IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENDRICK LAMAR WILLIAMS a/k/a SCOOTER — APPELLANT

VS. — NO. 2010-KA-0504-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

In this direct appeal from appellant's conviction of armed robbery and aggravated assault, the victim told a law enforcement investigator that someone stuck a gun in his face, shot at him three times, and tried to get his money. (R. 235)

The ineffectiveness of trial counsel, denial of a challenge for cause which was actually granted, improper oratory during the prosecutor's closing argument, refusal of a defense instruction targeting the credibility of accessories, allegedly improper testimony the accessories pleaded guilty to lesser charges, and the admissibility of the victim's prior written statement during re-examination after defense counsel first showed it to the victim during cross-examination, form the centerpiece of this appeal from convictions of armed robbery and aggravated assault.

Kendrick Williams has been convicted of armed robbery and aggravated assault after attempting to take $1,000 from his victim by pointing a pistol at his head, pulling the trigger, and leaving the scene empty handed after the gun jammed. (R. 264; C.P. at 36-38)

Williams's conviction was based largely, but not entirely, upon the testimony of the victim,

Eddie Lewis, the proprietor of the Club Tatiyana, a "barroom" located in Pike County between Magnolia and McComb. (R. 169, 240)

According to Lewis, who identified Williams in court as his armed tormentor (R. 169, 177-85), Williams attempted to rob Lewis at gunpoint after Lewis closed the club and was leaving the premises with over $1000 in his pocket. (R. 179-80)

According to Lewis he was in the process of handing Williams the money when Williams fired shot number one at his lower body. (R. 181) Lewis then looked Williams "dead in the eyes" and said, "you got to kill me now, you got to kill me." (R. 181)

> "When I said that, he reached the gun up and had it level with my head. My hand still in the air like this. I'm looking him dead in the eyes telling him this. I looked down the barrel. After I looked down the barrel, I look at his finger. And we looking, talking about eye to eye, like I'm looking you dead in your eye, just like looking at you like this, like, you got to kill me. And he didn't flinch. He just pulled the trigger. I'm looking down the barrel. And I just knew I was dead. But the gun jammed." (R. 182)

KENDRICK LAMAR WILLIAMS, a twenty-two (22) year old African-American male and non-testifying defendant, prosecutes a criminal appeal from his convictions of armed robbery and aggravated assault following trial by jury on February 23-24, 2009, in the Circuit Court of Pike County, David H. Strong, Jr., Circuit Judge, presiding.

Following the two day trial by jury, Williams was convicted of both armed robbery by attempt (Count One) and aggravated assault (Count Two).

Williams was sentenced by the jury to "life on count one being the sentence fixed by the jury and twenty (20) years on count two as set by the court with the two counts to run concurrently." (R. 265-66, C.P. at 39)

Williams's indictment, omitting its formal parts, charged

> " . . . [t]hat **KENDRICK LAMAR WILLIAMS** . . . on or about April 11, 2009, did wilfully, unlawfully, and feloniously, attempt to take from the person of Eddie Lewis, U.S. Currency, the personal property of Eddie Lewis, against his will, by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon, to-wit: a handgun, contrary to and in violation of Section 97-3-79 of the Mississippi Code of 1972 . . ." (C.P. at 3)
>
> * * * * * *
>
> COUNT TWO
>
> "and that on or about April 11, 2009, in Pike County, Mississippi, and within the jurisdiction of this court, the said KENDRICK LAMAR WILLIAMS did unlawfully, feloniously, purposely and knowingly attempt to cause bodily injury to another, namely, one Eddie Lewis, a human being, with a deadly weapon, to-wit: a handgun, by shooting at said victim, contrary to and in violation of Section 97-3-7(2) of the Mississippi Code of 1972; . . ." (C.P. at 3-4)

Indicted jointly with Williams as accessories after the fact were Deidre Bonds, Aris Joseph, and Jodenzo Thompson, all of whom were charged with " . . . providing [Williams] with transportation and assisting him in fleeing the scene of a crime. . ." (C.P. at 4)

At the close of all the evidence, the jury returned dual verdicts of (1) "guilty of Armed Robbery, and fix[ed] his sentence at life" and (2) "guilty of Aggravated Assault." (C.P. at 36)

A number of issues are raised by Williams on appeal to this Court, including the denial of a challenge for cause; admission of testimony reflecting the co-defendants had pleaded guilty and been sentenced; the admissibility of testimony allegedly pointing to other crimes, acts, or conduct; the denial of a cautionary charge; improper closing argument which invited the jury to do its duty, and, not surprisingly, the ineffectiveness of trial counsel.

Williams concedes in his brief there was no objection, contemporaneous or otherwise, to any of the evidence, testimony or argument complained about and apparently invites this court to rely upon plain error. (Brief of the Appellant at 10, 12, 14, 19)

STATEMENT OF FACTS

Counsel for Williams has penned a fair and accurate version of the facts involved in this prosecution for armed robbery by attempt and for aggravated assault.

It is enough to say here that Kendrick Williams was losing money shooting dice during a "slow night" at the Club Tatiyana in Pike County. Williams became angry and loud and was approached by Eddie Lewis, the owner of the club, who attempted to calm Williams down. (R. 171)

During the wee hours of the morning, after all of the patrons had left, Lewis turned out the lights and began locking the front door. (R. 175) A man wearing a bandanna over his mouth approached Lewis from the corner of the building and asked Lewis for the time. (R. 175-76)

This was a ruse.

The bandit, who Lewis later identified as Williams, pointed a pistol at Lewis and said, "give it up." (R. 178) According to Lewis, "He was talking about money. He was talking about money." (R. 178)

Lewis had over $1000 in his pocket and was on the verge of surrendering it to the bandit when Williams fired the pistol the first time. Lewis then looked his assailant "dead in his eyes" and said, "you are going to have to kill me now." (R. 181)

Lewis testified that

> "[w]hen I said that, he reached the gun up and had it level with my head. My hand still in the air like this. I'm looking him dead in the eyes, telling him this. I looked down the barrel. After I looked down the barrel, I look at his finger. And we looking, talking about eye to eye, like I'm looking you dead in your eye, just like looking at you like this, like, you got to kill me. And he didn't flinch. He just pulled the trigger. I'm looking down the barrel. And I just knew I was dead. But the gun jammed." (R. 182)

Lewis decided to run. He heard a gunshot as he ran across the highway. (R. 183)

Q. [BY PROSECUTOR BYRD:] Okay. So after you started running, he fired at you again.

A. Again.

Q. Do you know how many times?

A. As I recall, I heard the gun shoot three times. First, when he shot towards my lower body. Second, when I hit the corner of the club, past my girl's car. The third, I ran across the street to the neighbor's trailer and I heard it shoot again. I'm running, he's running. I look behind me - - I'm half way to the neighbor's yard. He's done crossed the street. (R. 183)

Williams aborted his pursuit of Lewis after Lewis reached the porch of a neighbor's trailer and the porch light came on. (R. 184) Lewis heard people inside an automobile hollering at Williams, "come on, come on." Williams thereafter climbed into a car occupied by Jodenzo Thompson, Aris Joseph, and a female named Deidre Bonds. The car sped away leaving Lewis alive but quite shaken. (R. 186)

The State produced four (4) witnesses during its case-in-chief.

Jeff Honea, an investigator with the Pike County Sheriff's Department, responded to the scene of the armed robbery and found two 9 mm shell casings outside the club. (R. 110)

Honea interviewed Jodenzo Thompson who identified the robber by nickname and description. (R. 111) Honea also questioned the defendant who verified his presence that night at the club. (R. 112)

Thompson, Aris Joseph, and Deidre Bonds were charged with "[b]eing an accessory after the fact" because "[t]hey admitted that after the armed robbery, they were aware that it had occurred and drove him away from the location, thus helping him get away."

"They admitted their guilt and I believe they have been sentenced." (R. 113)

Williams admitted being in the same car with them that night. (R. 114)

The gun used in the robbery " . . . was removed from the crime scene, and its location to this day is unknown." (R. 113)

Jodenzo Thompson testified he was at the club that night with Williams, Joseph, and Thompson's fiancé, Deidre Bonds, who was driving the car. (R. 122) There was dice shooting taking place, and Williams was losing his money to other people. (R. 123-24) Williams was not too happy about this state of affairs and began arguing with Lewis who " . . . was housing the game." (R. 125)

Thompson, Williams and the others left around 2:00 a.m. (R. 125) Williams " . . . was hot about - - he was just saying how could he go home and explain it to his old lady about he lost his money . . ." (R. 126)

After the vehicle pulled out onto the main road, Williams instructed Deidre Bonds to stop the car and yelled out for someone to pop open the trunk. (R. 127-28, 143) Williams then got out of the car after which Thompson heard a gunshot as Williams ran toward the club. (R. 129) Thompson then heard a second gunshot at which time he observed Eddie Lewis run across the street. (R. 129)

Williams then came back to the car. (R. 130, 132)

> Q. [BY PROSECUTOR BYRD:] Okay. I'm sorry. What did Mr. Williams say when he got back to the car?
>
> A. [BY THOMPSON:] He was just like - - he told about he ran up on the dude, and was like, you know what I'm saying, he mentioned about like the dude, when he ran around the building, Mr. Eddie Lewis still had the key in the door and he ran up on the man for the money. But, you know what I'm saying, he was fixing to give it to him. But he didn't get to get the money because of the simple fact, Mr. Eddie Lewis looked at him and saw the gun was jammed up and took off, sir. (R. 130)

Thompson testified that when Williams " . . . jumped in the car, sir, I did see a pistol. . ." (R. 131) "It was black and a little bigger than the gun I had, . . . [which was] [a] Cobra .380." (R. 131)

Thompson and Williams were incarcerated in the same cell block prior to trial. Williams told Thompson

> ". . . that as long as we keep our mouth shut, you know what I'm saying, we ain't got nothing to worry about, stuff like that. So as meaning, don't go and tell the investigator nothing. He ain't said nothing, so ain't no sense in us saying nothing. If we say something he going to get messed off or whatever. That's what he mentioning up on. So stuff like that." (R. 135)

Thompson testified he pled guilty to a gun charge and the accessory charge on this case. (R. 136)

During cross-examination by defense counsel, Thompson testified he was sentenced to six (6) months in the RID program after entering a guilty plea to firearm possession by a convicted felon and accessory after the fact. (R. 147-48) As a part and parcel of his guilty plea, he was promised nothing. (R. 147)

Aris Joseph, a co-indictee along with Thompson and Bond, testified that Williams complained about losing money as they were leaving the club. "[H]e had done lost his money and how he was going to tell his girl how he lost the money . . ." (R. 155)

As Bond, Joseph, Thompson and Williams pulled out of the parking lot, Williams told Bond to stop the car and open the trunk. Williams went into the trunk and disappeared in the direction of the club. (R. 156-57) Joseph then heard a gunshot and observed Lewis running across the street. (R. 158, 166) When Williams returned and got back into the car Joseph saw Williams with a gun. (R. 158-59) Williams told Joseph he was trying to get his money back and the gun jammed. (R. 159)

Joseph testified he pled guilty to being an accessory to robbery and had been sentenced to jail. (R. 160-61)

During cross-examination Joseph said he pled guilty to being an accessory after the fact and that he was sentenced to six months in the RID Program. (R. 164) Joseph said he " . . . wasn't aware of that until a few days [ago] . . . about the testifying part." (R. 164) There was no deal. (R. 164-65, 167-68)

Eddie Lewis, testified he heard three (3) gunshots. The robber and shooter was Kendrick Williams. Lewis identified Williams in court as his armed assailant. (R. 169, 175-76, 187)

At the close of the State's case-in-chief, Williams's motion for a directed verdict voiced on the ground of insufficient evidence was denied. (R. 216-19)

The defendant, who did not testify, produced two witnesses, **Deidre Bonds,** called as an adverse witness (R. 220), and **Gregory Keith Patterson**. (R. 220, 230)

Bonds testified she met Williams for the first time that night. (R. 220) Williams could have put something in her trunk. (R. 222)

Williams told her to stop the car; he got out and ran back to the club and later returned with a gun. (R. 224-25)

After being advised of his right to testify or not, Williams personally elected to remain silent. (R. 227-28)

The State had no rebuttal. (R. 238)

Williams's request for peremptory instruction was denied. (C.P. at 33)

Following closing arguments, the jury retired to deliberate at 10:33 a.m. (R. 262) Less than an hour later at 11:15 a.m., it returned with dual verdicts of, "Count I, we, the jury. find the defendant, Kendrick Lamar Williams, guilty of armed robbery and fix his sentence at life," and

defendant, Kendrick Lamar Williams, guilty of armed robbery and fix his sentence at life," and "Count II, we the jury find the defendant, Kendrick Lamar Williams, guilty of aggravated assault." (R. 264; C.P. at 36)

A poll of the jury signified by raised hands, reflected the verdicts returned were unanimous. (R. 264)

On March 8, 2010, Williams filed his motion for J.N.O.V. and/or for a new trial. (C.P. at 41-43)

The motion was denied by Judge Strong on March 9, 2010. (C.P. at 44)

John J. McNeil, a practicing attorney in McComb, represented Williams effectively during the trial of this cause.

Cynthia A. Stewart, a practicing attorney in Madison, has been substituted on appeal. (C.P. at 51) Ms Stewart's' representation, as usual, has been equally effective.

SUMMARY OF THE ARGUMENT

Juror Spears. Judge Strong reconsidered his previous ruling on Ms Spears and granted Williams's challenge for cause.

Testimony and Argument Not Objected To. "A trial judge will not be found in error on a matter not presented to him for decision." **Drummond v. State,** 33 So.3d 507, 512 (¶16) (Ct.App.Miss. 2009).

Miss.R.Evid. 103(a) (1) reads, in part, as follows: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) , , , [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . ."

matters complained about on appeal for the first time. These issues are procedurally barred." **Williams v. State,** 971 So.2d 581, 590 (Miss. 2007).

The plain error rule is inapplicable here because there was no error.

If otherwise, any error was neither "plain," "clear," nor "obvious."

Effectiveness of Trial Counsel. Appellate review of counsel's performance must be done in a post-conviction environment.

Instruction D-9. The trial judge did not abuse his judicial discretion in denying D-9, a cautionary charge, because both Joseph and Thompson who testified for the State, were accessories after the fact and not accomplices in the commission of the robbery and assault. **Ramsay v. State,** 959 So.2d 15 (Ct.App.Miss. 2006), reh denied, cert denied 958 So.2d 1232 (2007).

Cumulative Error. There being no error in any part, there can be no error to the whole. **Genry v. State**, 735 So.2d 186, 201 (Miss. 1999).

ARGUMENT

POINT 1.

THE TRIAL JUDGE REVERSED HIS RULING ON MS SPEARS AND GRANTED WILLIAMS'S CHALLENGE FOR CAUSE.

EVEN IF HE DID NOT, ANY ERROR IN DENYING WILLIAMS'S CHALLENGE FOR CAUSE OF JUROR SPEARS WAS HARMLESS BEYOND A REASONABLE DOUBT.

Williams contends the trial court erred in denying his challenge for cause which targeted juror number 44, Ms Spears. (R. 63, 76)

This argument is devoid of merit because Judge Strong reconsidered his previous ruling on Ms Spears and granted Williams's challenge for cause. We quote:

Ms Spears and granted Williams's challenge for cause. We quote:

> THE COURT: All right. Anything else before we - -
>
> MR. BYRD: Your Honor, may I run through the ones we've -
>
> THE COURT: I tell you what, out of an abundance of caution, I'm going to reconsider my ruling on Ms. Spears. **I'm going to grant the challenge for cause on Ms. Spears.** (R. 77-78) [emphasis ours]

The bottom line is that Spears was both challenged and struck for cause. Thus, she did not sit on the jury convicting Williams.

Even if, as Williams claims, the challenge for cause had been denied, it is clear that Ms Spears did not serve on the jury that convicted Williams.

The jurors finally selected to try this case are identified in the following colloquy:

> THE COURT: Ladies and gentlemen in the jury box, if you would step to the side, please.
>
> All right. Would the following persons please come forward and take their seats in the jury box:
>
> Joseph Roberson, Alfred Patterson, Willie Turner, Ricky Simpson, Elijah Wall, Michael Ehrlicher, Paul Hamilton, Latasha Sibley, Alan Matthews, Jerry Lang, Terry Hendrickson, Edith Parkman, Erin Myers, and Linda Skinner.
>
> (JURY SEATED)
>
> THE COURT: The remainder of the jury members are free to go and do we have - - do they need to call back?
>
> MR. BYRD: I don't think so, Your Honor. Do you want to have them check back Thursday? (R. 93)

Assuming, arguendo, Judge Strong did not reverse his ruling, any error in denying a challenge for cause based upon Ms Spears's preconceived notions concerning Williams's guilt could not have contributed one whit to Williams's conviction and was harmless beyond a reasonable doubt. *See*

In addition to all this, Williams only used four (4) of his peremptory challenges. (R. 90-91) The Supreme Court " . . . ha[s] consistently held that the trial court may not be put in error for refusal to excuse jurors challenged for cause when the complaining party chooses not to exhaust his peremptory challenges." **Scott v. Ball,** 595 So.2d 848, 851 (Miss. 1992), and the cases cited therein.

POINTS 2, 4, 6, AND 8.

THERE WAS NO OBJECTION DURING TRIAL, CONTEMPORANEOUS OR OTHERWISE, TO THE TESTIMONY AND ARGUMENT COMPLAINED ABOUT. RATHER, OBJECTION IS MADE FOR THE FIRST TIME ON APPEAL.

ACCORDINGLY, WILLIAMS IS PROCEDURALLY BARRED FROM RAISING THESE MATTERS AT THIS BELATED HOUR. STATED DIFFERENTLY, HE HAS WAIVED AND/OR FORFEITED HIS RIGHT TO HAVE THESE ISSUES CONSIDERED ON APPEAL.

THE PLAIN ERROR RULE IS INAPPLICABLE HERE BECAUSE ANY ERROR WAS NOT "PLAIN." IN FACT THERE WAS NO ERROR AT ALL.

Williams argues for the first time (1) the prosecution erred in eliciting testimony that Williams's testifying co-defendants pleaded guilty to being accessories after the fact, (2) defense counsel erred in failing to object to other crime evidence, (3) defense counsel erred in allowing the prosecution to place into evidence the victim's prior statement, and the prosecutor erred in arguing to the jury that by convicting the defendant they would be doing their duty as citizens. (Brief of Appellant at vi., 8, 10, 12, 17)

He seeks reversal of his two convictions and sentences and a remand for a new trial. (Brief of Appellant at 9, 14, 22)

We decline to address the merits of any of these complaints because there was no objection, contemporaneous or otherwise, to any of the evidence, testimony, or argument complained about

contemporaneous or otherwise, to any of the evidence, testimony, or argument complained about now. Williams is barred from raising them for the first time on appeal. Besides, Williams was hopelessly guilty.

Procedural Bar. The Contemporaneous Objection Rule.

The problem with all of these arguments, as Williams is well aware, is that none of this evidence, testimony or oratory generated an objection, contemporaneous or otherwise; rather, these matters and occurrences are complained about for the first time on appeal.

We respectfully point out the testimony and argument assailed "here and now" was not so obviously egregious and prejudicial "then and there." There was no contemporaneous objection at trial to any testimony or argument complained about on appeal.

The prosecutor's "job and duty" remarks assailed for the first time here were made in response to defense counsel's closing statements inviting the jurors to go home and talk to friends and family about why they found the defendant not guilty. (R. 255) This argument did not warrant an objection. The trial judge had already instructed the jury that "[a]rguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence." (R. 239; C.P. at 19)

Williams's testifying co-defendants were never found guilty by a jury of the same crimes for which Williams was being tried; rather, at the time of trial they had entered guilty pleas to being accessories after the fact. "The supreme court has held that if the defense wishes to exclude such testimony from consideration by the jury, he is duty bound to object." **Palm v. State,** 724 So.2d 424, 426 (Ct.App.Miss. 1998), citing **Johnson v. State,** 477 So.2d 196, 214 (Miss. 1985) [Reversal not required by prosecutor's improper elicitation of testimony concerning the guilty plea of accomplice prior to any attack on accomplice's credibility since accomplice was subject to cross examination

and counsel for the defense failed to object to accomplices's testimony.]

A contemporaneous objection to allegedly prejudicial remarks by the district attorney is required else the objection is waived. **Handley v. State,** 574 So.2d 671 (Miss. 1990); **Hill v. State,** 432 So.2d 427 (Miss. 1983); **Alford v. State,** 760 So.2d 48 (Ct.App.Miss. 2000); **Swindle v. State,** 755 So.2d 1158 (Ct.App.Miss. 1999) [Defendant waived any challenge to all but one of the prosecutor's remarks made during closing argument where he failed to make a contemporaneous objection to all but one comment.]

In **Hill v. State,** *supra*, 432 So.2d 427, 439 (Miss. 1983), this Court opined:

> In this case, however, there was no objection to this argument. We have consistently held that contemporaneous objection must be made to improper argument by the state, and unless such objection is made, any claimed error for such improper argument will not be considered on appeal. [numerous citations omitted]

The absence of a contemporaneous objection is absolutely fatal to Williams's complaint. **Turner v. State,** 818 So.2d 1181 (Miss. 2002) [By failing to object to the state's closing argument during trial, defendant was precluded from raising any issues concerning the argument for the first time on appeal.]; **Hampton v. State,** 815 So.2d 429 (Ct.App.Miss. 2002) [A contemporaneous objection must be made in order for the Court of Appeals to consider claims of improper or erroneous comments by a prosecuting attorney made during closing argument.]; **Swindle v. State,** *supra*.

These observations, standing alone, are fatal to Williams's complaints raised here for the first time on appeal. In short, any error was waived when Williams failed to object during trial or move to suppress prior to trial. Accordingly, Williams has "forfeited" his right to raise these claims on appeal. *See* **United States v. Dodson,** 288 F.3d 153 (5th Cir. 2002), reh denied, cert denied 123 S.Ct.

32 [Forfeiture is the failure to make the timely assertion of a right, generally by failure to object to an error in the proceedings.]

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct.App.Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct.App.Miss. 1999).

Otherwise the error, if any at all, is waived for appeal purposes. **Caston v. State,** *supra*, 823 So.2d 473 (Miss. 2002), reh denied.

Stated differently, "[t]he failure to object at trial acts as a procedural bar in an appeal." **White v. State,** 964 So.2d 1181, 1185 (Ct.App.Miss. 2007), citing **Jackson v. State,** 832 So.2d at 579, 581(¶3) (Ct.App. Miss. 2002), citing **Carr v. State,** 655 So.2d 824, 853 (Miss. 1995).

A defendant is **not** entitled to raise new issues on appeal that he has not first presented to the trial court for consideration. **Hodgin v. State,** 964 So.2d 492 (Miss. 2007). This rule is not diminished in a capital case. **Flowers v. State,** 947 So.2d 910 (Miss. 2007). Moreover, it also applies to constitutional questions. **Williams v. State,** 971 So.2d 581 (Miss. 2007) ["As a general rule, constitutional questions not asserted at the trial level are deemed waived."] *See also* **Ross v. State,** 954 So.2d 968, 987-88, 1015 (Miss. 2006); **Rogers v. State,** 928 So.2d 831, 834 (Miss. 2006).

In **Gonzales v. State,** 963 So.2d 1138, 1144 (Miss. 2007), the Supreme Court reaffirmed the rule with the following rhetoric:

> Where an argument has never been raised before the trial court, we repeatedly have held that 'a trial judge will not be found in error on a matter not presented to the trial court for a decision.' *Purvis v. Barnes,* 791 So.2d 199, 203 (Miss. 2001).

The contemporaneous objection rule has been applied to speedy trial violations, discovery

trial *in absentia*, and the like. *See* **Miller v. State,** 956 So.2d 221 (Miss. 2007) [speedy trial]; **Jackson v. State,** 962 So.2d 649 (Ct.App.Miss. 2007), reh den, cert den [discovery]; **Flowers v. State,** 947 So.2d 910 (Miss. 2007) and **Roles v. State,** 952 So.2d 1043 (Ct.App.Miss. 2007) [***Batson***]; **Black v. State,** 949 So.2d 105 (Ct.App.Miss. 2007) [in-court identifications]; **Gonzales v. State,** *supra*, 963 So.2d 1138 (Miss. 2007)[wrongfully obtained evidence]; **Mallard v. State,** 798 So.2d 539 (Miss. 2001) [trial *in absentia*].

The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122 (Miss. 2002), reh denied.

A trial court cannot be put in error unless it had an opportunity to first pass on the question. **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct.App.Miss. 2000). *See also* **Mallard v. State,** *supra*, 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. *See also* **McLendon v. State,** 945 So.2d 372 (Miss. 2006), reh den, cert den; **Howard v. State,** 945 So.2d 326 (Miss. 2006), reh den, cert den. "[The Supreme Court] cannot find that a trial judge committed reversible error on a matter not brought before him to consider." **Montgomery v. State,** 891 So.2d

179, 187 (Miss. 2004) reh den.

No egregious violation of a fundamental or substantial right is involved here, and the procedural bar/waiver/forfeiture rule is applicable to Kendrick Lamar Williams.

Plain Error .

Williams might suggest that because these matters were not objected to the Appellant must proceed under the doctrine of plain error.

Miss.R.Evid. 103 (d) reads as follows: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

We continue to adhere to our view that "plain error" is something for a reviewing court to notice and not a crutch for an appellant to argue and that application of the plain error doctrine eviscerates the heart of the contemporaneous objection rule.

In any event. the plain error doctrine is inapplicable here because in order to find "plain" error there must be "error."

"The plain error doctrine requires that there be an error and the error must have resulted in a manifest miscarriage of justice." **Williams v. State,** 794 So.2d 181, 187 (Miss. 2001).

In **McGee v. State,** 953 So.2d 211, 215 (Miss. 2007), we find the following language dispositive of any anticipated "plain error" argument:

> * * * However, if there is a finding of plain error, a reviewing court may consider the issue regardless of the procedural bar. A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State,* 794 So.2d 181, 187-88 (Miss. 2001). **To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial."** *Cox v. State,* 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v. State,* 584 So.2d 786, 789 (Miss. 1991);,*Porter v. State,* 749 So.2d 250, 260- 61 (Miss.Ct.App. 1999).

The Supreme Court applies the "plain error" rule " . . . only when it affects a defendant's substantial/fundamental rights." **Williams v. State,** *supra*, 794 So.2d at 187.

None of this criteria is found to exist in the case at bar,

First, Judge Strong did not deviate from a legal rule. In the absence of a motion to suppress or contemporaneous objection, the trial judge never had the opportunity to rule on the matters identified here. Thus, there is no error, plain or otherwise, to review.

Second, even if there is the spectre of error, it is neither "plain" nor "clear" nor "obvious." Accordingly, admission of the testimony and evidence targeted here and any impropriety during the prosecutor's closing argument did not prejudice the outcome of the trial where, as here, evidence of Williams's guilt was overwhelming. In other words, any error did not result in a "manifest miscarriage of justice."

Harmless Error.

Assuming, arguendo, there is "plain error," it was clearly harmless beyond a reasonable doubt because the evidence preponderates very heavily in favor the guilty verdict and any error could not have contributed one whit to the defendant's conviction. *See* **Chapman v. California,** 386 U.S. 18, 87 S.Ct.824, 17 L.Ed.2d 705 (1967), reh den 17 L.Ed.2d 705.

POINTS 3, 5, 7, AND 9.

TRY AS HE MIGHT, WILLIAMS HAS FAILED ON DIRECT APPEAL TO MAKE OUT A CLAIM *PRIMA FACIE* OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

THE RECORD OF TRIAL, IN ITS PRESENT POSTURE, FAILS TO REFLECT INEFFECTIVENESS OF CONSTITUTIONAL DIMENSION.

Appellate counsel, with the refractive aid of hindsight and back-focal lenses, assails the effectiveness of trial counsel, Mr. John McNeil, who is alleged to have committed several sins of

both commission and omission sufficient to render his representation at trial ineffective in the constitutional sense.

This is yet another case where, according to a convicted defendant, his trial attorney should have done this or should have done that and the failure of counsel to do this or that amounted to ineffectiveness in the constitutional sense.

The bark of Williams's appellate lawyer is far worse than the bite they attribute to Williams's trial lawyer. Our review of the record leads to the inescapable conclusion that counsel's representation, while not perfect or even errorless, was not so defective as to give rise to a bona fide claim of ineffectiveness in the constitutional sense. This is especially true given the strength of the prosecution's case.

The record, in our opinion, is factually inadequate for a determination by a reviewing court that trial counsel was ineffective for the reasons he now claims. Without addressing each individual lapse of counsel alleged by Williams, we respectfully defer to the cases which have declined to address the issue without prejudice to the appellant's right to raise the matter *de novo* in a post-conviction environment. *See* **Wilson v. State,** 21 So.3d 572 (Miss. 2009), reh denied; **Neal v. State,** 15 So.3d 388 (Miss. 2009), reh denied; **Brown v. State,** 965 So.2d 1023 (Miss. 2007).

Williams claims that counsel was ineffective in the constitutional sense for failing to object to certain testimony, documentary evidence, and argument. (Brief of Appellant at vi, 10-12, 14-17, 19) These issues are not based upon facts fully apparent from the record since the failure to object could have been a product of counsel's trial strategy.

We decline to stipulate the record is adequate for the Court to determine the effectiveness of trial counsel. The record, in our opinion, is factually inadequate for a determination by a reviewing court that trial counsel was ineffective for the reason he now claims. We respectfully

defer to the cases which have declined to address the issue without prejudice to the appellant's right to raise the matter *de novo* in a post-conviction environment.

The ground rules for resolving this complaint were first set forth in **Read v. State,** 430 So.2d 832, 841 (MIss. 1983), where this Court stated:

> (1) **Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter has not first been presented to the trial court. The Court should review the entire record on appeal.** If, for example, from a review of the record, as in *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950) or *Stewart v. State*, 229 So.2d 53 (Miss. 1969), this Court can say that the defendant has been denied the effective assistance of counsel, the court should also adjudge and reverse and remand for a new trial. *See also*, *State v. Douglas*, 97 Idaho 878, 555 P.2d 1145, 1148 (1976).
>
> (2) Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. **On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.** If the Court otherwise affirms, **it may nevertheless reach the merits of the ineffectiveness issue where (a) as in paragraph (1) above, the record affirmatively shows ineffectiveness of constitutional dimensions,** or (b) the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.
>
> (3) If, after affirmance as in paragraph (2) above, the defendant wishes to do so, he may then file an appropriate post-conviction proceeding raising the ineffective assistance of counsel issue. *See Berry v. State*, 345 So.2d 613 (MIss. 1977); *Callahan v. State, supra.* Assuming that his application states a claim, *prima facie*, he will then be entitled to an evidentiary hearing on the merits of that issue in the Circuit Court of the county wherein he was originally convicted./5 Once the issue has been formally adjudicated by the Circuit Court, of course, the defendant will have the right to appeal to this Court as in other cases. [emphasis supplied; text of

The following language found in the recent cases of **McLaurin v. State,** 31 So.3d 1263, 1266-67 ¶ (14-17) (Ct.App.Miss. 2009) and **Drummond v. State,** 33 So.3d 507, 511-12 (¶¶14 and 15) (Ct.App.Miss. 2009) control the posture of Williams's complaint:

> Drummond contends that defense counsel's failure to object when the State was attempting to elicit hearsay testimony from the victim amounted to ineffective assistance of counsel. Drummond also argues that defense counsel was ineffective because counsel never attempted to impeach Moffett with his prior testimony. This Court does not generally consider an ineffective-assistance-of-counsel claim on direct appeal.
>
> The Mississippi Supreme Court has stated that:
>
> > It is unusual for this [c]ourt to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. The Mississippi Supreme Court has stated that, where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge."
>
> *Wilcher v. State,* 863 So.2d 776, 825 (¶171) (Miss. 2003) (internal citations and quotations omitted). The record does not affirmatively indicate Drummond suffered denial of effective assistance of counsel of constitutional dimensions, and the parties have not stipulated that the record was adequate to allow the appellate court to make a finding without considering the finding of facts by the trial judge. Thus, we decline to address this issue without prejudice to Drummond's right to seek post-conviction relief, if he so chooses.

Drummond v. State, *supra*, 33 So.3d at 511-12 (¶ 15).

In the **McLaurin** case the Court of Appeals stated the following:

> McLaurin raises twenty-three allegations of ineffective assistance of counsel. Without exhaustively listing each of McLaurin's assertions, we summarize his allegations using his own words: "defense counsel did little to avail himself of the

Without exhaustively listing each of McLaurin's assertions, we summarize his allegations using his own words: "defense counsel did little to avail himself of the evidence in the custody of the State, . . . much less conduct an independent investigation."

Mississippi Rule of Appellate Procedure 22(b) states:

> Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

"Where the record is insufficient to support a claim of ineffective assistance, 'the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief.' " *Wynn v. State,* 964 So.2d 1196, 1200 (¶9) (Miss.Ct.App.2007) (citing *Aguilar v. State,* 847 So.2d 871, 878 (¶17) (Miss.Ct.App. 2002)).

Several of McLaurin's allegations are based upon facts that are not fully apparent from the record: defense counsel failed to file a direct appeal or a motion for post-conviction relief after accepting a retainer and asserting the defense he was going to file the appeals; defense counsel did not review an incriminating photograph of McLaurin used at trial and did not file a motion to exclude the photograph; defense counsel failed to sufficiently investigate potential witnesses and relevant medical records; and defense counsel did not submit any jury instructions. The record contains no medical records, nor does it contain any statements by potential witnesses. Thus, we cannot address these issues on direct appeal. Because we cannot address several of McLaurin's ineffective assistance of counsel allegations on direct appeal, we find that McLaurin's ineffective assistance claim would be more appropriately brought in a petition for post-conviction relief, if he chooses to do so. Accordingly, we deny relief on this issue without prejudice."

McLaurin v. State, *supra,* 31 So.3d at 166-67 (¶¶ 14-17).

Because (1) the record fails to show ineffectiveness of constitutional dimensions and (2) *both* parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of Williams's individual ineffective assistance of counsel claims. **Wynn v. State,** 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

conviction environment where trial counsel will have an opportunity to explain the reasons for his actions and/or inactions. It is a rare case indeed where an appellate court will find constitutional ineffectiveness in trial counsel without granting to counsel a meaningful opportunity to be heard.

Our position, in a nutshell, is that Williams has failed to demonstrate on direct appeal that any aspect of his lawyer's performance was deficient in the constitutional sense and that the deficient performance, if any, prejudiced the defense. Started differently, the record, in its present posture, fails to affirmatively reflect ineffectiveness of constitutional dimensions.

POINT 10.

THE TRIAL COURT DID NOT ABUSE ITS JUDICIAL DISCRETION IN DENYING JURY INSTRUCTION D-9 REQUESTED BY THE DEFENDANT.

Jury instruction D-9, which was marked refused, reads as follows:

> The Court instructs the jury that the law looks with suspicion and distrust on testimony from an accessory and in passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution, and look upon it with distrust and suspicion. (C.P. at 35)

Colloquy and dialogue dealing with the submission and approval of jury instructions is absent here. These matters took place in chambers and have not been transcribed and included in the record. (R. 238-39; C.P. at 47)

D-9 is marked "denied." A citation at the bottom of the page cites to **Derden v. State,** 522 So.2d 752 (Miss. 1988), as authority for denying this instruction. (C.P. at 35)

In **Derden** we find the following language controlling the posture of Williams's complaint:

> As a general rule a trail judge should not hesitate to grant the cautionary instruction when the State is relying upon the testimony of co-conspirators.
>
> In **Van Buren v. State**, 498 So.2d 1224, 1229 (Miss. 1986),

> this Court said, "the granting of a cautionary instruction regarding the testimony of an accomplice is discretionary with the trial judge." **Hussey v. State**, 473 So.2d 478 (Miss. 1985); **Davis v. State**, 472 So.2d 428 (Miss. 1985); **Jones v. State**, 381 So.2d 983 (Miss. 1980); cert. denied 449 U.S. 1003, 101 S.Ct. 543, 66 L. Ed.2d 300 (1980); **Fleming v. State**, 319 So.2d 223 (Miss. 1975). However, that discretion is not absolute; it may be abused. **Hussey**, 473 So.2d at 480. **Holmes v. State**, 481 So.2d 319, 322 (Miss. 1985). Two of the aspects in determining whether or not the discretion has been abused are (1) was the witness in fact an accomplice, and (2) was his testimony without corroboration. Here the three witnesses were in fact accomplices, although there was some slight corroboration of their testimony, corroboration was in fact minimal.

See also **Brown v. State,** 890 So.2d 901 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1842, 544 U.S. 981, 161 L.Ed.2d 735 (2005) [The granting of a cautionary instruction targeting the testimony of an accomplice is discretionary with the trial court.]; **Dahl v. State,** 989 So.2d 910 (Ct.App.Miss. 2007), reh denied, cert denied 993 So.2d 832 (2008).

No abuse of judicial discretion has been demonstrated in the case at bar for at least two reasons.

First, neither Joseph not Thompson were indicted as accomplices to armed robbery; rather, they were both indicted in Count Three as accessories after the fact after assisting Williams " . . . in fleeing the scene of a crime . . ." (C.P. at 4)

In **Ramsay v. State,** 959 So.2d 15 (Ct.App.Miss. 2006), reh denied, cert denied 958 So.2d 1232 (2007), the court held that a jury instruction inviting the jury to view the testimony of a co-defendant in a trial for capital murder was not warranted where, as here, the co-defendant was charged as an accessory-after-the-fact, not as an accomplice. Moreover, the co-defendant's testimony was corroborated by other evidence.

Second, the testimony of Joseph and Thompson testimony was corroborated in material

particulars by the testimony of the victim, Eddie Lewis, who positively identified Williams as the man who attempted to rob him at gun point by pointing a gun at his head and pulling the trigger.

In the case at bar, Aris Joseph and Jodenzo Thompson were indicted as accessories to armed robbery (C.P. at 3-4), and both Joseph and Thompson testified for the State against Williams. Both men were peripheral accessories who identified Williams as the man who fired at least one shot at the club after ordering Bonds to stop and "pop the trunk" of the automobile in which the men and Deidre Bonds were riding.

It is clear that neither Thompson nor Joseph shared in Williams's intent to rob Lewis. Their participation was knowingly and willingly driving the get-a-way car after Williams returned from his aborted attempt to rob Williams.

This is not a case where the testimony of an accomplice (or even a peripheral accessory) was the sole basis for the defendant's conviction and the defendant's guilt not otherwise clearly proven. *See* **Williams v. State,** 32 So.3d 486 (Miss. 2010), cited and relied upon by Williams. Moreover, it is not a case where there is some question as to the reasonableness and consistency of the testimony. *See* **Clemons v. State,** 952 So.2d 314 (Ct.App.Miss. 2007).

Rather, the Court of Appeals has stated that a cautionary charge should be given when the witness is in fact an accomplice, " . . . but only if the testimony is uncorroborated." **Walker v. State,** 962 So.2d 39, 43 (Ct.App.Miss. 2006),reh denied, cert denied 962 So.2d 38 (2007).

Such is not the state of the testimony here.

POINT 11.

NONE

There is no point 11 in appellant's brief which moves abruptly from point 10 at page 19 to point 12 at page 22.

POINT 12.

THERE BEING NO ERROR IN ANY INDIVIDUAL PART, THERE CAN BE NO ERROR TO THE WHOLE.

Our response to Williams's "cumulative error" argument is found in **Genry v. State**, *supra*, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

> This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. **Jenkins v. State**, 607 So.2d 1171, 1183-84 (Miss. 1992); **Hansen v. State**, 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." **McFee v. State**, 511 So.2d 130, 136 (Miss. 1987).

See also **Wheeler v. State,** 826 So.2d 731, 741 (¶ 39) (Miss. 2002) [Each alleged error discussed individually and no cumulative error found]; **McLaurin v. State,** *supra*, 31 So.3d 1263, 1270 (¶35) (Ct.App.Miss. 2009), citing **Bright v. State,** 894 So.2d 590, 596 (¶31) (Miss.Ct.App. 2004) (quoting **Coleman v. State,** 697 So.2d 777, 787 (Miss. 1997) ["Since McLaurin has failed to show any individual errors, we find no cumulative error that would necessitate reversal of his conviction."]

Contrary to Williams's suggestion otherwise, this is not a proper case for application of the doctrine of either "cumulative" error or "plain" error. It was true in the **Genry** and **McLaurin** decisions, and it is equally true here, that since the appellant failed " . . . to assert any assignments of error containing actual error on the part of the trial judge in this case, this Court finds that this case should not [be] reverse[d] based upon cumulative error." 735 So.2d at 201.

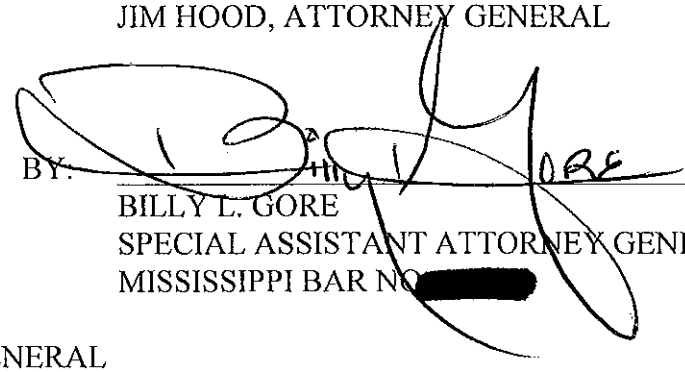
CONCLUSION

Appellee respectfully submits that no reversible error, if error at all, took place during the trial of this cause. Williams was hopelessly guilty.

Accordingly the judgments of conviction of armed robbery and aggravated assault, together with the life sentence fixed by the jury and the twenty (20) year concurrent sentence imposed for aggravated assault should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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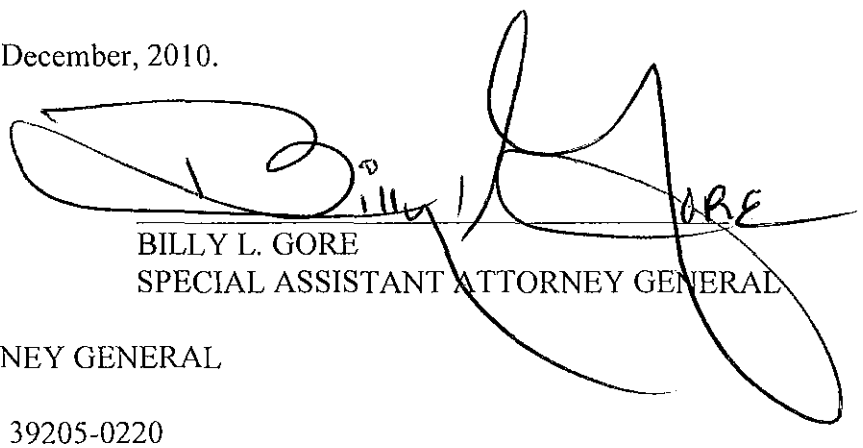
This the 6th day of December, 2010.



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