IN THE SUPREME COURT 0F MISSISSIPPI

NO. 2007-KA-00695-SCT

MICAH RUFFIN — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT OF YAZOO COUNTY
CAUSE NO. 24-9505

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENTS

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED RUFFIN'S DURESS INSTRUCTION TO THE UNDERLYING FELONY OF KIDNAPPING IN THE CAPITAL MURDER CHARGE OF COUNT ONE OF THE INDICTMENT.

The trial court erred when it did not give a duress instruction to kidnaping, the underlying felony in the capital murder charge. There was evidence to support the instruction. The instruction wasn't given because there wasn't evidence to support it. It wasn't given because the trial court incorrectly held that duress is not a defense to a capital murder charge.

The Mississippi Supreme Court elaborated on the defense of duress in *Brown v. State.*[1] In *Brown,* the supreme court repeated the holding in *Powe*[2] that an accused advancing duress as an affirmative defense must prove that impelling danger was present, imminent, impending, and not to be avoided at the time the crime was committed. Notwithstanding the language from *Powe,* the supreme court went on to hold, "[i]n the final analysis the most that can be said relative to the appellant's testimony as to duress is that it presented a question for the jury to determine."[3] that is, the supreme court found that circumstantial evidence in the form of the appellant's behavior contradicted the appellant's claim of duress. Accordingly, the supreme court held that, under such circumstances, a jury question existed as to whether the accused affirmatively demonstrated duress.[4]

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[1] 252 So. 2d 885 (Miss. 1971).

[2] 176 Miss. 455, 461, 169 So. 763 765 (1936).

[3] Id.

[4] Id.

In two cases, the Mississippi Supreme Court has recognized the inexact nature of the defenses of "duress" and "necessity.".[5] In *West v. State*[6], the supreme court stated that it: has not precisely enunciated the elements of a duress defense in this State, although it has expressly adopted the general rule of other states that where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal.

Jacob found that even if he was found not guilty of murder, he would nevertheless be guilty of capital murder because the victim was killed in the commission of a robbery.[7] *Jacob* does stand as authority that the defense of duress exists as to the underlying felony element of capital murder. *Jacob* sought a manslaughter instruction as the lesser included offense to capital murder. This instruction was denied.

Ruffin was not attempting to get a lesser included instruction to capital murder. He was attempting to get a duress instruction to the underlying felony of kidnaping in the capital murder charge. If the jury believe Ruffin acted under duress to the underlying felony of kidnaping, they would have been instructed to find him not guilty to the charge of capital murder.

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[5] *Knight v. State,* 601 So. 2d 403, 405 (Miss. 1992), the Mississippi Supreme Court examined the defense of "necessity and stated that it had not yet "addressed the question [of] whether, or what, circumstances inducing reasonable fear for one's safety create a viable defense to a crime." However, the supreme court did state that, "where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal.

[6] 725 So. 2d 872, 891 (¶ 79) (Miss. 1998).

[7] 870 So. 2d (¶ 19). The jury was given instruction that duress is a defense to robbery, and the jury found that there was no such duress.

Perhaps the reason why a duress instruction was not given to the underlying felony of robbery in the capital murder trial in *Milano* may be, unlike here, there was no factual basis or evidence to support the instruction. Not that the instruction was not given because duress is not a defense to the underlying felony of robbery in a capital murder trial. Ruffin asserts *Milano* as authority that duress is a defense to kidnaping. It follows that it is a defense to kidnaping when kidnaping is the underlying felony in a capital murder charge.

Herein, the State confuses Ruffin's awareness that duress is not a defense to murder and incorrectly asserts that Ruffin recognizes that duress is not available as a defense to capital murder. Contrary to the argument in the State's brief, Ruffin does not acknowledge that it is indeed the law in this State that duress is not available as a defense to a charge of capital murder. In fact just the opposite is the truth. There are several underlying felonies in a capital murder charge where duress would be a defense. Kidnaping is one of those applicable underlying felonies.[8] Yes, Duress is not a defense to murder.[9] Ruffin was not seeking a duress instruction to murder. He sought a duress instruction to the underlying felony of kidnaping in a capital murder charge. Duress can be a defense to the underlying felony in a capital murder charge.

The State is also incorrect in asserting that Ruffin presents no authority for the proposition that the defense of duress is available as to an underlying felony in a capitol murder case or available as a partial defense to a crime. In fact, Ruffin did cite a case

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[8] *Milano v. State*, 790 So. 2d 179 (¶ 28) (Miss. 2001) citing *Gibson v. State*, 731 So. 2d 1087 (Miss. 1998).

[9] *Sanders v. State*, 942 So. 2d 156 (Miss. 2006); see also *Fugua v. State*, 938 So. 2d 277 (Miss. Ct. App. 2006).

where a duress instruction to the underlying felony of robbery is given in a capital murder charge.[10]

Admittedly, during the fight Ruffin had the gun. Darwin Strahan told Ruffin to get the gun.[11] That may have been one reason why the jury rejected Ruffin duress defense to robbery. The fact the jury found Ruffin did not act under duress to the charge of robbery does not mean that they would have so found to the underlying felony charge of kidnaping. They should have been given the opportunity.

There was sufficient evidence to grant a duress instruction to the underlying felony of kidnaping. First of all, the jury heard evidence that Ruffin was not only scared but felt he could possibly be killed during the incident.[12] Not only Ruffin but several others told the investigator they were afraid of Strahan.[13] .

Secondly, as the State admits, immediately after the fight, Ruffin gave the gun to Strahan.[14] After giving the gun to Strahan, Strahan ordered him to pull the car around. Strahan then made Giles get into the trunk of the car. The gun was in the car when it made it to the field. It was passed by the girls in the car to Ruffin who passed to Darwin.[15]

Thirdly, there's no evidence Ruffin knew Strahan was going to kidnap Giles.

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[10] *Jacobs v. State,* 870 So. 2d 1202 (¶ 19) (Miss. 2004).

[11] 3:335:3-19.

[12] 3:354:17-24; 3:354:28-29; 3:355:24-26.

[13] 3:356:26-29; 3:357:1-2.

[14] 3:336:3-29; 3:337:1-29; 3:338:1-19.

[15] 3:332:6-29; 3:333:1-16.

Finally, it must be recalled that Ruffin testified at his suppression hearing that he was in special educations programs in school. He also suffers from dyslexia.[16] Furthermore, the court appointed clinical psychologist testified Ruffin scored on a 4th grade level on one test and was not given another IQ test because it would not have been effective.[17] Moreover, Ruffin's IQ score of 73, using the low end of the confidence interval, fell in the borderline range.[18]

To the argument Ruffin could have avoided the incident by simply driving away, it's evident that he was not familiar with the area and did not know which way to go.[19] Ruffin was not from Yazoo County. There's nothing in the record to indicate he had been to the residence before. He did not know his way around. Others had to tell him which way to go. He was only present because he had a drivers license.

This error was not harmless. If Ruffin did not commit the underlying felony of kidnaping he could not be guilty of and the jury would have been instructed to find him not guilty of capital murder. The jury properly instructed should have been given the issue to decide. Reversible error occurred when the trial court failed to submit the requested duress instruction to the jury.

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[16] 1:51:8-25. In this Brief R.E. refers to the Record Excerpts Page. The record page is cited as Volum:Page:Line(s).

[17] 1:54:5-27.

[18] 1:54:28-29; 1:55:1-9.

[19] 3:331:24-29; 3:376:22-28.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED RUFFIN'S MOTION FOR CONTINUANCE

The State in its brief continues to refrain from admitting the obvious. There is case law that supports Ruffin's argument that a duress instruction has been given to the underlying felony in a capital murder charge. As cited above, *Jacob* is a capital murder trial. The underlying felony was robbery. The jury was given the instruction that duress is a defense to robbery.

If the trial court did not abuse its discretion in denying the motion for continuance, *Jacob* would have been submitted as authority that a duress instruction could be given to the underlying felony of a capital murder charge. The court would have then given the jury the duress instruction to the underlying felony of kidnaping. The jury would have then recalled that after the fight, Ruffin gave the gun to Strahan. Strahan then ordered him to pull the car around. As there was no evidence Ruffin knew Strahan intended to kidnap Giles, the jury would have found that Ruffin acted under duress in participating in the kidnaping . Ruffin would have then been found not guilty of capital murder. Manifest injustice would have thereby been averted.

Finally, Lumumba is Ruffin's retained counsel by choice. Ruffin wanted his retained counsel to not only be lead counsel but to also be competent. There is no testimony that Alkebu-lan was retained by Ruffin. The trial court erred when it denied the motion for continuance.

III. THE TRIAL COURT COMMITTED MANIFEST ERROR, OR THE DECISION IS CONTRARY TO THE OVERWHELMING WEIGHT OF EVIDENCE, WHEN IT DENIED RUFFIN'S MOTION TO SUPPRESS HIS STATEMENT.

The State acknowledges that Investigator Snow gave the Miranda form to Ruffin to read. It fails to note if Ruffin read the form or not or could read the form or not or have the intellectual IQ to understand what was being read to him. Furthermore, the State concedes Ruffin testified at the suppression hearing that he could not remember if he was given his Miranda rights.

The evidence is there was no waiver of his rights. Considering Ruffin's very low IQ of 73,the fact he signed the advise form does not indicate his rights were read to him.

Snow should have read Ruffin his Miranda rights before taking the second statement. The first statement had clearly ended with Snow telling Ruffin he was not telling the truth. Reversible error occurred when Ruffin statement was admitted into evidence.

IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED RUFFIN'S MOTION FOR CHANGE OF VENUE.

Since this is a capital prosecution, exacting standards must be met to assure that it is fair.[20] Heightened standard of review in capital cases is the first element to consider when evaluating change of venue.[21]

A change of venue is constitutionally required where there is a "reasonable

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[20] *Johnson v. Mississippi,* 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) quoting *Gardner v. Florida,* 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

[21] *White v. State,* 495 So. 2d 1356, 1349 (Miss. 1986).

likelihood" that the community sentiment or pretrial publicity will prevent a fair trial.[22] A change of venue is required if the defendant can show that the impaneling of an impartial jury is "merely doubtful."[23]

Once a showing has been made that a fair trial is "doubtful," neither jurors' insiste[nce] that they could give [the defendant] a fair trial, nor ""he-can-get-a-far-trial-here' opinion testimony from a handful of public officials or law enforcement officers will ...[ever] be sufficient to rebut the *Johnson* presumption."[24] Because it was doubtful an impartial jury could be impaneled in the County, this Court must grant his motion and "not wait to see if voir dire of the prospective jurors may cure his doubts."[25] The Mississippi Supreme Court emphasized in *Johnson* that the "most obvious element" in determining the necessity of a change of venue is "the capital nature of the offense for which the accused is being

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[22] *Sheppard v. Maxwell,* 384 U.S at 333. These considerations are not necessarily ameliorated by the passage of time. The Supreme Court's concerns in *Rideau* were about the "climate of opinion" in Calcasieu Parish, Louisiana in 1961. They remained applicable even 44 years later, in 2005, when Mr. Rideau was finally freed from incarceration after a jury finally heard his case again, and acquitted him of capital murder, finding him guilty only of the manslaughter that he had always admitted he committed. As was reported at the time of the 2005 trial, Mr. Rideau (who had in the interim become a prize winning journalist for his work on the *Angolite,* the newspaper published by and for incarcerated person at the Louisiana State Penitentiary) even in 2005, a venue change was required. "Local sentinment here ... has been passionately opposed to letting him go ... In this trial, the jury was chosen in a distant twon because of the dept of local sentiment."

[23] *Johnson v. State,* 476 So. 2d 1195, 1210 (Miss. 1985). ("the sanctity of the right of a capital defendant to a fair trial ... we carry so far that we guard against even the appearance of abridgement").

[24] *Fisher v. State,* 481 So. 2d 203, 221 (Miss. 1985).

[25] *Johnson,* 481 So. 2d at 223.

tried.[26]

As has repeatedly been recognized by the federal courts under these circumstances, voir dire is not adequate to protect the accused's right to a fair trial by an impartial jury.[27]

Herein, the facts were very brutal. Giles was first beaten with a brick and hit with a gun. He was then dragged by his hair and put into the trunk of a car. He was then taken to field and shot numerous times.

In this capital murder trial, Ruffin was not from Yazoo County. Because he had a drivers license and could drive others at their direction was the only reason he was present. The fact that close to one third of the summoned jurors were disqualified from serving for various reasons indicate a "reasonable likelihood" that the community sentiment or pretrial publicity would and did prevent a fair trial. Because it was doubtful an impartial jury could be impaneled in the County, the trial court should have granted Ruffin's motion to change venue and "not wait to see if voir dire of the prospective jurors may cure its doubts.

V. CUMULATIVE EFFECTS OF ERRORS DENIED RUFFIN A FAIR TRIAL

Considering the foregoing arguments and authorities, there being individual error, there can be commutative error. Cumulative error deprive Ruffin of a fair trial.

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[26] *Johnson v. State,* 476 So. 2d 1195, 1214 (Miss. 1985).

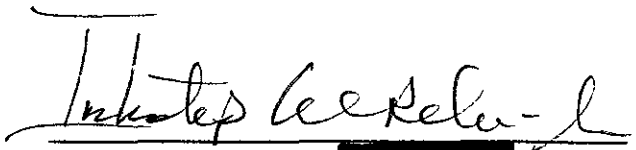
[27] *Coleman v. Kemp,* 778 F. 2d 1487, 1542 (11th Cir. 1985). ("[t]he jurors' assurances that they are equal to the task are not dispositive of the rights of the accused"}.

CONCLUSION

For the foregoing reasons and authorities, Ruffin request this Court enter an Order dismissing these charges. In the alternative, he prays for a new trial.

Respectfully submitted,

MICAH RUFFIN

By: 

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CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

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This the 21ST day of April, 2008.

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