IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENDALL WAYNE PILGRIM — APPELLANT

VS. — NO. 2008-KA-0531

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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Pilgrim, in the wake of an indictment returned on January 23, 2008, was convicted of the possession of methamphetamine in an amount of at least .10 grams but less than two (2) grams, contrary to and in violation of Miss.Code Ann. §41-29-139(c)(1)(A). (C.P. at 4)

Pilgrim was also charged and convicted as a second and subsequent offender. (C.P. at 5)

The indictment for the substantive offense ,omitting its formal parts, alleged

> "[t]hat . . . KENDALL WAYNE PILGRIM . . . on or about the 16th day of May, 2007, in the County and State aforesaid . . . did wilfully, unlawfully, and feloniously have in his possession and under his conscious control a Schedule II controlled substance, namely methamphetamine, in an amount of

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> 2007, in the County and State aforesaid . . . did wilfully, unlawfully, and feloniously have in his possession and under his conscious control a Schedule II controlled substance, namely methamphetamine, in an amount of at least .10 grams but less than 2 grams, . . . (C.P. at 4)

On the morning of trial, counsel for the defendant, an appointed public defender (R. 45), moved, *ore tenus*, for a continuance on the ground that Pilgrim, the week before, had retained another lawyer to represent him and appointed counsel was appearing in court believing that Pilgrim had another lawyer. (R. 45) This matter was argued at great length prior to the taking of testimony. (R. 44-51) The trial judge, in the end, found no prejudice to Pilgrim and denied his request for a last minute continuance. (R. 44-51)

Following trial by jury conducted on March 18, 2008, the jury returned a verdict of, "We the jury, find the defendant, Kendall Wayne Pilgrim, guilty as charged." (R. 137; C.P. at 19)

Judge Cotten, post-verdict, adjudicated Pilgrim a second offender.

On March 19, 2008, following review of a pre-sentence report and remarks in allocution by the defendant himself (R. 140-147), Judge Cotten sentenced Pilgrim to serve sixteen (16) years in the custody of the MDOC. (R. 147)

Three (3) issues, articulated by Pilgrim as follows, are raised on appeal to this Court:

1. "The Court erred in denying Appellant's motion for [a] continuance."

2. "The Court erred in refusing proposed jury instruction D-6."

3. "The court erred in overruling appellant's hearsay objection to testimony of Will Peterson."

STATEMENT OF FACTS

This case presents a very different version of Pilgrim's Progress.

On May 16, 2007, Harbert Johnson and several other members of the Mississippi State Highway Patrol, "... were conducting a driver's license checkpoint out on Mississippi Highway 482 at the intersection of County

Road 743" in Neshoba County. (R. 64)

Along came Kendall Wayne Pilgrim, the sole occupant of a white van. (R. 65-68)

Four (4) witnesses testified on behalf of the State during its case-in-chief, including **Harbert Johnson**, a Mississippi Highway Patrolman who observed Pilgrim toss a black object out the driver's side window as Pilgrim's van approached the checkpoint.

> Q. [BY PROSECUTOR:] Now, on this particular day, which was May 16, May 16th, 2007, around 2:45 p.m. in the afternoon, did something out of the ordinary occur there at the checkpoint?
>
> A. [BY JOHNSON:] Yes, sir, it did.
>
> Q. Tell us about that?
>
> A. Excuse me. While I was standing in the middle of the highway, it was three of us out there. Generally when there's three of us, you've got one man that can kind of float around, look around, be, you know, and the other two troopers were checking the east and westbound lanes while I was standing in the middle of 'em. Saw a white van traveling southbound on County Road 743, which was approaching the checkpoint at Highway 482. I was watching this van, and as I was observing him coming down southbound, I noticed a - - something come out his driver's window. It was black, it was a black object come out of the driver's side window, and I hit the road. Once the van got to my location, I recognized who the driver was, asked for his driver's license. He didn't have his driver's - - [license.] (R. 65-66)
>
> * * * * * *
>
> Q. What did you do as to him? What did you have him do?
>
> A. I asked Trooper Eddie Hunt if he would keep an eye on the subject. I got in my patrol car, went down County Road 743 to retrieve the black object that I seen come out his driver's window. (R. 66)

The object discarded and abandoned by Pilgrim, who was alone inside the van, was located [r]oughly 35 to 40 yards away. (R. 67) Trooper Johnson kept his eye on it at all times. (R. 68)

Q. When you reached this item, what did you find?

A. I found a black zipper bag, a small black zipper bag, which was unzipped. Lying beside the black zipper bag was two small white - - I'm sorry, not white - - two small, clear, small baggies that had a crystalized substance in it which I believe to be was methamphetamine. * * * (R. 69-70)

Pilgrim was placed under arrest, and the Mississippi Bureau of Narcotics was subsequently contacted. (R. 70)

Will Peterson, an agent with the Mississippi Bureau of Narcotics, testified he met Trooper Johnson at the Neshoba County Jail where Johnson relinquished custody of the evidence. (R. 93)

Grant Myers, a drug officer with the Neshoba County Sheriff's Office, testified as a chain of custody witness. (R. 104)

Jamie Johnson, a forensic scientist specializing in drug identification, testified the substance in question was methamphetamine with a weight of 0.87 grams. (R. 110)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal on the general ground "... the State of Mississippi has totally failed to meet their burden of proof..." (R. 114) This motion was promptly overruled. (R. 114)

After being personally advised of his right to testify or not (R. 118-21), Pilgrim elected to remain silent. (R. 121) Not a single witness testified in his defense. (R. 121)

Peremptory instruction was denied. (R. 15; C.P. at 10)

Following closing arguments (R. 126-35), the jury retired to deliberate at a time not reflected by the record. (R. 136) It subsequently returned with a verdict of, "We, the jury, find the defendant, Kendall Wayne Pilgrim, guilty as charged." (R. 137)

A poll of the jury reflected the verdict returned was unanimous. (R. 137)

On March 20, 2008, Pilgrim filed a motion for a new trial claiming, *inter alia*, the court erred in denying his motion for a continuance as well as jury instruction D-6. (C.P. at 22-23)

Christopher Collins, appointed public defender (R. 45), represented Pilgrim very effectively during the trial of this cause.

Edmund J. Phillips, Jr., a practicing attorney in Newton well known to this office for his expertise in criminal appeals, has been substituted on appeal. His representation and assistance to Pilgrim have been equally effective.

SUMMARY OF THE ARGUMENT

I. Denial of a Continuance.

This Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. The decision to grant or deny a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice."

No abuse of judicial discretion has been demonstrated here.

II. Denial of Jury Instruction D-6.

The denial of D-6 was not error because much of the State's evidence was direct evidence. Accordingly, a circumstantial evidence instruction was not required.

In addition, D-6, a jury instruction defining the concept of constructive possession, was cumulative with S-3 defining the same concept.

III. Admission of Hearsay Testimony.

The admission of the testimony criticized here, even if error, was admissible by the doctrine of invited error. There should be no reversal for invited error.

The testimony was not offered to prove the truth of the matter asserted in the crime laboratory's report.

Rather, it was offered to rebut any notion the State had been slipshod in its investigation.

In any event, given the nature of the criticized testimony, *viz.*, no latent prints of value found on the glassine sandwich bag(s) containing the contraband, any error was innocuous and harmless beyond a reasonable doubt.

How could Pilgrim be harmed by testimony that no latent fingerprints of any value were found on the bag(s) discarded by Pilgrim?

ARGUMENT

I.

THE TRIAL JUDGE DID NOT ABUSE HIS BROAD JUDICIAL DISCRETION IN DENYING PILGRIM'S MOTION FOR A CONTINUANCE.

Pilgrim states the following: "On the day set for trial, appellant's counsel asked the Court for a continuance." (Brief for Appellant at 2)

Within the four corners of that statement lies a sound, reasonable and viable basis for our position that the denial of a continuance was not an abuse of judicial discretion.

It was a matter of "ready, set, go."

A venire was present and *ready.* (R. 49)

The case had been previously *set* for trial. (R. 4)

And the prosecutor was prepared to *go.* (R. 4, 51)

The situation here is analogous to the situation where an accused appears on the morning of trial with a new lawyer and asks for a continuance. In such cases, "... the trial court does not abuse its discretion in denying the continuance." **Byrd v. State,** 522 So.2d 756, 759 (Miss. 1988).

Pilgrim's motion was requested for two reasons, *viz.*, (1) counsel's claim he was unprepared for trial and

(2) an alleged discovery violation.

This matter was argued at great length in chambers. (R. 44-51) The end result was that no latent fingerprints of any value were found on the glassine sandwich bag containing the contraband, thus nothing exculpatory was withheld to the prejudice of Pilgrim. Judge Cotten recognized that no prejudice ensued from any alleged discovery violation because there were no latent prints of value. This dispelled any notion the methamphetamine had been handled by and belonged to another person. The prosecutor did not know until the day of trial that a fingerprint examination had even been requested. (R. 46-47)

And, the spectre of retained counsel was just that, *i.e.*, an apparition, a mere ghost of retained counsel. According to prosecutor Brooks, Mr. Moran admitted as much the week prior to trial. (R. 50-51)

In denying the motion for a continuance, Judge Cotten stated the following:

> THE COURT: Okay. And likewise the Court undergirded this information that Mr. Mitch Moran might be representing the Defendant by my calling him yesterday and not getting him, but talking to his wife, and just telling her that if he represented him that the case would be going forward today, and to let me know. And I heard no further information from him. Okay, anything further from the Defendant?
>
> MR. COLLINS: No, Your Honor. (R. 51)

The record dispels any notion that Mr. Collins was unprepared for the trial of his client. The record certainly does not reflect a lack of familiarity with the facts of the case which were neither complex nor difficult. Counsel on several occasions referred to Pilgrim as "my client" and consulted with him during the trial. (R. 36, 42, 114-15) He conducted an adequate voir dire (R. 36-43) after examining the juror questionnaires. (R. 37) Any tangible discovery that counsel claimed he had not received was in the form of a laboratory report reflecting that no latent fingerprints of any value were found on the glassine bag(s) containing the methamphetamine.

Pilgrim himself was questioned by the judge and stated he was satisfied with the services of Mr. Collins.

Pilgrim had no complaints against Collins and felt that Collins had done a good job for him. (R. 120) This certainly detracts from the idea that Mr. Collins was ill-prepared for trial.

Trial was conducted on March 18th. As early as March 5th, Mr. Collins, on behalf of the public defender's office, had announced the case would be for trial. (R. 46) Nothing was said at this time about Mitch Moran as retained counsel.

Mr. Brooks, the prosecutor, also stated into the record he called Moran the previous day - March 17th - and was informed by Moran that Moran was not positively representing Pilgrim. Mr. Brooks then telephoned defense counsel Collins and left a message on his answering machine to this effect. (R. 51)

Judge Cotten stated into the record that he also had contacted Mr. Moran the previous day and talked with Moran's wife. The message left with Mrs. Moran was that the case was going forward the next day and to let the court know if her husband was representing Mr. Pilgrim. "And I heard no further information from him." (R. 51)

Counsel's knowledge of the facts, his cross-examination of the State's witnesses, and his motions and objections reflect great skill and expertise in attempting to raise a reasonable doubt of guilt.

Counsel for Pilgrim has not stated how Pilgrim's defense would have been any different had he had additional time to investigate the offense. Pilgrim really had no defense and was caught red-handedly tossing the dope out the window of his motor vehicle. No prejudice to Pilgrim has been alleged or demonstrated.

Regrettably, there is nothing in the present record demonstrating that Judge Cotten abused his broad discretionary powers in failing to grant a continuance. Stated differently, there is nothing in this record demonstrating the denial of a last minute continuance resulted in a "manifest injustice."

This Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. **Payton v. State,** 897 So.2d 921 (Miss. 2003) citing Rule 9.04, Uniform Circuit

and County Court Rules; **Smiley v. State,** 815 So.2d 1140 (Miss. 2002), reh denied; **Richardson v. State**, 722 So.2d 481 (Miss. 1998); **Wilson v. State**, 716 So.2d 1096 (Miss. 1998), citing Miss.Code Ann. Section 99-15-29; **Greene v. State**, 406 So.2d 805 (Miss. 1981), citing section 99-15-29, Mississippi Code 1972 Annotated (1973); **Clay v. State,** 829 So.2d 676 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245; **Gilbert v. State,** 934 So.2d 330 (Ct.App.Miss. 2006), reh denied; **McFadden v. State,** 929 So.2d 365 (Ct.App.Miss. 2006), reh denied.

Unless the trial court abuses its discretion to the prejudice of the defendant, its action will not be held error. *See* **Carter v. State**, 473 So.2d 471 (Miss. 1985); **Greene v. State**, *supra*; **Woods v. State**, 393 So.2d 1319 (Miss. 1981); **Norman v. State**, 385 So.2d 1298 (Miss. 1980).

The decision to grant or to deny a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice." **Boone v. State,** 973 So.2d 237 (Miss. 2008); **Coleman v. State**, 697 So.2d 777 (Miss. 1997); **Atterberry v. State**, 667 So.2d 622 (Miss. 1995); **Lambert v. State**, 654 So.2d 17 (Miss. 1995), appeal after remand 724 So.2d 392; **Johnson v. State**, 631 So.2d 185 (Miss. 1994); **McGee v. State,** 828 So.2d 847 (Ct.App.Miss. 2002); **Peters v. State,** 920 So.2d 1050 (Ct.App.Miss. 2006).

One of this Court's many expressions on the subject matter is found in **Jackson v. State,** 538 So.2d 1186, 1188-89 (Miss. 1989), where we find the following:

> The standards our courts employ when one criminally accused requests a continuance may be found in Miss.Code Ann. Section 99-15-29 (1972). [footnote omitted] The granting or denial of a continuance rests within the sound discretion of the trial judge. [citations omitted]
>
> Our dispositive inquiry is whether denial of Jackson's motion for a continuance resulted in substantial prejudice to his right to a fair opportunity to prepare and present his defense. Indeed, the last line of Section 99-15-29 reads
>
> [D]enial of continuance shall not be grounds for reversal unless the

Supreme Court shall be satisfied that injustice resulted therefrom.

In **Hill v. State,** No. 2006-KA-01966-COA (¶25) decided January 13, 2009 [Not Yet Reported], we find the following language applicable here:

> Regardless, the decision to grant or deny a motion for continuance will not be grounds for reversal unless it is shown to have resulted in an injustice. Miss.Code Ann. §99-15-29 (Rev. 2007); *Coleman v. State,* 697 So.2d 777, 780 (miss. 1997). Hill has not shown that an injustice resulted from the denial fo the continuance.

Pilgrim, much like Hill, has failed to demonstrate that an "injustice" resulted from the denial of a last minute continuance the day trial was to begin.

II.

THE TRIAL JUDGE DID NOT ERR IN DENYING JURY INSTRUCTION D-6 WHICH PLACED A GREATER BURDEN OF PROOF ON THE STATE THAN THAT REQUIRED UNDER THE FACTS OF THE CASE. MOREOVER, D-6 SAID THE SAME THING AS S-3.

D-6, an instruction defining the concept of constructive possession, was refused because a jury instruction requiring proof beyond a reasonable doubt *and to the exclusion of every reasonable hypothesis* was not required in this case.

Moreover, save for the circumstantial evidence portion, D-6 was cumulative with S-3.

In denying D-6 the trial judge stated the following:

> THE COURT: The testimony was that Officer Johnson was there at the road block and he saw the car, did he say something like 35 or 40 yards up the road when he saw the bag, the black bag, come out of the driver's side on the pavement there and he said essentially it was never outside of his presence, visibility, got in his vehicle, could have walked, but he got in there and drove right to it, so there appears to be nothing as far as conjecture about circumstances, so it looks to me to be - - to satisfy all the elements aspects of direct evidence, so I

> will give it with the - - redacting or excluding the aspects about the every reasonable hypothesis, which we have a circumstantial evidence case. (R. 116)

Defense counsel did not agree with the modification suggested by the Court, therefore, the judge refused D-6 in its entirety. (R. 116-17)

S-3 reads as follows:

> The Court instructs the Jury that to constitute a possession, there must be sufficient facts to warrant a finding that the Defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be in actual physical possession; constructive possession may be shown by establishing that the substance involved was subject to the Defendant's dominion or control. (R. 122; C.P. at 14)

Obviously, S-3, which was given, says the same thing as D-6, which was refused.

At best, the evidence in this case was a mixed blend of direct and circumstantial evidence. In this posture, it was not necessary for the jury, as finder of fact, to exclude every reasonable hypothesis consistent with Pilgrim's innocence. Rather, it was only necessary for the jury to find the State proved each element of the offense beyond a reasonable doubt.

"The well-established rule of this Court is that when the collection of admitted evidence is either direct evidence, or a combination of both direct and circumstantial evidence, circumstantial evidence jury instructions are not necessary." **Sullivan v. State,** 749 So.2d 983, 992 (Miss. 1999). *See also* **Bennett v. State,** 933 So.2d 930 (Miss. 2006), reh denied [Circumstantial evidence cases for which a circumstantial evidence instruction is required lack direct evidence.]

In addition to this, D-6, in its pertinent parts, was cumulative with S-3 which also defined the concept of constructive possession.

Where other instructions have both fully and fairly informed the jury, reversal is not warranted on appeal for

an error in the denial of other instructions. **Gaston v. State,** 823 So.2d 473 (Miss. 2002). A trial judge is under no obligation to grant redundant instructions. **Montana v. State,** 822 So.2d 954 (Miss. 2002).

It is elementary that "[j]ury instructions are not to be read unto themselves, but with the jury charge as a whole." **Kolberg v. State,** 829 So.2d 29, 45 (Miss. 2002), reh denied. Stated differently,

> "[j]ury instructions 'are to be taken collectively rather than be given individual consideration. So long as all the instructions read together adequately and properly instruct the jury on the issues, an individual instruction given to the jury will not constitute reversible error.' " *Coleman v. State*, 804 So.2d 1032, 1037 (Miss. 2002) (quoting *Detroit Marine Eng'g v. McRee*, 510 So.2d 462, 467-68 (Miss. 1987). Where other instructions have both fairly and fully informed the jury, reversal is not warranted on appeal for an error in the instruction. *Id.* at 1038. [**Caston v. State,** *supra*, 823 So.2d at 506.]

See also **Bell v. State,** 725 So.2d 836, 849 (¶29) (Miss. 1998) ["The trial judge is under no obligation to grant redundant instructions."]

In short, the denial of D-6 was not error because jury instruction S-3 said the same thing.

While a defendant is entitled to have jury instructions given that present his theory of the case, this entitlement is limited in that the trial court may refuse an instruction that incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. **Ford v. State,** 975 So.2d 859 (Miss. 2008). *See also* **Lamar v. State,** 983 So.2d 364 (Ct.App.Miss. 2008) [In reviewing the denial of a jury instruction, an appellate court must consider not only the denied instructions but also all of the instructions that were given to ascertain whether or not error lies in the refusal to give the requested instruction.]

No error ensued in the denial of D-6.

III.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR, IF ERROR AT ALL, IN OVERRULING THE DEFENDANT'S HEARSAY OBJECTION.

Pilgrim claims the trial judge improperly overruled his objection to hearsay testimony during the State's redirect examination of Agent Will Peterson.

During cross examination of Peterson by defense counsel, the following colloquy took place:

> Q. Agent Peterson, the assistance you talked about giving to other agencies, is that assistance in processing what's alleged drug evidence?
>
> A. That's correct.
>
> Q. In this instant, when you took possession of the exhibit from Trooper Johnson, did you put on latex gloves before you handled it?
>
> A. I did.
>
> Q. And the reason you did that is because when you submitted this evidence for analysis, you requested both drug analysis and also fingerprint analysis?
>
> A. That's correct.
>
> Q. And you submitted a known fingerprint card of the accused?
>
> A. That's correct.
>
> MR. COLLINS: No further questions.
>
> THE COURT: Redirect?

REDIRECT EXAMINATION BY MR. BROOKS:

> Q. Agent Peterson, what was the result of that fingerprint request?
>
> A. The Crime Lab did not find any - -

MR. COLLINS: Your Honor, I object to hearsay testimony here.

MR. BROOKS: Your Honor, he opened the - -

THE COURT: I'll overrule the objection.

MR. COLLINS: Your Honor, may I further make my objection. (R. 94-95)

Following argument conducted in chambers, defense counsel stated he had made his objection because "... frankly I knew they [the State] didn't have an expert here. That's why I objected." (R. 100)

In the end, the trial judge overruled the defendant's contemporaneous objection as well as his subsequent motion for a mistrial and allowed full bore cross-examination of the witness. (R. 100-01)

During re-examination by the State, the following allegedly objectionable testimony took place:

THE COURT: We're back in the presence of the jury. Proceed.

(By Mr. Brooks) Agent Peterson, before Mr. Collins' objection, I asked you what was the result of the fingerprint examination that you submitted to the Crime Lab?

A. [By Peterson:] According to their report, there was no prints of value found on the baggies, on the submission. (R. 101)

Agent Peterson was testifying about a crime laboratory report reflecting there were no latent prints of value on the glassine baggie(s). (R. 101) The State argued that admission of testimony attesting to the fact there were no prints of value did not result in any prejudice to the defendant and was admissible because Pilgrim "opened the door." (R. 97)

The trial judge agreed. (R. 98-99)

Pilgrim, citing **Murphy v. State,** 453 So.2d 1290 (Miss. 1984), claims on appeal the defense cannot open the door to hearsay. (Brief for Appellant at 8-9)

The **Murphy** case may be decent authority for the proposition one cannot open the door to hearsay. Where, however, is the authority in support of the proposition that the content of the laboratory report as testified about in this case by Peterson was inadmissible hearsay? It seems to us this testimony was not offered to prove the truth of the matter asserted in the report but to refute and dispel any notion that the state had been slipshod in their investigation. It was introduced to demonstrate there were tests conducted and results reached.

We submit the State was entitled to ask about the results of the fingerprint analysis after the defendant on cross-examination brought out the fact a known fingerprint of the defendant was submitted for analysis. This is especially true, where, as here, counsel knew the State has not subpoenaed an expert. If error, it was "invited error" which cannot be grounds for a reversal of Pilgrim's conviction. *Cf.* **Singleton v. State,** 518 So.2d 653, 655 (Miss. 1988) ["A defendant cannot complain on appeal of alleged errors invited or induced by himself."]

Obviously, once the State rested its case without introducing the results of the fingerprint comparison of Pilgrim's known fingerprint with any fingerprints found on the contraband, a reasonable and fairminded juror would have concluded the defendant's prints were not found on the exhibit else the State would have produced a witness to say so. Peterson's testimony on re-direct simply made this unknown a known fact. There was no harm, no foul, and certainly no prejudice to Pilgrim.

Moreover, without Peterson's testimony reflecting there were no latent prints of value, the jury would have been left to speculate with respect to whether the fingerprints of others, i.e., exculpatory evidence, were found on the contraband. The jury would be left wondering why the State chose to not come clean with the whole story.

In any event, whether hearsay or not, it is clear any error in admitting same was innocuous and the testimony harmless beyond a reasonable doubt. This is a classic case for application of the harmless error doctrine because the allegedly objectionable testimony was favorable to the defendant, *viz.*, no latent prints of any value.

How in the world was that testimony harmful to Pilgrim?

Finally "[w]hether to declare a mistrial is committed to the sound discretion of the trial court." **Johnson v. State**, 666 So.2d 784, 794 (Miss. 1995), citing **Brent v. State**, 632 So.2d 936, 941 (Miss. 1994). *See also* **Hoops v. State**, 681 So.2d 521 (Miss. 1996); **Horne v. State**, 487 So.2d 213, 215-15 (Miss. 1986). "The failure of the court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its [judicial] discretion." **Bass v. State**, 597 So.2d 182, 191 (Miss. 1992); **Hampton v. State,** 910 So.2d 651 (¶9) (Ct.App.Miss. 2005).

See also **Wright v. State,** 958 So.2d 158 (Miss. 2007), reh denied [Whether to declare a mistrial is within the sound discretion of the trial judge].

We respectfully submit the overruling of Pilgrim's objection resulted in no harm, no foul, and no prejudice to Pilgrim and that the trial judge did not abuse his judicial discretion in overruling Pilgrim's motion for a mistrial.

CONCLUSION

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction and sixteen (16) year sentence imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge, District 8
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Honorable Mark Duncan
District Attorney, District 8
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This the 10th day of February, 2009.

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