

**IN THE COURT OF APPEALS 03/12/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 93-KA-01157 COA**

**DARNELL BUMPHIS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK A. RUSSELL

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEE COUNTY

ATTORNEY FOR APPELLANT:

SHELLY NICHOLS ELLIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: CRIMINAL: ARMED ROBBERY AND AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTION: SENTENCED TO SERVE, AS AN HABITUAL  
OFFENDER, CONCURRENT TERMS OF THIRTY AND TWENTY YEARS, RESPECTIVELY,  
IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

## SOUTHWICK, J., FOR THE COURT:

Darnell Bumphis was convicted of armed robbery and aggravated assault. He was sentenced as a habitual offender to a total of thirty years in prison. Bumphis appeals his conviction, challenging the trial court's rulings against him concerning the suppression of a statement he gave to the police and whether mistrials should have been declared upon disclosure of other crimes he had committed. We conclude that, as to these issues, the trial court did not err. Bumphis also raises a challenge to jury selection based upon *Batson* and its progeny. Because the trial court did not make appropriate findings concerning the propriety of certain peremptory challenges to jurors, we must remand this case for further proceedings before finally disposing of this appeal.

## FACTS

In the evening of August 26, 1991, Bumphis and an accomplice robbed a clerk at the Tupelo Liquor Mart at gunpoint. After taking the store's money and on instructions from his accomplice, Bumphis forced the clerk into a back room of the store and shot him in the knee. Bumphis was arrested three days later, and he confessed to the crimes the next day in the custody of the Tupelo Police. He was also positively identified by the store clerk.

## DISCUSSION

### *1. Motion to Suppress Confession*

Bumphis contends that his confession was taken in violation of his constitutional rights and that, consequently, it should not have been admitted at his trial. In essence, Bumphis challenges the propriety of every step leading to the procurement of his confession. Our review of this case demonstrates that Bumphis' constitutional rights were not violated.

During Bumphis' testimony at a suppression hearing, his counsel asked him, "Darnell, were you promised anything, at any time, in order to get you to cooperate with the officers and make a statement?" Bumphis replied, "No, sir." That answer satisfies this Court that the original ground for suppressing the confession, "inducements and promises" made by the officers to obtain Bumphis' confession, had no merit.

Likewise, the circumstances of the arrest do not reveal a violation of Bumphis' constitutional rights. A Tupelo policeman testified that he, a police detective, and an investigator went to a home in Pontotoc County to arrest Bumphis. They carried a warrant for Bumphis' arrest on the armed robbery charge. An officer testified that the information on which the affidavit for the issuance of the arrest warrant was based came from the victim of the armed robbery and the statement of Bumphis' accomplice. Based on the foregoing evidence, the trial judge correctly held that "the arrest [of Bumphis] was a lawful arrest . . . ."

As to the voluntariness of Bumphis' confession, one of the officers testified that he advised Bumphis of his "*Miranda* rights." It is evident that Bumphis was advised of his rights following processing by the police department the day after his arrest. In the face of the *Miranda* warnings, Bumphis signed a waiver of his rights and confessed to his participation in the robbery.

Bumphis' version of the events was different. Bumphis testified that when he was arrested, one of the officers placed a pistol at his left temple and threatened to kill him. He also testified that the next day, an officer "unbuckled his gun, and asked the other officer, 'Don't you hear somebody trying to throw in this window?'" Bumphis maintained that he signed the statement only because the officers told him to do it and that he was scared of what they might do to him if he didn't sign it. The officers denied these allegations.

At the conclusion of the hearing, the trial judge found and held as follows:

Secondly, the Court finds that there were no threats, or inducements, or promises as alleged in the motion; that the Defendant was duly and fully advised of his *Miranda* rights, that he executed a rights waiver and that he thereafter waived his rights; that he waived those freely and voluntarily, knowingly and intelligently, and then proceeded to give a statement likewise of his own free will and accord, without the presence of counsel by his election. The motion to suppress shall be and the same is hereby overruled.

Bumphis then moved to amend his motion to suppress to conform to the proof adduced at the hearing, which was that the tape-recorded statement was taken after written statements had been taken. He argued that testimony from one of the officers indicated that a *Miranda* warning had not been given before the tape recording of his statement in violation of his Fifth Amendment right against self-incrimination and sufficient to exclude the taped statement. The trial court held that all three statements "were taken in one continuous setting there with the two detectives, without any interruptions, and that the advisement of his *Miranda* rights were [sic] still valid during the taking of the statements, the written and the taped statement too."

In *Abram v. State*, 606 So. 2d 1015, 1031 (Miss. 1992) (citations omitted), the Mississippi Supreme Court reiterated the usual standard by which it reviews and resolves the issue of whether a confession is voluntary and therefore admissible:

This point generally presents a fact question which is to be resolved by the trial judge according to the correct legal standards. In making this determination, the trial judge must absolutely resist any inclination to consider whether the confession is truthful or authentic; the focus must be limited to the voluntariness of the confession. Once the trial judge has determined the confession to be voluntary, this court will only reverse if convinced that such a finding is manifestly wrong and/or against the overwhelming weight of the evidence, except that our scope of review is less constrained where detailed and specific findings by the trial court are lacking on the critical issues.

We previously quoted the findings of the trial court on the admissibility of Bumphis' confession. We find them sufficiently detailed and specific to constrain our scope of review in this case. We further find that the trial court's findings were supported by substantial evidence, that the State had established beyond a reasonable doubt that Bumphis' confession was free and voluntary, and that the trial court correctly admitted his confession into evidence.

Nevertheless, Bumphis argues that the delay in his initial appearance renders his confession inadmissible. Bumphis confessed at approximately 10:20 a.m. on Friday morning after he had been arrested at about 9:19 p.m. the previous night. He appeared before a Lee County Justice Court Judge later that day, August 30, within twenty-four hours of his arrest. He relies on *Abram v. State*, 606 So. 2d 1015 (Miss. 1992), to support his argument that the police tarried so long in arranging his initial appearance that the trial court ought to have suppressed his confession. In *Abram*, the defendant was "functionally arrested without a warrant and questioned beginning in the early afternoon of Thursday . . . ," but he was not taken before a magistrate for an initial appearance until the following Sunday afternoon, after he had confessed. *Id.* at 1029.

The period between Abram's arrest and his initial appearance was three days. Uniform Criminal Rule of Circuit Court Practice 1.04 then required that every arrested person "be taken before a judicial officer without unnecessary delay." Unif. Crim. R. Cir. Ct. Prac. 1.04. About the delay of three days, the Mississippi Supreme Court wrote:

We hold the failure to provide the initial appearance reversible since, as a consequence, Abram gave a confession in the absence of, and in violation of, his right to counsel. Such an error could hardly be deemed harmless since the conviction of Abram for capital murder was based entirely on his confession.

*Id.* Even though Bumphis was taken before a justice court judge within twenty-four hours of his arrest, rather than seventy-two hours as was Abram, he argues that this period of twenty-four hours was long enough to vitiate the voluntary nature of his confession.

We do not consider the merits of this issue since it is procedurally barred. Bumphis did elicit testimony regarding the timing of his initial appearance, but he did not lay claim to this part of the issue in either his motion to suppress or during the hearing on the motion. Under such circumstances, this Court will not consider the matter. *Colburn v. State*, 431 So. 2d 1111, 1114 (Miss. 1983).

Were we to conclude that the issue was not procedurally barred, we would decide it adversely to Bumphis. He has failed to persuade us that he confessed in the absence of counsel as a consequence of the twenty-four hour period from arrest to initial appearance. The trial judge found from the evidence presented by the State that Bumphis "waived those [*Miranda* rights] freely and voluntarily, knowingly and intelligently, and then proceeded to give a statement likewise of his own free will and accord, without the presence of counsel *by his election*." Bumphis did nothing to require the trial judge to make a finding on whether the delay of twenty-four hours rendered his confession involuntary. Under our earlier quoted standard of review, we accept the trial judge's determination of this issue.

## 2. Other Crimes Evidence

Bumphis contends that the trial court should have granted motions for mistrial when witnesses for the prosecution indicated that Bumphis had been involved in other crimes. In one instance, the prosecution asked a witness if he had previously seen Bumphis to which the witness replied that he had seen Bumphis at the sheriff's department after Bumphis was arrested. An objection was promptly

made by the defense and the jury was instructed to disregard the witness' response. The trial court denied a motion for a mistrial made by the defense. A similar disclosure was again made during the testimony and, again, the trial court admonished the jury to disregard the response. Another motion for mistrial was denied.

Bumphis argues that this testimony amounts to evidence of other crimes which he committed and is therefore improper and inadmissible pursuant to Mississippi Rule of Evidence 404(b). He cites *Carter v. State*, 450 So. 2d 67 (Miss. 1984), a case which was decided before adoption of the Mississippi Rules of Evidence, to support his position on this issue. In *Carter*, on redirect examination the State asked the officer who had arrested the appellant if he had any other reason to arrest Carter. *Id.* at 68. The officer answered, "Oh, he was wanted on a petty larceny charge, also." *Id.* As did Bumphis, Carter objected to the answer and moved for a mistrial. *Id.* The trial judge denied the motion for mistrial but did instruct the jury to disregard that answer when they retired to deliberate their verdict. *Id.*

In response to Carter's argument that the trial court erred when it denied his motion for mistrial in response to the arresting officer's answer, the Mississippi Supreme Court opined:

In the case *sub judice*, the trial judge instructed the jury to disregard the answer of the witness Hunter, he complied with the law in doing so, and we are of the opinion that no reversible error was committed. Also, at the conclusion of the State's case, the appellant neither testified nor introduced evidence to refute that presented by the State, but immediately rested. Therefore, in our opinion, evidence of guilt was overwhelming against the appellant, and, from that evidence, the jury could not reasonably have found any verdict other than that of guilt.

*Id.* at 69. We interpret this paragraph to state two reasons for the supreme court's resolution of this issue. The first reason was "the trial judge instructed the jury to disregard the answer." A second reason, unrelated to the first reason was the "overwhelming" evidence of Carter's guilt which resulted from Carter's resting his case immediately after the State rested. Despite his reliance on *Carter*, Bumphis seeks to distinguish the case on the ground that, unlike Carter, he testified and offered one other witness on his behalf. We reject this distinction because we think that the court's reason for affirming the trial judge's denial of the motion for mistrial is equally applicable, whether or not the defendant testifies.

In its brief the State notes that the court in its Instruction C-1 instructed the jury to "disregard all evidence which was excluded by the Court from consideration during the course of the trial." It cites the case of *Reynolds v. State*, 585 So. 2d 753, 755 (Miss. 1991), in which the Mississippi Supreme Court affirmed the trial court's denial of a motion for mistrial where the trial court "properly admonished the jury to disregard the reference to reputation and criminal record [of the appellant]." The supreme court then presumed "that the jury [properly] follow[ed] these instructions." *Id.* It concluded, "[t]he trial court did not err in refusing to grant the motion for mistrial." *Id.*

Because of the overwhelming evidence of Bumphis' guilt and because the jury was admonished by the trial judge both immediately following the improper testimony and at the close of the trial, we

conclude that the trial court did not err.

### 3. Jury Selection

Bumphis challenges the trial court's denial of two of his peremptory challenges because the trial court perceived the challenges to have been impermissibly based on racial considerations. The trial court accepted twelve other challenges made by the defense. Primarily, Bumphis argues that the trial court's failure to make an on-the-record finding that race motivated the two strikes renders the court's action defective.

When the panel was tendered to him, Bumphis peremptorily challenged six of the ten white veniremen. The State responded by calling the court's attention to *Griffin v. State*, 610 So. 2d 354 (Miss. 1992), the "reverse *Batson*" case, and contested Bumphis' challenge of "these who appear to be all white jurors." The trial required Bumphis to state his "non-racial reasons" for challenging these six white veniremen. After Bumphis stated his reasons, the trial judge granted five of the six challenges. It denied his allegedly racially neutral reason for peremptorily challenging one woman and she remained on the jury.

The State then tendered five more veniremen to Bumphis. Bumphis peremptorily challenged three of these five new names, and the court accepted his reasons for two of those peremptory challenges. However, it denied his third peremptory challenge of a venireperson who then remained on the jury. Ultimately, the trial judge granted all but two of Bumphis' peremptory challenges of white members of the venire panel and Bumphis exhausted all twelve of his peremptory challenges. The jury which convicted Bumphis consisted of four black persons and eight white persons.

In *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992), the United States Supreme Court held that "if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants, must articulate a racially neutral explanation for peremptory challenges." In *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992), the Mississippi Supreme Court acknowledged that *Georgia v. McCollum* applied the *Batson* principle to prohibit the defendant's racially discriminatory use of its peremptory challenges.

In considering the trial court's evaluation of *Batson* issues, we note that the trial court is given great deference in determining whether impermissible racial considerations are injected into jury selection. In the case of *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987), the Mississippi Supreme Court stated "[t]hese findings largely turn on credibility and thus *Batson* states that 'ordinarily,' a reviewing court should give the trial court 'great deference.'" *Lockett* further held that a "trial judge's factual findings relative to a prosecutor's use of peremptory challenges on minority persons are to be accorded great deference and will not be reversed unless they appear clearly erroneous or against the overwhelming weight of the evidence." *Id.* at 1350.

The Mississippi Supreme Court has ruled that trial courts must make an on-the-record determination of the reasons for denying a peremptory challenge. *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993). This requirement was further interpreted in *Henderson v. State*, 641 So. 2d 1184, 1185 (Miss. 1994). There the court upheld the State's challenges to five black prospective jurors, and agreed that the *Hatten* requirement did not apply to cases tried before the November 24, 1993 date of that decision. *Henderson*, 641 So. 2d at 1185. The court complained that "the circumstances here

demonstrate the importance of requiring the trial court to make an on-the-record determination. Without such findings, it is nearly impossible for this Court to effectively review the determination whether a prospective juror has been deprived of her right to serve. . . ." *Id.*

This case is different -- rather than accepting the State's race neutral reasons as in *Henderson*, this case concerns a judge's rejecting the defense's allegedly race-neutral reasons. A majority of this court finds that it is more than "nearly impossible" as in *Henderson*, but actually impossible to judge the validity of this action in the absence of findings. The reasons cited by the defendant, namely, that one of the jurors knew several police officers and the other was a bank employee, are on their face race-neutral and are reasons similar to those accepted in *Lockett*, 517 So. 2d at 1356-57.

Looking at the reasons themselves, the first rejected challenge to a juror was because the juror was a bank employee. Another challenge was allowed to a second bank employee. However, the challenge that was accepted was when a venireman was both a bank employee *and* familiar with law enforcement officers. In contrast, the one which was rejected was when the venireman did not have familiarity with law enforcement.

The second challenge that was rejected was also based on knowledge of police officers. Additionally, the facial expression of the prospective juror had remained rigid during questioning. The defense counsel concluded his argument on why that juror should be rejected by stating "this is sufficient reason for peremptory challenge taken in light of the fact that the State has not tendered any black jurors within this group, this last group of tendering."

We must have findings from the trial court as to whether it rejected these challenges because they were not facially race-neutral, or that they were pretextual, or that they failed for some other reason. The trial court should prepare findings stating its reasons. It may do so by solely examining the transcript of the hearing on the challenges, or by conducting such other proceedings as it believes is justified. If the trial judge determines that either of the two challenges was appropriate and should have been permitted, he is directed to order a new trial. If the trial court finds both challenges to have been improper under *McCollum*, the findings should be certified to this Court, along with the record of any hearing and findings of fact by the trial court stated orally in the record or separately in writing.

The dissent says we have made one rule for the prosecution, and another for the defense. In fact we are holding both to the same standard. If the court cannot justify its actions the case must be retried. This is a transitional case, tried before *Hatten* but decided on appeal after that opinion. One way to deal with that transition is to presume the validity of the trial court's ruling. We are not doing so. Instead we are requiring the court to explain.

**THIS MATTER IS REMANDED TO THE LEE COUNTY CIRCUIT COURT FOR A MAXIMUM PERIOD OF FORTY-FIVE (45) DAYS WITHIN WHICH THE COURT IS DIRECTED TO CONDUCT A *BATSON/McCOLLUM* REVIEW OF THE TWO DEFENSE CHALLENGES HE DENIED. IF THE TRIAL COURT FINDS EITHER OF THE TWO DENIED PEREMPTORY CHALLENGES TO HAVE BEEN RACE-NEUTRAL AND NOT PRE-TEXTUAL OR OTHERWISE FLAWED, THE COURT IS DIRECTED TO ORDER A NEW TRIAL. IF A NEW TRIAL IS ORDERED OR THE CASE IS OTHERWISE FULLY DISPOSED OF AT THE TRIAL LEVEL, THE TRIAL COURT SHALL FORWARD TO**

**THIS COURT A CERTIFIED COPY OF THE RELEVANT ORDER SO THAT WE MAY REVERSE AND REMAND THE JUDGMENT. ALTERNATIVELY, IF AFTER THE *BATSON/McCOLLUM* REVIEW, THE COURT DETERMINES NEITHER DEFENSE CHALLENGE WAS RACE-NEUTRAL, THE TRIAL COURT SHALL CERTIFY THE MATTER TO THIS COURT WITH A TRANSCRIPT OF THE REASONS FOR HIS REJECTING THE TWO CHALLENGES STATED ON THE RECORD OF ANY HEARING OR SEPARATELY ENTERED IN WRITING. UPON OUR RECEIPT, THIS COURT WILL RESUME PROCEEDINGS ON APPEAL. IF ADDITIONAL TIME IS NEEDED TO CARRY OUT THIS JUDGMENT, THE TRIAL COURT SHALL CERTIFY TO THIS COURT THE REASON FOR THE NEED AND LENGTH OF ADDITIONAL TIME NEEDED.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, AND McMILLIN, JJ., CONCUR.**

**KING, J., DISSENTS WITH SEPARATE OPINION JOINED BY BARBER AND PAYNE, JJ.**

**IN THE COURT OF APPEALS 3/12/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-01157 COA**

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**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**KING, J., DISSENTING:**

I respectfully dissent, and would reverse and remand for a new trial.

The majority opinion appears to either misapprehend or apply unequally the mandates of *Batson*. The defense is not obligated to prove that its challenges are not racially motivated. Instead, a defendant is only required to *articulate* a race-neutral reason for exercising the challenge. *Georgia v. McCollum*, 120 L. Ed. 2d 33, 51 (1992).

If the State felt that the challenges were in fact predicated upon race, it then bore the burden of establishing that the stated reasons were (1) pretextual and (2) in fact based upon race. *Stewart v. State of Mississippi*, 662 So. 2d 552, 558-59 (Miss. 1995); *cf. Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988) (requiring defendant to show that the reasons cited by the State were masks for racially discriminatory purposes.) This is the standard which we have applied to the State. Justice requires that it be applied with equal measure to the defense.

The majority now seeks to camouflage its unequal application of the law by saying this Court should defer to the trial court's factual findings on the use of peremptory challenges. When the State has made no effort to show pretext in the reasons given by the defendant, there is no basis for a ruling by the trial court, and therefore nothing to which deference should be given.

This court has required that defendants complaining of the discriminatory exercise of peremptory challenges by the State demonstrate the pretext of the State's rationale. *See McDonald v. State of Mississippi*, No. 92-KA-00938 -COA (Miss. Ct. App. Sept. 5, 1995); *McGowan v. State of Mississippi*, No. 92-KA-00775-COA (Miss. Ct. App. Sept. 5, 1995). Today, this Court now seems to suggest that the State has no obligation to demonstrate pretext in objecting to a defendant's use of peremptory challenges. In doing so, this Court is establishing one level of obligation for the State, and a higher one for defendants on an identical issue.

**BARBER AND PAYNE, JJ., JOIN DISSENT.**

**IN THE COURT OF APPEALS 7/2/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 93-KA-01157 COA**

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**APPELLANT**

v.

**STATE OF MISSISSIPPI**

**APPELLEE**

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KING, J., DISSENTING:

In an earlier opinion, this Court remanded this matter to the trial court to supplement the record by providing written findings as to its resolution of *Batson* challenges during the trial of this matter.

Believing that action to have been in error, I offered a written dissent.

Because the majority seems determined to continue the same course of conduct, I think it appropriate to recite in this opinion the text of that dissent:

I respectfully dissent, and would reverse and remand for a new trial.

The majority opinion appears to either misapprehend or apply unequally the mandates of *Batson*. The defense is not obligated to prove that its challenges are not racially motivated. Instead, a defendant is only required to *articulate* a race-neutral reason for exercising the challenge. *Georgia v. McCollum*, 120 L. Ed. 2d 33, 51 (1992).

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The majority now seeks to camouflage its unequal application of the law by saying this Court should defer to the trial court's factual findings on the use of peremptory challenges. When the State has made no effort to show pretext in the reasons given by the

defendant, there is no basis for a ruling by the trial court, and therefore nothing to which deference should be given.

This court has required that defendants complaining of the discriminatory exercise of peremptory challenges by the State demonstrate the pretext of the State's rationale. *See McDonald v. State of Mississippi*, No. 92-KA-00938-COA (Miss. Ct. App. Sept. 5, 1995) ; *McGowan v. State*, No. 92-KA-00775-COA (Miss. Ct. App. Sept. 5, 1995). Today, this Court now seems to suggest that the State has no obligation to demonstrate pretext in objecting to a defendant's use of peremptory challenges. In doing so, this Court is establishing one level of obligation for the State, and a higher one for defendants on an identical issue.

The trial court has now supplemented the record in *Bumphis*, and the majority has recommended that deference be given to the findings of the trial court, and this matter affirmed.

In *Nixon v. State*, NO. 93-KA-01169-COA, decided by this Court on May 7, 1996, this Court found itself in the same position. I concurred with the result in that case but wrote to express my discomfort with the process. Since the circumstances are very similar, I believe it appropriate to include that concurrence as a part of this opinion.

I concur in the result reached in this case.

However, I write to express my concern with the process which brings us to this point. This Court remanded this matter to the trial court for the purpose of conducting a post conviction *Batson* hearing, and then filing a supplemental record with this Court. That has been done and the trial court has made an on the record finding that the Defendant failed to establish improper motive in the exercise of the State's challenges. Having made such a finding, this Court is obligated to give deference to that finding. *Davis v. State*, 660 So. 2d 1228, 1242 (Miss. 1995) (citations omitted).

Having read the record of that hearing, I am convinced that a trial court should not be asked to go back and attempt to reconstruct that portion of the trial. It cannot, and does not, result in a faithful reconstruction of the process.

If a new record is made, the reason for the challenge expands. In the present case I note that the challenge to one prospective juror was initially based upon a single arrest. The new record now has that challenge based upon numerous contacts with the law.

While, finding the reason for challenge expanding, no effort has been made to develop the

impact, if any, upon the ability of the prospective jurors to render a fair and impartial verdict.

It would appear that the trial courts have not received sufficient guidelines as to what their role should be in the *Batson* process. If that role is as guardian of the rights of prospective jurors, then that responsibility must be exercised with appropriate diligence. This is particularly true where the protected class is very small, as in the present case.

If the trial court is to be an impartial arbiter, making its decision based solely upon what is placed in front of it by the litigants, then it should not stray beyond that role.

^ But whatever the role of the trial court is, it must be consistent, it cannot serve as guardians in this process one day, and then umpire the next.

The responsibility for this failure must be shared by the trial courts and this Court.

To date, this Court has not adopted a consistent and even handed approach to the disposition of *Batson/McCollum* cases. Until such time as we provide guidelines to the trial bench, I would suggest that these cases not be remanded for *Batson* hearings, but rather that this Court assume its responsibility and dispose of them based upon the then existing record.

We have the findings of the trial court before us, and will give deference to them, as we are obligated. The findings to which we are now giving deference has the same basis, as those for which the trial court, by inference chides defense counsel that being counsel's opinion about the demeanor of the prospective juror, and inferences, which might be drawn therefrom.

The record supplement clearly states, that "the Court bases its decision on the demeanor of counsel in making his suggested race-neutral reason as well as other questioning during voir dire."

The trial court then explains in part, "Additionally the Court finds that the assertion of conservation is unfounded as most if not all of society is frequently in contact with banks and the banking industry. While an explanation need not rise to the level of a 'for cause' challenge, the fact that Ms. Alshargatli was a bank employee appeared insipid to this court."

Both the attorney and the trial court were engaging in soothsaying. On what basis can this Court logically declare the soothsaying of the trial judge under these circumstances to be more accurate or reliable than those of the trial attorney?

**BARBER AND PAYNE, JJ., JOIN THIS DISSENT.**

