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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK DOUGLAS DENHAM — APPELLANT

V. — NO.2006-KA-00725-COA

STATE OF MISSISSIPPI — APPELLEE

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# BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

**MISSISSIPPI OFFICE OF INDIGENT APPEALS**
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK DOUGLAS DENHAM — APPELLANT

V. — NO.2006-KA-00725-COA

STATE OF MISSISSIPPI — APPELLEE

## CERTIFICATE OF INTERESTED PERSONS

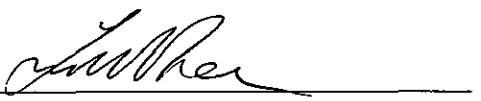
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Patrick Douglas Denham
3. Jon Mark Weathers and the Forrest County District Attorneys Office
4. Honorable Robert B. Helfrich

THIS 19th day of January 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Patrick Douglas Denham, Appellant

By: 

Leslie S. Lee, Counsel for Appellant

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**



**OTHER AUTHORITIES**

## STATEMENT OF THE ISSUES

ISSUE NO. 1: THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO PROHIBIT IN THE INTRODUCTION OF EVIDENCE REGARDING FINGERPRINT COMPARISON AND RESULTS.

ISSUE NO. 2: THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION IN LIMINE TO PROHIBIT OTHER CRIMES EVIDENCE FROM BEING ADMITTED IN VIOLATION OF MRE 404(b).

ISSUE NO. 3: THE TRIAL COURT ERRED IN ALLOWING AN EYEWITNESS TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT.

ISSUE NO. 4: THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTION ON INCONSISTENT TESTIMONY.

## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgment of conviction for the crime of burglary of a dwelling against Patrick Douglas Denham and resulting in a twenty-five year sentence as an habitual offender following a jury trial on November 17, 2005, Honorable Robert B. Helfrich, Circuit Judge, presiding. Patrick Douglas Denham is presently incarcerated with the Mississippi Department of Corrections.

## FACTS

According the trial testimony, On March 3, 2005, Shelia Mathis lived at 2145 James Street in Hattiesburg, MS. Tr. 76-77. She met her daughter and her daughter's husband for lunch. Tr. 84. It was her daughter's birthday. After lunch, Ms. Mathis and her daughter went shopping. Mathis's son-in-law, Nelson Peden, went back to Mathis's house to take a nap. After beginning to shop, Ms. Mathis received a phone call from Mr. Peden telling her

that her house was being burglarized. Tr. 85. When she arrived at the house, she noticed an open window in her utility room which she had not left open. Tr. 86. The house had been ransacked. Tr. 119. Ms. Mathis testified at trial that she did not know Patrick Denham and would not have given him permission to be in her house. Tr. 93-94. She also testified the home was her dwelling house. Tr. 94.

Nelson Peden related that when he arrived at Mathis's house to take a nap, he got out of his car and unlocked the carport door. He did not go inside, but stayed under the carport to smoke. Tr. 107-108. He then saw a man running across the yard. The man was running toward a car which was parked next to a shop located behind the Mathis's house. Tr. 110, Ex. 4. Mr. Peden was scared and excited. Tr. 122. Mr. Peden described him as "a large black man. I remember him having a baseball cap on." Tr. 111. Mr. Peden identified the car the man was driving. Ex. 12. Mr. Peden testified he got a good look at the man's face as the man was driving by him. Tr. 112. However, Mr. Peden never told police he got a good look at him at the time. Tr. 132, R.E. 26-27. Mr. Peden then chased the man in his car. Tr. 112. He did not get a license number off the car. The man he was chasing later got caught in traffic, turned around, and came back toward Mr. Peden in Peden's lane, causing Peden to go off the side of the road. Tr. 113. Mr. Peden told police the man ran him off the road. Tr. 160. Mr. Peden identified the appellant as the man he saw drive past him[1]. After following the man past some railroad tracks, Mr. Peden lost the car. Tr. 114.

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[1]Peden also admitted, however, that he knew he would have to identify the appellant and knew he would be sitting at the defense table. Tr. 133.

Mr. Peden then returned to Mathis's house. Tr. 115. He gave a description to police of the man he saw as 6'2" and 250 pounds, although he testified he told the police the man was about 6 foot and about 200 pounds and in his mid-30s. Tr. 123-124, 129, 157-158. The officer also noted on his report that Peden told him the man had a mustache, although Mr. Peden testified he had a beard. Tr. 125, 158. He also told the officer when the man drove by him, he smiled, but that fact was not in a subsequent written statement taken by Detective Doug Wilson later that day. Tr. 126-127, 159, Ex. 19, R.E. 26-27. Mr. Peden later met with detectives and picked the appellant out of a photo lineup. Tr. 116-117, 150, Ex. 14. Mr. Peden then admitted he was shown another picture of the appellant after the photo line-up. Tr. 118, 151, Ex. 11. Mr. Peden first admitted he worked a 24 hour shift the day before this incident, but later said he did not remember. Tr. 138.

Detective Wilson, while investigating the scene, noticed footprints outside an open window of the house. Tr. 146. While testifying about Peden's statement, he said Mr. Peden identified the car he saw because of the dents he recognized. However, nothing about dents was included in the written statement. Tr. 163-164. Mr. Peden never testified about any dents. Detective Wilson also admitted he did not follow the Department of Justice guidelines on line-ups. Tr. 175-176. When Mr. Denham was arrested, no items stolen from the Mathis home were recovered. Tr. 180.

Denise Ruple, with the Metro Crime Scene Unit of the Hattiesburg Police Department, testified she noticed a shoe impression under the open window of Mathis's house. Tr. 196, Ex. 21. Another shoe impression was found on the carpet inside the house. Tr. 197, Ex. 22-

23. No casts were made of the shoe print in the yard. Tr. 207. Ms. Ruple also testified she dusted the window for fingerprints. Tr. 201. She recovered two latent prints on the inside of the window. Tr. 202, Ex. 24. She also recovered a print from the master bedroom. Tr. 202-203. No other prints of any evidentiary value were discovered in the house. Tr. 209.

Jeffrey Byrd, a crime scene detective with the Hattiesburg Police Department testified he took the palm prints and fingerprints from Patrick Denham. Tr. 215-216, Ex. 25. Paul Wilkerson with the Mississippi Crime Laboratory testified as an expert in fingerprint identification. Tr. 221. He testified that the initial examinations were conducted by Jamie Bush. Mr. Bush is Wilkerson's boss. Tr. 223. After Mr. Bush made the call that the latent prints taken from the Mathis home matched the prints of Patrick Denham, Mr. Wilkerson reviewed the report and concurred that the appellant's left middle fingerprint matched the partial print found on the inside of Mathis's window. Tr. 225-226, 228. Mr. Wilkerson testified the print was made by Mr. Denham "to the exclusion of everybody else in the world." Tr. 228. The other prints did not match Mr. Denham. Tr. 230.

Detective Nick Calico testified that while on patrol on March 3, 2005, three days before the burglary, he came into contact with Patrick Denham. Tr. 96. He related that as part of that encounter, he took pictures of Mr. Denham. Tr. 97. Detective Calico related that Mr. Denham was driving a green Buick at the time. Tr. 98, Ex. 12. He also took pictures of the bottoms of Mr. Denham's shoes. Tr. 101, Ex. 15. Mr. Denham was not cited for any traffic violation or found to be in the violation of any law. Mr. Denham was cooperative and

was released after the photos were taken. Tr. 103-104. The photos were turned over to the Hattiesburg Police Department. Tr. 191.

## SUMMARY OF THE ARGUMENT

The jury was improperly allowed to hear evidence that the appellant, Mr. Patrick Denham, was stopped by police days before the crime on the suspicion of some criminal conduct. This was unduly prejudicial. Why would the police photograph Mr. Denham's shoes if he was not suspected of criminal conduct? The jury was also allowed to hear the in-court identification of Mr. Denham after a suggestive out of court identification. Mr. Denham's Sixth Amendment right to confrontation was violated when the initial fingerprint examiner was not called to testify, yet his opinion was introduced into evidence. Finally, the jury was not allowed to be instructed on Mr. Denham's theory of the case. All these errors individually and cumulatively deprived Mr. Denham of a fair trial.

## ARGUMENT

### ISSUE NO. 1: THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO PROHIBIT IN THE INTRODUCTION OF EVIDENCE REGARDING FINGERPRINT COMPARISON AND RESULTS.

On November 15, 2005, Mr. Denham's trial counsel filed a motion to prohibit the introduction of any evidence of the fingerprint comparisons done in this case. C.P. 27. The State only produced one examiner, Paul Wilkerson, when, according to the guidelines set forth in the Scientific Working Group on Friction Ridge Analysis, Study and Testing (SWGFAST), the testimony of two examiners is necessary for a valid identification. (Exhibit To the Motion, Page 1). The State's failure to produce the other examiner, Jamie Bush,

violated Mr. Denham's Sixth Amendment right to confrontation. The trial judge heard counsel's motion regarding this issue prior to trial. Tr. 61-65, R.E. 19-23. The court ruled the failure to have both examiners present was a matter for cross-examination. Tr. 65, R.E. 23. This was error.

The standard of review for the admission or suppression of evidence is abuse of discretion. *Haggerty v. Foster*, 838 So.2d 948 (¶25) (Miss. 2002). Furthermore, the admission of expert testimony is within the sound discretion of the trial judge. *Puckett v. State*, 737 So.2d 322 (¶57) (Miss. 1999). However, the Sixth Amendment to the United States Constitution and Article Three, §§ 14 and 26 of the Mississippi Constitution provide the accused with the right to confront those who testify against him. Mr. Denham clearly asserted this right in the court below and did not waive Mr. Bush's presence.

During the hearing on this motion, counsel pointed out that in fingerprint analysis, an identification is not valid unless it is verified by another examiner.

> **[MR. FARRIS:]** ....It would be a Sixth Amendment violation of my client's constitutional rights to effectively cross-examine and counter the witnesses if Mr. Bush and Mr. Wilkerson aren't here to testify.
> **THE COURT:** Response?
> **MR. SAUCIER:** Your Honor, I'm familiar with the guidelines. And the guidelines that are followed by the Mississippi Laboratory require two examiners and their signatures. And that occurs on the report. You have Jamie Bush and you have Mr. Wilkerson.
>
> Never is it required that they both have to actually show up for court. In this particular incidence, the testimony is going to be – and we're going to show the chain of custody is going to be from Denise Ruple – she actually carried everything up there the knowns are from the testimony of Mr. Byrd. The prints were taken to the crime laboratory. At that point in time, Mr. Bush and the other individual took control of them. They both examined them. They both signed on the sheet. And counsel got a copy of both of their

signatures, but only one is here today to testify. The other is, in fact, I believe, in Washington D.C. But I've never been required to present both people to actually testify.

**MR. FARRIS:** A brief response, Your Honor?

**THE COURT:** Response?

**MR. FARRIS:** The point being because, Your Honor, the case that I've reviewed nobody has ever looked into the validation and the process that goes into when an opinion is established.

In this case in order for them to offer that opinion, besides the fact that it's a Sixth Amendment violation, they've also got to lay the proper foundation to put this into evidence. Without the other examiner it's not a valid opinion and no foundation will be laid to put it into evidence.

**THE COURT:** Isn't the other examiner's opinion there as part of the ordinary business record of any other – I mean, isn't it there on that that this other witness is testifying, yes, I examined them, also?

**MR. FARRIS:** That would be an exception, Your Honor, to the hearsay part of it. But as far as putting the opinion into evidence to establish the foundation of it, they've got to have both of these examiners, in my opinion, before it can be offered into evidence, the results.

**THE COURT:** Mr. Saucier?

**MR. SAUCIER:** Your Honor, I've provided the Court with Adams v. State which is a 2001 case that's cited at 794-10-49. That case was even more critical because what happened was the technician that actually did the examination, which is even more critical than this, was not the person that testified. It was actually the person that followed the protocol by being the supervisor. And in that case, a DNA case, they said that they didn't require the technician that even did the DNA procedures, that the supervisor who simply reviewed those procedures was adequate. If that's the case, my goodness, in a fingerprint where they both examine it, you certainly wouldn't need them both here.

**MR. FARRIS:** Could I draw a distinction, Your Honor, briefly?

**THE COURT:** um-hum.

**MR. FARRIS:** Your Honor, the difference in that case and this case is in the DNA evaluation it only takes one examiner to draw the opinion and the conclusion, which he can document through a business record in the case.

In this situation it takes two examiners to establish the opinion. Without that examiner being here, I can't confront him as to whether his opinion was different than that of the second examiner. There has to be at least eight points or more before an opinion can be valid.

> And I also offer the Court there are no specific guidelines on the ridge test as to objectively looking at and determining whether an examiner has established a valid opinion. It is totally subjective.
> **THE COURT:** I think you can go into that on cross-examination, but, otherwise, I'm going to allow him to testify.

Tr. 62-65, R.E. 20-23.

At trial, the State cited the court to *Adams v. State*, 794 So.2d 1049 (Miss.App. 2001), for the proposition that a supervisor can testify as to the conclusions of a non-testifying technician. *Id.* at ¶ 21-24. The circumstances are clearly different in this case. Mr. Wilkerson was not Mr. Bush's supervisor. He did not supervise all aspects of Mr. Bush's examination. In fact, Mr. Bush was Mr. Wilkerson's boss. Tr. 223. They were not even located in the same laboratory. Tr. 224, 235. Mr. Wilkerson testified that for a valid identification to be made, two examiners must agree on the identification. Tr. 231-33. Mr. Denham had a constitutional right to cross-examine Mr. Bush on his conclusions. The jury was allowed to hear Mr. Bush's hearsay conclusion without any cross-examination. Tr. 223. This was clearly error.

The cases usually cited on this issue relate to an expert's use of the opinions of other non-testifying persons in making his or her own conclusions. *See Gray v. State*, 728 So.2d 36, ¶85-90 (Miss. 1998). However, the issue here is not Mr. Wilkerson's qualifications to testify, but on the failure to have Mr. Bush testify to verify the conclusion the fingerprint found on the window of Mathis's house matched Mr. Denham. Fingerprint examinations are very different than DNA analysis. Two experts do not need to agree in order for there to be a DNA match. Fingerprints are much more subjective and human error is possible.

Q. [**MR. FARRIS**] In your experience, Mr. Wilkerson, there have been more than one case of an examiner being wrong?
A. [**MR. Wilkerson**] This is correct. It has happened.
Q. There has been more than one case of misidentification?
A. That's correct.
Q. So you'd agree with me than that fingerprint comparison is not an exact science. When a human component is involved, there's always a factor of fallacy, right?
A. There's always the opportunity for operator error, yes. And that is the reason you have so many checks and balances in the system to try to ensure that no mistakes are made.

Tr. 235.

This is precisely why Mr. Denham had an absolute constitutional right to cross-examine the other expert who identified his print[2].

Finally, Mr. Bush's opinion was clearly testimonial under *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Mr. Denham is entitled to a new trial so that he may properly confront all the witnesses against him. *Bell v. State*, 928 So.2d 951 (¶36-38) (Miss.App. 2005).

**ISSUE NO. 2: THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION IN LIMINE TO PROHIBIT OTHER CRIMES EVIDENCE FROM BEING ADMITTED IN VIOLATION OF MRE 404(b).**

Prior to trial, Mr. Denham's trial counsel filed a motion to prohibit the introduction of prejudicial evidence of other crimes. C.P. 32. The motion was heard by the trial court immediately prior to trial and overruled. Tr. 57-61, R.E. 15-19. This evidence clearly

[2]It should also be noted, although not necessary to assert this error, the latent prints taken from the Mathis's home and referenced as Exhibit 24, are not contained in the exhibits provided to the Court. Only a copy of the envelop marked Exhibit 24 is included.

prejudiced Mr. Denham in the eyes of the jury and should have been excluded under M.R.E. 404(b) and M.R.E. 403.

Jurors know that drivers are not stopped by police and photographed for no reason. It was clear to the jury that Mr. Denham was suspected of some crime by the police for officers to want to photograph him, his car, and his shoes. Jurors know that normal traffic stops do not include police taking pictures of the occupants of the car. Detective Nick Calico testified he came in contact with Mr. Denham in early March of 2005. Tr. 96. He also stated Mr. Denham was not engaged in any illegal conduct and was not ticketed on that day. Tr. 103. Yet Detective Calico testified he took pictures of Mr. Denham. Tr. 97. In the motion in limine, trial counsel argued to the court:

> **MR. FARRIS:** .....This burglary happened on March 3, 2005. Two days prior to this incident my client was stopped in Palmer's Crossing with two other individuals in a green Buick vehicle. And the officers, as a result of their ongoing investigation separate from this case, took photographs of my client and the other individuals in the car, their shoes, and the vehicles. It's believed that the State will intend to offer this into evidence in this case. We would state that this has no relevance whatsoever. It's extremely prejudicial to my client. And furthermore, it would affect my cross-examination. There would be no way that I could cross-examine the officer that's going to testify about this information without having to get into the fact that there were other burglaries involved that he may have been implicated in.....

Tr. 58, R.E. 15-16.

The court ruled that "officers are allowed to testify as to how they develop suspects and everything else as long as they don't bring in other bad acts that are going to – so I'm going to allow the testimony in that regard." Tr. 61, R.E. 19. No on-the-record balancing test was conducted by the court as required by M.R.E. 403. The admission of the

photographs and the testimony of Detective Calico was clearly prejudicial and tended to show evidence of other crimes, prior bad acts, and bad character of the appellant in violation of M.R.E. 404(b). This violated Mr. Denham's right to due process and a fair trial. *Brooks v. State*, 903 So.2d 691, ¶ 32-35 (Miss. 2005).

**ISSUE NO. 3: THE TRIAL COURT ERRED IN ALLOWING AN EYEWITNESS TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT.**

Clearly the strongest evidence presented against Mr. Denham was the eyewitness testimony given by Nelson Peden. However, it is clear that Mr. Peden's testimony was tainted by the unduly suggestive out of court identification he made on the day of the crime. Counsel's motion was heard prior to trial and denied. C.P. 35, Tr. 55-57, R.E. 13-15. This was error.

In *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), the U.S. Supreme Court set out five factors to be considered in determining whether a lineup is impermissibly suggestive: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. The trial judge erred in determining that under the totality of the circumstances, Nelson Peden's identification of Mr. Denham was reliable.

**(1) Opportunity to view the criminal at the time of the crime:**

Mr. Peden testified he saw a man running across the yard. The man's car was parked by the shop, so the man would have been running away from him. Tr. 110. The man then

drove past him. Tr. 112. Mr. Peden then testified he gave chase to the man and saw him again when the man turned around and drove past him while he drove off the road. Tr. 113. Although Mr. Peden claimed to have gotten a good look at the man, he neglected to mention in his testimony that he actually ran to his car, but had to go back to the carport for his keys. This is how Mr. Peden described it in his written statement:

> ...I was looking at the car when I seen a man running toward the car. I ran to my S.U.V. When I entered the S.U.V. I realized my key's where [sic] on the outside table. Ran back for the keys got into the S.U.V., at this time the man was driving through the yard....

Ex. 19, R.E. 26.

He also related in his statement that during the chase, the car turned around and came at him in the wrong lane, "I was forced off the side of the road." Ex. 19, R.E. 26. Yet, Mr. Peden claims to have gotten a good long look at the man, even testifying the man smiled at him. Tr. 126-127. Clearly, the evidence suggests the witness could not have had a significant amount of time to view the burglar in order to make an reliable identification.

**(2) The witness's degree of attention:**

Mr. Peden testified he was scared and excited. Tr. 122. As argued above, Mr. Peden was running to his car or being forced off the road while viewing the suspect. It is unreasonable to believe Mr. Peden got a good look at the suspect's face.

**(3) The accuracy of the witness's prior description:**

As demonstrated by the able cross-examination of trial counsel, Mr. Peden's descriptions of the suspect varied depending on to whom and when he gave statements. As

set forth in the Statement of Facts, Mr. Peden gave a description to police of the man he saw as 6'2" and 250 pounds, although he testified he told the police the man was about 6 foot and about 200 pounds and in his mid 30s. Tr. 123-124, 129, 157-158. The officer also noted on his report that Peden told him the man had a mustache, although Mr. Peden testified he had a beard. Tr. 125, 158.

**(4) The level of certainty of the identification at the confrontation:**

Although Mr. Peden testified he was one hundred certain Mr. Denham was the man he saw (Tr. 126), he also conceded that he knew the defendant would likely be the one black man sitting at the defense table. Tr. 133-34. Mr. Denham was not put in a live line-up for Mr. Peden to review. Tr. 177. The first time Mr. Peden had the opportunity to identify the suspect in person was at trial. The police did not put a suspect into the photo line-up that weighed about 250 pounds, the description of the size of the suspect Mr. Peden originally gave to officers. Tr. 167. Detective Wilson never told Mr. Peden it was just as important to clear an innocent man as it was to identify someone. Tr. 172. This is contrary to the guidelines set forth by the Department of Justice. Ex. D-1. The detective was not even certain he told Mr. Peden the suspect may or may not be in the line-up. Tr. 173.

**(5) The length of time between the crime and the confrontation:**

Mr. Peden testified he looked at the photo line up approximately two hours after his chase of the suspect. Tr. 118. The time between the crime on March 5, 2005, and the date of trial, November 16, 2005, was over eight months.

It is noteworthy that the trial judge apparently did not even consider the *Biggers* factors in his decision to overrule trial counsel's motion.

> **MR. FARRIS:** Your Honor, just a brief response. If the previous identification that the law enforcement and this witness has conducted is that credible and that valid, then there would be no need for this witness to identify my client her in open court especially when he'll be the only black male sitting at the defense table, and this witness is familiar with the jury. The fact that he's over here will be a foregone conclusion that he is in fact the defendant.
> **THE COURT:** If the witness saw this defendant at some point during this case and can identify this witness, I think he's entitled to identify this defendant.
>
> Note your motion and overrule the same.

Tr. 57, R.E. 15.

"The standard of review for suppression hearing findings in a matter of pretrial identification cases is whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, [the] in-court identification testimony was not impermissibly tainted." *Ellis v. State*, 667 So.2d 599, 605 (Miss.1995). The record does not reflect that the trial court reviewed any of the *Biggers* factors before making his ruling, nor did the court consider the admission of the in-court identification under the totality of the circumstances as required by *Ellis*. *Id.* at 605. This was error.

Mr. Peden's subsequent in-court identification was obviously tainted by his prior out-of-court identification. Immediately after the photo line-up, Mr. Peden was shown an 8x10 color picture of Mr. Denham taken by Detective Calico. Tr. 118, Ex. 11. This improperly caused Mr. Peden to remember Mr. Denham's face from the picture, not the crime. As argued above, Mr. Peden was never given the opportunity to identify the suspect from a live

line-up. The only time he saw Mr. Denham in person was at trial, the only black man at the defense table. Tr. 133. Under the totality of the circumstances, Mr. Peden's in-court identification of Mr. Denham was clearly unreliable and violated his rights to due process. Mr. Denham must be given a new trial with Mr. Peden's identification suppressed.

**ISSUE NO. 4: THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTION ON INCONSISTENT TESTIMONY.**

Finally, the trial court denied Mr. Denham's instruction on inconsistent testimony. Tr. 245, C.P. 53, R.E. 28. The appellant's theory of the case was that Mr. Peden's out of court identification of Mr. Denham was unreliable and unduly suggestive. The inconsistent statements made by Mr. Peden were crucial to the defense in establishing reasonable doubt. The denial of the instruction improperly denied Mr. Denham an instruction on his theory of the case. This was error.

A defendant is entitled to jury instructions on his theory of the case whenever there is evidence that would support a jury's finding on that theory. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). Even the 'flimsiest of evidence' is sufficient to mandate a trial court's giving an instruction on the [defendant's] proposed theory, but there must be some 'probative value' to that evidence. *Miller v. State*, 733 So.2d 846 (¶ 7) (Miss.App. 1998)." *Goff v. State*, 778 So.2d 779 (¶ 5) (Miss.App. 2000).

The Mississippi Supreme Court has held that a defendant is entitled to an inconsistent statement instruction where the witness has given a prior inconsistent statement. *Ferrill v. State*, 643 So.2d 501, 505-06 (Miss. 1994). Conflicts between testimony of a witness and

the written statement of a witness would justify such an instruction. In *Wright v. State*, 797 So.2d 1028 (Miss.App. 2001), similar to the case at bar, the trial judge refused an inconsistent statement instruction.

> ¶ 11. Wright had requested the trial court to instruct the jury that, in evaluating the credibility to assign to Deputy Campbell's testimony, it should take into account the fact that he had made statements prior to the trial that were inconsistent with his trial testimony. The court refused the instruction saying that it was "a comment on the testimony of one witness as to one particular part of that one witness's testimony. And for that reason the Court is refusing that instruction."
>
> ¶ 12. The alleged inconsistency in Campbell's pre-trial statement arose out of the fact that, in his written report shortly after the incident, Campbell had not mentioned seeing the defendant holding a shiny object while in the store nor had he reported seeing Wright throw such an object into the car before running away on foot.
>
> ¶ 13. We agree with Wright's contention that it is not, as the trial court held, an improper comment on the testimony of a witness to instruct the jury regarding the proper effect to give to prior inconsistent statements by witnesses testifying at trial. Such instructions have been approved in a number of prior decisions of the Mississippi Supreme Court. See, e.g., *Ferrill v. State,* 643 So.2d 501, 505 (Miss.1994); *McGee v. State,* 608 So.2d 1129, 1135 (Miss.1992).

*Wright* at ¶ 11-13.

Although the Court did not find sufficient prejudice in *Wright* to reverse the conviction, this was Mr. Denham's theory of the case. This Court has found reversible error when a defendant's instruction on his theory of the case was denied. *Jones v. State*, 798 So.2d 1241 (Miss.App. 2001). "In fact, proposed instructions should generally be granted if they are correct statements of law, are supported by the evidence, and are not repetitious. *Id.* at ¶ 40, *citing Taylor v. State*, 577 So.2d 381, 383-84 (Miss. 1991).

The trial judge erred in refusing the instruction, and Mr. Denham should be granted a new trial with a jury properly instructed on his theory of the case.

## CONCLUSION

Patrick Douglas Denham is entitled to have his burglary conviction reversed and remanded for a new trial, free from the introduction of prejudicial evidence.

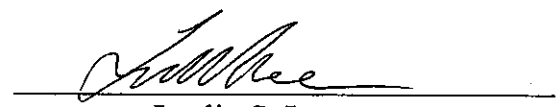
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Patrick Douglas Denham, Appellant

By: 
Leslie S. Lee

## CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 19th day of January, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Honorable Robert B. Helfrich, Circuit Judge, P. O. Box 309, Hattiesburg, MS 39401, and to Honorable Jon Mark Weathers, District Attorney, P. O. Box 166, Hattiesburg, MS 39403, and to Honorable Charlie Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



Leslie S. Lee

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