P. 2.

On September 4, 2007, Anderson was tried for armed robbery before a Hinds County Circuit Court jury, the Honorable Bobby B. Delaughter presiding. R. 1. Anderson was represented by Mr. William LaBarre with the Hinds County Public Defender's Office. R.1

After an objection to the admissibility of State's Exhibit 4, the set of six photographs shown to witnesses, the trial court held a suppression hearing. R. 131-214. After hearing testimony and argument, the trial court found that the viewing of the mother's photograph of Anderson did not taint the later viewing of the set of photographs used by law enforcement. R. 207-214.

Mr. Bryan Hales testified to having been robbed. He was robbed by a gun man on September 10, 2002. Hales was working at Jerry's Appliance Store in Utica, Hinds County at the time. It occurred between 12:00 and 1:00 P.M.. R. 114.

The gunman was only a few feet from him. He was holding an automatic hand gun. The gunman demanded money from the cash register. Hales went to the cash register. It was opened.

The man accompanying the gun man took approximately $1,000.00 in cash and checks. R. 126. The gun man demanded Hales' wallet which he surrendered. The gun man ordered Hales and Ms. Stephens, the other clerk, to get down on the floor until he left the store. R. 128. The other suspect with the gunman did not confront or speak to Hales or Stephens. R. 126.

Hales had a good look at his assailant while paying close attention. The gun man was not disguised or hiding his face. Hales saw him when he entered the store, when he was walking around, as well as when he was near him and facing him with the gun in his hand. R. 112-143.

On September 17, 2002, Mr. Hales testified that Officer Shinnie showed him a photo-spread

which included six suspects. Hales testified to identifying photograph one in a few seconds as being the gunman he encountered at Jerry's Appliance Store. R.133. He was sure this was the suspect who robbed him with an automatic handgun. R. 134.

Ms. Lynda Stephens , another employee at the store during the robbery, also testified to having been shown a photographic spread. She also identified photograph one as being that of the suspect. R. 181. She was one "a hundred percent" sure of her positive identification of Anderson. R. 182.

Officer Von T. Shinnie testified that he showed a set of photographs to Hales and Stephens. It included six photographs of suspects. They were shown the photographs separately and apart from each other. R. 149. They both picked out photograph one as being that of the suspect. R. 147-149. Shinnie testified that he made no suggestions or mentioned no names for any suspect. Photograph one was that taken of Anderson. See State's exhibit 4 in manila envelop for copy of set of photographs shown to Hales and Stephens. Shinnie learned from Anderson's mother that Anderson had been in a Louisiana correctional facility. R. 144.

Anderson's counsel presented Ms. Hattie Washington, Anderson's mother. Ms. Washington was a native of Utica. She had been doing business with Jerry's Appliance store for some time. R. 204. In response to inquiries from the store owner about her son, she retrieved a photograph. She testified that she showed it, exhibit 8, to Hales and Stephens. She believed they told her that they could not identify the photograph as being that of the suspect. R. 199-200.

On cross examination, Mr. Hales testified that he did not remember seeing Washington's photograph of a suspect. R. 140. On cross examination, Ms. Stephens testified that when shown the photograph she did not either say that Washington's son was or was not the suspect. R. 186.

After hearing all the testimony at the suppression hearing, the trial court found that the

showing of a single photograph to Hales and Stephens by Washington did not give rise to any danger of improper misidentification under the facts as described above. R. 275.

State's exhibit one, a photograph of the exterior of Jerry's Appliance Store in Utica, was introduced into evidence. R. 115. State's exhibit two and three showed the interior of the store including the cash register where the robbery took place. Exhibit 4 was a xerox copy of the six man photographic display of suspects which included Anderson. He was represented in photograph number one. The photographic spread also included another darker skinned suspect, which was number 6. Exhibit 8 was an enlarged photograph of Anderson eating cake which was in his mother's possession.

The trial court also overruled an objection to the "authenticity" of the photographic display shown to the robbery victims. The objection was that Ms. Stephens "can not identify that as being the document that she viewed." R. 251.

The trial court found that the photographic display, exhibit 4, was what it purported to be. It was copies of the collection of photographs shown to the witnesses. It was "copies of photographs in black and white that were shown to the witnesses." R. 251. The trial court found that whether the photographic collection was shown separately or all together was immaterial. R. 251.

Both Mr. Hales and Ms. Stephens identified Anderson in the court room. They identified him as being the person who robbed Jerry's Appliance Store in Utica on September 10, 2002. R. 221; 243.

Mr. Darren Howard testified that he operated a car wash in Utica. It was on Main Street across the street from Jerry's Appliance Store. R. 278. On September 10, 2002, the day of the armed robbery, Howard testified to seeing Anderson near the store. He was driving a blue car with Louisiana plates. R. 280. He had a passenger with him in the car. Howard saw him driving "up and

down Main Street", and "in front and back" of Jerry's Appliance Store. R. 287. It estimated the time to be "about 12:00 (noon time)." R. 280.

Shortly after seeing the blue car driving around, Howard heard "Mr. Jerry," the owner of the store, run out and say they had been robbed. R. 279. That was also when Howard saw the blue car leave the area near the store. R. 279.

When contacted by police, Howard informed investigators of what he had seen. Howard had known Anderson since child hood. He was Anderson's cousin. R. 280. Howard identified Anderson in the court room as the person he saw near the store the day of the robbery. R. 281.

After being fully advised of his right to testify or not, based upon his own decision, Anderson chose not to testify in his own behalf. R. 288-289.

Anderson was found guilty. R. 347. At a separate sentencing hearing, the court noted that within sixty days of earning release for a previous Louisiana armed robbery conviction, Anderson was convicted of robbing Jerry's Appliance Store. R. 358.

Anderson was given a thirty five year sentence in the custody of the Mississippi Department of Corrections. C.P. 31. From that conviction, Anderson appealed to the Mississippi Supreme Court. C.P. 40.

SUMMARY OF THE ARGUMENT

1.A. There was credible, corroborated record evidence in support of the trial court finding that the set of photographs shown to the witnesses, exhibit 4, was not suggestive, much less impermissible suggestive. R. 213; 275-276. Under "the totality of the facts" of this case, it did not give rise "to a very substantial likelihood of irreparable misidentification." **Foster v. State**, 493 So. 2d 1304, 1305 -1306 (Miss.1986), **Jones v. State**, 504 So. 2d 1197, 1200 (Miss. 1987), and **York v. State**, 413 So. 2d 1372, 1374 (Miss. 1983).

The record indicates that Ms. Washington, Anderson's mother, testified to showing exhibit 8 to Hales and Stephens. According to her, and not them, neither could identify this photograph of her son as being the suspect in the robbery. R. 199; 306. The record reflects that exhibit 8 was not used in the subsequent exhibit 4 set of photographs. A viewing of exhibit 4 does not indicate anything suggestive about Anderson's photo that would distinguish him from any other suspect. While photograph one shows a dark skinned suspect so does photograph six.

Both Hales and Stephens had a good opportunity to view the suspect's face under good lighting. They were face to face with him. He was wearing no disguise. They picked his photo without any suggestions being made. They both described him as tall and skinny. They were both sure that he was the suspect who robbed Jerry's Appliance Store in Utica. R.134; 181-182; 221; 248.

1.B. Officer Von T. Shinnie testified that exhibit 4 was what it purported to be. It was the photo copy of the photographs shown to eye witnesses Hales and Stephens. It was shown to them on September 17, 2002. R. 161-162. Mr. Hales and Ms. Stephens testified that they recognized exhibit 4 as being substantially the same set of photographs shown to them by Officer Shinnie. R. 219; 241. See **Wells v. State**, 604 So.2d 271, 277 (Miss. 1992), and Ms. Rule Evidence 901(a) and (b)(1).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT 4, THE PHOTO SPREAD, AND ALLOWING IDENTIFICATION TESTIMONY.

IA.
BECAUSE THE SHOWING OF EXHIBIT 8, THE MOTHER'S PHOTO, DID NOT TAINT THE VIEWING OF EXHIBIT 4.

Anderson argues that the trial court erred in allowing in court identification. He also thinks admitting Exhibit 4 into evidence was error. This set of photographs included the photograph of six young black male suspects. Anderson argues that the showing of a single photograph of himself to Mr. Bryan Hales and Ms. Lynda Stephens was impermissibly suggestive. It allegedly tainted their later viewing of Exhibit 4.

In addition, he believes there was inadequate evidence for finding that exhibit 4 was what it was purported to be. This was based upon discrepancies in the testimony about differences between the original photographs and photocopies of the originals, as well as questions about what format and color was used in showing the photographs to the eye witness victims. Appellant's brief page 1-14.

To the contrary, the record reflects that a suppression hearing was held on the admission of the photo-spread. R. 131-214. This was the set of photographs shown to eye witnesses Hales and Stephens. The trial court found that the showing of Anderson's mother's enlarged photograph to the witnesses did not taint their subsequent identification of Anderson's photograph. The record reflects they both identified Anderson's photo from a set of suspect's photographs. The mother's photograph was shown to them earlier in the investigation. It was not used by law enforcement in

exhibit 4. In addition, Ms. Washington testified that neither witness thought it was a photograph of the armed robbery suspect. R. 131-214.

The trial court's ruling was as follows:

> As to the testimony of Ms. Washington, she has testified that both witnesses, Hales and Stephens, observed the photograph that she provided of the defendant and that both witnesses indicated that he was not the person engaged in the robbery. That's a matter for the jury to weigh and consider concerning guilt or innocence.
> ...**She also has testified that both witnesses indicated that after seeing the photograph that he was not the person that participated in the robbery. So we have a conflict in the testimony in that respect as that testimony is not supported and, in fact, contradicted by Mr. Hales, and by Ms. Stephens.** R. 211-212.
>
> ...
>
> The Court, also, is further guided on the issue of suggestiveness by the Mississippi Supreme Court's decision in **Foster v. State** cited as 493 So. 2d on page 1,304. In that case the defendant was the only person of a lineup wearing a distinctive fishing hat. The Mississippi Supreme Court of Appeals rejected the defendant's claim that that lineup was unduly suggestive. Similarly in **Jones versus State** cited at 504 So.2d on page 1,197 the defendant was the only person in a photo lineup wearing a cap similar to the one worn by the rapist in that case, and the Court held that that was not unduly suggestive.
> **Well, if those matters are not unduly suggestive, there's nothing about exhibit 4 for identification that's unduly suggestible, and it's not even necessary for the Court to consider the four factors of Neil versus Biggers concerning an in court identification, and the Court overrules the defendant's motion.** R. 213. (Emphasis by Appellee).

While Anderson believes the showing of a single photograph by his mother tainted the later identification, the trial court found this not to be the case. The trial court pointed out that it was the defense that wanted to introduced exhibit 8 , not the state. In addition, according to Ms. Washington neither eye witnesses Hales or Stephens believed this photograph was that of one of the suspects. R. 198-200. This personal photograph was not used by the police in its later display. Therefore, it did not somehow affect or taint the showing of the photographic spread shown in State's Exhibit 4.

As stated by the trial court in its supplemental ruling:

However, the state did not attempt to introduce evidence of that show up. It was the defense who did so. So the show up itself, evidence of that, is not subject to being suppressed by the defense since it was the defense who brought it up. **Now, did the show up result or taint the photographic lineup made by either witness Hales or Stephens? The Court is of the opinion the answer to that is still no because no identification was made of that show up. We would be dealing with a different situation if in showing the photograph or in observing the photograph that Ms. Washington presented in saying, yes, that was one of the culprits, and the police got together and came up with a photo lineup which included the same photograph or a photograph of the same defendant that had been earlier identified by the witness, then we would be looking at the York factors. But according to Ms. Washington's testimony as fact, both witnesses according to her indicated that the person shown in that photograph was no involved in the robbery. Therefore, there could not have been any resulting taint from that which led them to make an identification of the defendant from the subsequent photographic lineup.** R. 275-276. (Emphasis by Appellee).

Ms Hattie Washington testified that neither Hales nor Stephens identified her son's photograph as being one of the suspects. She showed the photograph to them on her own initiative. She admitted to crying and being upset at the time. R. 198-200.

Q. And you said that both the son-in-law that you're not sure about his name and Ms. Stephens did view the picture and look at it?

A. **They both did. They passed it between themselves, and she said that it wasn't him and she passed it back to him, and he shook his head no.** R. 200. (Emphasis by Appellee).

Mr. Hales testified at the suppression hearing that he did not remember much about any photograph shown to him by the defendant's mother. R. 140. It had been five years since the alleged showing of the photograph.

Q. So you do or don't recall seeing any other photographs as presented by Hattie Washington?

A. **It rings a bell, but I can't remember why. I can't remember. Maybe she said she had a picture or something. I don't remember.**

Q. You don't remember?

A. I do not. R. 140. (Emphasis by Appellee).

While Ms. Lynda Stephens did remember seeing the photograph, she testified that she did not saying that it was either the suspect or not.

Q. **So you didn't say that it was him or it wasn't him?**

A. **No.** R. 186. (Emphasis by Appellee).

In **Foster v. State**, 493 So.2d 1304, 1305 -1306 (Miss.1986), the Supreme Court found that the showing of a photograph of Foster in a fishing hat did not impermissibly taint the eye witnesses identification of Foster. The other suspects were not wearing a hat. The eye witness had seen Foster up close during the robbery under good lighting conditions. Foster was not wearing a disguise. The witness also helped produce a composite sketch of the suspect.

> Foster assigns the line-up as error, in that it was impermissibly suggestive. It can hardly be denied that the Oxford police used very poor judgment in conducting it. The defendant was the only participant wearing the distinctive fishing hat referred to by the robbery victim. The explanation given was that the police did not have hats for the other participants, but in that case, Foster should have taken part without a hat.
>
> [1] [2] Appellant contends that the sales clerk's in-court identification of Foster was tainted because she had been shown a picture of this line-up. Under our jurisprudence, however, the mere fact that a line-*1306 (Cite as: 493 So.2d 1304, *1306) up was suggestive does not of itself compel such a result, unless under the totality of the circumstances, the impropriety gave rise to "a very substantial likelihood of irreparable misidentification." **York v. State**, 413 So.2d 1372, 1383 (Miss.1982). Having reviewed the circumstances of this robbery and the testimony of the sales clerk, we consider it highly unlikely that she could be mistaken in her identification of the robber. We therefore reject this assignment of error.

In **Jones v. State**, 504 So. 2d 1197, 1200 (Miss. 1987), the Supreme Court found that although only Jones was wearing a distinctive baseball hat, a photo lineup did not give rise to a likelihood of misidentification. The eye witness had been near Jones' face. She gave an "accurate and complete description" of the suspect to investigators. She was paying close attention. She was confident of her identification based upon her observations of him at the time of the rape.

> Finally, in dispensing of any remaining problem concerning the cap, we would point out that the record reveals that such a distinctive looking item worn by the rapist could not have had the effect of tainting the in-court identification when the police had been given an accurate and complete description of the man prior to the photographic identification and police line-up, and he was identified as well with great assurance at trial.
>
> We believe that this identification testimony was competent, raising a jury issue of defendant's guilt, and find no error in permitting the in-court identification of the defendant.

In **Foster v. California** 394 U.S. 440, 442-443, 89 S. Ct. 1127, 1128 - 1129 (U.S.Cal. 1969), relied upon by Anderson, the Supreme Court found identification procedures used resulted in an unfair lineup. However, this included a one on one confrontation, as well as having Foster included in more than one successive line up. The record reflects that this did not occur in the instant cause.

> Judged by that standard, this case presents a compelling example of unfair lineup procedures.FN2 In the *443 (Cite as: 394 U.S. 440, *443, 89 S.Ct. 1127, **1128) The first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. See **United States v. Wade**, supra, 388 U.S. at 233, 87 S. Ct. at 1935. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. This Court pointed out in **Stovall** that '(t)he **1129 (Cite as: 394 U.S. 440, *443, 89 S.Ct. 1127, **1129)practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.' 388 U.S., at 302, 87 S. Ct., at 1972. Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. See **Wall**, supra, at 64. This finally produced a definite identification.

The Mississippi Supreme Court stated in **Nicholson v. State**, 523 So. 2d 68, 72 (Miss. 1988) that the leading case in Mississippi on **U.S. v. Wade**, 338 U. S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1966), and its progeny is **York v. State**, 413 So. 2d 1372, 1374 (Miss. 1983). It states the **Neil v. Biggers**, 409 U. S. 188, 199, 34 L. Ed. 2d 401, 411 (1972) five factors to be considered in

assessing the validity of identification testimony.

> **York** goes on to set out the **Neil** factors to consider in determining whether these standards have been fulfilled:
>
> We turn, then to the central question, whether under the "totality of the circumstances" the identification was reliable even thought the confrontation procedure was suggestive. As indicated in our cases, the factors to be considered in evaluating the likelihood of misidentification include
>
> 1. Opportunity of the witness to view the accused at the time of the crime.
>
> 2. The degree of attention exhibited by the witness;
>
> 3. The accuracy of the witness's prior description of the criminal;
>
> 4. The level of certainty exhibited by the witness at the confrontation;
>
> 5. The length of time between the crime and the confrontation. **Nicholson**,. page 72, **Neil, supra**, 411.

The Appellee would submit that the record reflects that the trial court did not abuse its discretion in finding exhibit 4, the photo lineup, was admissible. The two eye witnesses to the robbery, Mr. Hales and Ms. Stephens, both testified to having a good opportunity to view the suspect under good lighting conditions inside Jerry's Appliance Store. R. 215-221; 234-243. It was day light with good lighting conditions. Anderson was not wearing a disguise. He was not trying to conceal his face. Both witnesses were paying close attention to Anderson who held a automatic weapon in his hand. Both witnesses were only a few feet away from the gunman. They were face to face with him.

They both accurately described the suspect. They were both sure of the their identification of photograph number one as being that of the suspect. R. 134; 181-182.

> Q. How did you identify to Officer Shinnie, yes, this is the person?
>
> A. Just like I did then. That's the one.

Q. You pointed to number one and told him that's the one.

A. Uh-huh.

Q. Were you positive in your identification?

A. Yes.

Q. **If you could put a percentage on it, how much would you say?**

A. **A hundred per cent.** R. 181-182. (Emphasis by Appellee).

Both Mr. Hales and Ms. Stephens testified before the jury to identifying photograph number one from the set of photographs as being the photograph of the gunman. R. 217; 242. They were sure it was the gun man that confronted them. They both identified Anderson in the court room as being the person who robbed them at gun point. R. 221; 243.

Officer Shinnie testified that he made no suggestions, and mentioned no names to Hales or Stephens. He corroborated the fact that they each identified photograph number one as the suspect. R. 254-261. Photograph number one was the photograph of Anderson. The armed robbery occurred on September 10, 2002. The photographic spread was shown on September 17, 2002.

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is a presumption that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, "There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

The Appellee would submit that the record reflects ample support for the trial court's ruling. The record reflects there was nothing suggestive about the set of photographs shown to the eye

witnesses. The trial court correctly found with record support that the set of photographs were admissible.

There was a lack of evidence for finding that the showing of Hattie Washington's single photograph of her son resulted in any danger of misidentification. It was not used in exhibit 4. This issue is lacking in merit.

PROPOSITION B

AND BECAUSE THE TRIAL COURT CORRECTLY FOUND EXHIBIT 4 WAS WHAT IT PURPORTED TO BE.

The record reflects that an objection to "the authenticity" of the photographic spread was overruled. The objection was that "she (Ms. Stephens) can not identify that, exhibit 4, as being the document that she viewed." R. 251.

The trial court found that the set of photographs shown to Ms. Stephens and Mr. Hales was "what it purported to be." See Ms. Rule Evidence 901(a) and (b)(1). It was a collection of the copies of photographs shown the eye witnesses. The issue of whether the photographs were shown all together as arranged on two pages in exhibit 4 or separately, one photo at a time, was not crucial for resolving this authenticity of the document issue.

> Court: Well, the Court has considered the testimony it heard outside the presence of the jury as well because it's the Court to determine whether or not it's admissible, and in exercising that discretion the ultimate inquiry is is the Court satisfied that the document is what it is purported to be, and what it is purported to be is a collection of the photographs shown to the witness. **The Court is satisfied that it's a collection of the photographs shown to the witness. Whether or not the photographs were shown separately or all together in a sheet as far as the court is concerned is immaterial. The Court is satisfied that it contains copies of photographs in black and white that were shown to the witnesses. So the objection is duly noted but overruled.** R. 251. (Emphasis by Appellee).

In **Wells v. State**, 604 So.2d 271, 277 (Miss. 1992), the Supreme Court found that photographic evidence can be authenticated by witnesses who testify that the photographs are what they purport to be.

> Regarding authentication of the tape, Wells is correct in citing **Barham v. Nowell**, 243 Miss. 441, 448, 138 So.2d 493, 493 (1962). A videotape may be authenticated by someone familiar with the scene. This person does not have to be the photographer. See **Jackson v. State**, 483 So.2d 1353, 1355 (Miss.1986) (no requirement that photographer testify where there is other competent testimony that photograph represents what it purports to be). In the case at bar, both Mr. Reznikoff

and Officer Chaffin testified that the videotape scene was what it purported to be, MaLinda Wells working the cashier's counter at Toby's Toys in Tupelo on the day in question. See also M.R.E. 901(b)(1) (authentication by testimony of witness with knowledge).

In the instant cause, Officer Von T. Shinnie testified that State's exhibit 4, which is a collection of photographs showing various young black males, was "a fair representation" of the photographic spread. It was "a fair and accurate representation" of the collection which he showed to witnesses and victims Hales and Stephens. R. 161-162.

Q. **The exhibit 4, what's been shown to you previously and marked 4 for I.D. are these fair and accurate representations of the photographs that you showed Mr. Hales?**

A. **Yes, they are.**

Q. **These are photocopies of the exact same photographs? Is that your testimony?**

A. **Yes.**

Q. **Are these also the exact same pictures, photocopies of them, that you showed Ms. Stephens?**

A. **Yes.** R. 161-162. (Emphasis by Appellee).

Mr. Hales and Ms. Stephens testified that exhibit 4 was the set of photographs shown to them by Officer Shinnie. This was on September 17, 2002. R.132-134; 180, 241.

The objection at trial was that "she says that she cannot identify that as being the document that she viewed." R. 251.

On direct, Ms. Stephens testified that exhibit 4 was the set of photographs shown to her by Officer Shinnie.

Q. Have you seen this before? (Exhibit 4, the photo spread of six suspects)

A. Yes.

Q. **Is this the set of photographs that Officer Shinnie showed you?**

A. **Yes.** R. 241. (Emphasis by Appellee).

In **Thomas v. State**, 247 Miss 704, 159 So. 2d 77, 80 (1963), the Mississippi Supreme Court stated that the court should give "all reasonable presumptions in favor of the rulings of the court below."

> In reference to any doubts as to whether a fair trial was obtained by the appellant in the court below, it should be noted that in **Gordon v. State**,(Miss.)149 So 2d 475, this Court concluded that in reviewing a conviction of a crime, any doubts should be resolved in favor of the integrity, competence and proper performance of the official duties of the judge and prosecuting attorney, and this Court should give effect to all reasonable presumptions in favor of the rulings of the court below.

The Appellee would submit that the record reflects that Officer Shinnie, and eye witnesses Hales and Stephens testified that exhibit 4 was what it purported to be. It was an accurate representation of a set of photos of various young black male suspects. It was shown to eye witnesses Mr Hales and Ms. Stephens on September 17, 2002. They both identified photograph one as being the photograph of the gun man who confronted them on September 10, 2002. R. 217; 242.

The Appellee would submit that we have cited sufficient record evidence for showing that the trial court did not abuse its discretion in admitting exhibit 4 into evidence. There was a lack of evidence that exhibit 8 tainted the subsequent identification of Anderson from the copies of a set of photographs shown in exhibit 4. By Ms. Washington's own testimony neither eye witness thought her photograph of Anderson with food in his mouth was the suspect that robbed Jerry's Appliance Store. R. 198-200.

The record does not indicate anything suggestive about the photograph of Anderson shown in the set of suspect's photographs. Hales and Stephens were corroborated by Officer Shinnie as to their identification of Anderson's photograph from the spread. R. 261. See State's Exhibit 4.

They identified his photograph from the other five without any suggestions being made. They viewed the photographs separate and apart from each other. R. 149.

The record reflects that both witnesses had a good opportunity to view Anderson under good lighting. They were paying close attention. They were sure it was him. R. 134; 181-182. The photos were shown to them a week after the robbery. They both described him as tall and thin. R. 215-234; 234-252.

The Appellee would submit that both of these identification through photographs issues are lacking in merit.

CONCLUSION

Anderson's conviction for armed robbery should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 5th day of August, 2008.

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