IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-KP-00233-SCT

MERLIN HARDISON

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	05/24/2006
TRIAL JUDGE:	HON. W. SWAN YERGER
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	MERLIN HARDISON (PRO SE)
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS SCOTT STUART
DISTRICT ATTORNEY:	ROBERT SHULER SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	REVERSED AND REMANDED - 08/09/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE WALLER, C.J., DICKINSON, P.J., AND KITCHENS, J.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. The trial judge erroneously denied the accused a peremptory strike by holding that a juror's previous service on a jury in a criminal case was not a race-neutral reason for the strike. During voir dire, the juror had expressed regret that the jury was unable to reach a verdict. We reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

¶2. When, at the beginning of Merlin Hardison's armed-robbery trial, his counsel exercised a peremptory strike on a juror, the State raised a ***Batson***[1] challenge. The trial judge

[1] ***Batson v. Kentucky***, 476 U.S. 79, 82-84, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

required Hardison's counsel to provide a race-neutral reason for the strike. Hardison's counsel responded that, during voir dire, the juror had expressed regret that a previous jury on which he had served in a criminal case had failed to reach a verdict. The trial judge held this was not a valid race-neutral reason and denied Hardison the peremptory strike.

¶3. A jury convicted Hardison, and he appealed, raising nine issues. However, we find the trial judge's denial of Hardison's peremptory strike to be dispositive. We also shall address Hardison's claim that he was denied his right to a speedy trial.

ANALYSIS

¶4. Were Hardison to prevail on the speedy-trial issue, we would dismiss this case. Therefore, we address that issue first.

I. Hardison's right to a speedy trial was not violated.

¶5. Hardison was indicted on February 10, 2004, arrested on March 2, 2005, and brought to trial on May 22, 2006. Because a total of 833 days passed between the indictment and trial, Hardison claims the delay violated his Sixth Amendment right to a speedy trial. But Hardison failed to make this objection at the trial in circuit court, and we remanded the issue to the circuit court for a hearing on the matter. As ordered, the circuit court held a hearing for the limited purpose of allowing the State an opportunity to show reason for the delay and to overcome the presumption that Hardison was prejudiced by the twenty-seven-month delay. Based on the circuit judge's findings of fact and conclusions of law, we now hold that there was no violation of Hardison's constitutional right to a speedy trial.

¶6. The Sixth Amendment of the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[2] And when a defendant claims the State did not provide a speedy trial, we analyze the claim using the following four factors announced in ***Barker v. Wingo***: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[3]

¶7. In weighing the ***Barker*** factors, we look at "the quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of non-persuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered."[4]

A. Length of Delay

¶8. It is well-settled that "[t]he Sixth Amendment clock begins to tick upon indictment when no prior arrest on the alleged offense is involved."[5] And this Court has held that an eight-month delay is presumptively prejudicial.[6] Because the delay in bringing Hardison to trial was more than three times the presumptively prejudicial eight-month mark, this factor clearly weighs against the State, thus triggering an examination of the remaining ***Barker*** factors.

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[2] U.S. Const. amend. VI.

[3] ***Barker v. Wingo***, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[4] ***Price v. State***, 898 So. 2d 641, 648 (Miss. 2005) (citing ***Beavers v. State***, 498 So. 2d 788, 790 (Miss. 1986) (citations omitted)).

[5] ***United States v. Hill***, 622 F.2d 900, 909 (5th Cir. 1980) (citing ***Dillingham v. United States***, 423 U.S. 64, 96 S. Ct. 303, 46 L. Ed. 2d 205 (1975) (per curiam); ***United States v. Marion***, 404 U.S. 307, 320-21 (1971)).

[6] *See, e.g.,* ***Smith v. State***, 550 So. 2d 406, 408 (Miss. 1989).

B. Defendant's Assertion of His Rights

¶9. The second ***Barker*** factor is whether or not the defendant asserted his Sixth Amendment right in the trial court.[7] But we have long recognized that a defendant "has no duty to bring himself to trial."[8] That statement would have no meaning at all if defendants who fail to demand a speedy trial nevertheless have "***Barker*** points" taken away. So while a defendant is awarded points for asserting his right, the failure to demand a speedy trial does not count against Hardison. Instead, as here, the factor favors neither the defendant nor the State – it remains neutral.

C. Reason for Delay

¶10. After the alleged crime, Hardison fled to California – where he remained for almost a year following the indictment. This time – 385 days – is attributable to Hardison. Hardison eventually was arrested on March 2, 2005, and trial was set for May 9, 2005. But it was not until May 22, 2006, that Hardison was actually brought to trial. Between his arrest and trial, a total of 445 days elapsed. Of this delay, 316 days resulted from continuances sought by Hardison himself. This time is attributable to Hardison as well. So, of the 833 total days between indictment and trial, 701 days are attributable to Hardison.

D. Prejudice to the Defendant

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[7] ***Barker v. Wingo***, 407 U.S. 514, 5127, 92 S. Ct. 2182, 2190, 33 L. Ed. 2d 101 (1972).

[8] ***Thomas v. State***, 48 So. 3d 460, 476 (Miss. 2010) (citing ***Jefferson v. State***, 818 So. 2d 1099, 1107-108 (Miss. 2002); ***Brengettcy v. State***, 794 So. 2d 987, 994 (Miss. 2001)) (internal quotations omitted).

¶11. An eight-month delay is presumptively prejudicial, and the delay here was more than three times that amount.[9] But because a majority of that delay – 701 of 833 days – is attributable to Hardison, the State has overcome the presumption of prejudice in this case.

*E. Balancing the **Barker** Factors*

¶12. Not a single ***Barker*** factor weighs in Hardison's favor, and one – reason for the delay – weighs heavily against him. Therefore, we hold that Hardison was not denied his Sixth Amendment right to a speedy trial.

¶13. After finding no Sixth Amendment violation, we move to Hardison's other claims. And because we find the denial of Hardison's peremptory challenge without a proper ***Batson*** analysis constituted reversible error, we reverse and remand for a new trial without addressing the remaining issues.

II. The trial court erroneously denied Hardison's right to a peremptory strike.

¶14. Hardison argues that the trial court denied his constitutional right to a jury of his peers when it sustained the State's objections to his peremptory challenges. Hardison's specific argument for this issue, however, is that the trial court erred by not requiring the State to make a prima facie showing of racial discrimination and by sustaining the State's ***Batson***[10] challenge.

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[9] ***State v. Ferguson***, 576 So. 2d 1252, 1255 (Miss. 1991) (citing ***Moore v. Arizona***, 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973); ***Prince v. Alabama***, 507 F.2d 693, 707 (5th Cir. 1975)); ***Ross***, 605 So. 2d at 23 (citing ***Ferguson***, 576 So. 2d at 1255).

[10] ***Batson***, 476 U.S. at 82-84 (holding that the prosecution cannot discriminate racially in its use of peremptory strikes).

¶15. During jury selection, and after Hardison's counsel struck four white veniremembers, the State made a ***Batson*** challenge. Hardison's counsel argued that the State did not present a prima facie case of discrimination, because the defense struck both African-American and white veniremembers. The State rebutted, arguing that defense counsel struck highly educated older persons, many of whom had served on juries in the past. Ultimately, the trial judge found that the State had raised a prima facie case of discrimination and required Hardison to present race-neutral reasons for striking four white veniremembers: James Gray, Donald Wilder, Johnny Ramia, and John Danahue.

¶16. As required, Hardison's counsel gave reasons for striking those four witnesses. The trial judge agreed with defense counsel's race-neutral reasons for all but one of the strikes (James Gray). During voir dire, Gray said that he had served on a jury in an armed-robbery case and that the jury did not reach a verdict because of prosecutorial error. Hardison's counsel argued that this response suggested to him that Gray regretted not being able to reach a verdict, so he was more likely to convict. Hardison's counsel pointed out that the defense was not trying to strike Gray for cause, and that the reason was race-neutral. The trial judge, however, found the reason insufficient, denied Hardison the peremptory challenge, and restored Gray to the jury pool.

¶17. In ***Batson v. Kentucky***, the United States Supreme Court held that the prosecution may not use peremptory strikes in a discriminatory manner.[11] This Court has said that the

[11] ***Id.***

Batson analysis applies to both prosecutors and defendants.[12] And when the ***Batson*** analysis is used against the defense, this Court has referred to it as a reverse-***Batson*** challenge.[13] We analyze a ***Batson*** challenge using a three-part test:

> *First*, the party objecting to the peremptory strike of a potential juror must make a prima facie showing that race was the criterion for the strike. *Second*, upon such a showing, the burden shifts to the State to articulate a race-neutral reason for excluding that particular juror. *Finally*, after a race-neutral explanation has been offered by the prosecution, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike, i.e., that the reason given was a pretext for discrimination.[14]

A. Prima facie showing

¶18. To establish a prima facie case, the opponent of a peremptory strike must establish that (1) the opponent is a member of a cognizable class, such as a racial group; (2) the proponent has used peremptory strikes to remove veniremembers in that class; and (3) the facts and circumstances give rise to an inference that the proponent used peremptory strikes to purposefully remove individuals of that class.[15] In ***Powers v. Ohio***, the Supreme Court modified that test.[16] Under ***Powers***, a defendant has standing to challenge the exclusion of

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[12]***Griffin v. State***, 610 So. 2d 354, 356 (Miss. 1992) (citing ***Georgia v. McCollum***, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

[13]***Bailey v. State***, 78 So. 3d 308, 318-20 (Miss. 2012); ***Henley v. State***, 729 So. 2d 232, 239-41 (Miss. 1998).

[14]***Pitchford v. State***, 45 So. 3d 216, 224 (Miss. 2010) (emphasis added) (citing ***Flowers v. State***, 947 So. 2d 910, 917 (Miss. 2007)).

[15]***Henley***, 729 So. 2d at 239 (citing ***Batson***, 476 U.S. at 96).

[16]***Powers v. Ohio***, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

a juror even if that juror is not of the defendant's race.[17] The critical inquiry, then, is whether "the opponent has met the burden of showing that the proponent has engaged in a pattern or practice of strikes based on race or gender."[18]

¶19. Based on this Court's highly deferential standard, we cannot say that the trial court erred by finding a prima facie case of racial discrimination. Again, the record does not show the racial makeup of the venire, so we cannot determine how the defendant's strikes compared to the overall composition of the venire. And, as this Court stated in ***Birkhead v. State***, "[w]e cannot override the trial court when this Court *does not even know* the racial makeup of the venire or the jury."[19] Although we know from the record that the final jury comprised six blacks and six whites, we cannot reverse the trial judge's decision without knowing the racial makeup of the venire from which the jury was chosen. Thus, we move on to the second (race-neutral) and third (pretext) parts of the ***Batson*** analysis.

B. Race-neutral reasons, pretext

¶20. When reveiwing a ***Batson*** challenge, we will not overrule a trial judge's decision "'unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence.'"[20] Here, the judge allowed three of Hardison's four peremptory strikes against white veniremembers, but found that Hardison did not present a

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[17]***Id***. at 416.

[18]***Id.***

[19]***Birkhead v. State***, 57 So. 3d 1223, 1230 (Miss. 2011).

[20]***Pitchford***, 45 So. 3d at 226 (quoting ***Lynch v. State***, 877 So. 2d 1254, 1270 (Miss. 2004)).

sufficient race-neutral reason for striking Gray. At voir dire, the State had the following exchange with Gray:

> Q: You have been on a criminal jury before?
> A: A long, long time ago.
> Q: Do you remember what kind of case it was?
> A: It was – I think it was an armed robbery case. It's been so long ago since I was on the jury.
> Q: Was that in Hinds County?
> A: It was. It was right here.
> Q: And do you remember if y'all were able to reach a verdict?
> A: I think that the D.A.'s office failed to do something and the judge threw the case out.
> Q: Okay. So y'all didn't even get to that point.
> A: Unh-unh.
> Q: Okay. So that was so long ago neither Gregg [nor] I [was] involved with that; right?
> A: No.

¶21. After the State finished its voir dire, Hardison's counsel followed up:

> Q: I believe you said you had been on a criminal jury?
> A: Yes, sir.
> Q: Did you reach a verdict?
> A: No. And I can tell you who prosecuted that because I remember his name now. For the D.A., it was Tom Royals, and he failed to do something. I can't remember exactly what he failed to do, but the judge dismissed the case.
> Q: I believe you said that when you were asked earlier.
> A: I didn't say Mr. Royals' name, but I just happened to remember who it was.

¶22. Hardison's counsel claimed that Gray's responses indicated he was proprosecution and that he regretted not being able to reach a verdict the last time he was a juror. The trial judge found that this reason was not a "proper or sufficient race-neutral" reason and placed Gray on the jury. This decision was clear error.

¶23. In ***Davis v. State***, we listed sufficient race-neutral reasons for striking venire members: "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."[21] Hardison's reason – that Gray's responses about a prior jury experience indicated he might be proprosecution – certainly qualifies as race-neutral. If a prosecutor's distrust of a venire member is a race-neutral reason, then a defendant's distrust must be as well. It is important to point out here that the trial judge never addressed the issue of pretext; he simply held that the stated reason was not race-neutral.

¶24. In finding the reason was not race-neutral, the trial judge did not proceed to the third part of the ***Batson*** analysis – pretext. Because of this, the judge never looked at how this particular strike compared to others, that is, whether the defense had accepted black venire members who previously had served on juries that were not able to reach a decision because of a prosecutor's error. The ***Batson*** analysis has three steps, and it is imperative that a trial judge follow those steps accordingly.

¶25. A trial judge, of course, has great deference in this regard.[22] But the proponent of a strike – at the second step of the analysis – need only show a race-neutral reason. "'At this second step of the inquiry,'" wrote the United States Supreme Court in ***Purkett v. Elem***, "'the

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[21]***Davis v. State***, 660 So. 2d 1228, 1242 (Miss. 1995).

[22]***Berry v. State***, 802 So. 2d 1033, 1037 (Miss. 2001) (citing ***McGilberry v. State***, 741 So. 2d 894, 923 (Miss. 1999)).

issue is the facial validity of the [proponent's] explanation.'"[23] The Court went on to say that "'[u]nless a discriminatory intent is inherent in the [proponent's] explanation, the reason offered will be deemed race neutral.'"[24] There, the Court held that the Eighth Circuit Court of Appeals had erred by combining steps one and two of the ***Batson*** analysis, and that the State's explanation – that the venire member had long, unkempt hair, a mustache, and a beard – satisfied the second step of the ***Batson*** analysis. [25] Thus, it is at the third-step (pretext) – not the second step of the analysis – that persuasiveness becomes relevant.[26] The second step of the analysis does not even require the explanation to be "plausible."[27]

¶26. Here, the trial judge never made it to the third step of the analysis, instead finding Hardison's concern – that the venire member was proprosecution – was not race-neutral. We find that Hardison provided the trial court with a race-neutral reason, requiring the trial judge to proceed to the third step of the ***Batson*** analysis. His failure to do so constituted clear error.

¶27. The dissent incorrectly argues that Hardison did not raise this issue. Its underlying argument is that the "trial court erred when it sustained the objection of the prosecution the peremptory challenges made by Hardison." The prima facie case is a prong of the ***Batson***

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[23] ***Purkett v. Elem***, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam) (quoting ***Hernandez v. New York***, 500 U.S. 352, 358-59, 111 S. Ct. 1859, 114 L. Ed. 395 (1991) (plurality opinion)).

[24] ***Purkett,*** 514 U.S. at 768.

[25] ***Id.***

[26] ***Id.***

[27] ***Id.*** at 767-68.

analysis, which Hardison clearly addressed in his brief. Also, the trial judge denied only one peremptory strike, so the dissent's argument that Hardison did not specifically mention Gray is irrelevant. The dissent – characterizing the trial judge's ruling as "inarticulate terminology"[28] – fails to see that the trial judge never allowed the parties to address pretext, the third step in the ***Batson*** process.

¶28. When a party makes a ***Batson*** challenge, the burden falls on it to show a prima facie case of discrimination.[29] Once shown, the burden shifts to the other side to give a sufficient race-neutral reason.[30] If, at this stage, a trial judge ***properly*** finds the party has failed to provide a race-neutral reason, the question of pretext never arises, and the juror is returned to the jury. But when – as here – the party offers a valid race-neutral reason, the trial judge must allow the strike unless the other party demonstrates that the valid race-neutral reason was a pretext for discrimination.[31]

¶29. No case – in any jurisdiction – has found that a party wishing to exercise a peremptory strike with a race-neutral reason must, even without a challenge from the other party, prove the absence of pretext. Such a holding would create a two-pronged test, which the United States Supreme Court already has rejected.[32]

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[28]Dis. Op. at ¶ 40.

[29]***Pitchford***, 45 So. 3d at 224.

[30]*See* ***id.***

[31]*See* ***id.***

[32]*See* ***Purkett***, 514 U.S. at 768 (holding that the race-neutral prong and the pretext prong are to be separately decided).

¶30. Had the trial judge (as he should have) found that Hardison's reason was race-neutral, then the State would have had the opportunity and burden to prove pretext. And had the judge allowed the State to proceed with a pretext argument, and had the State made one, Hardison would then have had the opportunity to respond. But the judge never did. The State never argued pretext. And Hardison, of course, could not rebut an argument the State was never given the opportunity to make.

¶31. We recognize several factors under the pretext prong: "the extent and nature of voir dire on the grounds upon which the strike is being exercised; the relation between the reason for the strike and the facts of the case; the demeanor of the attorney and the prospective juror; and disparate impact upon a minority or gender class."[33] The trial judge, however, never made it to the pretext phase. So the dissent not only forgives the trial judge for not moving to the pretext phase, it also forgives the State for failure to show pretext. We instead hold that the trial judge's failure to conduct a proper ***Batson*** analysis constituted clear error.

C. Reversible error

¶32. We now must determine whether this error requires reversal. In ***Rivera v. Illinois***, the United States Supreme Court held that an erroneous denial of a defendant's peremptory challenge did not require automatic reversal pursuant to the Due Process Clause of the Fourteenth Amendment.[34] There, the Court recognized that a defendant does not have a freestanding constitutional right to peremptory challenges.[35] But the Court also noted that,

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[33]***Henley v. State***, 729 So. 2d 232, 240 (Miss. 1998) (footnotes omitted).

[34]***Rivera v. Illinois***, 556 U.S. 148, 161-62, 129 S. Ct. 1446, 173 L. Ed. 320 (2009).

[35]***Id.*** at 157.

"[a]bsent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal."[36] At least five states have done just that.

¶33. Iowa, Massachusetts, Minnesota, New York, and Washington – in their own reverse-***Batson*** cases – all held that a trial judge's erroneous denial of a defendant's peremptory strike requires automatic reversal.[37] We follow their lead and hold that a trial court cannot deprive defendants of their right to a peremptory strike unless the trial judge properly conducts the analysis outlined in ***Batson***. Here, under our Uniform Circuit and County Court Rules, Hardison had a right to twelve peremptory strikes.[38] The judge, having erroneously denied him that right, erred.

¶34. A juror's right to equal protection, of course, is crucial. But as Iowa's Supreme Court noted, "[a]dherence to the proper, three-step ***Batson*** analysis is sufficient to ensure that all parties are allowed to use their peremptory challenges while complying with the Constitution's equal protection requirements."[39] And as another court noted, the question "is whether the erroneous denial of a peremptory challenge can ever be harmless when the objectionable juror actually sits on the panel that convicts the defendant."[40] We hold that it

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[36]***Id.*** at 161-62.

[37]***State v. Mootz***, 808 N.W.2d 207, 225-26 (Iowa 2012); ***Commonwealth v. Hampton***, 928 N.E.2d 917, 926-27 (Mass. 2010); ***Angus v. State***, 695 N.W.2d 109, 118 (Minn. 2005); ***People v. Hecker***, 942 N.E.2d 248, 272-73 (N.Y. 2010); ***State v. Vreen***, 26 P. 3d 236, 238-40 (Wash. 2001).

[38]URCCC 10.01.

[39]***Mootz***, 808 N.W.2d at 226.

[40]***Vreen***, 26 P. 3d at 40.

cannot. Therefore, when a trial judge erroneously denies a defendant a peremptory strike by failing to conduct the proper ***Batson*** analysis, prejudice is automatically presumed, and we will find reversible error.

¶35. The dissent's discussion of a juror's right to sit on a jury is misplaced. A potential juror's right to sit on a jury has never been held to trump the accused's right to a peremptory strike. What the ***Batson*** Court did say, of course, was that a juror has a constitutional right to be free from discrimination during voir dire.[41] That issue is not before us.

¶36. Finally, we must address the dissent's observation that "no injustice should be presumed when a jury is equally balanced, racially, as in today's case."[42] But racial balancing is relevant only at the prima facie phase of the ***Batson*** analysis,[43] which is not an issue here.

CONCLUSION

¶37. Of the 833 days between Hardison's indictment and trial, 701 are attributable to Hardison himself. We find that the ***Barker*** factors do not weigh in his favor, and hold that Hardison's Sixth Amendment right to a speedy trial was not violated. We do hold, however, that the trial judge committed clear and reversible error by denying Hardison's right to a peremptory strike. We therefore reverse and remand for a new trial.

¶38. **REVERSED AND REMANDED**.

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[41] ***Batson***, 476 U.S. at 79.

[42] Dis. Op. ¶ 40.

[43] *See* ***Birkhead v. State***, 57 So. 3d 1223, 1230 (Miss. 2011) (holding that the Court would not overturn the trial court's denial of the defendant's ***Batson*** challenge without knowing the racial makeup of the jury or venire).

KITCHENS, CHANDLER AND KING, JJ., CONCUR. WALLER, C.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION. CARLSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH, LAMAR AND PIERCE, JJ.

WALLER, CHIEF JUSTICE, CONCURRING IN PART AND IN RESULT:

¶39. I agree that Hardison's Sixth Amendment right to a speedy trial was not violated and that the trial judge erred in denying Hardison his right to a peremptory strike. I write separately only to express my disagreement with the plurality's assertion that a defendant's failure to demand a speedy trial does not count against him. Plur. Op. ¶ 9. This Court has "repeatedly held that a defendant's failure to assert his right to a speedy trial must be weighed against him." *E.g.,* ***Young v. State***, 891 So. 2d 813, 818 (Miss. 2005) (citing ***Watts v. State***, 733 So. 2d 214, 236 (Miss. 1990)). Therefore, I respectfully concur in part and in result.

CARLSON, PRESIDING JUSTICE, DISSENTING:

¶40. I agree with the plurality's speedy-trial analysis, but I disagree with its resolution of the ***Batson*** issue. ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Although Hardison raised nine issues in his pro se brief, the plurality reviews only his speedy-trial claim, which it finds to be without merit, and the ***Batson*** claim, which the plurality finds to be case-dispositive. The plurality holds that the trial judge committed reversible error because he improperly conflated the second and third prongs of the ***Batson*** analysis – i.e., the trial court determined that the explanation for the strike was a mere pretext without first determining whether the reason was race-neutral. I would hold that the ***Batson*** issue raised by the plurality was not argued by the defendant, and thus should not be

addressed on appeal. Notwithstanding the plurality addressing an issue not raised, no injustice should be presumed when a jury is equally balanced, racially, as in today's case. I would find that the trial judge correctly applied the three prongs of ***Batson***, despite his inarticulate terminology. Finally, even assuming *arguendo* that the trial judge did not apply ***Batson*** correctly, I would find that any error was harmless.

¶41. But, with this being said, of significant concern is the plurality's silence regarding the constitutional right of the targeted juror, James Gray (who was otherwise qualified) to sit on a jury, which is an equally important holding of ***Batson***. In ***Batson***, the U.S. Supreme Court held that:

> [T]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Batson, 476 U.S. at 79. In ***Georgia v. McCollum***, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), ***Batson*** was extended to cover peremptory challenges exercised by a criminal defendant. So today, in light of ***Batson*** and ***McCollum***, regardless of the race of the defendant and the race of the juror targeted by a peremptory challenge exercised by the State or the defendant, no peremptory challenge may be exercised in a racially discriminatory manner. *See* ***Henley v. State***, 729 So. 2d 232, 239 (Miss. 1998).

¶42. As I would affirm the judgment of the trial court on the ***Batson*** issue, I dissent.

FACTS

¶43. During voir dire, the State had the following exchange with veniremember Gray:

Q: You have been on a criminal jury before?
A: A long, long time ago.
Q: Do you remember what kind of case it was?
A: It was – I think it was an armed robbery case. It's been so long ago since I was on the jury.
Q: Was that in Hinds County?
A: It was. It was right here.
Q: And do you remember if y'all were able to reach a verdict?
A: I think that the D.A.'s office failed to do something and the judge threw the case out.
Q: Okay. So y'all didn't even get to that point?
A: Unh-unh.
Q: Okay. So that was so long ago [that] neither Gregg [nor] I [was] involved with that; right?
A: No.

After the State finished its voir dire, Hardison's counsel had the following exchange with Gray:

Q: I believe you said you had been on a criminal jury?
A: Yes, sir.
Q: Did you reach a verdict?
A: No. And I can tell you who prosecuted that because I remember his name now. For the D.A.[,] it was Tom Royals, and he failed to do something. I can't remember exactly what he failed to do, but the judge dismissed the case.
Q: I believe you said that when you were asked earlier.
A: I didn't say Mr. Royals' name, but I just happened to remember who it was.

¶44. During jury selection, defense counsel for the black defendant struck four white veniremembers, including Gray. The State made a ***Batson*** challenge. Defense counsel argued that there was no prima facie case for discrimination, but the State responded that defense counsel had struck older white persons who had served on juries. The judge found that a prima facie case of discrimination was made and required Hardison to present race-neutral reasons for striking the four white veniremembers. The judge found Hardison's race-neutral

reasons for three of these veniremembers to be sufficient. But as to Gray, the following lengthy discussion occurred between the trial judge and the attorneys:

> **The Defense:** Mr. James Gray. . . was the first white person that the defense chose to strike. And our reason was that he was opinionated about the fact that he served on a criminal jury. And he said that Mr. Tom Royals [the prosecutor in an earlier trial that Gray served on as a juror] did something so that they didn't get to make a decision. And we felt like his opinion was that he was more likely to convict. And his discussion about the service on the jury, his regret not being able to reach a verdict, we felt he was more likely to convict if he sat on a jury. So for his explanations about his past experience, we felt that that was a reason to strike.
>
> **The Court:** All right. Response by the State.
>
> **The State:** Your Honor, our response would be that if he seemed indifferent about whether or not he could reach a verdict or not about a past experience, that that would make him exactly what we want, which is someone who is on the middle of the fence, someone who is fair and impartial and cannot – would not make up their mind until they hear what evidence is presented. I don't recall him saying that he could not be fair and impartial to either side.
>
> **The Defense:** And Judge, we're not trying to strike him for cause. We just felt like that's a race neutral reason that we want to strike [him] and use a peremptory.
>
> **The Court:** That you wanted to what?
>
> **The Defense:** We wanted to strike and use a peremptory challenge. We're not trying to strike for cause.
>
> **The Court:** Well, I understand. I understand.
>
> **The Defense:** So we feel like the fact that his – you know, when he elaborated. . . about his service. . . that that is enough showing for a peremptory challenge.
>
> **The Court:** He said the judge threw it out.
>
> **The Defense:** Right. But we just felt like he regretted not being able to deliberate. And [the State] asked if he – if they were serving as the prosecutors at the time, and he said no, it wasn't you; in other words, like the prosecutor messed it up. And we just felt like he was pro-prosecution from his answers.

> **The State:** I don't think there was [sic] any questions to that effect, your Honor.
>
> **The Court:** Still the Court doesn't understand the basis for the opinion that you thought he might be prosecution oriented.
>
> **The Defense:** To us he sounded like he regretted not being able to convict in the case. And when Mr. Doleac [prosecutor] had an exchange with him, whether he and [his co-counsel] were the prosecutors, he said oh, no, it wasn't you, but he sort of blamed the prosecutor for messing up. Mr. Royals got him off on a technicality. That sounded like pro-prosecution language to us. And for that reason we wanted to strike him. He didn't get to deliberate. And some of the language seemed, frankly, that he regretted that.

The trial judge stated that he did not understand the defense's reasoning for excluding Gray, ruled that this was not a "proper or sufficient race-neutral" reason, and kept Gray on the jury.

¶45. Ultimately, the trial court accepted three of the State's peremptory strikes as race-neutral and denied three. The trial court accepted three of Hardison's peremptory strikes as race-neutral and denied one (Gray). The record reflects that the resulting jury panel consisted of six black jurors and six white jurors; the first alternate juror was black, and the second was white.

ANALYSIS

I. The trial judge's application of the third prong of Batson was not raised on appeal.

¶46. As a preliminary matter, I question whether the purported error on which the plurality reverses – that the trial judge erred by not applying the third prong of ***Batson*** – was even raised on appeal. Having reviewed Hardison's pro se briefs, I am convinced that the matter was never properly raised for review. Accordingly, I would find that the issue is precluded from review by this Court.

¶47. In his pro se brief, Hardison raised the following two issues pertaining to peremptory strikes:

> Issue No. 7
> The trial court erred when it denied the challenge of Hardison to the peremptory challenges made by the prosecution and allowed by the trial court, in violation of [***Batson***], thus denying to Mr. Hardison his fundamental and constitutional right to a jury of his peers[.]
>
> Issue No. 8
> The trial court erred when it sustained the *objection of the prosecution [to] the peremptory challenges made by Hardison, when it falied [sic] to require the [S]tate to make a prima facie showing of racial discrimination* in violation of [***Batson***], thus denying to Mr. Hardison his fundamental and constitutional right to a jury of his peers[.]

(Emphasis added.) Issue Number 7 deals with the State's peremptory strikes, and Issue Number 8 with Hardison's peremptory strikes. Gray was peremptorily struck by Hardison. However, Hardison's contention in Issue Number 8 deals solely with the *first* prong of ***Batson***, the existence of a prima facie case of discrimination. That subject cannot even be reviewed on appeal since this Court does not know the makeup of the venire. *See* ***Birkhead v. State***, 57 So. 3d 1223, 1230 (Miss. 2011) (this Court "cannot override the trial court when this Court does not even know the racial makeup of the venire."). Nowhere in Hardison's brief can I discern any argument that the trial judge failed to apply the third prong of ***Batson***, nor that he improperly conflated the second and third prongs. Furthermore, there is no specific mention of Gray or of the peremptory strike against him anywhere in Hardison's briefs.

¶48. Under Mississippi Rule of Appellate Procedure 28(a)(3), "[n]o issue not distinctly identified shall be argued by counsel, except upon request of the court[.]" Miss. R. App. P.

28(a)(3). While pro se litigants are afforded some leniency, they "must be held to substantially the same standards of litigation conduct as members of the bar." ***Sumrell v. State***, 972 So. 2d 572, 574 (Miss. 2008) (citing ***Perry v. Andy***, 858 So. 2d 143, 146 (Miss. 2003)). Since Hardison failed to raise the particular ***Batson*** issue on which the plurality reverses and remands – the trial judge's alleged failure to find whether the defense's stated race-neutral reason for striking Gray was a mere pretext – I would find that this issue should not be addressed on appeal. But this being said, alternatively, I now proceed to analyze the issue on its merits.

II. The trial court correctly applied the substance of Batson.

¶49. ***Batson*** challenges are analyzed under a three-part test: (1) the party objecting to the peremptory strike must make a prima facie showing that race was the reason for the strike; (2) the burden then shifts to the other party to articulate a race-neutral reason for excluding the juror;[44] and (3) the trial court must determine whether the objecting party has met its burden to prove that the reason was a mere pretext for discrimination.[45] *See, i.e.,* ***Bailey v.***

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[44] The issue under the second prong is "the facial validity of the [proponent's] explanation. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral." ***Purkett v. Elem***, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam) (citations omitted). This step "does not demand an explanation that is persuasive, or even plausible." ***Id***. at 767-68. Furthermore, "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." ***Id.*** at 769 (citation omitted). In ***Purkett***, the prosecutor for the State of Missouri explained that a veniremember was struck because he had long, unkempt hair, a mustache, and a beard. ***Id.*** at 766. The U.S. Supreme Court held that this explanation satisfied the second prong of ***Batson***. ***Id.*** at 769-70.

[45] Under the third prong of ***Batson***, "the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory [challenge]." ***McFarland v. State***, 707 So. 2d 166, 171 (Miss. 1997) (citations omitted). "[T]he trial court determines if the reasons given by the

State, 78 So. 3d 308, 318-20 (Miss. 2012) (citations omitted); ***Pitchford v. State***, 45 So. 3d 216, 225 (Miss. 2010) (citation omitted). This Court has listed sufficient race-neutral reasons for striking veniremembers as including:

> [A]ge, demeanor, marital status, single with children, prosecutor distrusted juror, educational background, employment history, criminal record, young and single, friend charged with crime, unemployment 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) (citing ***Lockett v. State***, 517 So. 2d 1346 (Miss. 1987)). The plurality finds, and I agree, that if a prosecutor's distrust qualifies as a race-neutral reason, then a defendant's distrust must qualify as well.

¶50. This Court has held that:

> [o]n appellate review, a trial court's determinations under ***Batson*** are accorded great deference because they are largely based on credibility. ***McGilberry v. State***, 741 So. 2d 894, 923 (Miss. 1999). . . . This Court will reverse only when such decisions are clearly erroneous. ***Woodward v. State***, 726 So. 2d 524, 530 (Miss. 1997); ***Lockett v. State***, 517 So. 2d 1346, 1349-50 (Miss. 1987).

Birkhead, 57 So. 3d at 1229 (citing ***Berry v. State***, 802 So. 2d 1033, 1037 (Miss. 2001)). As this Court "cannot override the trial court when this Court does not even know the racial makeup of the venire[,]" which the plurality recognizes is the case here, the analysis proceeds to the second ***Batson*** prong – articulating a race-neutral reason. ***Birkhead***, 57 So. 3d at 1230. Under the facts presented, I would hold that the trial judge was imprecise but committed no error in his application of ***Batson***.[46]

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prosecution were pretexts for intentional discrimination." ***Berry v. State***, 802 So. 2d 1033, 1040 (Miss. 2001) (citation omitted).

[46] In reviewing the transcript of the voir dire proceedings, the ***Batson*** decisions regarding multiple members of the venire reflect that the trial judge consistently utilized the

¶51. Regarding the peremptory strike of Gray, the trial judge properly provided the State, the party bringing the ***Batson*** challenge, with an opportunity to rebut the race-neutral reason articulated. According to Gray, he had served previously on a jury in a trial in which the prosecution had "failed to do something and the judge threw the case out." The defense proffered this statement as "regret" that the verdict was not reached and as an indication of a proprosecution bias. The trial judge rejected that contortion of Gray's statements. In effect, the judge determined that the reason given was pretextual.

¶52. Viewing the trial judge's ruling on the peremptory strike of Gray in context, it is apparent that the judge consistently applied the correct substance of the ***Batson*** test, and that his sole mistake was in using the wrong labels. The judge consistently and properly allowed the opponents of the peremptory strikes to offer argument that the given race-neutral reasons were mere pretexts, and made his rulings accordingly. In particular, the judge allowed the

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wrong terminology, but the correct process, in addressing ***Batson*** challenges. After determining that the objecting party had established a prima facie case of discrimination, which this Court cannot review since we have not been provided with the makeup of the venire, the judge proceeded repeatedly to conflate the second and third prongs of ***Batson*** – allowing the party proposing the challenge to allege a race-neutral reason, providing the objecting party with an opportunity for rebuttal, and then determining whether a "sufficient race-neutral reason" had been established. For instance, in summing up his rulings on the State's peremptory strikes, the judge stated: "in the opinion of the Court there were three of those challenges by the State that were *race neutral*, and three that were not. . . and *race neutral reasons* not being sufficiently stated in the opinion of the Court as to Patricia Willis, Andrew Dent, and Nellie Bennett. So they will remain on the panel." The reason the State gave for striking Dent and Bennett was their demeanor during voir dire, which under the precedent of ***Davis***, 660 So. 2d at 1242, is indeed a race-neutral reason. So the judge properly considered whether the race-neutral reasons provided were mere pretexts, and concluded that they were. He stated his ruling in the language of the second and not the third prong. Yet, despite the trial judge's imprecise phraseology, the totality of the circumstances indicates that he correctly applied all three prongs of the ***Batson*** analysis.

State an extensive opportunity to rebut the defense's articulated race-neutral reason (that Gray was proprosecution due to alleged regret he showed at not being allowed to reach a verdict in a previous case). Effectively, the judge found that the purported race-neutral reason was a mere pretext, correctly applying the third prong of ***Batson***. While the language that the trial court used was faulty ("the Court does believe that there was not a proper or sufficient race neutral reason to give as to James Gray. So he will be restored to the panel"), in context, it is clear that the finding was not that no race-neutral reason was articulated, but rather that the articulated reason was a mere pretext.

¶53. In a similar case in Tennessee, a defendant, Stout, argued "that the trial court erred by not accepting his proffered race-neutral reasons at face value and then requiring the State to prove purposeful discrimination." Stout opined "that the trial court completed only the first two steps of the ***Batson*** analysis[.]" ***State v. Stout***, 2000 WL 202226, *8. (Tenn. Crim. App. Feb. 17, 2000) *aff'd*, 46 S.W.3d 689 (Tenn. 2001), superseded by statute on other grounds by ***State v. Franklin***, 308 S.W.3d 799 (Tenn. Apr. 29, 2010). The Tennessee Court of Criminal Appeals noted that it was "reviewing the trial court's lengthy findings after it heard substantial argument on this issue from both the State and the defendant." ***Stout***, 2000 WL 202226, at *8. The Tennessee Court of Criminal Appeals held that "despite the imprecise phraseology used by the trial court, the record makes clear that the court engaged in the required in-depth analysis of all the circumstances before reseating [a peremptorily struck veniremember] on the jury, and did not impermissibly shift the burden of persuasion to the defendant." ***Id.*** I would likewise hold that, in the instant case, where an in-depth analysis occurred before Gray's reseating and the burden of persuasion was not impermissibly shifted,

but imprecise phraseology was employed by the trial court, the reseating of the venireman was not error.

¶54. A further indication that the trial judge properly applied the third prong of ***Batson*** is his apparent application of the rule of ***Robinson v. State***, 761 So. 2d 209, 210 (Miss. 2000), and ***Hatten v. State***, 628 So. 2d 294, 298 (Miss. 1993), pertaining to the third prong of the ***Batson*** analysis. That line of cases mandates that it is necessary for "trial courts [to] 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***, 628 So. 2d at 298. In ***Hatten***, we noted that "such a requirement is far from revolutionary, as it has always been the wiser approach for trial courts to follow. Such a procedure, we believe, is in line with the 'great deference' customarily afforded a trial court's determination of such issues." ***Id.*** (citations omitted). In ***Robinson***, this Court reversed the judgment of a trial court which did not make factual findings requested by a defense attorney, who had made the following objection to the State's purportedly race-neutral reason for a peremptory strike:

> Your Honor, we would object to all of those reasons. The law is now clear in Mississippi if they are going to base their strikes on things like sleeping, inattentive, no eye contact, the Court has to make a factual finding that those things are, in fact, true. We would ask the Court to make that determination that [venireman] Mr. Jones was, in fact, sleeping.

Robinson, 761 So. 2d at 212.

¶55. In the instant case, the trial judge articulated that he would be making the sort of fact-based determinations on the third ***Batson*** prong required by the ***Robinson*** line of cases. In ruling with regard to venireman Andrew Dent – whom the State peremptorily struck, citing his demeanor at voir dire as its race-neutral reason – the trial judge stated:

> [I]t's the policy of this Court that unless the attorneys call the attention of the Court to a witness who is uninterested or makes a face, or has a bad expression looking at an attorney or turns away from them or something else, body language, folds their arms or whatever, it has to be called to the attention of the Court so that the Court can view them as well and make that determination. So the attorney should come to the bench and make that observation, or send word to the Court. So that's the Court's ruling.

When the issue next arose with regard to venirewoman Nellie Bennett, whom the State also peremptorily struck, citing her demeanor at voir dire, the trial court *explicitly* articulated that it would be applying the third-***Batson***-prong, fact-based determination required by the line of cases in ***Robinson***, as indicated by the following exchange:

> **The Defense**: Your Honor, we'd like to cite to the Court the case of ***Jeremiah [Robinson] v. State***, 761 So. 2d 209, where, quote, the law is now clear in Mississippi if they are going to base their strikes on things like sleeping, inattentive, no eye contact, the Court has to make a factual finding that those things are in fact true. We would ask . . . that the Court make a determination that the lady was either sleeping or doing something of that nature that would – being inattentive is not enough under this case.
>
> **The Court**: Well, the Court has already stated its policy. The Court – you know, folding arms doesn't necessarily mean somebody is not interested. They just may do that out of habit or to be comfortable or for whatever reason. So that in itself does not necessarily show disinterest in what's going on. And so the Court thus far has not heard any justifiable *race neutral reason* for her.

(Emphasis added.) Interestingly, the trial court here linked its finding of a justifiable "race neutral reason," the requirement of the second ***Batson*** prong, to the ***Robinson*** rule, which regulates the third prong.

¶56. As reflected in the exchanges noted above,[47] the State was allowed extensive rebuttal to the race-neutral reason articulated by the defense for striking Gray and, in essence, called

[47] *Supra*, ¶¶ 43, 44.

for a fact-based determination from the trial judge, consistent with the ***Robinson*** line of cases. Although the defense attorney at one point suggested that its race-neutral reason was based on "the language" of Gray, a natural reading of Gray's statements does not indicate a proprosecution bias, as the trial judge recognized. The defense appears to have been more concerned about Gray's tone or attitude, as indicated by the defense statements "he was opinionated," "we just felt like he regretted," and "[t]o us it sounded like he regretted." Tone and attitude fall squarely within the category of race-neutral reasons about which the trial judge is required to make an on-the-record, fact-based determination of the merits under ***Robinson*** and ***Hatten***. ***Robinson***, 761 So. 2d at 210; ***Hatten***, 628 So. 2d at 298.

¶57. The deferential standard accorded to the trial court's ***Batson*** determinations is logical. *See* ***Birkhead***, 57 So. 3d at 1229. Matters such as tone and attitude do not translate well into the written record, and it is impossible for this Court to substitute its judgment for that of the trial court with any expectation of accuracy. Here, the trial judge indicated that he did not understand the basis for the defense's purportedly race-neutral reason for striking Gray and finally made the determination that "there was not a proper or sufficient race-neutral reason to give as to James Gray." In the lengthy discussion of the peremptory strike against Gray, and the rebuttal thereto, the trial court clearly applied the correct substance, if not the correct labels, of the three-prong ***Batson*** test. This is true even though the trial judge imprecisely stated that his final determination related to whether a "sufficient race-neutral reason" has been established.[48] Accordingly, I would conclude that this issue is without merit.

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[48] Nevertheless, I would caution trial judges in the future to carefully differentiate between the latter two prongs of ***Batson***. ***Purkett*** established that the second prong (race-

III. In the alternative, if any error existed, it was harmless.

¶58. Since I find no error, I would affirm the trial court on the ***Batson*** issue. However, even if there were an error, I would find it to be harmless. The plurality does not apply a harmless-error analysis, holding that a trial judge's erroneous denial of a defendant's peremptory strike requires automatic reversal. The plurality notes that the Supreme Courts of Iowa, Massachusetts, Minnesota, New York, and Washington have found that a trial judge's erroneous denial of a defendant's peremptory strike requires automatic reversal. *See* ***State v. Mootz***, 808 N.W. 2d 207, 225-26 (Iowa 2012); ***Commonwealth v. Hampton***, 928 N.E. 2d 917, 927 (Mass. 2010); ***Angus v. State***, 695 N.W.2d 109, 118 (Minn. 2005); ***People v. Hecker***, 942 N.E. 2d 248, 272 (N.Y. 2010); ***State v. Vreen***, 26 P. 3d 236, 238-40 (Wash. 2001).

¶59. I disagree. Whether such errors require automatic reversal in Mississippi appears to be a question of first impression. I do not find the reasoning in the opinions cited above convincing.

¶60. As the plurality noted, in ***Rivera v. Illinois***, the United States Supreme Court held that an erroneous denial of a defendant's peremptory challenge did not require automatic reversal pursuant to the Due Process Clause of the Fourteenth Amendment. ***Rivera v. Illinois***, 556 U.S. 148, 161-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009). There, the Court stated that,

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neutral reason) has an extremely low threshold – the U.S. Supreme Court held that unless a discriminatory intent is inherent in the explanation, the second prong will be deemed to be met; it need not be persuasive, plausible, or even make sense. ***Purkett***, 514 U.S. at 767-68, 769. It is only in the third prong of the ***Batson*** analysis that persuasiveness becomes relevant. In a future case that is not as clear cut, a trial judge may risk reversal if he or she does not carefully distinguish between the second and third prongs of his or her ***Batson*** analysis.

"[a]bsent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal." ***Rivera***, 556 U.S. at 161-62.

¶61. I would adopt the standard favored by the Oklahoma Court of Criminal Appeals[49] in ***Kevin Wayne Robinson v. State of Oklahoma***, 255 P. 3d 425, 430, 2011 OK CR 15 (Ct. Crim. App. Okla. 2011),[50] holding that ***Batson*** errors may be reviewed on a case-by-case basis. The Oklahoma court noted that "[t]here is a strong presumption that errors which occur during trial are subject to harmless error analysis, as long as a defendant is represented by counsel and is tried by an impartial judge." ***Oklahoma***, 255 P. 3d at 428 (citations omitted). *See also* ***People v. Bell***, 473 Mich. 275, 295, 702 N.W.2d 128, 139 (2005) *opinion corrected on reh'g*, 474 Mich. 1201, 704 N.W.2d 69 (2005); ***U.S. v. Patterson***, 215 F.3d 776, 780-81 (7th Cir. 2000) *vacated in part on other grounds*, ***Patterson v. U.S.***, 531 U.S. 1033, 121 S. Ct. 621, 148 L. Ed. 2d 531 (2000) (Supreme Court of Michigan and United States Court of Appeals for the Seventh Circuit, respectively, holding that peremptory challenge errors are subject to harmless-error analysis). The opinion further noted that those errors which mandate automatic reversal "appear to have in common the violation of a right granted by the Constitution, rather than a violation of due process by failure to afford a right granted by

[49] The Oklahoma Court of Criminal Appeals is Oklahoma's highest appellate court for criminal matters.

[50] To distinguish this case from the ***Jeremiah Robinson*** case cited above, I will refer to this case as ***Oklahoma*** in this opinion.

state statute." ***Oklahoma***, 255 P. 3d at 428.[51] Peremptory strikes have a statutory basis in Mississippi. *See, i.e.,* Miss. Code. Ann. § 99-17-3 (Rev. 2007).

¶62. In accord with ***Rivera*** and ***Oklahoma***, I would hold that errors in granting peremptory strikes are subject to harmless-error analysis in Mississippi. I reiterate that I do not find error in the instant case, but only imprecision that did not have a negative effect on Hardison's rights. However, even assuming, *arguendo*, that the trial judge erred in failing to find explicitly that Hardison's stated race-neutral reason for striking Gray was a mere pretext, I would find that this error was harmless beyond a reasonable doubt.

CONCLUSION

¶63. I agree with the plurality's speedy-trial analysis. However, since I would affirm the trial court on the ***Batson*** issue, the issue on which the plurality reverses and remands for a new trial, I dissent.

RANDOLPH, LAMAR AND PIERCE, JJ., JOIN THIS OPINION.

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[51] Citing faulty jury instruction on reasonable doubt, *see* ***Sullivan v. Louisiana***, 508 U.S. 275, 282, 113 S. Ct. 2078, 2083, 124 L. Ed. 2d 182 (1993); intentional racial discrimination in selection of grand jurors, *see* ***Vasquez v. Hillery***, 474 U.S. 254, 263-64, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598 (1986); denial of the right to a public trial, *see* ***Waller v. Georgia***, 467 U.S. 39, 49, 104 S. Ct. 2210, 2217, 81 L. Ed. 2d 31 (1984); denial of the right to self-representation, *see* ***McKaskle v. Wiggins***, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 950 n.8, 79 L. Ed. 2d 122 (1984); improper exclusion of qualified capital jurors, *see* ***Davis v. Georgia***, 429 U.S. 122, 123, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339 (1976) (per curiam); exposure to improper publicity which wholly denies the defendant an impartial jury, *see* ***Sheppard v. Maxwell***, 384 U.S. 333, 351-352, 86 S. Ct. 1507, 1516, 16 L. Ed. 2d 600 (1966); failure to afford a defendant the right to counsel, *see* ***Gideon v. Wainwright***, 372 U.S. 335, 345, 83 S. Ct. 792, 797, 9 L. Ed. 2d 799 (1963); and the lack of an impartial trial judge, *see* ***Tumey v. Ohio***, 273 U.S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749 (1927).