

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**ROBERT MITCHELL HILLARD, APPELLANT**

**VS.**

**STATE OF MISSISSIPPI, APPELLEE**

CAUSE NO. 2008-KA-02055-COA

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

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**BRIEF OF THE APPELLANT**

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ORAL ARGUMENT REQUESTED

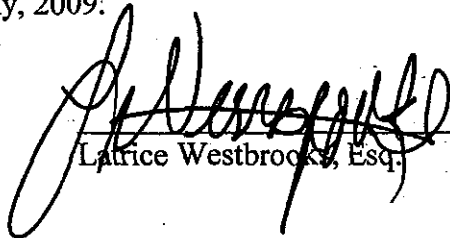
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## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Robert Mitchell Hillard, Appellant;
2. Latrice Westbrooks, Esq., The Law Office of Latrice Westbrooks, PLLC, attorney of record for Appellee, R.B., a Minor by and through his Next Friend, D.L.B.;
3. Michael Guest, District Attorney of Rankin & Madison Counties, District 20; and
4. Joey Mays, Assistant District Attorney.

This the 31<sup>st</sup> day of July, 2009.

  
\_\_\_\_\_  
Latrice Westbrooks, Esq.

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## STATEMENT OF THE ISSUES

- I. **WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION FOR CONTINUANCE AFTER THE DEFENSE WAS PRESENTED WITH NEW EVIDENCE?**
- II. **WHETHER THE PROSECUTION COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY UNJUSTLY PREJUDICED THE DEFENDANT?**
  - A. **Whether Commenting on the Defendant's Failure to Testify or Present Evidence During Closing Argument, Unjustly Prejudiced Mr. Hillard?**
- III. **WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT AN INFORMANT INSTRUCTION THAT HILLARD REQUESTED?**

## STATEMENT OF THE CASE

### I. Nature of the Case

¶1. The Appellant seeks to reverse the verdict finding him guilty of Sale of a Controlled Substance: to wit crack cocaine within 1500 feet of the YMCA. The Rankin County Circuit Court sentenced under the prior conviction enhancement statute.<sup>1</sup> Hillard received a sentence of forty-five (45) years in the custody of the Mississippi Department of Corrections with the stipulation that after the Defendant has served thirty (30) years in MDOC, he shall be released and placed on Post-Released Supervision for a period of five (5) years. The lower court also fined the defendant in the amount of ten thousand dollars (\$10,000.00) with five thousand dollars (\$5,000.00) suspended of said fine. Upon his release, Hillard was also ordered to pay court costs, fees and assessments in the amount of one thousand three hundred seven dollars and fifty cents (\$1,307.50). He is ordered to pay the amounts within two (2)

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<sup>1</sup> Robert Mitchell Hillard was convicted of Possession of Cocaine under MCA 41-29-139 in the Circuit Court of Hinds County, First Judicial District in March 2003.

years after his release from custody.

## **II. Course of Proceedings and Disposition Below**

### **A. Procedural History**

¶2. The Appellant appeals the verdict and sentence rendered in the Rankin County Circuit Court. The Appellant was indicted on March 26, 2008 by a Rankin County Grand Jury. On April 18, 2008, the Defendant waived arraignment and received a trial date of October 28, 2008. On October 20, 2008, the court held a pretrial conference and on October 27, 2008, the lower court held a status conference. The Defense made a motion for continuance to which the court denied. On October 28, 2008, the trial commenced with both parties announcing their readiness for trial. On the same day, the jury returned a verdict of guilty. The Defendant was sentenced on October 29, 2008. Defense counsel made a motion for a new trial on October 31, 2008. According to the Clerk's records the hearing was set for December 8, 2008 however, there appears to be no filing beyond December 1, 2008. Therefore it does not appear that there was ever a ruling on the Defendant's motion for a new trial or the Motion For Judgment Not Withstanding The Verdict Or In The Alternative A New Trial. On December 1, 2008, the undersigned filed a notice of appeal with the Rankin County Circuit Clerk and hence brings forth this appeal.

### **B. Substantive Facts**

¶3. On September 24, 2007, the Flowood Police Department arrested Phillip Melton for possession of a controlled substance. Melton, a habitual offender, was on house arrest at the time of his arrest. Upon his arrest, Melton offered his assistance to cooperate with law enforcement authorities. He agreed to cooperate and act as a confidential informant in an

undercover capacity in an attempt to purchase narcotics. That evening Melton made two (2) drug buys; Robert Hillard was allegedly the latter purchase.<sup>2</sup> Flowood Police Officer, Ricky McMillan drove Melton to an area west of the Pearl River and on Old River Place. Argumentatively, there is a small space that is in Flowood, Rankin County, Mississippi that is adjacent to the YMCA off I-55 north.

¶4. Allegedly the confidential informant, Melton, was searched<sup>3</sup> and an audio body transmitter was installed so the officers could overhear the conversation. The alleged transaction was not videotaped. The confidential informant was given two hundred dollars (\$200.00). Melton then made a phone call and told someone he was looking to purchase two hundred dollars of cocaine<sup>4</sup>. Approximately an hour later, Mr. Hillard arrived. The CI claims that Mr. Hillard sold him drugs yet Officer McMillan testified that he saw hands moving but did not see money or drugs exchanged. (T.rec. p. 115;ln 10-11). According to the CI, he brought the drugs back to the officers<sup>5</sup> and they subsequently call two other

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<sup>2</sup> Prior to Hillard's arrival, Melton received drugs from another source in the same area. This purchase was made between eight and eight-thirty (8:00 and 8:30). Melton received drugs from one (1) of three (3) males in a pick-up truck. Upon receipt he tried to conceal some crack in his mouth. (T.rec.p. 126, ln. 7-9); (T.rec.p. 128, ln. 20-22). Officer McMillan retrieved the drugs from Melton and placed them in an unsealed bag.

<sup>3</sup> According to Officer McMillan, Sargent Johns searched Melton prior to the alleged transaction with Hillard. McMillan did not personally search him and as a result has no personal knowledge as to what was on Melton's person. (T.rec.p. 113; ln 20).

<sup>4</sup> While the CI, Mr. Melton testified he spoke with Mr. Hillard, the audio tape of their conversation was not presented for evidence to corroborate he actually spoke to Hillard. During his direct examination, Officer McMillan testified that he could only hear Melton's side of the conversation and Melton's speaker phone did not work. Officers McMillan and Johns were not privy to any conversation that took place between the CI and a third party.

<sup>5</sup> During his cross examination, Officer McMillan stated that the CI, Mr. Melton is not in the chain of custody in this operation. (T.rec.p. 134, ln. 21-24). According to *Black's*

officers to make an arrest on Mr. Hillard. Officer McAbee and Corporal Cullom attempted to arrest Mr. Hillard. According to Officer McAbee, Hillard discarded the money out of his vehicle and Officer McAbee's car video captured this image on film. No tape or film was ever presented to support McAbee's claim. Furthermore, no other officer supported his claim.

¶5. Hillard was apprehended at the scene. His person was searched as well as his vehicle. No money, weapons, drugs or other contraband was found in his possession.<sup>6</sup> Allegedly, in the road, there was money found on the ground that was not shown to be the same money tendered to the confidential informant. Moreover, neither the money nor copies of the same were presented during the trial as evidence. (See Record Excerpt, Exhibit A). Upon his arrest, Hillard invoked his right against self-incrimination and continued to do so throughout the trial.

### **SUMMARY OF THE ARGUMENT**

¶6. The Rankin County Circuit Court did abuse its discretion during the trial. First, Hillard was entitled to a continuance upon the presentation of new evidence, namely the two discs (audio transmission of the sale and a video of the subsequent arrest). Secondly, the lowered court erred when it failed to grant a mistrial after the improper argument was made

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*Law Dictionary* (8<sup>th</sup> ed., West 2004) "Chain of Custody" is the movement and location of real evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court". Later he could not deny that Melton was acting as an agent for the Flowood Police Department (when he sought drugs to purchase). (T.rec.p. 135, ln. 2-5).

<sup>6</sup> According to Corporal Cullom, there were a few dollars found on Hillard which were not linked to the drug buy money.



regarding Hillard's failure to testify and present evidence in his defense. This created an unjust prejudice against the accused so as to result ultimately in a decision influenced by the prejudice so created. Lastly, the lower court erred when it refused to give cautionary jury instruction, D-6, regarding the weight and scrutiny given to a confidential informant's testimony, especially with the judge alluding to the fact that there were not any errors in the trial or in the jury instructions. In the wake of these three issues, Appellant/Defendant Robert Hillard requests that the matter be reversed and remanded back to the Circuit Court.

## **ARGUMENT**

### **I. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION FOR CONTINUANCE AFTER THE DEFENSE WAS PRESENTED WITH NEW EVIDENCE?**

¶7. On October 27, 2008, the day prior to trial, the District Attorney provided the Defendant with additional evidence, two discs (audio transmission of the sale and a video of the subsequent arrest). Mr. Ganner requested more time to review the new evidence and therefore requested a continuance. In addition there had been a breakdown in the attorney-client relationship and Mr. Hillard wanted to hire another attorney. For those reasons, Mr. Ganner requested a continuance to the next term of court. Mr. Guest stated the State had no plans to introduce the discs into evidence and subsequently the Court denied the motion. (T.rec. 6-9).

¶8. When reviewing the lower court's denial of a motion for continuance, the court looks to see whether the Court abused its discretion in denying the continuance. The court will not

reverse unless the ruling resulted in manifest injustice. *Johnson v. State*, 926 So.2d 246, 251, (¶15) (Miss. 2006), *citations omitted*; *Hicks v. State*, 902 So.2d 626 (Ct.App. 2004). The circuit judge has wide discretion deciding whether to grant a continuance . . . and will not be reversed absent a finding of substantial prejudice; It is the moving party who has to show prejudice. *Conway v. State*, 915 So.2d 521 (Ct.App. 2005)(¶15).

¶9. Mr. Ganner certainly expressed his need to carefully review the new evidence conveyed to him the day prior to trial. He expressed the need to possibly enhance the video and review the audio tape given to him. He told the court he needed additional time to prepare. (T.rec.p. 7). The prosecutor objected to the continuance stating that the State did not intend to use or introduce the discs in evidence.<sup>7</sup> (T.rec.p. 8; ln 2-3). The trial court denied to the motion. Also, Mr. Hillard definitely expressed he deep concern about his attorney's representation of him. Proceeding to trial prejudiced Mr. Hillard.

## **II. WHETHER THE PROSECUTION'S COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY UNJUSTLY PREJUDICED THE DEFENDANT?**

¶10. During the closing argument of the State, the prosecutor, Mr. Guest, commented on the Defendant's failure to testify. Mr. Guest made a reference to the defendant, stating that the "this defendant lied". (See T.rec. p. 199, ln 25-29 & p. 200, ln 1-2; Rec. Ex.B)<sup>8</sup>. The defense counsel made an objection and requested a mistrial in front of the jury. Guest recognized the misrepresentation and the lower court conducted a bench conference. (p.200,

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<sup>7</sup> This statement by Mr. Guest is just as relevant on the issue of commenting on the defendant's right to remain silent.

<sup>8</sup> Exhibit B contains all excerpts from the trial transcript mentioned in the brief.

ln. 13-21). Judge Chapman sustained the objection and cautioned the jury regarding the Defendant's right not to testify. The court went on to acknowledge that Guest's statement was in error albeit a mistake. (See T.rec. p. 201, ln. 1-8). Mr. Guest informed the jury he was speaking of the confidential informant. (p. 201, ln 9-11).

¶11. After being cautioned on the previous error, Mr. Guest made direct comments on the Defendant's failure to introduce evidence in his defense. (T.rec. p. 211, ln 21-29 & p.212, ln.1-4). The prosecutor stated that the defendant could have introduced "those tapes in evidence just as we could". He went on to state that if the "photocopy bills didn't match up, that *they* would have introduced those in evidence? *They* had access to those just as we did". (*emphasis added*). Specifically, the district attorney put an obligation/burden on the defendant, the same as the State, to present evidence and not remain silent, which is his constitutional right. The defendant's counsel failed to object to the district attorney's comments during rebuttal.

¶12. Hillard presented no witnesses and no evidence in his case in chief. As a matter of fact, among the state's witnesses, it was undisputed that Hillard was alone during the alleged transaction. (T.rec.p 161; ln 3-5). Inasmuch, he would have been the only one who could have contested the testimony of the confidential informant as well as the police officers who testified during the trial.

¶13. The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created. *Hampton v. State*, 815 So.2d 429 (Ct.App.

2002). Our Supreme Court has also held that the question in these cases is “whether the comment of the prosecutor can reasonably be construed as a comment upon the failure of [the accused] to take the stand. Whether the comment is improper is determined on a case-by-case basis. *Fears v. State*, 779 So.2d 1125 (Miss. 2000).

¶14. Furthermore, the fact defense counsel failed to object to the subsequent comments by the District Attorney does not waive the issue on appeal as it circles around the exercise of a constitutional right. In both, *Whigham* and *Hampton*, the defense counsel did not object to prosecutorial references to the defendant’s right against self-incrimination yet the issues were promptly addressed on the appellate level. A trial error involving a Constitutional right may reach such serious dimension, however, that this Court is required to address it, though raised for the first time on appeal. *Whigham*, 611 So.2d at 995.

**A. Commenting on the Defendant’s Failure to Testify or Present Evidence During Closing Argument, Unjustly Prejudiced Mr. Hillard.**

¶15. Mr. Hillard’s case mirrors that of *Whigham v. State*, 611 So.2d 988 (Miss. 1992). In *Whigham*, the prosecutor commented on the defendant’s failure to testify. The Mississippi Supreme Court opined that the State is always free to discuss at length the State’s witnesses and why they are credible. The defendant’s failure to testify does not diminish that latitude. *Id* at 995. The Court found that “when the defendant is the only person who can rebut the testimony of a State’s witness, the prosecuting attorney is not free in his argument to that if the State’s witness said it was true, the defendant would, and could have taken the stand and denied it. Because for obvious reasons the prosecution cannot make such statement

directly, it follows equally that the prosecution is equally prohibited from doing so indirectly or by implication. While the jury, in evaluating all the evidence in the case, may make such a deduction, if it does it must have been entirely on its own, unassisted by any affirmative comment whatsoever from the State”. *Whigham*, 611 So.2d at 995 citing, *Monroe v. State*, 515 So.2d 860 (Miss. 1987); *Griffin v. State*, 504 So.2d 186 (Miss. 1987); *West v. State*, 485 So.2d 681 (Miss. 1985).

¶16. First, Guest explicitly told the court that the State did not plan to use or introduce the audiotape or the videotape in evidence. However, the district attorney referenced the discs throughout the direct examination of the confidential informant, Officer McMillan and Officer McAbee. Hence, using the discs in evidence making the witnesses’ testimony more probable on the issue. Use of the evidence had an impact on the credibility of the story told by the witnesses. *Jackson v. State*, 551 So.2d 132 (Miss. 1989).

¶17. Also during the trial officers testified from “memory” about the arrest of Hillard that took place more than a year before the trial. Officer McAbee testified that there was video showing that the Defendant threw the buy money out the window of his car (T.rec 151; ln 8-26). However, no other witnesses saw that occurrence or testified to it; he did not have the video or a report to support the events of that night. No buy money, weapons or drugs were found on the person of the Defendant (T.rec. 154; ln 13-17); (T.rec. 155; ln 1-5); (T.rec. 159; ln 26-28). The audio transmission was not made apart of the record or presented by the State in evidence. (See McMillan’s testimony). The only evidence connecting Mr. Hillard to a drug transaction was the confidential informant, Phillip Melton, who was inherently unreliable (inasmuch as his testimony was conflicting and he earlier tried to conceal drugs from law

enforcement during a buy earlier that evening).

¶18. The prosecutor's comments unjustly prejudiced the defendant. Hillard was the only one who could have rebutted the testimony presented by the State. The natural and probable effect of the improper argument created an unjust prejudice against Mr. Hillard so as to result in a decision influenced by the prejudice so created in this present matter.

### **III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT AN INFORMANT INSTRUCTION THAT HILLARD REQUESTED?**

¶19. The confidential informant was arrested earlier on the evening of September 24, 2007 for possession of a controlled substance. (T.rec.p. 73; ln. 17-19). Melton was a habitual offender, who was also on house arrest.<sup>9</sup> (T.rec.p. 69; ln 22-25); (T.rec.p. 74; ln 9-10). Upon his arrest, he offered to work with the Flowood Police Department in the hopes of receiving leniency as he was on house arrest at the time of his arrest. During the trial, both Melton and McMillan testified that Melton was released on his own recognizance and never went to jail after his arrest. (T.rec.p. 138; ln. 11-15). Melton testified that he assisted in two (2) drug arrests, to include the defendant. The confidential informant's testimony regarding the events was uncorroborated. During the trial, the Defense requested Jury Instruction D-6 which states

“Phillip Melton testified that he was involved in a criminal activity and has implicated Robert Mitchell Hillard. Whenever one person testifies against another for personal gain, such is to be considered and weighed with great care,

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<sup>9</sup> The implications of being arrested on house arrest were not exhausted before the jury.

caution and suspicion. You may give it such weight and credit as you deem it is entitled. You should never convict based on such testimony unless you believe such testimony beyond a reasonable doubt". (See Exhibit C).

¶20. Mr. Guest objected to the instruction stating that, "I don't know of incidents where a confidential informant who was testifying either because there were pending charges or because they were being paid, that their testimony should be given and weighed with great care, caution and suspicion. (T.rec.p. 188; ln 18-23). Mr. Ganner offered an amendment to the instruction to liken it more to a informant instruction to which the State objected. (T.rec.p. 190; ln 1-9). The trial court refused the instruction in alignment with the prosecutions's argument as well as on the grounds that it seemed to be cumulative to the Court's instruction. (T.rec.p. 190; ln 14-18). The Court also stated, "I don't believe there's any case law that supports the court instructing the jury to consider a witness's testimony with suspicion under the circumstances of this case". (T.rec.p. 191; ln 5-8).

¶21. When reviewing the denial of a proposed jury instruction, [t]he standard of review [ ] is that of the viewing the instructions as a whole . . . citations omitted . . . a defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that 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. *Johnson v. State*, 926 So.2d 246 (Ct.App. 2006); *Austin v. State*, 784 So.2d 186, 192 (¶18) (Miss. 2001). Conviction of a defendant was reversed based on testimony of a jailhouse witness who was released on his own recognizance after cooperating with the State in the defendant's case because there was sufficient evidence of favorable treatment in exchange

for his testimony to support the granting of the requested cautionary instruction. *Moore v. State*, 787 So.2d 1282 (Miss. 2001). In *Johnson*, 926 So.2d at 250, the Court of Appeals cited *Moore* and that it deals strictly with the uncorroborated testimony of the jailhouse snitch.

¶22. In the case at bar, Melton was admittedly in the intensive supervision program (ISP) or house arrest at the time of his arrest on September 24, 2007.<sup>10</sup> Upon his arrest, he offered himself to be used as a confidential informant for the Flowood Police Department. After his cooperation with Flowood, he was released on his own recognizance. This was also after he tried to conceal some crack cocaine from the first buy transaction. It is obvious that he received a benefit as a habitual offender on house arrest. Furthermore, Melton also testified that Hillard was alone when he met him. There are no other witnesses to the transaction.<sup>11</sup>

¶23. The lower court committed reversible error by refusing to give jury instruction D-6 under the circumstances of this case.<sup>12</sup> While the trial court claimed that the court's instruction covered all witnesses testimony, the instruction did not advise the jury to weigh Melton's testimony with caution and suspicion. *Moore*, 787 So.2d at 1287, (¶16.) The case at bar is distinguishable from *Johnson* because (1) there were not several witnesses who

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<sup>10</sup> McMillan knew of Melton's arrest earlier that evening. (T.rec. 135; ln 23-27). Among Melton's violations was driving with a suspended license, expired tag and possession of a controlled substance. (T.rec. 85-86). During his cross-examination, Melton admitted he decided to do whatever it takes to get these charges off of him. (T.rec.p. 89; ln. 1-4).

<sup>11</sup> While McMillan claimed there was an audio transmission of the exchange, none was presented into evidence. Moreover, McMillan never saw an exchange of drugs or money between Melton or Hillard. (T.rec. 115).

<sup>12</sup> Both the lower court and the prosecutor were mistaken when they purported that there were no cases that support instructing the jury to consider a witness's testimony with suspicion under the circumstances of this case. (T.rec. 191).



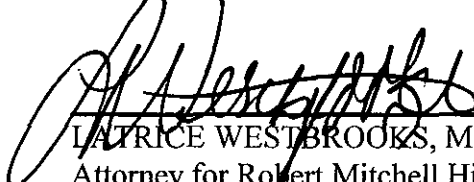
could corroborate Melton's version of the events and (2) the court's instructions did not advise the jury to *carefully* weigh the credibility of all the witnesses in the case. *Id* at 250. (See Exhibit D). In light of these circumstances and relevant case law, Mr. Hillard was entitled to a cautionary instruction regarding the confidential informant.

### CONCLUSION

¶24. Appellees respectfully pray that this Court reverse the verdict of the Rankin County jury and remand the case back to the Rankin County Circuit Court. The Appellant also request any relief under the principals of law and equity to which he may be entitled.

Respectfully Submitted this the 31<sup>st</sup> day of July, 2009.

BY: ROBERT MITCHELL HILLARD



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**CERTIFICATE OF SERVICE**

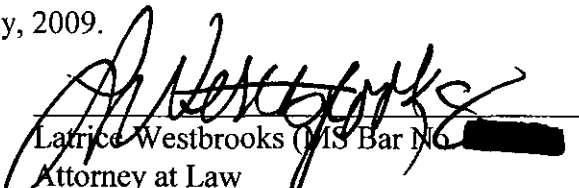
I, LATRICE WESTBROOKS, do hereby certify that I have this day forwarded, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing the Brief of the Appellant to all parties concerned as listed below:

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THIS the 31<sup>st</sup> day of July, 2009.

  
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