IN THE MISSISSIPPI COURT OF APPEALS

**No. 2010-KA-00504-COA**

KENDRICK LAMAR WILLIAMS APPELLANT

Vs.

STATE OF MISSISSIPPI APPELLEE

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# BRIEF OF APPELLANT

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Appeal from the Circuit Court of Pike County, Mississippi

**Cynthia A. Stewart MSB** [redacted]
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## CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualifications or recusal.

Kendrick Lamar Williams.
*Appellant/Defendant*

John J. McNeil
*Trial attorney for Defendant*

Cynthia Ann Stewart
*Appellate attorney for Defendant*

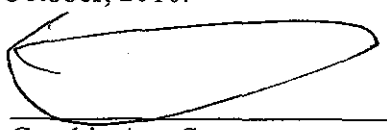
Robert W. Byrd
*Assistant District Attorney*

Jim Hood
*Attorney General*

The State of Mississippi
*Appellee*

Honorable David H. Strong
*Circuit Court Judge, Pike County, Mississippi.*

SO CERTIFIED, this the 8th day of October, 2010.



Cynthia Ann Stewart

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## STATEMENT OF THE ISSUES

1. The trial court erred in refusing defendant's challenge for cause of juror Spears.

2. The prosecution erred in eliciting testimony that Williams' codefendants pleaded guilty.

3. Defense counsel was ineffective for failing to object to the testimony that Williams' codefendants had all pleaded guilty.

4. The prosecution erred in eliciting testimony that could have been considered as witness intimidation evidence.

5. Defense counsel was ineffective for failing to object to the 404(b) evidence.

6. The trial court erred in allowing the prosecution to place Lewis's prior statement into evidence.

7. Trial counsel was ineffective in failing to object to the admission of Lewis's prior statement and in failing to request a limiting instruction. The trial court also erred in failing to sua sponte give a limiting instruction.

8. The prosecution committed misconduct in arguing to the jury that by convicting the defendant, they would be doing their duty as citizens of Pike County.

9. The prosecution committed misconduct in arguing to the jury that by convicting the defendant, they would be doing their duty as citizens of Pike County.

10. Defense counsel was ineffective in failing to object to the prosecutor's misconduct.

11. The trial court erred in refusing the defense's instruction on the credibility of accessories.

12. The errors taken together are cause for a new trial.

## STATEMENT REGARDING ORAL ARGUMENT

Kendrick Lamar Williams does not request oral argument in this case.

## STATEMENT OF THE CASE

Kendrick Williams was indicted by a Pike County grand jury in June, 2009, for an armed robbery and aggravated assault alleged to have occurred on April 11, 2009. Indicted with Williams were Deirdre Patrick Bonds, Aris Joseph and Jodenzo Thompson for accessory to armed robbery. Thompson was also charged with possession of a firearm by a convicted felon. CP. 3; RE. 5.

Eddie Lewis runs the Club Tatiyana. The night of April 10, 2009, was a slow night. Kendrick Williams was there along with some others participating in a game of dice. T. 170. Apparently Williams was losing money and became angry. T. 171. Lewis came over and tried to call him down. "And I told him", Lewis testified, "I said, look, and I called him the N word, if you came in here with your diaper money, you shouldn't have come here." T. 171. Around 1:00 a.m. or 1:30, Jodenzo Thompson came up to Lewis and passed him a gun. T. 172. Thompson told him "I want to give you this gun because I don't want nobody to think nothing funny going on or, you know, nobody going to get, you know, robbed or anything." T. 172.

At some point, Lewis asked everyone to leave because it seemed like another incident was happening. T. 173. Thompson came up to retrieve his gun. T. 172. Everyone left leaving Lewis alone in the club; it took Lewis about ten or fifteen minutes to close the club. T. 174. Meanwhile, Lewis's cousin was in his car out front waiting for Lewis. T. 174. As Lewis was locking the door, he heard someone say "you know what

time it is." T. 175. Lewis turned around and saw a person he later identified as Kendrick Williams with a bandana over his mouth. T. 175. Lewis didn't know Williams and had only spoken to him twice before but testified that he recognized him from his eyes, his voice, height and hair. T. 212. The robber repeated "you know what time it is" two or three times. T. 176. Then he said "give it up." T. 178. As the robber came toward him, Lewis could see a gun in his hand. T. 178. Lewis had around $1000.00 in his pocket. As he started to bring the money out of his pocket, Lewis heard a gun shot. T. 179. Lewis placed the money back into his pocket and told the robber "Nigga, you going to have to kill me now." T. 179. The robber pointed the gun at Lewis's head and pulled the trigger again but this time the gun jammed. T. 182. Lewis took the opportunity to run across the street. T. 83. Lewis reached a porch and the porch light turned on. At that point, the robber ran. T. 184. Lewis went back the club's parking lot where his girlfriend, who had been waiting in her car to drive Lewis home, was asleep. T. 185. Lewis woke her up and told her what happened but she didn't believe him. He then called his father. T. 185. After that he went home. It was only then that he called the police. T. 186, 213.

On cross examination, Lewis admitted that he did not know that it was Williams who was robbing him at the time of the robbery. T. 208. A police officer came to Lewis's house after the robbery and Lewis called someone who had been at the bar that night and described a tattoo on one of the patron's arm and was told that that person was called Denzo. T. 208.

Both Jodenzo Thompson and Aris Joseph pleaded guilty and testified against Williams at trial. T. 120; 152.

Thompson testified they were playing dice at Lewis's club. Williams was losing money. When the club closed around 2:00 a.m., there were about six people left in the club. T. 126. Thompson got into Deidre Bonds' car along with Deidre, Aris Joseph and Kendrick Williams. T. 126. Williams was complaining about how he was going to have to go home and explain to his "old lady" about losing the money. T. 126. As they were driving out of the parking lot, Williams said to stop and open the trunk. T. 127. Williams got out of the car, walked around the car, "and shot down there toward the club." T. 128. Thompson then saw Eddie Lewis run across the street. T. 129. Williams ran back to the car and Deidre drove off. Williams explained that Lewis was about to give him the money when he saw that the gun was jammed and started running. T. 130. Thompson testified that he did not see any of this happen. T. 131. Later, when both Thompson and Williams were in jail, Williams told him 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." T. 135.

The prosecution asked whether Thompson had pleaded guilty to accessory after the fact as well as being a felon in possession of a firearm and Thompson answered that he had. T. 135-136. On cross-examination, Thompson testified that he was sentenced to six months in the Regimented Inmate Discipline (RID) program. T. 146.

Aris Joseph testified that he was at the club that night and Jodena Thomspn and Kendrick Williams were gambling. T. 154. As they were leaving the club, Williams was talking about having lost money. T. 155. As they pulled out of the parking lot, Williams said to Deidre to stop the car and open the trunk. T. 156. He went into the trunk and left going toward the club. T. 156-157. Joseph testified that he heard a shot and then

Williams came back to the car carrying a gun. T. 157-158. Joseph then saw Eddie Lewis run across the road. T. 158.

The prosecutor asked Joseph whether he had pleaded guilty to accessory after the fact. T. 161. Joseph replied that he had. T. 161. On cross-examination, Joseph testified that he, too, was sentenced to six months in the RID program. T. 164.

The defense called Officer Gregory Keith Patterson. He testified that in the incident report, the suspect was identified as Jodenzo Thompson. T. 231.

The trial began on February 23, 2009. On February 24, 2009, the jury found Williams guilty of aggravated assault and armed robbery. CP. 36; RE. 9. For the latter, the jury imposed a life sentence. CP. 36; RE. 9. Thereafter, the court imposed a life sentence for the armed robbery and twenty years for the aggravated assault with the sentences to run concurrently. CP. 39; RE. 12.

## SUMMARY OF THE ARGUMENT

Numerous errors were committed in this case depriving Kendrick Williams of his right to due process and a fair trial. First of all, the trial court denied Williams' challenge for cause of a potential juror who stated that the mere fact that Williams was on trial led her to believe there must be some evidence against him. The trial court denied the challenge for cause on the mistaken basis that it was defense counsel's duty to rehabilitate the juror.

The prosecution committed error when it announced during opening argument that all of Williams' codefendants pleaded guilty. When two of the codefendants testified against Williams, the prosecution elicited testimony that they had both pleaded guilty to

the charges in the indictment in which they were named with Williams. Defense counsel was ineffective in failing to object to this argument and testimony.

During Lewis's testimony, the prosecution elicited testimony about an encounter between Lewis and Williams after Williams bonded out of jail. This encounter could have been interpreted as an attempt to intimidate Lewis. As such, it was inadmissible 404(b) evidence. Again, defense counsel was ineffective in failing to object to said evidence.

Lewis had given a statement to the police after the alleged robbery. Defense counsel questioned Lewis about some particulars of the statement. On redirect, the prosecution introduced the statement into evidence and, in closing, urged the jury to use the statement as substantive evidence of Williams' guilt. Not only did defense counsel fail to object to the admission and use of Lewis's prior statement, defense counsel agreed to admit the statement. Both trial counsel and the court erred in failing to request and/or give the jury an instruction limiting their use of Lewis's prior statement.

The prosecution committed misconduct in arguing that the jurors would be doing their duty as citizens of Pike County in finding Williams guilty. Defense counsel failed to object to this improper argument.

And while defense counsel asked for the standard instruction cautioning jurors about the use of codefendants' statements, the trial court refused to give the instruction.

Finally, the cumulative effect of these errors denied Williams due process and a fair trial.

## LAW AND ARGUMENT

### 1. The trial court erred in refusing defendant's challenge for cause of juror Spears.

During voir dire, defense counsel asked "does anyone here believe that a person, just because he is charged with a crime, is probably guilty of that crime?" T. 63. A Ms. Spears, juror no. 44, indicated that she would. "Well," Ms. Spears stated, "I would say, yes, more on the probable side, because they have to have enough evidence to bring it to a case. But I would still be fair." T. 63.

At the end of voir dire, defense counsel asked that Ms. Spears be removed for cause. T. 76. The trial court denied the challenge on the basis that defense counsel never followed up to explain the law to her and find out whether she would still say that she would start out believing that there was evidence that Williams was guilty. "I just don't think you went back to her with it", the court stated. T. 76. "I think some more questions should have been asked. And, perhaps, shame on me for not asking them." T. 76.

"One of the fundamental hallmarks of our legal system is an accused's right to a fair trial before an impartial jury." *Hickson v. State,* 707 So.2d 536, 541 (Miss.1997). The trial court is required to "guard against even the appearance of unfairness" when impaneling a jury. *Mhoon v. State,* 464 So.2d 77, 81 (Miss.1985).

A juror who starts out believing that there must be some evidence of guilt prior to having heard any evidence is not the impartial juror contemplated by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution or Art. 3, §§ 14 and 26 of the Mississippi Constitution. Where a juror, because of his relationship to one of the parties, his occupation, his past experience or for other reasons, would normally lean in

favor of the prosecution, then his ability to be fair and impartial is impaired, and he should be excused even though he has stated that the relationship will not affect his verdict. *Scott v. Ball*, 595 So.2d 848, 850 (Miss. 1992) (juror should have been excused for cause where physician-party had treated his family but was not family doctor); *Montgomery v. State*, 828 So.2d 816, 821 (Miss.App. 2002) (prospective juror was properly excused for cause after he expressed his opinion that defendant was guilty based on his dirty clothing). . This is particularly true, where, as here, additional jurors could have been readily summoned without great difficulty. *Scott*, 595 So.2d at 850.

Moreover, once a juror has expressed that she has preconceived notions of a defendant's guilt, it is not defense counsel's duty to rehabilitate the prospective juror. "[I]t is the duty of the court to see that a competent, fair, and impartial jury is impanelled [citation omitted]." *Hudson v. Taleff*, 546 So.2d 359, 363 (Miss. 1989).

In the context of qualifying jurors in a death penalty case, the Mississippi Supreme Court has stated "that if there is any question concerning whether a prospective juror may be properly excluded for cause based on his views on capital punishment, **the trial judge should conduct his own independent examination** of the jurors to determine whether they can follow the testimony, the instructions, and their juror's oath and return a verdict of guilt even though such a verdict could result in the imposition of the death penalty." *Williamson v. State,* 512 So.2d 868, 881 (Miss. 1987) (emphasis added).

> [I]t is not defense counsel's obligation to rehabilitate a juror who has responded to questions in a manner that would sustain a challenge for cause. The appropriate procedure, when the record preliminarily establishes that a juror's views could prevent or substantially impair his or her duties, is for either the prosecutor or the judge to make

> sure the prospective juror can be an impartial member of the jury.

*Bryant v. State*, 601 So.2d 529, 531 -532 (Fla. 1992).

In this case, it was the trial court's duty to determine whether the juror could set aside any preconceived notion of the defendant's guilt based on the mere fact that he was on trial. When the trial court failed in this duty, it had no choice but to grant Defendant's challenge for cause.

**2. The prosecution erred in eliciting testimony that Williams' codefendants pleaded guilty.**

Sheriff's Deputy Jeff Honea testified that he was one of the people investigating the armed robbery at Club Tatiyana. T. 107. Eddie Lewis told him who he thought the shooter was. T. 222. One of the people Lewis identified was Jodenzo Thompson. Honea tracked Thompson and his girlfriend down and brought them in for questioning. T. 111. Honea testified that he also interviewed Aris Joseph, Deirdre Patrick Bonds, Jodenzo Thompson and the defendant. T. 112. Williams admitted being at the scene. T. 112. The others admitted being with Williams, knowing about the armed robbery and driving him away from the scene. All but Williams, Honea testified, admitted their guilt and were sentenced. T. 113. Indeed, Thompson and Joseph both testified against Williams and the prosecution elicited from both of them the fact that they had pleaded guilty to crimes associated with the armed robbery with which Williams was charged.

Honea's testimony and elicitation of evidence that Williams' codefendants all pleaded guilty was error. *Ivy v. State,* 301 So.2d 292 (Miss.1974); *Buckley v. State,* 223 So.2d 524 (Miss.1969); *State v. Thornhill,* 251 Miss. 718, 171 So.2d 308 (1965).

Appellate courts have found the admission of a co-conspirator's plea of guilty, while incompetent as substantive evidence of the defendant's guilt, may be admissible for other purposes. *United States v. Medley,* 913 F.2d 1248, 1257-58 (7th Cir.1990); *United States v. Davis,* 766 F.2d 1452, 1456 (10th Cir.), *cert. denied* 474 U.S. 908, 106 S.Ct. 239, 88 L.Ed.2d 240 (1985); *United States v. Wiesle,* 542 F.2d 61, 62-63 (8th Cir.1976); *State v. Padgett,* 410 N.W.2d 143, 146 (N.D.1987); *People v. Brunner,* 797 P.2d 788, 789 (Colo.Ct.App.1990). In this case, however, there was no "other purpose" for which the evidence of Williams' codefendants' guilty pleas was introduced.

In *Fulgham v. State,* 386 So.2d 1099 (Miss. 1980), the Mississippi Supreme Court reversed where the judge accepted the codefendant's plea of guilty in front of the jury panel that was about to start hearing the defendant's case. *Fulgham,* 386 So.2d at 1100. "[T]he fact that both men were called for trial in the same case with one changing his plea and being sentenced in the presence of the jury panel that was to try both at the same time would, in all probability, cause to consider this situation as laymen." *Fulgham,* 386 So.2d at 1101.

In this case, there was no legitimate reason to inform the jury that all of Williams' codefendants pleaded guilty. This evidence did nothing but prejudice the jury. As such, Williams' convictions and sentences should be reversed and remanded for a new trial.

3. **Defense counsel was ineffective for failing to object to the testimony that Williams' codefendants had all pleaded guilty.**

Defense counsel failed to object to Honea's disclosure that Williams' codefendants had all pleaded guilty and had been sentenced. T. 113. The failure of defense counsel to object to such testimony amounted to ineffective assistance of counsel. The Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 675 (1984). Courts have long recognized that in order to render constitutionally adequate effective assistance of counsel, an attorney must provide "an intelligent and knowledgeable defense on behalf of his client. *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1979). In *Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983), the Fifth Circuit held that an attorney who failed to preserve error for appeal rendered ineffective assistance of counsel.

4. **The prosecution erred in eliciting testimony that could have been considered as witness intimidation evidence.**

After Lewis testified about the robbery, he testified that some weeks later, he was standing in line to purchase something when someone tapped him on the shoulder. It was Kendrick Williams who told him that he was out of jail because the courts knew that Williams was telling the truth [when he stated he didn't do the robbery]. T. 187. Lewis testified he was upset because no one had warned him that Williams had bonded out of jail. T. 187. He closed his club and started carrying his pistol everywhere. T. 186-188.

This evidence had no relevance as to alleged robbery of Lewis or the identity of the alleged perpetrator. It could have, however, left the jury feeling that Williams was attempting to intimidate Lewis even though he was never charged with having done so

and in light of the fact that Lewis testified that he closed his club and started carrying his gun with him everywhere.

Davis's trial counsel objected to **none** of this evidence even though M.R.E. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith...." M.R.E. 404(b). *See also Eubanks v. State,* 419 So.2d 1330, 1331 (Miss.1982) ("Mississippi follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused."). "This rule exists to prevent the State from suggesting that, since a defendant has committed other crimes previously, the probability is greater that he is also guilty of the offense for which he is presently charged." *Jasper v. State,* 759 So.2d 1136, 1141 (Miss.1999). *See also Floyd v. State,* 166 Miss. 15, 148 So. 226, 230 (1933) ("[s]uch evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him.").

The evidence of Williams' statement to Lewis some weeks after the alleged robbery and Lewis's testimony that he had to carry a gun after he learned that Williams was out on bond were not relevant to Williams' guilt or innocence but could have led the jury to believe that Williams was attempting to intimidate Lewis. As such, the introduction of this evidence was reversible error.

**5. Defense counsel was ineffective for failing to object to the 404(b) evidence.**

Reasonably competent counsel would have objected to the evidence of Williams' encounter with Lewis after the robbery. An attorney who fails to object to inadmissible evidence renders constitutionally ineffective assistance of counsel. *Davis v. State*, 743 So.2d 326, 338 (Miss. 1999). *See also Holland v. State,* 656 So.2d 1192, 1198 (Miss. 1995) (holding that counsel who failed to object to an arguably inadmissible confession was constitutionally ineffective where, as here, the evidence was highly damaging); *Holland v. State,* 656 So.2d 1192 (Miss. 1995) (failure to preserve error for review constitutes ineffective assistance of counsel); *United States v. Demelio*, 2009 WL 3698110, 3 (W.D.Pa.) (ordering evidentiary hearing on petitioner's issues including issue whether counsel was ineffective for failing to object to 404(b) evidence). See also, *State v. Al Bayyinah*, 356 N.C. 150 (2002) (reversing death row inmate's convictions because evidence improperly admitted under 404(b)) "The dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subject to strict scrutiny by the courts." *Al Bayyinah*, at 154.

**6. The trial court erred in allowing the prosecution to place Lewis's prior statement into evidence.**

In cross-examining Lewis, defense counsel questioned him about inconsistencies between his current testimony and the statement he gave to Detective Honea after the robbery. T. 204. On redirect, the prosecution moved to introduce the statement into evidence and the trial court allowed it. T. 212; S-3. This was error inasmuch as prior unsworn statements are not admissible as substantive evidence.

Unsworn prior inconsistent statements are generally not admissible as substantive evidence in a criminal case. M.R.E. 801(d)(1)(A). They may, however, may be used to impeach a witness' credibility. M.R.E. 613(b) states:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. . . .

M.R.E. 613(b).

Furthermore, a prior unsworn statement used to impeach a witness is not to be used as substantive evidence. *Moore v. State*, 755 So.2d 1276 (Miss. App. 2000); *Moffett v. State,* 456 So.2d 714, 719 (Miss. 1984) (firmly embedded in hornbook and case law that unsworn prior inconsistent statements are admissible only for impeachment); *Davis v. State,* 431 So.2d 468, 473 (Miss. 1983) (admissible only to impeach); *Sims v. State*, 313 So.2d 388, 391 (Miss. 1975) (only for impeachment).

During his closing argument, the prosecution read from Lewis's statement:

> And in looking at the statement, the two-page statement, not the little brief explanation that was written by an officer on the scene when the man reported but the two-page statement which says – from the victim – At first I thought the boy that stayed across the road was playing a trick on me whenever this man came up and put a gun to his face with a bandanna. Then, as he came closer, I know that it was not him, but the guy that was with Joe, not Joe. Then he pointed the gun.
>
> (Clerk indicated time was up)
>
> Mr. Byrd: -- then he pointed the gun –
>
> The Court: All right, Mr. Byrd.

Closing argument by Mr. Byrd: (Cont.)

> Mr. Byrd: -- and shot one more time, and the gun jammed and he ran. Ladies and gentlemen, **that's all the evidence you need to find this defendant guilty beyond a reasonable doubt**, beyond any doubt, that he committed armed robbery and should go to jail for life, and that he committed aggravated assault on the victim, Mr. Eddie Lewis, on April 11.

T. 261 (emphasis added).

By telling the jury that it needed only to look at Lewis's prior statement to return a verdict of guilt, the prosecution was using Lewis's prior statement as substantive evidence. For this reason, Williams' convictions and sentences should be reversed and remanded for a new trial.

**7. Trial counsel was ineffective in failing to object to the admission of Lewis's prior statement and in failing to request a limiting instruction. The trial court also erred in failing to sua sponte give a limiting instruction.**

Trial counsel not only failed to object to the prosecutions introduction of Lewis's prior statement (indeed, trial counsel agreed with its admission), he failed to request an instruction that would have limited the jury's use of the statement. Nor did the trial court give such an instruction.

Rule 105, M.R.E. states:

> When evidence which is admissible as to one part or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, **shall** restrict the evidence to its proper scope and instruct the jury accordingly [emphasis added].

As this and other courts have observed, upon request, the trial judge should give a cautionary instruction when such evidence is admitted. *Id. See, Brown v. State,* 755 So.2d at 1280 (court could give an instruction on limited application of the evidence); *Harrison v. State,* 534 So.2d 175, 179 (Miss. 1988) (trial judge could *sua sponte* instruct); *Kolberg v. State,* 829 So.2d 29, 45 (Miss. 2002) ("[t]here is no doubt that the trial court is ultimately responsible for rendering proper guidance to the jury via appropriately given jury instructions, even *sua sponte.*"); *Bailey v. State,* 952 So.2d 225, 238 (Miss. App. 2006).

However, at the same time, courts have observed that it is unlikely that the jury is able to compartmentalize evidence limiting the use of prior inconsistent statements to impeachment regardless of how well they are instructed. *Harrison v. State,* 534 So.2d 175, 179 (Miss. 1988); *Flowers v. State,* 773 So.2d 309, 327 (Miss. 2000). For example, in *Moffett v. State,* 456 So.2d 714, 720 (Miss. 1984), although the trial judge instructed on the proper use, the court opined that the error was not cured. The Fifth Circuit has said, "we have acknowledged, as have many others, that the legal distinction between using a statement to destroy credibility and to establish the stated fact 'is a fine one for the lay mind to draw.' *Dowell, Inc. v. Jowers,* 166 F.2d 214, 219 (5th Cir. 1948) cert. denied 334 U.S. 832, 68 S.Ct. 1346, 92 L.Ed. 1759." *Slade v. United States,* 267 F.2d 834, 839 (5th Cir. 1959).

Where the prosecution argues that the evidence should be used substantively, this Court has noted that even a well-instructed jury would "have had a difficult chore distinguishing between the substantive and impeachment evidence." *Brown v. State,* 556 So.2d 338, 341 (Miss. 1990). *See also discussion of the history of Rule 607 in Wilkins v.*

*State,* 603 So.2d 309, 319 (Miss. 1992) (permitting a jury to hear such testimony and then instructing it not to consider it except for "impeachment" has been called by one scholar "a pious fraud."); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv.L.Rev. 177, 193 (1948)).

As the Mississippi Supreme Court has repeatedly held, it is ultimately the duty of the trial judge to ensure that the jury is properly instructed on the law on important issues in the case. *See, Harper v. State,* 478 So.2d 1017, 1023 (Miss. 1985). The Court did not do so here, and that error is reversible because the jury was told by the prosecution to use the prior inconsistent statement as evidence of Williams' guilt. By not having the jury instructed on a critical issue, Williams was deprived of his constitutional rights to present a defense and was denied a fair trial, requiring reversal of his conviction.[1]

Where the prosecution argues that the evidence should be used substantively, the Mississippi Supreme Court has noted that even a well-instructed jury would "have had a difficult chore distinguishing between the substantive and impeachment evidence." *Brown v. State,* 755 So.2d at 341. *See also, discussion of the history of Rule 607 in Wilkins v. State, supra* at 319 (permitting a jury to hear such testimony and then instructing it not to consider it except for "impeachment" has been called by one scholar "a pious fraud." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv.L.Rev. 177, 193 (1948)]; *King v. State,* 994 So.2d 890, 897-898 (Miss.App. 2008).

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[1] The Sixth and Fourteenth Amendments of the United States Constitution and Art. 3, §§14, 26 and 31 of the Mississippi Constitution guarantee a defendant the right to due process, a fair trial and the right to present a defense through witnesses or cross-examination. An accused's right to "establish a defense" is a "fundamental element of due process." *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

This Court has held that a trial judge commits plain error by failing to instruct that such statement may not be used as substantive evidence. In *Moore v. State,* 755 So.2d 1276, 1280 (Miss. App. 2000), the prosecution introduced two statements from accomplices implicating Moore after the witnesses took the stand and denied that Moore had participated in the crime. The Court reversed because it found that without a limiting instruction, "a principle of law applicable to this case was not explained to the jury, and the jury was improperly allowed to consider the witnesses' prior statements as evidence of Moore's participation in the crimes charged. Consequently, the jury instructions were inadequate to render a fundamentally fair trial." *Moore*, 755 So.2d at 1280. In this case, the failure of the court to instruct the jury that it could not use Lewis's prior statement as substantive evidence was reversible error.

**8. The prosecution committed misconduct in arguing to the jury that by convicting the defendant, they would be doing their duty as citizens of Pike County.**

At the start of his final closing argument, the prosecutor argued to the jury the following:

> Ladies and gentlemen, what you're going to tell your family and friends is that you did your job and your duty as citizens of Pike County, Mississippi, when you convicted this man for shooting at, robbing – committing armed robbery and committing aggravated assault on Eddie Lewis on April 11.

T. 255.

It is improper for a prosecutor to inform the jurors that if they found a guilty verdict on all counts they would fulfill their oath and discharge their function as jurors, or

for a prosecutor to request the jury to convict a defendant for any reason other than his or her guilt. *Arthur v. State*, 575 So.2d 1165, 1185 (Ala.Crim.App. 1990) (the prosecutor is in error, in exhorting the jury to "do its job," to imply that, in order to do so, it can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law); *United States v. Young*, 470 UI.S. 1, 30, 105 S.Ct. 1038, 1053, 84 L.Ed.2d 1, 22 (1985) (Brennan, J., concurring in part and dissenting in part) ("Many courts historically have viewed such warnings about not 'doing your job' as among the most egregious forms of prosecutorial misconduct"); *State v. Pennington*, 575 A.2d 816, 831 (N.J. 1990).

Defense counsel made no objection to any of the argument; however, this Court has repeatedly held that "in cases of prosecutorial misconduct, we have held 'this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'" *Randall v. State,* 806 So.2d 185, 210 (Miss. 2001) quoting *Mickell v. State,* 735 So.2d 1031, 1035 (Miss. 1999). The prosecution's argument that the jurors would be doing their duty as citizens of Pike County in finding Williams guilty was error and Williams' convictions and sentences should be reversed.

**9. Defense counsel was ineffective in failing to object to the prosecutor's misconduct.**

Reasonably competent counsel would have objected to the prosecution's argument that the jury members had a duty as citizens of Pike County to find Kendrick Williams guilty. An attorney who fails to object to improper evidence or argument renders constitutionally ineffective assistance of counsel. *Davis v. State*, 743 So.2d 326, 338 (Miss. 1999). *See also Holland v. State,* 656 So.2d 1192, 1198 (Miss. 1995) (holding that counsel who failed to object to an arguably inadmissible confession was constitutionally ineffective where, as here, the evidence was highly damaging); *Holland v. State,* 656 So.2d 1192 (Miss. 1995) (failure to preserve error for review constitutes ineffective assistance of counsel); *United States v. Demelio*, 2009 WL 3698110, 3 (W.D.Pa.) (ordering evidentiary hearing on petitioner's issues including issue whether counsel was ineffective for failing to object to 404(b) evidence).

**10. The trial court erred in refusing the defense's instruction on the credibility of accessories.**

Defense counsel requested an instruction that would have guided the jury on its use of Williams' codefendants' testimony. CP. 35, D-9; RE. 8. The trial court denied the instruction.

The instruction would have informed the jury as follows:

> The court instructs the jury that the law looks with suspicion and distrust on testimony of accessories to a crime and requires the jury to weigh the 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.

CP. 35; RE. 8.

Under Mississippi law, the trial court should grant this accomplice testimony instruction when an accomplice testifies against a defendant and that accomplice has received favorable treatment in exchange for that testimony. In this case, Williams' codefendants Thompson and Joseph testified against Williams and were given relatively light sentences of six months in the RID program. The Mississippi Supreme Court has ruled that it was error for an accomplice testimony jury instruction to be denied even though another general instruction on the credibility of witnesses was given because no instruction advised the jury to view with "caution and suspicion" the testimony of an accomplice. *Moore v. State,* 787 So.2d 1282, 1286 (Miss. 2001) (accomplice was released on own recognizance after giving statement to police concerning defendant and accomplice's case was later ordered nolle prosequi); *Cole v. State,* 217 Miss. 779, 785, 65 So.2d 262, 264 (1953) (theft conviction reversed and remanded, testimony of accomplice should be viewed with great caution and suspicion).

Plainly, the refusal to instruct the jury to consider the codefendants' testimony with great care and caution was reversible error in this case. *Wheeler v. State*, 560 So.2d 171 (Miss. 1990) (instruction telling jury to view testimony with "great care" insufficient; defendant entitled to an instruction that testimony should be viewed with "caution and suspicion"). Other courts have so held. For example, in *United States v. Partin*, 493 F.2d 750 (1974), the Fifth Circuit held that the trial court committed reversible error in failing to instruct the jury to approach with great care and caution the testimony of an interested witness or a witness who had given prior inconsistent statements. The failure to

specifically instruct was prejudicial error despite a general instruction on how to assess witness credibility. *Partain*, 493 F.2d at 760.

The Mississippi Supreme Court in *Williams v. State,* 32 So.3d 486 (Miss. 2010), held that a defendant was not required to show that an accomplice's testimony was unreasonable, self-contradictory, or substantially impeached in order to obtain a cautionary instruction telling the jury that such testimony should be viewed with great care and caution. Rather, the Court held that a defendant is entitled to a cautionary instruction whenever the accomplice's testimony is the sole basis for conviction and the defendant's guilt is not otherwise clearly proven. In determining whether an instruction is warranted, the testimony of the accomplice which must be corroborated is the portion which ties the defendant to the crime. According to the Court, it is "irrelevant" whether the accomplice's testimony is corroborated as to other details. *Williams,* 32 So.2d at 491-92.

The failure to give such an instruction has constitutional implications. In *United States v, Cervantes-Pacheco,* 826 F.2d 310 (5th Cir. 1987) (en banc), the Fifth Circuit, for example, considered the due process implications of allowing paid informants to testify at all. The Court held that so long as certain safeguards were in place to protect against abuses, the use of such informants did not violate due process. Significantly, included among those safeguards is the requirement that the jury be instructed that such testimony is to be weighed with great care and caution. *Cervantes-Pacheco*, 826 F.2d at 316

Again, because the failure to so instruct implicates the defendant's due process rights to a fair trial, the state bears the burden of demonstrating that the error is harmless

beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

**12. The errors taken together are cause for a new trial.**

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial may, when taken together, require reversal. *Stringer v. State*, 500 So.2d 928, 946 (Miss. 1986); *Hickson v. State*, 472 So.2d 379, 385-86 (Miss. 1985); *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) (reversing based on various evidentiary errors resulting in a denial of due process). If this Court finds that no single error in this case calls out for reversal of the convictions and/or sentences, it should nonetheless consider a new trial based on the combination of prosecutorial misconduct that prevented Kendrick Williams from obtaining a fair trial.

**Conclusion**

For the above and foregoing reasons, this Court should reverse Kendrick Williams' convictions and remand for a new trial.

Respectfully submitted,

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## CERTIFICATE OF FILING AND SERVICE

I, Cynthia Ann Stewart, Attorney for the Appellant, certify that I have this day served a copy of the Appellant's Brief by United States mail, first class postage prepaid , to:

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Hon. David H Strong Jr.
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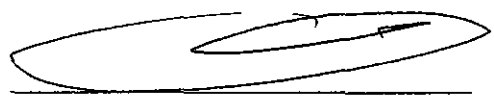
And mailed the original and four (4) copies for filing (along with a copy on CD-ROM in PDF format) to the Clerk of the Mississippi Appellate Court at P. O. Box 249, Jackson, Mississippi 39205.

This, the 7th day of October, 2010.



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