IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-KA-00695-SCT

MICAH RUFFIN — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

# APPELLANT'S BRIEF

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

ORAL ARGUMENT REQUESTED

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed individuals have an interest in the outcome of this cause. These representations are made in order that the Justices of the Court of Appeals may evaluate possible disqualification or recusal:

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This the 26th day of November, 2007.

Imhotep Alkebu-lan

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## SUMMARY OF THE CASE

This case comes before the Court on appeal from a jury verdict of guilty and a judgment and sentence of life imprisonment for capital murder and ten (10) years for arm robbery, to run concurrently, by the Circuit Court of Yazoo County, Mississippi, Judge Jannie M. Lewis, on April 5, 2007.[1]

The State of Mississippi charged Micah Ruffin in count one of a two count indictment with capital murder in violation on M.C.A. §97-3-53. Count two charged him with armed robbery in violation of M.C.A. §97-3-79.[2] On April 2, 2007 the charges against Ruffin came on for trial. The District Attorney announced ready and Ruffin announced ready. The jurors who were summoned were selected, specially sworn, impaneled and accepted by

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[1] R.E. 211. In this brief R.E. refers to the Record Excerpts Page. The record page is cited as Volum:Page:Line(s).

[2] R.E. 5.

both the State and Ruffin to try this cause. On April 5, 2007, after testimony from witnesses, the jury found Ruffin guilty on both counts. On April 5, 2007 the court sentenced Ruffin to serve a term of life imprisonment without parole for count one and ten (10) years for Count 2. Count one and two to run concurrently.[3] A Notice of Appeal was filed on April 9, 2007.[4]

## STATEMENT OF THE FACTS

On July 2, 2002 Tommy Lee White was at his home in Yazoo City, Mississippi shooting dice with the victim, Thomas Giles, and others. Along with other visitors, Darwin Strahan and Micah Ruffin were also at the house watching the dice game. At one point, Strahan and Ruffin exited the house only to return minutes later. Ruffin returned with a gun and Strahan a brick. Giles was beaten by Strahan and put in the trunk of a car driven by Ruffin.

Along with two other companions in the car, Strahan had Ruffin drive to a corn field where Strahan removed Giles from the trunk. Strahan shot Giles six time about the head with a 22 caliber rifle. Strahan took some money from Giles. His body was later found at the end of a turn row within the city limits of Yazoo City, Mississippi.

## SUMMARY OF THE ARGUMENT

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. A defendant is entitled to have jury instructions given which present his theory

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[3] R.E. 211.

[4] R.E. 209-10.

of the case. The law and evidence supported such an instruction. The. motion for continuance should been granted where Ruffin's retained counsel, Chokwe Lumumba, had been recently reinstated to practice law in Mississippi and needed more time in which to prepare for trial. The court's ruling was an abuse of the court's discretion and the abuse actually worked an injustice against Ruffin. Manifest error occurred when Ruffin's statements were not suppressed where, considering the totality of the circumstances, they were coaxed and not freely and voluntarily given. The motion for change of venue should have been granted because it became evident Ruffin could not receive a fair trial in Yazoo County. Finally, the commutative effect of trial errors denied Ruffin a fair trial.

## ARGUMENT

### 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 standard of review for the grant or denial of jury instructions is well established. An appellate court, when reviewing a denial of a jury instruction, must consider not only the denied instruction but also all of the instructions which were given to ascertain if error lies in the refusal to give the requested instruction.[5] A defendant is entitled to have jury instructions given which present his theory of the case; however, the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.[6]

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[5] *Divine v. State,* 947 So. 2d 1017, 1021 (¶ 6) (Miss. Ct. App. 2007); see *Coleman v. State,* 697 So. 2d 777, 782 (Miss. 1997).

[6] *Chandler v. State,* 946 so. 2d 355, 360 (¶ 21) (Miss. 2006).

When a party claims that the trial court erroneously refused a tendered instruction, normally the party must show the tendered instruction properly stated the law. However, the court has held that the trial court may have a duty to advise counsel of deficiencies in an instruction and to afford an opportunity to prepare a new instruction. The court said:

> [W]here under the evidence a party is entitled to have the jury instructed regarding a particular issue and where theat party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new, corrected instruction. Where the trial judge fails in the duty and where the proffered instruction relates to a central issue in the case which is not covered by any other instruction given to the jury, we will reverse.[7]

Ruffin gave his statements, which were later transcribed, to Yazoo City Police Department Investigator Eric Snow on July 8, 2002.[8] State exhibit 9 was his first transcribed statement introduced into evidence. The following exchange occurred on direct examination in the State's case in chief:

Q What did you ask him?

A "Darwin didn't say nothing."

"Did you ever hold a gun or hit anybody while you were in the house?"

Q Okay. And what was Mr. Ruffin's answer to that?

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[7] *Harper v. State*, 478 So. 2d 1017, 1018 (Miss. 1985). See also *Peterson v. State*, 518 So. 2d 632 (Miss. 1987).

[8] 3:318:23-27.

A He told me to hold it."[9]

Q And what was his response to that?

A "He told me to back it up, so that's why I went outside, to back it up."[10]

Q And how did he respond to that?

A "Then he opened the door and said, "Pop[11]

the trunk."[12]

Q Did he tell you where they went after they left the house?

A He stated that he really didn't know. They was telling him which way to go, and that he stopped near a cornfield where they almost ran off the edge of the street on the frontage road.[13]

It's clear in this statement that what Ruffin did he did at the direction of Strahan. State exhibit 10 was Ruffin's second statement introduced into evidence. The following exchange occurred on direct examination during the State's case in chief:

Q Then what did he say that he did?

A Then he told me to get his gun.[14]

Q All right, turn to the next page. He makes a statement at the top of that page. What is that statement?

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[9] 3:327:1-7.

[10] 3:328:17-19.

[11] 3:328:28-29.

[12] 3:329:1.

[13] 3:331:24-29.

[14] 3:335:18-19.

A "Darwin told me to give him the gun, and I gave it to him."

Q What was your question to him after that?

A "And then what? What were you doing when you gave Darwin the gun?"

"He told me - - he told me to pull the car around."

Q You told him "Okay, keep going." what else did he say?

A "I pulled the car around, and he told me to pop the trunk."

"All right."

"And I popped the trunk, and I got out of the car and stepped back inside and told the boy to get up, and we went to the car."[15]

Q And (PAUSE) read his response there at the page, at the top of page 205, about what he said they did.

A "When he got through, he told me to drive. But we got in the car. I was the only one that had license. That's the only reason he kept me around, because I was the only one that had a[16] license."[17]

Q All right. Then you told him to go ahead. What did he tell you after that?

A "once I backed in there, I put it in park and he got out. He said 'open the trunk, open the[18] trunk.' And he dragged the boy out by his hair. And he walked him. I wasn't too far from the car. It wasn't too far from the car. And

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[15] 3:336:3-20.

[16] 3:340:23-29.

[17] 3:341:1.

[18] 3:341:26-29.

he told him to set down. He sat down, and he told me to hand him his gun, and I handed it to him."[19]

Again, it is clear in this second statement that what Ruffin did he did at the direction of Strahan. More telling of why Ruffin did what he did is elicited in the following exchange on cross-examination during the State's case in chief:

Q For instance, there was a portion in there where you asked him why he didn't stop Mr. Strahan from doing what he did. You remember that; right?

A Yes.

Q And he said "I was scared to death." Isn't that right?

A He said he was scared.[20]

Q We'll get to it in a minute. And at one point, he indicated that he might be killed or[21] something himself. He was concerned about that; right?

A Yes.[22]

Q He had no control over what was going on out there, at least from what he said; right?

A Yes.[23]

Q So it wasn't just Mr. Micah Ruffin that told you he was afraid of Strahan. A

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[19] 3:342:1-6.

[20] 3:354:17-24.

[21] 3:354:28-29.

[22] 3:355:1-3.

[23] 3:355:24-26.

whole lot of people told you, well, several people tod you they were afraid of Darwin Strahan?[24]

A I can't remember how many, but I recall someone saying that.[25]

Q Okay. And it says, "Did you think he did something?" and then you said, then he goes on to explain. "I don't know. I didn't know whether to go home that night or be killed. I'd leave, but I did not have a way, no way." that's what he says; right?

A Yes.[26]

Q He says, "So why didn't you try to stop Darwin?"

And his answer was, "I was scared." is that what he said?

A Correct.

Q then your response was, "Scared? What were you scared of?"[27]

A "Scared of him." that's what it says; right?

A Correct.

Q And then you go on to say, "Scared of him? You had the gun at one time; right?"

A Yes.[28]

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[24] 3:356:26-29.

[25] 3:357:1-2.

[26] 3:376:22-28.

[27] 3:379:23-29.

[28] 3:380:1-6.

This passage clearly indicates that Ruffin did what he did because he was scared of Strahan. He felt if he did not do what Strahan told him to do he was scared he would be killed. Duress is the exercise of unlawful force upon a person whereby that person is compelled to do some act that he or she otherwise would not have done. A person having a reasonable opportunity to avoid committing the crime without undue exposure to death or serious bodily harm cannot invoke duress as a defense.[29]

Duress is not a legal defense to murder.[30] However, there's no case law holding that duress cannot be a defense to the underlying felony in a capital murder charge. In fact, a duress instruction to robbery has been given where robbery was the underlying felony in a capital murder charge.[31] Moreover, duress is a defense to kidnapping.[32]

Ruffin's jury instruction D-20 was a duress instruction the court gave to the count two charge of armed robbery.[33] The trial court denied his requested duress instruction to the underlying felony of kidnapping in the capital murder charge of count one of the indictment. The trial court reasoned that duress is not a defense to capital murder.[34] This reasoning is misplaced.

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[29] Id.

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

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

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

[33] 5:625:14-29; 5:626:1-3..

[34] 5:625:26-29; 5:626:1-3.

Ruffin made the following argument that a duress instruction should be given to the underlying felony of kidnapping:

> Secondly, let me explain carefully, Judge, because first of all, I would think that you could never give an instruction saying that duress is not an defense. Maybe, and I would say no, but I would say maybe you can refuse to give the instruction that duress is a defense. But if you give an instruction saying duress in not a defense, you actually nullify one of the requirements of kidnapping, which is necessary for capital murder.
>
> One of the requirements of kidnapping is that it must be willfully done. If you say that duress is not a defense, then you're basically saying that, even if it wasn't willfully done, then you didn't voluntarily or willfully do it, then you're saying that even acts which are not voluntarily and willful can be considered in convicting the gentleman of kidnapping, and, therefore, of capital murder if a death results.
>
> So I cannot imagine there's a case that allows an instruction to be given that says duress is not a defense. Maybe[35] there's a case that says, and that's not -- the one he gave us is not the one. **Sanders** is not the one. I've got it right here. **Sanders** has nothing to do with it. But, so we have a double objection here to this. One, is that (a) the case doesn't stand for that proposition, and we think duress is a defense to an underlying crime, which makes it a defense to capital murder. If you don't find him guilty of the underlying crime, then you can't find him guilty of capital murder. So duress is a defense to kidnapping. The kidnapping has to be willful, just

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[35] 5:639:4-29.

like any other crime. And so what we are actually aiming at, and maybe we stated it wrong, is that, and maybe what he should put in the complaint is that, to the charge of kidnapping, which is the underlying offense in count 1, we would like a duress instruction, because clearly, kidnapping requires willful action.

According to everyone who has testified - - uh - - Darwin, what's his name? Darwin Strahan had the weapon in his possession at the time that the gentleman was allegedly put in the car and at the time that the driving took[36] place to the scene where he was quote/unquote "kidnapped." and if you - - and then, without question, our client, all throughout his statement, insists "Why did you do it?"

"Darwin said. Darwin said."

"Why did you drive the car?"

"Darwin said."

"Why did you back it up?"

"Darwin said."

And so when asked, at one point he said, " I though I was going to be killed." and at another point, he said, "I was scared to death. That's why I did the way I did."

So the point is, is that, I think we have established enough to give the defense of duress as an instruction, but, clearly, I don't think there could be an instruction which says that duress is not a defense, because that negates a potion, that negates an element of the offense of kidnapping, which is willfulness.

Now, you can read them both, one that says kidnapping and willfulness, and

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[36] 5:640:1-29.

another one that says that duress is not a defense, but that's a conflicting instruction, and when you tell the jury[37] to take the two together, what they do is one cancels the other.

And so I would say that there never could be an instruction given saying that duress is not a defense, is not a defense to any crime that requires willfulness.[38]

To this argument the Court made the following ruling:

> THE COURT: that argument goes to the State's instruction 7. The Court finds that there is case law that says duress is not a defense of capital murder. And 5-7 is given.[39]

The court's reasoning was a misstatement of law. Instruction S-7 states in pertinent part that duress would not constitute any defense whatsoever to the charge of capital murder.[40] The submission of this instruction amounted to reversible error. The correct statement of law is duress is not a legal defense to murder.[41] It does not hold that duress would not constitute any defense whatsoever to the charge of capital murder or that it is not a legal defense to the underlying felony of a capital murder charge.

After the close of all the evidence, Ruffin made the following requested jury instruction that duress is a defense to kidnapping.

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[37] 5:641:1-29.

[38] 5:642:1-6.

[39] 5:642:7-12.

[40] R.E. 174.

[41] *Sanders v. State*, 942 So. 2d 156 (¶ 23) (Miss. 2006) citing *Watson v. State*, 212, Miss. 788, 793, 55 So. 2d 441, 443 (1951).

MR. LUMUMBA: Judge just one final request: I would like to amend the instruction that the State has offered the Court, since the Court, in alternative, since the Court has denied my request to deny their duress cannot be an offense of capital murder instruction, I would like to either amend that [42] instruction or offer an additional instruction to indicate that duress may be a defense to kidnapping.[43]

The State objected to this request with the following argument:

MR. POWELL: to which we would object, because the jury is not being instructed on a finding of kidnapping, Your Honor, and duress has to be a complete defense. We have another case in **Fuqua v. State** where, basically, the same instruction in another capital case in which that instruction, the duress instruction, was denied. There are no cases where duress has been allowed as a lesser-included offense to capital murder or the underlying felony.[44]

The State's argument that the jury is not being instructed on a finding of kidnapping is in error as State's instruction S-2 was given.[45] There is no case law that duress has to be a complete defense to a capital murder charge. Furthermore, *Fuqua* held that the defendant was not entitled to jury instruction on duress in prosecution for capital murder where a person is not authorized to **take the life of another person at the command of**

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[42] 5:644:22-29.

[43] 5:645:1-3.

[44] 5:645:4-15.

[45] R.E. 169.

**a third person**, whether he is in fear of such person or not. (emphasis supplied)[46] Herein, the evidence established that Ruffin did not shoot Giles. The evidence demonstrated that Strahan shot Giles. Ruffin was not requesting a duress instruction to murder because he had **taken the life of another person at the command of a third person.** Ruffin requested the duress instruction to the underlying felony of kidnapping to the capital murder count. Finally, there is case law where a duress instruction is given to the underlying felony in a capital murder charge.[47]

Ruffin responded to the State's argument as follows:

> MR. LUMUMBA: Judge, first of all, I would like to see the case. The case he gave me before, I'd like to repeat, the **Sanders** case has absolutely nothing to do with denying duress instruction. It has absolutely nothing. It's about severance.
>
> But, secondly, the point is, is that we cannot mislead the jury and cannot deny the defendant his lawful defense.
>
> Now, they are giving an instruction on kidnapping. You have approved an instruction on kidnapping in their instruction. Kidnapping is in here.[48]

They defined kidnapping, and I'll tell you what instruction it is. Let me see. Capital murder is S-1.

> THE COURT: It's S-2.
>
> MR. LUMUMBA: Pardon?

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[46] *Fuqua,* 938 So. 2d at ¶ 20.

[47] *Jacobs v. State,* 870 So. 2d at ¶ 19.

[48] 5:645:16-29.

THE COURT: S-2

MR. LUMUMBA: S-2? Yeah, it's S-2, it's a kidnapping instruction. And so I would ask we amend this, and indicate that if the defendant was acting under duress, then he cannot be found guilt of capital murder. The prosecution must prove beyond a reasonable doubt that he wasn't acting in duress. By saying that the duress would not have, confusion would not be caused if you just delivered a duress instruction as to Count I, or their anti-duress instruction. And this is clearly going to confuse the jury. The jurors are going to go back there and fell, "well, we can't use this duress instruction as it goes to kidnapping." and that is clearly not the law.[49]

The trial court made the following ruling:

THE COURT: Okay, I don't want to hear that duress instruction argument again. The request is denied. Okay, anything further before we get into closing.[50]

The trial court denied Ruffin's duress instruction to the underlying felony of kidnapping in the capital murder charge not because there was no evidence to support it. It was not denied because it was in the wrong form. Nor was it denied because duress is not a defense to the underlying felony of kidnapping. It was denied, the court reasoned incorrectly, because duress is not a defense to capital murder. This denial was misplaced. Duress is a defense to the underlying felony of kidnapping. A duress instruction has been given to the underlying felony in a capital murder charge. The jury should have been given such an instruction herein as it is supported by law and evidence.

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[49] 5:646:7-23.

[50] 5:646:24-28.

The State, in its closing argument, compounded this misplaced, prejudicial and reversible error when it made the following argument that duress is not a defense to kidnapping:

> Then in instruction, those are the elements. I mean, that's the one charge. Then you have the instruction that deals with duress, this Number 11, "The Court instructs the jury that even if you were to find from the evidence in this case that the defendant, Micah Ruffin, was acting under some form of duress, such duress would not constitute any defense, whatsoever, to the charge of capital murder." it's not a defense to any of the elements contained in there. Kidnapping is one of the elements.[51]

Ruffin made the following objection to this argument:

> MR. LUMUMBA: Could we approach, please?
>
> (BENCH CONFERENCE OUT OF HEARING OF JURORS)
>
> MR. LUMUMBA: The prosecution is going to tell us that it's not a defense[52] to any element of capital murder. So that's saying it's not a defense to kidnapping. That is just so wrong.
>
> MR. POWELL: Not the way that it's charged, and I let Mr. Lumumba make his argument, which I though was improper, didn't interrupt him, and

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[51] 5:729:12-22; 5:732:2-6; 5:732:13-29; 5:733:1-6.

[52] 5:729:12-29.

I'm sure I'm going to be interrupted a hundred times in this, but that's the instructions that the Court gave, Your Honor.

MR. LUMUMBA: All I'm saying is that what you're doing is banding about - - how can you possibly say that - - so what we're saying is that if somebody put a gun to your head and force you to shoot somebody else in the, somebody forces you to rob somebody else, if that becomes a capital murder, then you can't say "I was under duress"? First of all, he hasn't produced a case. I understand that there is a case and what the case mean is that if the kidnapping was committed without duress, it was committed willfully, it's got to be willfully, then you can't come back here and say because you're under duress, so you kidnapped somebody willfully. And then you get to the point of the death. And then you shoot the person because somebody else is forcing[53] you to shoot the person. Well, you can't use that as a defense to the capital murder, the duress, but you can always use duress as a defense to kidnapping.

I mean the Court, I understand, is trying to do the good thing, but I'm saying that he is using this thing exactly like it ain't supposed to be used, and he has no case law that supports that proposition.

MR. POWELL: I certainly do, and I'm the only one that has produced Any case law, whatsoever, for the Court on that, and there are two cases. It was, the whole duress instruction was his instruction to begin with. First, I

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[53] 5:730:1-29.

don't think there's been any evidence raised, but in the instruction, it's properly been told and the Supreme Court has held it does not apply to murder and it does not apply to capital murder cases.

I went back and got the **Funches** case after **Sanders** that I provided. It says exactly the same thing, and the Court instructed properly, and I would like to be able to make my closing argument, Your Honor.[54]

The trial court overruled the objection.[55]

*Sanders* was charged with depraved heart murder not capital murder. Ruffin objected to the State's proposed instruction, S-7 in part because it was a misstatement of law and failed to include an instruction that duress is a defense to the underlying felony of kidnapping. Ruffin argued that he acted under duress which was a defense to the underlying felony of kidnapping and his duress instruction should have been given to the jury.[56]

The record evidence presented shows that Ruffin acted under duress in committing the crime of kidnaping. If the jury found Ruffin did not commit the underlying felony of kidnapping because he acted under duress he could not be guilty of capital murder.

A defendant is entitled to have jury instructions given which present his theory of the case. Ruffin's theory of the case was that he acted under duress in kidnapping Giles because he was afraid of Strhan. The proposed instruction did not misstate the law

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[54] 5:731:1-28.

[55] 5:731:29.

[56] 5:638:17-29; 5:639:1-29; 5:640:1-29; 5:641:1-29; 5:642:1-6.

because duress is a defense to kidnapping. The duress instruction to kidnapping was not covered fairly elsewhere in the instructions. In fact it was not covered at all as the duress instruction to kidnapping was denied. There was evidence in the record to support the instruction as Ruffin said he was afraid of Strahan and though he would be killed. The instruction was denied not because there was no foundation to support it. It was denied because duress is not a defense to capital murder the court reasoned. Reversible error occurred when the trial court denied the duress instruction to the underlying felony of kidnapping. Therefore, this Court must reverse Ruffin's capital murder conviction and order a new trial.

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

The decision to grant or deny a motion for continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in a manifest injustice.[57] To succeed in this claim on appeal, the defendant must show an abuse of the court's discretion and that the abuse actually worked an injustice in his case.[58]

At the start of trial on April 2, 2007 Ruffin's retained counsel, Chokwe Lumumba, moved the court to grant a continuance in this case.[59] He noted Ruffin is charged with the most serious of crimes - capital murder. He questioned whether Ruffin could receive effective assistance of counsel at this time. Ruffin wanted Lumumba to remain as his counsel though Lumumba was suspended from the practice of law for approximately

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[57] *Bailey v. State,* 956 So. 2d 1016 Miss. App. 2007).

[58] *Nelson v. State,* 850 So. 2d 201, 204 (¶ 7) (Miss. Ct. App. 2003).

[59] 1:7:8-29: 1:8:1-29; 1:9:1-29; 1:10:1-29; 1:11:1-29; 1:12:1-4.

robbery, to run concurrently, in the Mississippi Department of Corrections.

If the case had been continued Ruffin's counsel would have been prepared to meet the State's challenged and the court's denial to his duress instruction to the underlying felony of kidnapping in the capital murder charge. Case law would have been proffered refuting the State's argument that duress had to be a complete defense and that there was no case law holding permitting a duress instruction to the underlying felony in a capital murder charge. Moreover, Ruffin would have benefitted from a continuance in that he would have been better prepared to raise a change of venue motion.

For the foregoing reasons, the trial court abused its discretion when it denied Ruffin's Motion for Continuance. Therefore, this Court must reverse Ruffin's capital murder and arm robbery convictions and order a new trial.

## 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 STATEMENT.

Appellate courts review denials of motions to suppress confessions for manifest error or for whether the decision is contrary to the overwhelming weight of the evidence.[62] As long as the correct principles of law are applied and the finding of voluntariness is factually supported by the evidence, we will affirm.[63] The supreme court observed the well established standard for appellate review of a trial court's decision overruling a motion to suppress.[64]

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[62] *Thomas v. State,* 936 So. 2d 964 )Miss. 2006).

[63] *Carlisle v. State,* 822 So. 2d 1022, 1026 (¶ 11) (Miss. Ct. App. 2002).

[64] *Moody v. State,* 841 So. 2d 1067 (Miss. 2003).

Regarding the overruling of a motion to suppress by the circuit court, the scope of review is limited. Once the trial judge has determined at a preliminary hearing, that a confession is admissible, the defendant/appellant has a heavy burden in attempting to reverse that decision on appeal. Such finds are treated as finds of fact made by a trial judge sitting without a jury as in any other context. As long as the trial judge applied the correct legal standards, his decision will not be reversed on appeal unless it is manifestly in error, or is contrary to the overwhelming weight of the evidence. Where, on conflicting evidence, the court makes such findings, this Court generally must affirm.[65]

The applicable standard for determining whether a confession is voluntary is whether, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice.[66] The burden is on the prosecution to prove beyond a reasonable doubt that the confession was voluntary.[67] A prima facie case must be made out by the prosecution by the testimony of an officer or others who are knowledgeable about the case that the confession was voluntary and there were no threats or coercion against the accused or rewards offered to him in exchange for the confession.[68] After such a prima facie case has been made, the defense must then offer testimony in rebuttal, showing that the defendant was coaxed into confession.[69]

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[65] *Moody v. State,* 841 So. 2d 1086 (¶ 53) (citations omitted).

[66] *Greenlee v. State,* 725 So. 2d 816, 826 (Miss. 1998).

[67] Id at 826;

[68] *Chase v. State,* 645 So. 2d 829, 838 (Miss. 1994).

[69] *Stokes v. State,* 548 So. 2d 118,121 (Miss. 1989). See also *Cox v. State,* 586 So. 2d 761, 763-64 (Miss. 1991).

The trial court must determine whether the accused has been adequately warned, and whether, under the totality of the circumstances, he has voluntarily and intelligently waive his privilege against self-incrimination.[70]

Yazoo City Police Department Investigator Eric Snow taped recorded two statements from Ruffin on July 8, 2002.[71] After the Miranda right were read to him Ruffin signed the acknowledgment form.[72] He did not sign the form waiving his Miranda rights.[73]

Snow had never met or knew if Ruffin had any problems reading prior to July 8, 2002.[74] When Ruffiin signed the acknowledgment form Snow did not know if Ruffin could read or not.[75] He did not know if Ruffin knew or understood the rights that were read to him.[76]

Ruffin's alleged statements was transcribed.[77] At the suppression hearing, the State identified S-2 as the first transcribed statement Ruffing gave.[78] S-3 was Ruffin's second

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[70] *Layne v. State,* 542 So. 2d 237, 239 (Miss. 1989).

[71] 1:15:9-21.

[72]1:17:23-26.

[73] 1:18:19-20; 1:27:10-14.

[74] 1:24:11-26.

[75] 1:25:18-26.

[76] !:28:20-27.

[77] 1:15:22-24.

[78] 1:20:8-11.

transcribed statement.[79] No where on S-2 was Ruffin advised of his Miranda rights.[80]

In his second statement, Ruffin agreed with Snow's incorrect statement that Snow advised him of his Miranda rights on the first tape.[81] Snow agreed no such admonishment appeared on the first tape.

Ruffin testified that he was in special education programs in school and suffers from dyslexia.[82] Dyslexic hinders his reading and he testified he did not understand what was happening at the time of the interview.[83] Depending on how big the words were would determine if he could read the statement or not.[84] He argued that the print on the Miranda form wasn't big enough.[85]

Ruffin filed a motion to suppress statement.[86] The trial court denied Ruffin's motion to suppress statement.[87] Manifest error occurred when the trial court denied Ruffin's motion to suppress statement. The overwhelming weight of the evidence was that his statements should have been suppressed. Considering the totality of the circumstances, he did not voluntarily and intelligently waive his privilege against self incrimination.

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[79] 1:20:12-14.

[80] 1:30:1-27.

[81] 1:29:21-29; 1:30:1-1-29; 1::31:1-23; 1:34:22-29; 1:35:1-18.

[82] 1:51:8-25.

[83] 1:52:2-19.

[84] 1:51:26-29; 1:52:1-19.

[85] 1:56:6-8.

[86] R.E. 59-64.

[87] 1:57"16-29; 1:58:1-11.

Firstly, Ruffin did not sign the form waiving his Miranda rights. At this juncture of the interview all further questioning should have ceased since Ruffin did not waive his right to make a statement, . Secondly, at the end of the first statement, Ruffin was coaxed into making the second statement as the following cross-examination of Yazoo City Police Department Investigator Eric Snow establishes:

Q What it says you said, "It's not true. I told you I knew what happened. If that's all you want to say, then that's fine, but that's not the truth."

You're telling him that's not the truth; right?

A Yes."[88]

Q Even though you weren't there; is that right?

A Yes.

Q "I know that, I know the truth." You told him that; right?

A Yes.

Q And you tell him that you know the truth, "I'm going to give you a chance to tell me the truth, the whole truth, who had the gun."

Is that right?

A Yes.

Q In other words, although it's inaudible, he had said something that you were basically telling him he was lying; right?

A It appeared that way, yes, sir.[89]

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[88] 1:33:23-29.

[89] 1:34:1-15.

Thirdly, coupled with this known threat, Snow said some things to Ruffin not recorded on the tape as the following exchange of cross examination of the pre-trial hearing demonstrates:

Q Okay. And, also, interestingly enough in here, it says that, "I told you I know what happened.'

Now, that's what it says; right?

A Yes.

Q. Now, I don't see that that in the rest of the transcript before we get to that point, or maybe it is, but I don't see it. But if that doesn't appear[90] in this transcript and it would be easy enough for anybody to read it and find out whether it does, then that means that you must have told him off tape that you knew what happened; is that right?

A No, I normally wouldn't do that. But I can't recall why that's in there, why the other is inaudible.

Q But you say "I told you I know what happened." Right?

A Yes.

Q Either it's in the tape or it's not in the tape; right?

A Yes.

Q And if it's not in the tape, then that would suggest, assuming that your statement there is true, that you told him off tape what happened; right?

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[90] 1:34:22-29.

A If it's not on the tape, yes.[91]

After the known threats, Ruffin made the second statement.[92] Finally, before Ruffin made the second statement, Snow did not have him execute a second Miranda rights form.[93]

Ruffin argued that the court appointed clinical psychologist who examined Ruffin, W. Kriss Lott, confirmed that Ruffin suffered from dyslexia, scored on a 4th grand level on one test and was not given another IQ test because it would not have been effective.[94] Furthermore, Ruffin's IQ score of 73, using the low end of the confidence interval, fell in the borderline range.[95]

Considering the overwhelming weight of the evidence, manifest error occurred when the trial court denied Ruffin's motion to suppress his statement. Considering the totality of the circumstances, his statement was not freely and voluntarily given. Therefore, this Court must reverse Ruffin's capital murder and arm robbery convictions and order a new trial.

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

The supreme court will not disturb the ruling of the trial court where the sound discretion of the trial judge in denying a change of venue was not abused.[96] Granting a

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[91] 1:35:1-18.

[92] 1:21:6-15.

[93] 1:21:29; 1:22:1-2.

[94] 1:54:5-27.

[95] 1:54:28-29; 1:55:1-9.

[96] *King v. State,* 960 So. 2d 413 (Miss. 2007).

change of venue is a matter that falls largely within the sound discretion of the trial court that a judgment of conviction will not be reversed on appeal on the ground that a change of venue was refused, unless it clearly appears that the trial court abused it discretion.[97] A capital case is under a higher standard of review.[98]

Ruffin moved the court for a change of venue.[99] He argued that a significant portion of the community has a bias against the defendant and for the deceased. There were some jurors who heard about the case. Some said they could not be fair. Defendant was not from Yazoo County.

The trial court, in denying the motion for change of venue, found as follows:

> THE COURT: Before the Court is Defense's Motion for a Change of Venue based on the voir dire, the panel - -uh - - of potential jurors for this case. The court finds that the panel consisted of 73 potential jurors. Out of that 73, 14 people were excused because of legal excuses or legal exemptions, which left a panel of 59. Out of that 59, the Court finds that 13 people stated that they cannot be fair and impartial for some reason, which leaves a panel of 46, with possible causes that could dwindle that panel.[100]
>
> And based on those numbers, in that this is a Motion for Change of Venue whereby the defendant is claiming that he cannot get a fair trial in

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[97] M.C.A. § 99-15-35 (Rev. 2000).

[98] *Howell v. State, 860 So. 2d* 704 (Miss. 2003).

[99] 1:148:21-29; 1:149:1-29; 2:150:1-8.

[100] 2:222:16-29.

> Yazoo County, the Court finds that out of a panel of 59, 13 people said that they could not be fair and impartial, and that is not a percentage great enough for this Court to make a determination that the defendant cannot receive a fair trial in Yazoo County, and, therefore, this Motion for Change of Venue is denied.[101]

To summon only 73 jurors is too few potential jurors considering the higher standard of review for a capital murder trial. The fact that close to one third of the summoned jurors were disqualified from serving for various reasons indicates Ruffin could not get a fair trial in Yazoo County. Again, considering the higher standard review of a capital murder trial, this court should not hold that there has to be at least fifty (50%) percent of the jury panel disqualified before a change of venue is warranted.

Reversible error occurred when the trial court denied Ruffin's motion for change of venue. Therefore, this Court must reverse Ruffin's capital murder and arm robbery convictions and order a new trial.

## V. WHETHER CUMULATIVE EFFECTS OF ERRORS DENIED RUFFIN A FAIR TRIAL?

This Court has an established practice in capital cases of considering trial errors for their cumulative impact. Upon appellate review of cases in which we find harmless error or 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, although not reversible when standing alone, may when considered cumulatively require

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[101] 2:223:1-12.

reversal because of the resulting cumulative prejudicial effect.[102] This Court may reverse a sentence based upon the cumulative effect of errors that, by themselves, do not independently require a reversal.[103]

Herein, most significantly, commutative error occurred when the trial court denied Ruffin's duress instruction to the underlying felony of kidnapping in the capital murder charge of count one of the indictment. This was not harmless error but reversible error as a defendant is entitled to have jury instructions given which present his theory of the case. Moreover, the instruction was not covered elsewhere and there is law and evidence to support the instruction.

Ruffin gave his statements, which were later transcribed, to Yazoo City Police Department Investigator Eric Snow on July 8, 2002.[104] State exhibit 9 was his first transcribed statement introduced into evidence. The following exchange occurred on direct examination in the State's case in chief:

Q ` What did you ask him?

A "Darwin didn't say nothing."

"Did you ever hold a gun or hit anybody while you were in the house?"

Q Okay. And what was Mr. Ruffin's answer to that?

A He told me to hold it."[105]

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[102] *Byrom v. State,* 863 So. 2d 836, 847 (¶ 3) (Miss. 2003).

[103] *Jenkins v. State,* 607 So. 2d 1171, 1183 (Miss. 1992).

[104] 3:318:23-27.

[105] 3:327:1-7.

Q And what was his response to that?

A "He told me to back it up, so that's why I went outside, to back it up."[106]

Q And how did he respond to that?

A "Then he opened the door and said, "Pop[107]

the trunk."[108]

Q Did he tell you where they went after they left the house?

A He stated that he really didn't know. They was telling him which way to go, and that he stopped near a cornfield where they almost ran off the edge of the street on the frontage road.[109]

It is clear in this statement that Ruffin did what he did at the direction of Strahan. State exhibit 10 was Ruffin's second statement introduced into evidence. The following exchange occurred on direct examination during the State's case in chief:

Q Then what did he say that he did?

A Then he told me to get his gun.[110]

Q All right, turn to the next page. He makes a statement at the top of that page. What is that statement?

A "Darwin told me to give him the gun, and I gave it to him."

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[106] 3:328:17-19.

[107] 3:328:28-29.

[108] 3:329:1.

[109] 3:331:24-29.

[110] 3:335:18-19.

Q What was your question to him after that?

A "And then what? What were you doing when you gave Darwin the gun?"

"He told me - - he told me to pull the car around."

Q You told him "Okay, keep going." what else did he say?

A "I pulled the car around, and he told me to pop the trunk."

"All right."

"And I popped the trunk, and I got out of the car and stepped back inside and told the boy to get up, and we went to the car."[111]

Q And (PAUSE) read his response there at the page, at the top of page 205, about what he said they did.

A "When he got through, he told me to drive. But we got in the car. I was the only one that had license. That's the only reason he kept me around, because I was the only one that had a[112] license."[113]

Q All right. Then you told him to go ahead. What did he tell you after that?

A "once I backed in there, I put it in park and he got out. He said 'open the trunk, open the[114] trunk.' And he dragged the boy out by his hair. And he walked him. I wasn't too far from the car. It wasn't too far from the car. And he told him to set down. He sat down, and he told me to hand him his gun,

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[111] 3:336:3-20.

[112] 3:340:23-29.

[113] 3:341:1.

[114] 3:341:26-29.

and I handed it to him."[115]

Again, it is clear in this second statement that what Ruffin did he did at the direction of Strahan. More telling of Ruffin's fear of Strahan is established in the following interchange on cross-examination during the State's case in chief:

Q For instance, there was a portion in there where you asked him why he didn't stop Mr. Strahan from doing what he did. You remember that; right?

A Yes.

Q And he said "I was scared to death." Isn't that right?

A He said he was scared.[116]

Q We'll get to it in a minute. And at one point, he indicated that he might be killed or[117] something himself. He was concerned about that; right?

A Yes.[118]

Q He had no control over what was going on out there, at least from what he said; right?

A Yes.[119]

Q So it wasn't just Mr. Micah Ruffin that told you he was afraid of Strahan. A whole lot of people told you, well, several people tod you they were afraid of

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[115] 3:342:1-6.

[116] 3:354:17-24.

[117] 3:354:28-29.

[118] 3:355:1-3.

[119] 3:355:24-26.

Darwin Strahan?[120]

A I can't remember how many, but I recall someone saying that.[121]

Q Okay. And it says, "Did you think he did something?" and then you said, then he goes on to explain. "I don't know. I didn't know whether to go home that night or be killed. I'd leave, but I did not have a way, no way." that's what he says; right?

A Yes.[122]

Q He says, "So why didn't you try to stop Darwin?"

And his answer was, "I was scared." is that what he said?

A Correct.

Q then your response was, "Scared? What were you scared of?"[123]

A "Scared of him." that's what it says; right?

A Correct.

Q And then you go on to say, "Scared of him? You had the gun at one time; right?"

A Yes.[124]

This passage clearly indicates that Ruffin was scared of Strahan. He did what he

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[120] 3:356:26-29.

[121] 3:357:1-2.

[122] 3:376:22-28.

[123] 3:379:23-29.

[124] 3:380:1-6.

did because if he didn't do what Strahan told him to do he feared he would be killed. Duress is the exercise of unlawful force upon a person whereby that person is compelled to do some act that he or she otherwise would not have done. A person having a reasonable opportunity to avoid committing the crime without undue exposure to death or serious bodily harm cannot invoke duress as a defense.[125]

Duress is not a legal defense to murder.[126] However, there's no case law holding that duress cannot be a defense to the underlying felony in a capital murder charge. In fact, a duress instruction to robbery has been given where robbery was the underlying felony in a capital murder charge.[127] Moreover, duress is a defense to kidnapping.[128]

When the trial court committed reversible error when it denied Ruffin's duress instruction to the underlying felony of Kidnapping in count one of the indictment, the State in its closing argument compounded the error when it made the following argument that duress is not a defense to kidnapping:

> Then in instruction, those are the elements. I mean, that's the one charge. Then you have the instruction that deals with duress, this Number 11, "The Court instructs the jury that even if you were to find from the evidence in this case that the

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[125] Id.

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

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

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

> defendant, Micah Ruffin, was acting under some form of duress, such duress would not constitute any defense, whatsoever, to the charge of capital murder." it's not a defense to any of the elements contained in there. Kidnapping is one of the elements.[129]

Ruffin made the following objection to this argument:

> MR. LUMUMBA: Could we approach, please?
>
> (BENCH CONFERENCE OUT OF HEARING OF JURORS)
>
> MR. LUMUMBA: The prosecution is going to tell us that it's not a defense[130] to any element of capital murder. So that's saying it's not a defense to kidnapping. That is just so wrong.[131]

Secondly, at the start of trial on April 2, 2007 Ruffin's retained counsel, Chokwe Lumumba, moved the court to grant a continuance in this case.[132] He noted Ruffin is charged with the most serious of crimes - capital murder. He questioned whether Ruffin could receive effective assistance of counsel at this time. Ruffin wanted Lumumba to remain his counsel though Lumumba was suspended from the practice of law for approximately fifteenth (15) months. The suspension prevented him from doing any work on the case and was a factor in the length of delay of the trial. Witnesses who had

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[129] 5:729:12-22; 5:732:2-6; 5:732:13-29; 5:733:1-6.

[130] 5:729:12-29.

[131] 5:730:1-1-3.

[132] 1:7:8-29: 1:8:1-29; 1:9:1-29; 1:10:1-29; 1:11:1-29; 1:12:1-4.

previously testified in co-defendant Strahan's trial needed to be interviewed and their trial testimony reviewed. Additionally, counsel argued that Ruffin had been notified within the week that Strahan would be a witness for the State which Ruffin was not prepared to meet. Finally, considering Ruffin's mental frailties, the case needed to be continued in that it is very difficult considering Ruffin gave a statement which needed to be considered and analyzed due to his stated mental frailties.

The trial court agreed to continue the case until April 11, 2007. Unfortunately, that date proved to be a conflict for Mr. Lumumba.[133] The court overruled Ruffin's motion for continuance.[134]

The fact the trial court agreed to continue the case until April 11, 2007 attests to the fact Ruffin's counsel made cogent argument that warranted the case being continued and the court recognized the need that the case be continued. The fact the proposed date conflict with a previously scheduled case no less means the case should not be continued. The court's denial to continue the case until a date that was not in conflict with a previously scheduled case of counsel was an abuse of the court's discretion.

The court's abuse of its discretion in the denial of the motion for continuance actually worked an injustice for Ruffin. Foremost, he was found guilty on both counts in the indictment and sentenced to life for the capital murder and ten (10) years for arm robbery, to run concurrently, in the Mississippi Department of Corrections. If the case had been continued Ruffin's counsel would have been prepared to meet the State's challenged and

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[133] 1:7:8-22.

[134] 1:12:5-25.

the court's denial to his duress instruction to the underlying felony of kidnapping in the capital murder charge of count one of the indictment. Case law would have been proffered refuting the State's argument that duress had to be a complete defense and that there was no case law that permitted a duress instruction to the underlying felony in a capital murder charge. Moreover, Ruffin would have benefitted from a continuance in that he would have been better prepared to raise a change of venue motion.

Thirdly, Ruffin's statement should not have been admitted into evidence. Ruffin did not sign the form waiving his Miranda rights. At that juncture of the interview all further questioning should have ceased since Ruffin did not waive his right to make a statement. Thereafter, at the end of the first statement, Ruffin was coaxed into making the second statement as the following cross-examination of Yazoo City Police Department Investigator Eric Snow establishes:

Q What it says you said, "It's not true. I told you I knew what happened. If that's all you want to say, then that's fine, but that's not the truth."

You're telling him that's not the truth; right?

A Yes."[135]

Q Even though you weren't there; is that right?

A Yes.

Q "I know that, I know the truth." You told him that; right?

A Yes.

Q And you tell him that you know the truth, "I'm going to give you a chance to

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[135] 1:33:23-29.

tell me the truth, the whole truth, who had the gun."

Is that right?

A Yes.

Q In other words, although it's inaudible, he had said something that you were basically telling him he was lying; right?

A It appeared that way, yes, sir.[136]

Finally, coupled with this known threat, Snow said some things to Ruffin not recorded on the tape as the following exchange of cross examination at the pre-trial hearing demonstrates:

Q Okay. And, also, interestingly enough in here, it says that, "I told you I know what happened.'

Now, that's what it says; right?

A Yes.

Q. Now, I don't see that that in the rest of the transcript before we get to that point, or maybe it is, but I don't see it. But if that doesn't appear[137] in this transcript and it would be easy enough for anybody to read it and find out whether it does, then that means that you must have told him off tape that you knew what happened; is that right?

A No, I normally wouldn't do that. But I can't recall why that's in there, why the other is inaudible.

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[136] 1:34:1-15.

[137] 1:34:22-29.

Q But you say "I told you I know what happened." Right?

A Yes.

Q Either it's in the tape or it's not in the tape; right?

A Yes.

Q And if it's not in the tape, then that would suggest, assuming that your statement there is true, that you told him off tape what happened; right?

A If it's not on the tape, yes.[138]

In summation, after the known threats, Ruffin made the second statement.[139] Significantly, before Ruffin made the second statement, Snow did not have him execute a second Miranda rights form.[140]

In support of his motion to suppress statement, Ruffin argued that the court appointed clinical psychologist who examined Ruffin, W. Kriss Lott, confirmed that Ruffin suffered from dyslexia, scored on a 4th grand level on one test and was not given another IQ test because it would not have been effective.[141] Furthermore, Ruffin's IQ score of 73, using the low end of the confidence interval, fell in the borderline range.[142]

Lastly, in denying the motion for change of venue, the trial court found as follows:

THE COURT: Before the Court is Defense's Motion for a Change of

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[138] 1:35:1-18.

[139] 1:21:6-15.

[140] 1:21:29; 1:22:1-2.

[141] 1:54:5-27.

[142] 1:54:28-29; 1:55:1-9.

> Venue based on the voir dire, the panel - -uh - - of potential jurors for this case. The court finds that the panel consisted of 73 potential jurors. Out of that 73, 14 people were excused because of legal excuses or legal exemptions, which left a panel of 59. Out of that 59, the Court finds that 13 people stated that they cannot be fair and impartial for some reason, which leaves a panel of 46, with possible causes that c0uld dwindle that panel.[143]
>
> And based on those numbers, in that this is a Motion for Change of Venue whereby the defendant is claiming that he cannot get a fair trial in Yazoo County, the Court finds that out of a panel of 59, 13 people said that they could not be fair and impartial, and that is not a percentage grant enough for this Court to make a determination that the defendant cannot receive a fair trial in Yazoo County, and, therefore, this Motion for Change of Venue is denied.[144]

To summon only 73 jurors is too few potential jurors considering the higher standard of review for a capital murder trial. The fact that close to one third of the summoned jurors were disqualified from serving for various reasons indicates Ruffin could not get a fair trial in Yazoo County. Again, considering the higher standard review of a capital murder trial, this court should not hold that there has to be at least fifty (50%) percent of the jury panel disqualified before a change of venue is warranted.

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[143] 2:222:16-29.

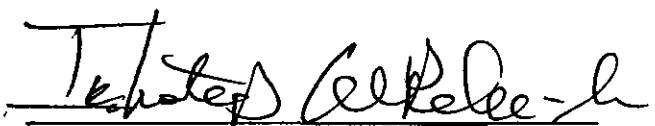
[144] 2:223:1-12.

## CONCLUSION

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's ruling in denying Ruffin's motion for continuance was an abuse of discretion that actually worked an injustice against Ruffin The fact that the date the court considered continuing the case until was a conflict for Ruffin's retained counsel no less meant the continuance should not have been granted. Manifest error occurred when Ruffin's statements were not suppressed where, considering the totality of the circumstances, it was coaxed and not freely and voluntarily given. The motion for change of venue should have been granted because it became evident that Ruffin could not receive a fair trial in Yazoo County. The commutative effect of trial errors denied Ruffin a fair trial. For the foregoing reasons and authorities, this Court must reverse Ruffin's convictions for capital murder and armed robbery and order 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:

Judge Jannie M. Lewis
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This the 26th day of November, 2007.

Imhotep Akebu-lan