IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2006-CA-01394

LOI QUOC TRAN — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

Consolidated with

NO. 2004-KA-00840-COA

LOI QUOC TRAN — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Glenn S. Swartzfager, MS Bar No. [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Loi Quoc Tran

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LOI QUOC TRAN **APPELLANT**

V. **NO. 2006-CA-1394-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Loi Quoc Tran, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Kosta N. Vlahos, Circuit Court Judge

This the 29th day of August, 2007.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
Glenn S. Swartzfager
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUES

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II. **THE CIRCUIT COURT ERRED IN FAILING TO ALLOW THE APPELLANT TO ARGUE HIS DURESS DEFENSE TO THE JURY.**

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IV. ***THE MULTIPLE CUMULATIVE* ERRORS COMMITTED BY THE CIRCUIT COURT DURING THE TRIAL OF THIS MATTER UNDULY PREJUDICED THE APPELLANT, THEREBY PREVENTING HIM FROM OBTAINING A FAIR TRIAL.**

STATEMENT OF THE CASE

On January 31, 2001, two masked men entered the home of Dung "David" Nguyen. Mr. Nguyen was not home at the time, but his daughter, Tiffany, and younger son were in the home. The assailants held the two children of Mr. Nguyen inside the home while they looked for money. During this time, Mr. Nguyen returned home, entering through the front door. A struggle ensued after which Mr. Nguyen was shot and the assailants fled the home. Shortly thereafter, the Appellant, Loi Quoc Tran, and his co-defendant, Dung Van Tran, were arrested near Mr. Nguyen's home. On July 30, 2001, the Grand Jury of the Second Judicial District of Harrison County, Mississippi returned an indictment against Dung Van Tran and Loi Quoc Tran, charging them with Burglary of a Dwelling, Armed Robbery, and Aggravated Assault. (C.P. at 14-15).

The case was tried on September 17, 18, and 19, 2003 before the Circuit Court of Harrison County, Second Judicial District, Honorable Kosta Vlahos presiding. (C.P. at 30). Before the trial began, trial counsel for the Appellant requested a hearing on his Motion to Dismiss for the state's failure to provide the Appellant with a speedy trial as is required by Miss. Code Ann. § 99-17-1. (C.P. at 28-29; Tr. at 134-36). The trial judge, however, refused to consider the motion and continued with the trial. (Tr. at 135-36). The trial continued through September 18, 2003 (C.P. at 31) and September 19, 2003, at which time the jury retired to deliberate on its verdict. (Tr. at 406).

While the jury was deliberating, trial counsel for the Appellant again requested permission to argue the motion to dismiss for a violation of Miss. Code Ann. § 99-17-1, but trial counsel was not permitted to make argument and the motion was summarily denied by the trial judge. (Tr. at 407). Trial counsel for the Appellant was allowed to later supplement the record with his speedy trial arguments. (C.P. at 85-86). Following one (1) hour and thirty (30) minutes of deliberations, the jury returned a verdict of guilty. (C.P. at 64; Tr. at 408-09). The court subsequently entered

judgment on that verdict and sentenced the Defendant. (C.P. at 65-68; Tr. at 411-21).

On September 30, 2003, the Defendant filed his Motion for New Trial. (C.P. at 70-71). The record does not demonstrate that a hearing was ever held on this motion or that a ruling on the motion was obtained. On a *pro se* basis, the Appellant filed his own Motion for Appointment of New Counsel on Direct Appeal, primarily asserting his concern with his ineffective trial counsel and requesting new appellate counsel. (C.P. at 81-84). New counsel was appointed, and the Appellant subsequently filed his Notice of Appeal on April 9, 2004. (C.P. at 87).

The case was briefed by both sides, and oral arguments were heard by the Court of Appeals. However, sometime after the oral arguments, the case was dismissed *sua sponte* because the Notice of Appeal was untimely filed. Counsel for the Appellant then filed a petition for post-conviction relief in the Mississippi Supreme Court which was granted by an Order entered on November 8, 2006. A timely Notice of Appeal was then filed on November 15, 2006.

SUMMARY OF THE ARGUMENT

The Appellant was denied his right to a speedy trial guaranteed by Miss. Code Ann. § 99-17-1. The Appellant was not brought to trial until 779 days after he was arraigned. 470 of those days were excusable, but 309 were not. The 309-day delay is presumptively prejudicial and the state did not proffer any good faith explanations regarding this delay. Moreover, the trial judge failed to properly consider the Appellant's application for a speedy trial dismissal.

The Appellant was denied his right to fully and completely argue his duress defense to the jury. The heart of the affirmative defense of duress is whether the defendant developed a reasonable belief regarding his circumstances, something which must be judged and determined by the jury from the defendant's point of view. Yet, the trial judge did not allow the jury to consider the circumstances from the defendant's shoes and prevented trial counsel from making an argument in that regard.

The Appellant's trial counsel was ineffective and said ineffectiveness resulted in actual prejudice to the appellant. At a minimum, trial counsel committed forty-nine (49) identifiable errors during the trial, averaging an error or omission approximately every 13.5 minutes before the jury. This level of performance by trial counsel prevented the Appellant from receiving a fair trial.

Finally, the Appellant submits that if any of the errors pointed out in his argument do not constitute reversible error standing alone, then the cumulative effect of the errors at trial require reversal.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO PROPERLY CONSIDER THE APPELLANT'S MOTION TO DISMISS FOR A VIOLATION OF HIS STATUTORY RIGHT TO A SPEEDY TRIAL.

The Appellant asserts that his right to a speedy trial guaranteed by Miss. Code Ann. § 99-17-1 was violated. Section 99-17-1 provides:

> Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

Miss. Code Ann. § 99-17-1 (1999).

In the case *sub judice*, the applicable time line went as follows:

SPEEDY TRIAL TIME LINE

Event	Date	Time Elapsed
Arraignment (C.P. at 20)	August 10, 2001	0 days
Continuance by Prosecution (C.P. at 85)	April 15, 2002	255 days
-Court's order apparently reset case for August 19, 2002		
Joint Continuance (C.P. at 23)	August 19, 2002	255 days
-Court's order reset case for trial on January 20, 2003		
Defense Continuance (C.P. at 24)	January 28, 2003	263 days
-Court's order reset case for trial on January 27, 2003 (one day before the date of the order itself). While no speedy trial time accumulated until after January 20, 2003, as per the court's prior order, 8 days did accumulate from January 21, 2003 through January 28, 2003.		
Joint Continuance (C.P. at 25)	May 12, 2003	263 days
-Court's order now resets the trial for September 16, 2003. The trial court's prior order of January 28, 2003 reset the case for trial on January 27, 2003 (one day before the date of the order itself). Apparently, there was some form of mis-communication		

which cannot be reasonably held against the state. Thus, no additional speedy trial time accumulates through May 12, 2003.

Defense Continuance (C.P. at 26) June 20, 2003 263 days

-Court's order now resets the trial for July 14, 2003. The prior order reset the trial for September 16, 2003, but the case apparently came up again for consideration on this date. Anyhow, no speedy trial time will again accumulate until after July 14, 2003.

Defense Continuance (C.P. at 27) August 21, 2003 301 days

-Apparently, the state did not bring the Appellant on for trial on July 14, 2003 and no explanation by the state is provided. Thus, 38 days of speedy trial time from July 14, 2003 to August 21, 2003 does accumulate. By the trial court's order of August 21, 2003, no speedy trial time will accumulate from August 22, 2003 through the new trial date of September 8, 2003.

Trial Commences (C.P. at 30) September 17, 2003 309 days

-The trial court's last order was for the trial to begin on September 8, 2003, but the state did not bring the Appellant on for trial until September 17, 2003, with no explanation provided. Thus, the 8 days that elapsed from September 9, 2003 to September 17, 2003 are charged against the state.

As can be clearly seen above, 309 speedy trial days elapsed from the time of the Appellant's arraignment to the time of the Appellant's trial, well in excess of the 270-day statutory scheme. When the length of delay between arraignment and trial exceeds 270 days and is, therefore, presumptively prejudicial, the state then carries the burden of persuasion to demonstrate that the delay did not prejudice the Appellant and violate his rights. ***Duplantis v. State***, 708 So. 2d 1327 (Miss. 1998). This is because the accused is under no duty to bring himself to trial. ***Herring v. State***, 691 So. 2d 948 (Miss. 1997).

In the instant case, the trial judge, more than once, refused or failed to properly consider the speedy trial arguments of the Appellant. (Tr. At 134-36). Moreover, for the delays, the state has provided no good faith explanation and, therefore, cannot carry its burden. The State missed trial

dates of January 20, 2003, July 14, 2003, and September 8, 2003. In each instance, after the fact, the State apparently recognized it missed the trial dates and attempted to cure the error. After missing the trial date of January 20, 2003, a new setting was sought 8 days later. After missing the trial date of July 14, 2003, a new setting was sought 38 days later. Finally, after missing the trial date of September 8, 2003, trial was finally commenced 9 days later on September 17, 2003. The State's failure to bring the Appellant to trial within the appropriate time, and, additionally, provide good faith explanations as to why it failed to bring the Appellant on for trial on three (3) separate occasions clearly weighs against the State. For the violation of the Appellant's statutory right to a speedy trial, the judgment of the trial court should be reversed and a judgment of dismissal rendered.

II. THE CIRCUIT COURT ERRED IN FAILING TO ALLOW THE APPELLANT TO ARGUE HIS DURESS DEFENSE TO THE JURY.

During closing arguments, trial counsel for the Appellant attempted to argue the defense of duress to the jury. Yet, during this argument, the prosecutor invoked a "Golden Rule" objection which was improperly sustained by the trial court. (Tr. at 396). In Mississippi, a duress defense requires the jurors to place themselves into the shoes of the Defendant. Thus, this ruling by the circuit court amounts to reversible error and requires a new trial.

In ***West v. State***, this Court adopted the 5th Circuit's elements of a duress defense:

(1) the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;

(2) that he had not recklessly or negligently placed himself in the situation;

(3) that he had no reasonable legal alternative to violating the law;

(4) that a direct causal relationship may be reasonably anticipated between the criminal action and the avoidance of harm.

West v. State, 725 So. 2d 872, 890 n.7 (Miss. 1998) (*citing* ***United States v. Harper***, 802 F.2d 115,

117 (5th Cir. 1986)). Unless the jury stands in the shoes of the defendant, it cannot determine whether the defendant "was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury." This Court recognized that concept in ***West*** when it discussed "the reasonableness of West's fear of Cothren's violent nature." A measure of whether such a fear was reasonable could only be obtained from the standpoint of the defendant's shoes and circumstances. However, because the trial judge improperly refused the defendant to argue his duress defense, the jury was not able to properly consider the duress from the proper standpoint. A new trial is therefore required.

III. THE APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE AND SAID INEFFECTIVENESS RESULTED IN ACTUAL PREJUDICE TO THE APPELLANT.

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To successfully claim ineffective assistance of counsel, Tran must meet the two-pronged test set forth in ***Strickland*** and adopted by the Mississippi Supreme Court. ***Stringer v. State***, 454 So. 2d 468, 476 (Miss. 1984). Under the ***Strickland*** test, Tran must prove that (1) his attorney's performance was defective and (2) such deficiency deprived him of a fair trial. ***Id.*** at 477. Such alleged deficiencies must be presented with "specificity and detail" in a non-conclusory fashion. ***Perkins v. State***, 487 So. 2d 791, 793 (Miss. 1986).

The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney and there is a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. ***Id.*** Tran must show that there is a reasonable

probability that, but for his trial attorney's errors, he would have received a different result in the trial court. ***Stringer v. State,*** 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy." ***Cole v. State***, 666 So. 2d 767, 777 (Miss. 1995). In order to find for Tran on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. ***Coleman v. State***, 749 So. 2d 1003, 1012 (Miss. 1999).

In the case at hand, while counsel's failure to perform certain tasks generally falls within the ambit of trial strategy, the overwhelming number of errors and omissions by trial counsel resulted in representation which was Unconstitutional. **According to the record, counsel was involved and/or engaged with the jury during this trial for only approximately eleven (11) hours. However, during this time, as identified below, trial counsel for the Appellant committed at least forty-nine (49) errors or omissions. Therefore, approximately every 13.5 minutes, the Appellant's trial counsel was making a mistake which prejudiced the Appellant**. Trial counsel's continual failure to recognize objectionable evidence and make proper objections, throughout the entire course of the trial, resulted in extreme prejudice to the Appellant.

A. TRIAL COUNSEL FAILED TO OBJECT TO HEARSAY.

On multiple occasions, trial counsel for the Appellant failed to object to improper hearsay evidence. Specifically, the failed objections occurred as follows:

Page 156	Line 25	The witness testified as to what one victim allegedly said. The testimony was inadmissible hearsay. ***Goodson v. State***, 566 So.2d 1142 (Miss. 1990).
Page 165	Lines 12-13	Same reason and authority as Page 156, Line 25.

Page 165	Lines 19-20	Same reason and authority as Page 156, Line 25.
Page 166	Lines 22-24	The witness testified as to what one of the assailants allegedly said. This is problematic because (a) the witness was unable to identify the Defendant as one of the assailants, and (b) even if the witness was able to identify the Defendant as one of the assailants, her testimony did not state which one did or said what. In other words, because we don't know which assailant made the declaration, it would be impossible for the court to apply Rule 801(d)(2) of the Mississippi Rules of Evidence and allow this testimony. Had counsel for the Appellant objected to this hearsay, the trial court would have had no choice but to sustain the objection. *See* ***Gayten v. State***, 595 So.2d 409, 415 (Miss. 1992)(to be admissible under M.R.E. 803(1)(d)(2) "there must be sufficient evidence to allow a reasonable fact finder to conclude that the speaker was in fact the defendant)." *See also* ***Harrison v. State***, 722 So.2d 681, 684 (Miss. 1998).
Page 167	Lines 25-26	Same reason and authority as Page 166, Lines 22-24.
Page 168	Line 2-3	Same reason and authority as Page 166, Lines 22-24.
Page 168	Line 25-29	Same reason and authority as Page 166, Lines 22-24.
Page 169	Line 14	Same reason and authority as Page 166, Lines 22-24.
Page 170	Line 14	Same reason and authority as Page 166, Lines 22-24.
Page 170	Line 21	Same reason and authority as Page 166, Lines 22-24.
Page 170	Line 27-28	Same reason and authority as Page 166, Lines 22-24.
Page 176	Line 19-20	The witness testified as to what one of the victims allegedly said. The testimony was inadmissible hearsay. ***Goodson v. State***, 566 So.2d 1142 (Miss. 1990). Additionally, the probative value of the testimony was far exceeded by its unfair prejudice to the Appellant. This statement by the wounded father was immaterial and only served to further invoke the sympathies of the jurors, inflaming them and prejudicing them against the Appellant. Moreover, because the father was alive and available to testify, this statement would not have qualified as a hearsay exception (dying declaration) under Rule 804(b)(2) of the Mississippi Rules of Evidence. ***Watt v. State***, 492 So.2d 1281 (Miss. 1986).

Page 176-77	Line 27-8	Same authority as Page 176, Line 19-20.
Page 212	Line 8-10	The witness testified as to what some unknown "dispatch" person told him about the assailants. This constituted inadmissible hearsay which was prejudicial to the Appellant because it went directly to the question of the identity of the assailants. ***Goodson v. State***, 566 So.2d 1142 (Miss. 1990).
Page 231	Line 5-6	The witness testified as to what his wife said about missing items in the house This constituted inadmissible hearsay which was prejudicial to the Appellant because it went directly to the elements of burglary and robbery. ***Goodson v. State***, 566 So.2d 1142 (Miss. 1990).
Page 283	Lines 3-4	The witness testified as to what one of the victims allegedly said about something one of the assailants may have left in her home. This constituted inadmissible hearsay. M.R.E. 802.

B. TRIAL COUNSEL FAILED TO OBJECT TO SPECULATION.

On multiple occasions, trial counsel for the Appellant failed to object to improper speculative evidence. Specifically, the failed objections occurred as follows:

Page 170	Line 5-6	The witness lacked personal knowledge and testified that she was assuming in violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 170	Line 24-25	The witness testified as to what one of the assailants allegedly saw and thought which is obviously she could not know. violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 171-72	Line 23-3	The witness speculated as to why the assailant allegedly hit her (what the assailant was thinking), again a violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).

Page 172	Line 23-24	The witness testified as to what one of the assailants was allegedly thinking ("trying to find somewhere to hide"). Another violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 173	Line 1-2	The witness testified as to what both of the assailants were allegedly thinking ("trying to find somewhere to hide"). A violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 173	Line 6-10	Same reason and authority as Page 173, Line 1-2.
Page 175	Line 1-2	The witness speculated as to who might have run by her house, though she didn't really know. ***Id.***
Page 176	Line 21	The witness speculated as to her father's medical condition and whether he would have lived, though she did not know exactly his physical status or medical condition. A clear violation of M.R.E. 702.
Page 177	Line 8-10	The witness speculated as to her father's medical condition regarding (a) whether he was breathing, and (b) whether he would have lived, though she did not know exactly his physical status or medical condition. Again, a clear violation of M.R.E. 701, 702, and 703.
Page 188	Line 26	The witness testified as to what both of the assailants were allegedly thinking ("hiding"). A violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 188	Lines 27-28	The witness testified as to what she "assumed" regarding how a certain set of keys ended up in a certain location in violation of M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 190	Lines 25-26	Same reason and authority as Page 188, Line 26.

Page 193	Lines 5-7	The witness speculated as to what may have transpired with a gun that was allegedly used during the burglary in violation M.R.E. 602. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974).
Page 204	Lines 22-23	The witness testified as to what both of the assailants were allegedly thinking ("trying to find somewhere to -- somewhere to hide"). ***Id.***
Page 205	Lines 24-25	The witness testified as to what both of the assailants were allegedly thinking ("like they were trying to leave or something"). ***Id.***
Page 230	Lines 4-5	The witness testified as to what the assailants thought ("they thought that I would die") when the witness could not have possibly known what was in the hearts or minds of the assailants. ***Id.***

The admission of all of the above speculative testimony violated Mississippi Rule of Evidence 602 by allowing evidence outside the personal knowledge of the witnesses. ***Moody v. State***, 841 So.2d 1067 (Miss 2003); ***Clay v. State***, 821 So.2d 136 (Miss.App. 2000). *See also* ***Dennis v. Prisock***, 221 So.2d 706 (Miss. 1969); ***Perkins v. State***, 290 So.2d 697 (Miss. 1974). Furthermore, the admission of the speculative testimony prejudiced the Appellant.

C. TRIAL COUNSEL FAILED TO OBJECT TO IMPROPER EXPERT TESTIMONY.

On multiple occasions, trial counsel for the Appellant failed to object to improper expert testimony which was offer by either (1) non-medical experts, or (2) individuals who were not properly qualified and accepted by the circuit court as experts. Specifically, the failed objections occurred as follows:

Page 176	Line 21	The witness speculated as to her father's medical condition and whether he would have lived, though she was not qualified to make such a medical determination. A clear violation of M.R.E. 702. ***Langdon v. State***, 798 So.2d 550

(Miss.App. 2001); ***Walker v. State***, 740 So.2d 873 (Miss. 1999).

Page 177	Line 8-10	The witness speculated as to her father's medical condition regarding (a) whether he was breathing, and (b) whether he would have lived, though she was not qualified to make such a medical determination. ***Id.***
Page 284	Line 15-16	The witness, a police officer who was not tendered as an expert and possessed no specific ballistics qualifications, gave testimony on the specific caliber of spent and damaged bullets that were recovered from the crime scene. A violation of M.R.E. 702. ***Walker v. State***, 740 So.2d 873 (Miss. 1999).

The admission of the above testimony violated Mississippi Rule of Evidence 702 by allowing evidence from witnesses not "qualified as an expert." ***Langdon v. State***, 798 So.2d 550 (Miss.App. 2001); ***Walker v. State***, 740 So.2d 873 (Miss. 1999).

D. TRIAL COUNSEL FAILED TO OBJECT TO LEADING QUESTIONS.

On multiple occasions, trial counsel for the Appellant failed to object to improper leading questions which are not permitted on direct examination by M.R.E. 611. ***Smothers v. State***, 738 So.2d 246 (Miss.App. 1998). Specifically, trial counsel failed to object to the following:

Page 168	Lines 6-8	The prosecutor improperly led the witness, enhancing her testimony.
Page 168	Lines 20-21	The prosecutor improperly led the witness, enhancing her testimony and attempting to place possession of the deadly weapon with the Appellant—whom the witness could not identify.
Page 168	Lines 22-23	The prosecutor improperly led the witness, enhancing her testimony that "you've just said they forced themselves into the house" when the witness never gave that specific testimony.
Page 169-70	Lines 29-1	The prosecutor improperly led the witness, enhancing her testimony.
Page 177	Lines 16-20	The prosecutor improperly led the witness, not just enhancing her testimony, but now testifying for the witness.

Page 188	Lines 2-5	The prosecutor improperly led the witness, not just enhancing her testimony, but now testifying for the witness and leading her to testimony about items that allegedly enhanced the guilt of the Appellant. (Trial counsel for the Appellant did object to the next leading question, but it was too late and the damage had already been done). *See* ***Erving v. State,*** 815 So.2d 434 (Miss.App. 2002).
Page 190	Line 9	The prosecutor improperly led the witness, not just enhancing her testimony, but also testifying for the witness and establishing the location of who the prosecutor (not the witness) believed the Appellant to be during the burglary.
Page 218	Lines 10-13	The prosecutor improperly led the witness, enhancing his testimony and testifying to the jury about the location of the alleged burglary.
Page 227	Line 6	The prosecutor improperly led the witness, enhancing his testimony and testifying for him as to the approximate time of the burglary.
Page 241	Lines 27-29	The prosecutor improperly led the witness and testified that the "red substance" on an item of clothing "was later identified as blood," though there is no testimony or evidence in the record, other than the prosecutor's testimony, that any such identification was made.
Page 242	Lines 11-12	The prosecutor improperly led the witness, enhancing his testimony as to the scene of the burglary.

The admission of the above testimony violated Mississippi Rule of Evidence 611(c) by allowing evidence pursuant to an improper form of direct examination. M.R.E. 611(c). *See c.f.* ***Smothers v. State***, 738 So.2d 246 (Miss.App. 1998).

E. TRIAL COUNSEL FAILED TO VOIR DIRE THE WITNESS REGARDING CERTAIN PHYSICAL EVIDENCE WHICH LINKED THE APPELLANT TO THE SCENE OF THE BURGLARY.

During the testimony of Tiffany Falcon, the prosecutor attempted to introduce into evidence Exhibit 8, a photograph of a pair of white tennis shoes that the Appellant was allegedly wearing at the time of the alleged burglary. Trial counsel properly objected to the prosecutor's failure to lay a

proper foundation for the authentication, but then failed to take advantage of the trial court's offer to *voir dire* the witness regarding her identification of the shoes. (Tr. at 180-82). Had trial counsel undertaken this task, the lack of a proper foundation would most likely have been revealed since white tennis shoes are very common and, during the midst of the burglary, the witness could not have possibly identified the exact brand and style of white tennis shoes worn by her assailants. Either way, it was clear error for trial counsel to not have conducted *voir dire* on this particular issue.

F. TRIAL COUNSEL FAILED TO OBJECT TO THE INTRODUCTION INTO EVIDENCE OF A BLOODY PHOTOGRAPH THAT POSSESSED NO PROBATIVE VALUE AND ONLY SERVED TO PREJUDICE THE JURY.

During trial, the prosecutor sought to introduce a photograph which showed the wound allegedly sustained by Tiffany Falcon during the burglary. (Tr. at 187). However, Ms. Falcon did not know for sure, but only assumed that she was hit by one of the assailants (Tr. at 171-72). Moreover, Ms. Falcon had already testified extensively about her injuries and wounds. Thus, the photograph was no longer necessary and, at that juncture, its probative value was vastly outweighed by the risk of undue prejudice to the Appellant. Miss. R. Evid. 403. Yet, counsel for the Appellant failed to object to this evidence and prevent the continued prejudicing of the jury.

Finally, should the Court find that any of the previously argued issues were not properly preserved for appellate review, then the Appellant respectfully submits that trial counsel was ineffective for failing to properly preserve said issues for appellate review. In the interest of clarity and in order to avoid repetition on these issues, the Appellant relies on the arguments previously made in this brief regarding those issues.

Taking the above into consideration, the Appellant submits that counsel committed professional errors, and further, that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Mohr v. State***, 584

So.2d 426, 430 (Miss.1991). Therefore, the Appellant has met his burden of proof on both prongs of the ***Strickland*** test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); ***Edwards v. State***, 615 So.2d 590, 596 (Miss.1993).

In making this argument, the Appellant does not attempt to demean his trial counsel. However, as shown, counsel did commit critical errors, and those errors were of such a nature that they deprived the Appellant of his Sixth Amendment right to counsel, and therefore, the Appellant respectfully submits that reversal on this issue is warranted.

IV. THE MULTIPLE CUMULATIVE ERRORS COMMITTED BY THE CIRCUIT COURT DURING THE TRIAL OF THIS MATTER UNDULY PREJUDICED THE APPELLANT, THEREBY PREVENTING HIM FROM OBTAINING A FAIR TRIAL.

Even should the Court find that the errors cited above by the Appellants by themselves do not mandate reversal, the Court should reverse based on the effect of the cumulative error. The Mississippi Supreme Court has recognized that several errors taken together may warrant reversal even though when taken separately they do not. ***Flowers v. State,*** 773 So.2d 309, 334 (Miss.2000). "This Court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal." ***Coleman v. State***, 697 So.2d 777, 787 (Miss. 1997)(citing ***Jenkins v. State***, 607 So.2d 1171, 1183-84 (Miss.1992); ***Hansen v. State***, 592 So.2d 114, 153 (Miss.1991)). The question under these and other cases is whether the cumulative effect of all errors committed during the trial deprived a party defendant of a fundamentally fair and impartial trial. Where there is "no reversible error in any part, . . . there is no reversible error to the whole." ***McFee v. State,*** 511 So. 2d 130, 136 (Miss. 1987). Thus, where multiple errors have occurred at the trial level, their cumulative effect may constitute reversible error.

The Court has recently reaffirmed that principle in ***Byrom v. State,*** 863 So.2d 836 (Miss.2004). There, the Court stated that "upon appellate review of cases in which we find ... any

error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis as to whether such error or errors ... may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect." ***Byrom***, 863 So.2d at 847. Cumulative error has been held to be applicable in the civil context.

In the case *sub judice*, the Appellant has demonstrated that he was denied his statutory right to a speedy trial, was denied the right to fully and completely his one and only defense of duress, and that he was denied constitutionally effective counsel. Even any one of these errors taken alone do not mandate reversal, the cumulative effect of the errors denied the Appellant a fair trial, and the Court should reverse based on the effect of the cumulative errors.

CONCLUSION

The Appellant was not brought on for trial until 779 days after the Appellant was arraigned, 309 days of which were without any form of appropriate good faith excuse or rationale. Because the 309 days exceeds the 270-day statutory requirement, it is presumptively prejudicial. The State has also not offered any form of good faith explanation regarding the excessive delay. Therefore, the Appellant's right to a speedy trial was violated and the matter should be dismissed.

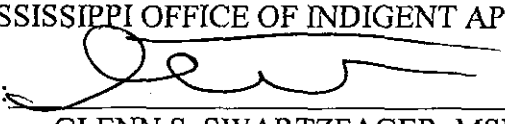
When a defendant is prohibited from arguing his defense and/or theory of the case, he is prejudiced from receiving a fair trial. Here, the trial judge excluded the jurors from considering the Appellant's duress defense from the standpoint of the Appellant, something which is necessary to the appropriate consideration of that defense.

Moreover, the Appellant was denied constitutionally effective assistance of counsel. As demonstrated herein, at least forty-nine (49) specific errors or omissions of the Appellant's trial counsel were identified. Given the approximate eleven (11) hours that the trial counsel were engaged with the jury, the Appellant was prejudiced by his own attorney every 13.5 minutes.

When this many errors and omissions are made during the course of a trial, one cannot receive a fair trial. Furthermore, even if the errors alone do not constitute reversible error standing alone, the accumulation of these errors deprived the Appellant of a fair trial and reversal should ensue.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

GLENN S. SWARTZFAGER, MSB [redacted]
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: (601) 576-4200
Facsimile: (601) 576-4605

CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, do hereby certify that I have this day mailed, through the United States Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

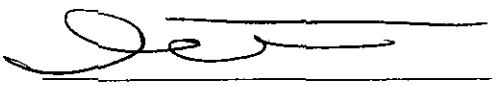
Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

Mark Ward, Esquire
Assistant District Attorney
Post Office Box 1180
Gulfport, Mississippi 39502;

Honorable Kosta Vlahos
Circuit Court Judge
Post Office Drawer 1570
Gulfport, Mississippi 39502

Loi Quoc Tran (#L7456)
South Mississippi Correctional Institution
Post Office Box 1419
Leakesville, Mississippi 39451

SO CERTIFIED, this the 29th day of August, 2007.



Glenn S. Swartzfager

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: (601) 576-4200
Facsimile: (601) 576-4605