IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01050 COA

MARK BARNES A/K/A MARK D. BARNES **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	SEPTEMBER 22, 1995
TRIAL JUDGE:	HONORABLE KEITH STARRETT
COURT FROM WHICH APPEALED:	WALTHALL COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CHARLES E. MILLER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	DUNN LAMPTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ARMED ROBBERY & CONSPIRACY TO COMMIT THE CRIME OF ARMED ROBBERY: 25 YRS FOR ARMED ROBBERY; 5 YRS FOR CONSPIRACY TO COMMIT ARMED ROBBERY, RUN CONCURRENT WITH LAST 8 YRS SUSPENDED FOR 5 YRS PROBATION; PAY COURT COSTS & $1, 000.00 VICTIM COMPENSATION FUND
DISPOSITION:	AFFIRMED 12/16/97
MOTION FOR REHEARING FILED:	12/13/97
CERTIORARI FILED:	
MANDATE ISSUED:	4/28/98

EN BANC

SOUTHWICK, J., FOR THE COURT:

Barnes was convicted by a jury in the Circuit Court of Walthall County of armed robbery and conspiracy to commit armed robbery. Barnes challenges his conviction with these arguments: (1) the

trial court erred in denying a motion to suppress statements and evidence; (2) the verdict was against the overwhelming weight of the evidence; and (3) the sentence imposed by the trial court was disproportionate to the sentences of the other assailants. We find no error and affirm.

FACTS

On March 1, 1995, two masked gunmen entered Bonnie's Country Store and ordered the owner and two customers to "hit the floor." The taller assailant, dressed in a clown outfit with a clown mask, carried a twelve gauge sawed-off shotgun. The other gunman, covered by a bandana, displayed an "Uzi" automatic pistol. After realizing that the incident was not a practical joke, the owner escaped out the back door of the store while the customers complied with the assailants' demands. The owner flagged down a passing motorist and called law enforcement officials from a nearby house. Meanwhile, the two assailants fled from the store without taking any property and without injuring the customers.

Applewhite and Barkdull, the responding officers, obtained a description of the assailants and began to search the surrounding area. The officers recovered a clown mask and other clothing worn by the assailants. Several witnesses also informed the officers that they observed a black Ford Tempo leaving the vicinity of the store. After further inquiry, the officers discovered that the automobile was a rental car. The officers proceeded to the rental agency and learned that the automobile, rented by Mark Barnes, was due later that afternoon. As scheduled, Barnes returned the rental car which was followed by a second automobile containing two individuals. Posing as employees of the rental agency, the officers questioned Barnes and the two occupants of the other automobile.

The officers obtained consent from the driver to search the second automobile. After searching the automobile, the officers discovered an "Uzi" automatic pistol and approximately a pound of marijuana. The officers placed Barnes and the other two occupants under arrest for possession of marijuana. The suspects were advised of their *Miranda* rights and placed in the police vehicles. While in the police vehicle, Officer Barkdull questioned Barnes about his potential involvement in the store robbery. Barnes informed Barkdull that he was in the rental car during the robbery, but had not actually gone into the grocery store. Barnes claimed that only the two other individuals entered the store. Eventually, Barnes directed the officers to the location of the shotgun used in the robbery, which was hidden in a wood pile behind his mother's house. Later, Barnes signed a written confession and a printed waiver of rights form.

Following a trial in the Circuit Court of Walthall County, a jury found Barnes guilty of armed robbery and conspiracy to commit armed robbery. The two other individuals pled guilty to robbery and armed robbery and conspiracy to commit armed robbery.

DISCUSSION

I. SUPPRESSION OF CONFESSION AND EVIDENCE

On appeal, Barnes asserts that the trial court erred in failing to suppress his confession and his subsequent actions which lead to the recovery of the weapon. He contends that the confession was not voluntary because Officer Barkdull induced him with promises of leniency. As a result of this alleged inducement, Barnes argues that his statements to the officers and his revealing the location of

the weapon were inadmissible under the exclusionary rule.

Prior to trial, the court conducted a suppression hearing to determine whether Barnes's statements and the recovered weapon were admissible. Officer Barkdull testified that while Barnes was in the police vehicle he asked Barnes if he understood his rights. After Barnes responded affirmatively, Barkdull stated that he inquired into the location of the other gun. According to Barkdull, Barnes then informed him: "I can take you to it, it's at my house." On cross-examination, Barkdull testified as follows:

> Q. Did you at any time state to Mr. Barnes that if he were to help you you'd help him, you'd assist him in some way?
>
> A. No, not that I would help him.
>
> Q. What did you say to him?
>
> A. That it could help him.
>
> Q. That it could help him.
>
> A. Yes.
>
> Q. And after that you said that he needed to tell Officer Applewhite the truth, is that correct?
>
> A. I made that statement, yes.
>
> Q. And that if he were to tell the truth that it could help him, is that correct?
>
> A. That it could help, it sure couldn't hurt.

After Barnes talked with Applewhite, Barkdull testified that Barnes led the officers to the location of the weapon, and later gave a taped and written statement following a second warning of his *Miranda* rights.

At the close of the suppression hearing, the trial judge concluded that under a totality of the circumstances, i.e., considering all the facts that he just heard, the statement was made knowingly and voluntarily. Accordingly, the trial court ruled that the statement made by Barnes to Barkdull in the police vehicle, the cooperative actions by Barnes in leading the officers to the weapon, and the subsequent written statement given by Barnes were all admissible. The jury, however, was never told that Barnes had said that he was in the car when the robbery occurred.

During the trial, Barnes requested the court to reconsider its ruling on the motion to suppress. The trial court granted Barnes's request and conducted a second suppression hearing. The testimony elicited at this suppression hearing was essentially the same as the testimony from the earlier hearing. Barkdull remembered the phrase as being "it couldn't hurt" if Barnes talked and that "it's best if you tell the truth" rather than "it could help him." Nonetheless, the trial court reached the same conclusion as it did in the earlier hearing. The court found that Barnes had been advised of his *Miranda* warnings and that Barnes gave a statement that was admissible along with the recovered weapon.

The determination of whether a confession was freely and voluntarily given is a finding of fact for the trial court. ***Layne v. State,* 542 So. 2d 237, 239 (Miss. 1989).** The trial court must resolve "whether the accused has been adequately warned, and whether, under the totality of the circumstances, he has voluntarily and intelligently waived his privilege against self-incrimination." ***Id.*** The State has the burden of proving all facts relevant to the admissibility of the confession beyond a reasonable doubt. ***Blue v. State*, 674 So. 2d 1184, 1204 (Miss. 1996).** We will not reverse the decision of the trial court unless it is manifestly in error, or is contrary to the overwhelming weight of the evidence. ***Hunt v. State,* 687 So. 2d 1154, 1160 (Miss. 1996).**

Barnes asserts that when the officer used the phrase "it could help" if he talked, a forbidden "magic words" phrase was uttered. In Barnes's view, such words are always held to overpower the will of a suspect. To the contrary, the United States Supreme Court has held that whether a confession is the product of free will depends on the facts of each case, and "[n]o single fact is dispositive." ***Brown v. Illinois*, 422 U.S. 590, 603 (1975)** (confession after illegal arrest).

Next, it is important in determining what the totality of circumstances reveal here, that in response to these "irresistible" words of inducement to tell the truth, Barnes told what the trial jury in effect found to be a lie. He told the officer that he had not been involved in the robbery, that even though he had been in the car outside at the time of the crime, he had not participated. He knew where one of the guns used in the crime was hidden and agreed to take the officers to it. It is the knowledge of the location of that weapon that is the incriminating part of the statement; the jury was never told the rest of what Barnes said about having been in the car when the robbery occurred. Other witnesses placed Barnes inside the store, holding a weapon.

In relying on evidence that Barnes lied as support for finding that his free will was not overwhelmed, we are not ignoring case law that the veracity of the statement cannot be a factor in determining its voluntariness. One case counsels that "the trial judge must absolutely resist any inclination to consider whether the confession is truthful or authentic; the focus must be limited to the voluntariness of the confession." ***Abram v. State,* 606 So. 2d 1015, 1031 (Miss. 1992).** To determine what the *Abram* court meant, we turn to the case cited for the point, ***Powell v. State,* 540 So. 2d 13, 15 (Miss. 1989).** In that case the prosecution at the hearing conducted on the voluntariness of the statement, questioned the defendant on its truthfulness and on "several other issues besides voluntariness." ***Powell,* 540 So. 2d at 15.** The court found that such questioning can inhibit a defendant's willingness to testify at a suppression hearing and is improper. ***Id.*** From the other cases cited, it is clear that the court was requiring that the reliability and usefulness of a confession in proving guilt not be a factor in determining whether it should be admitted. This is nothing more than keeping trial courts focused on the constitutional requirement that even good evidence may have to be excluded if it was improperly acquired. The salutary purpose of barring questioning of a defendant at a suppression hearing regarding *truthfulness* does not prevent other evidence of *untruthfulness* from being considered if it is a central element of improper inducements.

Powell itself relies on a United States Supreme Court decision that predates ***Miranda v. Arizona,* 384 U.S. 436 (1966).** That pre-*Miranda* decision held that a trial court determining voluntariness could not use "a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." ***Rogers v. Richmond,* 365 U.S. 534, 543-544 (1961).** The court elaborated by noting

the "consideration of the 'reliability' element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known." ***Rogers,* 365 U.S. at 545.** All *Rogers* means is that if reliability is the focus of a suppression hearing, this tends to encourage a trial court to allow admission despite evidence showing involuntariness. As Justice Frankfurter stated in a famous part of the *Rogers* opinion, involuntary confessions are inadmissible "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal laws. . . ." ***Id.* at 541**. None of that means that if the invalidity of a statement helps demonstrate that it was not the product of inducements to tell the truth, that such evidence is inadmissible.

Reading any of these cases in a vacuum is dangerous. In 1961 there was no *Miranda*decision. Applying the standards of the Due Process Clause to the means by which statements were procured was only a twenty-five year-old requirement, one that ended what in many states had been a requirement only that the reliability of a confession be determined. ***Brown v. Mississippi,* 297 U.S. 278, 286 (1936); Charles H. Whitebread & Christopher Slobogin, Criminal procedure 368 (1993).** Reminding judges that the reliability standard was dead is exactly what Justice Frankfurter was doing. The Due Process approach itself died three years later when the Fifth Amendment was applied for the first time to the states. ***Malloy v. Hogan,* 378 U.S. 1, 6 (1964).** Thus when the Mississippi Supreme Court in *Abram* held that the defendant cannot be asked about the authenticity of his statement, this is what it was discussing. Judges themselves are not to be tempted by the displeasure of excluding an accurate confession; thus accuracy is not a separate issue for a suppression hearing. If the inaccuracy of a statement is probative of whether a suspect's free will was overawed by words that there could be benefits in telling the truth, nothing in this line of cases would prevent the consideration of that evidence.

We next turn to whether there are in fact certain "magic words" and phrases that the state supreme court has held automatically render a resulting statement involuntary. The *Abram* court gave an overview of its own case law in this area by stating that it had "repeatedly condemned the practice whereby law enforcement interrogation, or related third parties, convey to suspects the impression, however slight, that cooperation by the suspect might be of some benefit." ***Abram,* 606 So. 2d at 1031.** What the court meant must be examined in context, and the context is each case cited to support the summary.

In order to make a meaningful comparison to the precedents, we need to recall the suspect statements made in this case. Officer Barkdull said during the suppression hearing that he told Barnes that if he talked, "it could help him." At trial, Barkdull remembered the phrase as being "it couldn't hurt" if Barnes talked and that "it's best if you tell the truth." That an officer might not have been able to recall exactly between the alternative phrases appears reasonable. What was significant was that nothing was promised -- Barnes would get a lighter sentence or not even be charged -- and Barnes was not told that his talking *would* help him.

The oldest case *Abram* cited for the "impression, no matter how slight" statement was ***Agee v. State,* 185 So. 2d 671 (Miss. 1966).** This pre-*Miranda* case discussed the State's burden to prove voluntariness. ***Agee,* 185 So. 2d at 673.** Many problems arose with this confession, including "that violence was inflicted on the defendant two hours before the confession was signed," thereby making the confession inadmissible. ***Id.* at 674.** As an independent ground for exclusion, the court found that

a professor who had taught the defendant and potentially had a relationship of trust with him, "told him to tell the truth and . . . it would be lighter on him if he'd tell the truth." ***Id.*** The opinion states that the officers asked the professor to talk with the defendant, but there is no indication that the officers asked him to suggest that benefits would arise from a confession. The court cites early 1900's Mississippi case law that even a private person's raising of the question of possible leniency leads to involuntariness, without the court requiring that the person be acting at the direction of law enforcement. ***Id.*** That is inconsistent with current Fifth Amendment jurisprudence. ***Colorado v. Connelly,* 479 U.S. 157 (1986).** It no longer is the law in Mississippi either, as the *Abram* court talked about the inducements coming from law enforcement officers or "related third parties. . . ." ***Abram,* 606 So. 2d at 1031; *Darghty v. State*, 530 So. 2d 27, 31 (Miss. 1988).**

The slight encouragement given Agee by a professor he may well have highly respected was not ameliorated by rights warnings. Thus the entire context for the suggestions of leniency is different today. *Abram* describes *Agee* at some length, and makes note of the pre-existing relationship between the questioner and the defendant. No previous relationship is suggested in our case.

Another case cited by ***Abram* was *Dunn v. State,* 547 So. 2d 42 (Miss. 1989).** The court stated that well before *Miranda*, in Mississippi "a confession given after promises of leniency was incompetent as evidence." ***Dunn,* 547 So. 2d at 44-45**. The *Dunn* court found that the fact the suspect was personally acquainted with the police chief who interrogated him, that he "had a great deal of confidence and trust" in the officer, and that the police chief said that he "would do what ever was legal with my realms to help," caused the confession to be involuntary as the result of these inducements. ***Id.* at 46.** In our case, Barnes was not made any "promises of leniency" if he talked, nor did the questioner say anything close to a commitment to do "what ever was legal" to help.

The next case *Abram* cites involved a defendant who put on no evidence at a suppression hearing to support that he had been persuaded to make a statement because an officer told him that "the best policy would be to tell the truth." ***Layne v. State,* 542 So. 2d 237, 239-241 (Miss. 1989).** The *Layne* opinion was described by *Dunn* as standing for the proposition that the supreme court will "give great deference to the finding of a circuit judge that a confession was freely and voluntarily made. . . ." ***Dunn,* 547 So. 2d at 46.** A long list of precedents from other courts were cited for the proposition that merely telling a suspect that the prosecutor would be advised of his cooperation does not render a statement involuntary. ***Layne,* 542 So. 2d at 240-241**. The court referred to one of its own precedents and said that "it would be easier on him if he told the truth" is over the line; an exhortation to tell the truth was not. ***Id.* at 240** (citing *Moore v. State*, 493 So. 2d 1301, 1303 (Miss. 1986)). It is indeed a fine line. The most that Barnes was ever told was it "could help if he talked."

Abram itself, in making the "impression, no matter how slight" statement, involved what appeared to be an effort by the investigating officials to enlist the help of a minister. That minister suggested a likelihood of leniency and avoidance of the death penalty if the suspect talked; he also argued that Abram's spiritual welfare demanded that he tell the truth. ***Abram,* 606 So. 2d at 1032-1033.** *Abram* was not the use of a few-word phrase, but involved describing an array of significant benefits that would flow from a confession. We do not have the equivalent of a promise that the suspect will not receive the death penalty if he talks.

Neither does what was said to Barnes cross over the line that one opinion found to exist between "it

would be easier on him if he told the truth" (improper inducement) and an exhortation to tell the truth (not an improper inducement). ***Moore v. State,* 493 So. 2d at 1303.** Here Barnes at worst was told it "could" (not "would") help him to talk.

The United States Supreme Court has never held that any phrase is *per se* an impermissible inducement to testify that violates the Fifth Amendment. Other federal courts have found that promising to inform the prosecutor that the suspect cooperated, and even stating that information would probably be helpful, did not render a statement involuntary. ***United States v. Broussard,* 80 F. 3d 1025, 1033-34 (5th Cir. 1996)** (inform prosecutor); ***United States v. Davidson,* 768 F. 2d 1266 (11th Cir. 1985)** (talking would be "helpful"). The Fifth Circuit put it this way:

> A confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice. *United States v. Scurlock*, 52 F.3d 531, 536 (5th Cir.1995). A confession cannot be the product of official overreaching in the form of either direct or subtle psychological persuasion. *Id.*

***United States v. Broussard,* 80 F. 3d at 1033-34.** A statement such as "it will be better" if a suspect talks would only render a statement involuntary if, under the totality of the circumstances, the suggestion overcame the accused's ability to make a free choice. The trial judge made the specific finding here that this statement was voluntary, but did not elaborate.

Certainly the Mississippi Supreme Court can decide independently that it believes voluntariness requires more, but it is important to know that there is no constitutional imperative to this result. What we are called on to decide is whether the *Abram* court was rejecting the totality of circumstances test when it said that it "condemned" law enforcement interrogators who convey the "impression, however slight," that cooperation could be beneficial. ***Abram,* 606 So. 2d at 1031.**

First, the court in many cases has held that voluntariness is weighed by the totality of the circumstances. ***Davis v. State*, 551 So. 2d 165 (Miss. 1989).**

Thus the question is whether language "it could help you to talk" is so powerful that it will as a matter of law render a statement involuntary? The supreme court in 1989 said "no." ***Layne v. State,* 542 So. 2d at 241** (always "best" to tell the truth). A more recent case held that determining voluntariness after an officer stated that "it was always best to tell the truth" required determining "whether these were mere exhortations to tell the truth or were inducements or implied promises of leniency." ***Willie v. State*, 585 So. 2d 660, 668 (Miss. 1991).** The supreme court looked at the total circumstances -- age of suspect, acquaintance with interrogator, and naivete concerning justice system -- and made an appellate finding that these were not improper inducements. ***Willie,* 585 So. 2d at 668.** The statement in *Willie* is almost verbatim one of the statements that the officer recalled making here: "Best I can recall I said you need to tell the truth, that it's best to tell the truth to Investigator Applewhite and I'm sure it cannot hurt you." Here, the defendant was older than in *Willie*, twenty-four versus twenty-two. He had no stated familiarity with the interrogator. We discover in the record no reference to Barnes having a prior involvement with the law, but he had lived away from home in an attempt to pursue a boxing career. This background and age suggest a lack of naivete.

Each of the cases relied upon in *Abram* involve a greater inducement to the defendant than occurred

here. This case has one similarity to some of the statements held to be involuntary, in that the word "help" was used. It is different from any of the cases cited because the officer did not argue that it "would" help to tell the truth, only that it "could." Single word distinctions are not a useful focus. The ultimate fact question -- the forest and not the trees -- is whether police action overcame the will of the suspect and caused his statement to be given involuntarily. Barnes's theory of magic words must be that something inherent in them is so likely to cause a suspect's will to be overcome, that no further inquiry is permitted. Involuntariness means that the suspect's statement was not the product of his freely reached decision to talk. Barnes's statement could not have been involuntary as a result of being enticed to tell the truth. Barnes's mind was under his own direction since it convinced him that instead of telling the truth as the officer asked him to do, he should lie. Since Barnes is guilty of being present in the store only if he lied to the officer, that lie could not have been the product of a free will overwhelmed by inducements to be truthful. The officer did not say that it could be better for him if he came up with a plausible story that might be difficult to disprove. That apparently was what motivated Barnes: the decision to talk was reached by Barnes's personal equations of costs and benefits, not the benefits raised by the officer.

The trial court found the statement to have been voluntary. It was a reasonable ruling based on the evidence. It is for the trial court, looking at the totality of the circumstances, to decide whether the will of the defendant was overcome by inducements. The trial court found the will still to have been free in this case. That finding was not manifestly in error, nor contrary to the overwhelming weight of the evidence. ***Hunt v. State,*** **687 So. 2d at 1160.**

II. WEIGHT OF THE EVIDENCE

Barnes next argues that the testimony of the witnesses, including his accomplices in the robbery, was not reliable. He contends that the two accomplices and another witness were cousins, and yet another witness was the aunt of the accomplices. Because of this familial relationship between the witnesses, Barnes asserts that their testimony was "highly suspect," and therefore, the conviction was not supported by substantial evidence. Additionally, Barnes claims that one of the accomplices had not been sentenced prior to the trial, and thus, it was to the witness's detriment not to tell the truth.

In reviewing the decision of the trial court, this Court views all of the evidence in the light consistent with the jury verdict. ***Strong v. State,*** **600 So. 2d 199, 204 (Miss. 1992).** "It is the function of the jury to weigh the evidence and to determine the credibility of the witnesses." ***Miller v. State,*** **634 So. 2d 127, 130 (Miss. 1994).** We will reverse and remand for a new trial only upon reaching the conclusion that the trial court has abused its discretion in failing to grant a new trial. ***Herring v. State,*** **691 So. 2d 949, 957 (Miss. 1997).**

During the trial, each of the potential conflicts of interest which Barnes raises on appeal were brought to the attention of the jury. On cross-examination, the defense elicited testimony from several of the witnesses concerning their possible relationship to other witnesses. All of the witnesses clearly stated what, if any, familial relationship existed among the various witnesses. Furthermore, the defense thoroughly questioned one of the accomplices about whether his current testimony had any bearing on his future sentence. The jury was entitled to determine the credibility of the witnesses and to conclude, after hearing all of the testimony, that the proof established that Barnes was guilty of armed robbery and conspiracy to commit armed robbery.

The verdict was not against the overwhelming weight of the evidence.

III. DISPROPORTIONATE SENTENCE

Barnes asserts that his sentence is disproportionate when compared to the sentences received by his two accomplices in the robbery. The trial court sentenced Barnes to twenty-five years for armed robbery and a concurrent five years for conspiracy to commit armed robbery with eight years suspended. The two accomplices to the robbery were sentenced to fifteen years with nine years suspended and twenty years with twelve years suspended. Barnes contends that his sentence should clearly be lesser than the sentence received by one of the accomplices since he did not use any force during the robbery.

A review of the record fails to reveal any objection by Barnes to the sentence imposed during the sentencing hearing. Although Barnes asserts that this issue was not ripe prior to trial, the court had already sentenced one of the accomplices to the robbery. Furthermore, the record before us does not contain any post-trial motions including a motion for new trial based upon a disproportionate sentence.[(1)] Since Barnes did not present the alleged disproportionate sentence to the trial court for consideration, he may not assert the allegation on appeal. ***See Reed v. State,* 536 So. 2d 1336, 1339 (Miss. 1988)**. The need for an adequate evidentiary record prevents a meaningful review of this issue on direct appeal.

THE JUDGMENT AND CONVICTION OF THE WALTHALL COUNTY CIRCUIT COURT AND SENTENCE TO TWENTY FIVE YEARS WITH LAST EIGHT YEARS SUSPENDED FOR FIVE YEARS PROBATION FOR ARMED ROBBERY AND FIVE YEARS FOR CONSPIRACY TO COMMIT ARMED ROBBERY, TO RUN CONCURRENTLY WITH PREVIOUS SENTENCE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND PAYMENT OF $1,000 TO THE VICTIM COMPENSATION FUND IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN, P.J. AND DIAZ, HINKEBEIN, AND PAYNE, JJ., CONCUR.

KING, J., CONCURS IN RESULT ONLY.

HERRING, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY THOMAS, P.J. AND COLEMAN, J.

HERRING, J., DISSENTING

With due respect to the majority's well reasoned opinion, I must dissent because in my opinion, clear Mississippi Supreme Court precedent calls for a reversal of this case on the issue of improper inducement of a confession and an admission against interest by the Appellant. I would also remand this case for a new sentencing hearing in which the trial judge would be given the opportunity to explain further the disparity between the sentence received by Barnes and the sentence received by

his accomplice, Vernado.

IMPROPER INDUCEMENTS

In ***Abram v. State*, 606 So. 2d 1015, 1031 (Miss. 1992)**, our Mississippi Supreme Court stated "[w]e have repeatedly condemned the practice whereby law enforcement interrogation, or related third parties, convey to suspects the impression, *however slight*, that cooperation by the suspect *might* be of some benefit." (emphasis added). This clear statement by the supreme court, when read together with one hundred years of Mississippi precedent, conclusively establishes that this state extends to its citizens great protection against law enforcement misconduct in regard to improper inducement of confessions. With this standard of protection in mind, I would hold that the statements made by Officer Barkdull fall within the supreme court's prohibition of improper inducements by law enforcement officers. Because I cannot say, beyond a reasonable doubt, that Barnes was not given the impression, "however slight," that cooperation with law enforcement officers *might* have been of some benefit to him, I feel duty-bound to cast my vote in accord with the unequivocal mandate set forth by the Mississippi Supreme Court in *Abrams.* It is not the function of an appellate court to say what the law should be in the face of clear precedent by our Mississippi Supreme Court at to what the law is in Mississippi.

It is noteworthy that at the suppression hearing several days prior to trial, Officer Barkdull testified that he told Mark Barnes, prior to his incriminating statements, that "it could help him" to tell the truth, and "that it could help, *it sure couldn't hurt*." (emphasis added). As stated by our Mississippi Supreme Court, a confession is only admissible if it has been given voluntarily and not given "as a result of promises, threats or inducements." ***Morgan v. State*, 681 So. 2d 82, 86 (Miss. 1996)**. If a defendant charges that his confession has been improperly induced, the State has the burden of proving *beyond a reasonable doubt* that the confession was voluntary, and the defendant is entitled to "a reliable determination that his confession was not given as a result of coercion, inducement, or promises." ***Id.* at 86.** As stated in ***Abram v. State*, 606 So. 2d at 1029**, a prima facie case of voluntariness is made when a law enforcement officer testifies that a confession was voluntarily given without threats, coercion, or offer of reward. However,

> When objection is made to the introduction of the confession, the accused is entitled to a preliminary hearing on the question of the admissibility of the confession. This hearing is conducted in the absence of the jury . . . then the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness.

***Id.* at 1030** (citing *Agee v. State*, 185 So. 2d 671, 673 (Miss. 1966)). "Only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the State under *Agee*." ***Abram*, 606 So. 2d at 1030.** Moreover, the issue of whether or not a confession was voluntarily given beyond a reasonable doubt is a fact question to be determined by the trial court without any regard whatsoever as to whether the confession is authentic or truthfully given. ***Id.* at 1031. *See also Powell v. State*, 540 So. 2d 13, 15 (Miss. 1989).** Where a trial court applies the correct legal standard, a finding of fact on conflicting evidence that a confession was voluntarily given will generally be affirmed by an appellate court unless it is clearly erroneous. ***Alexander v. State*, 610 So. 2d 320, 326 (Miss. 1992)**. However, "our scope of review is less

constrained where detailed and specific findings by the trial court are lacking on critical issues." ***Abram*, 606 So. 2d at 1031. *See also McCarty v. State*, 554 So. 2d 909, 912 (Miss. 1989).**

In the case *sub judice*, the trial court clearly ruled that the statements and actions of Barnes in leading the officers to the shotgun were voluntary and thus justified the court's ruling that the shotgun was recovered not as a result of an illegal search, but because of the voluntary actions of a criminal suspect who was seeking to help his cause. The court further ruled that the statement given by Barnes concerning his involvement in the robbery was admissible, notwithstanding the fact that Barkdull had promised that "it could help him" if he told the truth. However, the trial court made no specific findings of fact as to why the statement of Barnes was voluntary and first stated at the suppression hearing that Barnes's statement had no probative value and thus was inadmissible. In this regard, a review of the actual record as to the trial court's ruling on the statement made by Barnes to Barkdull would be helpful. On cross-examination in the suppression hearing, Barkdull testified as follows:

> Q. Did you at any time state to Mr. Barnes that if he were to help you you'd help him, you'd assist him in some way?
>
> A. No, not that I would help him.
>
> Q. What did you say to him?
>
> A. *That it could help him.*
>
> Q. That it could help him.
>
> A. *Yes.*
>
> Q. And after that you said that he needed to tell Officer Applewhite the truth, is that correct?
>
> A. I made that statement, yes.
>
> Q. And that if he were to tell the truth that it could help him, is that correct?
>
> A. *That it could help, it sure couldn't hurt*.
>
> Q. All right. Did you or anyone else advise Mr. Barnes of his rights as far as the search of his parents' or of his mother's house, property?
>
> A. I did not.
>
> Q. You didn't.
>
> A. No.
>
> Q. In fact, you never informed Mr. Barnes of his rights, Miranda or otherwise, is that correct?
>
> A. I did not read him his rights.

(emphasis added). The trial court ruled as follows:

BY THE COURT: I find that the testimony does not warrant the suppressing of the statement. I find beyond a reasonable doubt that the statement made at the jail was voluntary, it was made at a time the defendant had been mirandized or told his Constitutional rights, and that the defendant knowingly -- that he understood the rights, and he knowingly and intelligently executed a waiver and gave a statement. That's what the evidence appears to be at this time, so the Motion for Directed Verdict will be overruled. Anything further?

BY MR. SMITH: Not from the State, Your Honor.

BY MR. MILLER: Nothing further from the Defendant.

BY THE COURT: What about the other Motions, Mr. Miller, do you want to address those now?

BY MR. MILLER: The Motion to Quash the Indictment goes along with the Suppression Motion. Motion for Discovery, we have completed that. Included with the Motion to Suppress the Statement was Motion to Suppress Illegally Obtained Tangible Evidence, and that was the gun.

BY THE COURT: All right. Insofar as the gun is concerned, the testimony, as I heard it, there was a voluntary statement made to Officer Barkdull regarding the weapon -- 'I'll show you where the gun is.' This was made in conjunction with the exculpatory statements of the defendant that he was there but no involved. I don't find that -- well, I affirmatively find that the gun was not the product of a wrongful search in that this was something voluntarily done and initiated by the defendant based on the officer's testimony. What's your next motion?

BY MR. MILLER: Judge Starrett, the motion to suppress the Oral statement --

BY THE COURT: -- The Motion to Suppress the Oral Statement, I sustain that for two reasons. First of all, there was some question as to whether or not the mirandizing had been completed. It appears that it was, but, mainly the statement is just not inculpatory at all.

BY MR. MILLER: The oral statements made in the car relating to the gun, that is not suppressed, Your Honor?

BY THE COURT: Yes, sir, it will be suppressed.

BY MR. MILLER: Sir?

BY THE COURT: It is suppressed.

BY MR. MILLER: And the gun?

BY THE COURT: Not the gun. I think the statement about the gun, according to the testimony, was a voluntary unsolicited statement made by the defendant. I don't think that statement has any probative value. It just gets us to the point where they ride out on 48 to the residence of the defendant's mother.

> BY MR. MILLER: Yes, sir. What we questioned was Officer Barkdull's stating to Mr. Barnes that it would help him if he were to tell Officer Allen the truth. That was an indication to Mr. Barnes that if you tell the truth then we'll give you a break. I feel that that solicited any comments that Mr. Barnes, any oral comments that Mr. Barnes made, including the location of the gun.
>
> . . . .
>
> BY THE COURT: -- Based on the statements that are before the Court, I find that this search was not -- or that the statement should not be suppressed.

It was only after defense counsel argued that the shotgun could not be admissible if the trial court excluded the statement by Barnes to Barkdull that the trial court reversed itself and found the incriminating statement by Barnes to be admissible after all.

As stated above, it is also noteworthy that the trial court made no specific findings of fact concerning the "totality of the circumstances" that led it to conclude that the statement of Barnes was voluntary. Unlike the majority, the trial court, in determining the voluntariness of Barnes's statement, did not consider the age of the appellant, his past experience in life, or whether or not he was telling the truth when he spoke to Barkdull. According to the record before us, *all the trial court considered was the fact that Barnes had been given a Miranda warning prior to making his incriminating statement.* We know from established case law that a prior *Miranda* warning, by itself, is inconsequential and unimportant when we are dealing with whether or not an incriminating statement was improperly induced. In a case involving a Fourth Amendment violation the United States Supreme Court stated that "[i]f Miranda warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to zero." ***Taylor v. Alabama*, 457 U.S. 687, 690 (1982).** ***See also Abram v. State*, 606 So. 2d 1015, 1049 (Miss. 1992) (Sullivan, J., dissenting); *Moore v. State*, 493 So. 2d 1301, 1302 (Miss. 1986); *Bolton v. State*, 530 So. 2d 1360, 1362 (Miss. 1988); *and Dycus v. State*, 396 So. 2d 23, 27 (Miss. 1981).** I would hold that the trial court's reliance on the fact that Barnes was read his *Miranda* rights created the talisman that the Supreme Court has prohibited.

Thus, following ***McCarty v. State*, 554 So. 2d 909, 912 (Miss. 1989)** in the absence of any specific or detailed findings of fact by the trial court as to how it determined that the statement by Barnes was voluntary, we are not bound by the "clearly erroneous" standard in reviewing the trial court's ruling on this issue and we are entitled to determine for ourselves whether the statement by Barnes was voluntary beyond a reasonable doubt. I cannot reach such a conclusion, given the statements by Barkdull.

In my opinion, Officer Barkdull's statements were improper. In fact, almost one hundred years ago, our Supreme Court ruled that a confession given after the sheriff advised the defendant that "it would make it better for him if he would tell all about it" was involuntarily given. ***Mitchell v. State*, 24 So. 312, 312 (Miss. 1898).** Thereafter, in ***Miller v. State*, 243 So. 2d 558, 559 (Miss. 1971),** the supreme court was confronted with a confession given after the sheriff advised the defendant that "he might better tell the truth about the thing, he would be better off." Once again, the court reversed the conviction and ruled that the confession was involuntarily given. As stated above, the Mississippi Supreme Court ruled in *Abram v. State* that "[w]e have repeatedly condemned the practice whereby

law enforcement interrogators, or related third parties, convey to suspects the impression, however slight, that cooperation by the suspect might be of some benefit." ***Abram,* 606 So. 2d at 1031** (citations omitted). Thus, in the absence of any evidence to show that Barnes placed no confidence or trust in the statements of Barkdull and that the confessions or admissions against interest made by Barnes, as well as his subsequent actions in directing the officers to the shotgun, were made without regard to Barkdull's improper statements to him, I feel that we are required to reverse and remand this action to the trial court for a new trial. From the record before us, it simply cannot be said that the statements and subsequent actions of Barnes were voluntary beyond a reasonable doubt. In ruling otherwise, the trial court committed reversible error.

The majority gives credence to the fact that (1) Barnes was advised of his *Miranda* rights prior to Barkdull's statement, (2) the fact that Barnes did not tell the truth to Officer Barkdull and (3) the fact that Barkdull told Barnes that truth *could* help him, and not that it *would* help him. As for the fact that Barnes was made aware of his *Miranda* rights, the Mississippi Supreme Court has pointed out that this fact is not dispositive and stated that "the mere giving of the *Miranda* warnings, no matter how meticulous, not matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused." ***Moore v. State*, 493 So. 2d 1301, 1302 (Miss. 1986)** (quoting *Neal v. State*, 451 So. 2d 743, 753 (Miss. 1984)). As for the fact that Barnes's statement was not truthful, the supreme court has held that "[i]n making this determination, the trial judge must absolutely resist any inclination to consider whether the confession is truthful or authentic; the focus must be limited to the voluntariness of the confession." ***Moore,* 493 So. 3d at 1301.** Finally, the fact that Barkdull told Barnes that the truth *could* help him and not that it *would* help him, should carry no weight. The Mississippi Supreme Court has forbidden any coercion or promises of leniency. In fact, the *Abrams* court stated that law enforcement officers are not to give suspects the impression that "cooperation by the suspect might be of some benefit." ***Abram,* 606 So. 2d at 1031**. Note that the supreme court used the word *might* and not *will.* Clearly, there is no requirement that in order for a statement to be ruled involuntary, the law enforcement officer must expressly inform the suspect that he will not go to jail if he tells the truth. I would hold that the statement in question made by Barkdull was just as improper as if Barnes had been told that telling the truth *would* help him. Either way, the same result is reached: the statement clearly gave Barnes the impression that cooperation could be beneficial. This is exactly the kind of statement that the Mississippi Supreme Court has condemned in the past. What is clear to me, absent specific findings of fact by the trial court to the contrary, is that it is impossible to say from the record that Barnes's statement was voluntary beyond a reasonable doubt.

Finally, in deference, I find it necessary to comment further on the majority's reliance on the "totality of the circumstances" analysis in finding the statement to be voluntary. While a "totality of the circumstances" analysis is normally the proper standard for a trial court to use in cases involving voluntariness of confessions, the court has held that "[a] confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary." ***Abram,* 606 So. 2d. at 1032**. Thus, a presumption of involuntariness is created upon a showing of improper inducement. This presumption can only be overcome by a finding, beyond a reasonable doubt, that the officer's statements did not induce the suspect to make the statements at issue. ***Id.*at 1031**. If the traditional "totality of the circumstances" analysis is used in these circumstances, then the entire *Abram* case has no effect, and its warning against improper inducements is meaningless. Under

such circumstances, a trial court could easily use the totality of the circumstances analysis to hold that no statement made by police officers would rise to the level of displacing a defendant's free will. We have no power to circumvent *Abram* in such a manner.

Having found that the statements made by Barnes were improperly induced, I would hold that the shotgun, and other evidence discovered as a result therefrom, should have been excluded. The Mississippi Supreme Court has held that evidence procured as a direct result of the violation of a constitutionally protected right is inadmissible. ***Hill v. State,* 432 So. 2d 427, 434 (Miss. 1983)**. In *Hill*, the court stated that evidence seized as a result of an illegal search or an illegal arrest is inadmissible. The court also noted that this same exclusionary rule applies to cases involving evidence obtained after an involuntary confession by stating:

In ***Dover v. State*, 227 So.2d 296 (Miss.1969),** the Sheriff of Quitman County obtained a confession from the accused on a Saturday. On the Monday following the sheriff again questioned the accused and learned the whereabouts of the victim's shirt. Upon appeal, we held the confession was involuntary and therefore inadmissible. We also held that admission of the shirt into evidence was error, since it was a result of the illegally obtained confession. We stated:

> We are of the opinion that the evidence appertaining to the shirt falls within the exception noted above and that if it is to be admitted in evidence, it must be identified by evidence other than the involuntary confession or admissions subsequent thereto.

***Hill*, 432 So. 2d at 434-35** (quoting *Dover v. State*, 227 So. 2d 296, 301 (Miss. 1969)). In regard to this issue, I am also directed by the rationale of the United States Supreme Court in ***Nix v. Williams,* 467 U.S. 431 (1984)**. In *Nix*, the Supreme Court stated:

> The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes.

***Nix*, 467 U.S. at 442-43**. I feel that this rationale is applicable to the case before us. Barnes's rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the police extracted an involuntary confession from him. This confession led the police to the shotgun used in the armed robbery and also led to a written statement made by Barnes that was later used against him at trial. Therefore, I would hold that the shotgun admitted into evidence against Barnes was the fruit of his involuntary confession. The shotgun, as well as all statements made by Barnes directly after Officer Barkdull's improper inducement, are inadmissible. The trial court committed reversible error in allowing them into evidence.

ISSUES INVOLVING SENTENCING

I also disagree with the majority's holding that Barnes's claim of a disproportionate sentence is procedurally barred. While it is true that Barnes did not raise this issue in a timely manner, the Mississippi Supreme Court has held that such a failure is not a bar in situations where a defendant

claims that he was improperly punished for failing to enter a plea of guilty. In ***Bush v. State,* 667 So. 2d 26, 27 (Miss. 1996)** the Mississippi Supreme Court stated that:

> If the trial court had imposed a harsher penalty based on Bush's decision to invoke his constitutional right to proceed to trial for a determination of guilt, then his right to due process would have been affected. Therefore, it is proper to consider this issue on appeal notwithstanding the procedural defect.

***See also Gallion v. State,* 469 So. 2d 1247, 1249 (Miss. 1985)** ("an exception to the rule that questions not raised in the trial court cannot be raised for the first time on appeal exists where the errors at trial affect fundamental rights.").

Barnes was sentenced to twenty-five years in the custody of the Mississippi Department of Corrections on an armed robbery charge and five years on a conspiracy charge, these sentences to run concurrently. However, the trial judge suspended eight of the years of confinement and added five years of probation. Leander Ellzey, who pleaded guilty and agreed to cooperate with the State, was sentenced to fifteen years of imprisonment, with the last eleven years suspended. The other assailant, Tyrone Varnado, was sentenced to twenty years of imprisonment, with the last twelve years suspended. In fact, Varnado was granted post-conviction relief following his testimony against Barnes, and his sentence was thereafter reduced to four years, with the final year suspended, for a total of only three years to serve in the custody of the Mississippi Department of Corrections.

Barnes now asserts that the trial judge erred in sentencing him to serve seventeen years, while his accomplices were sentenced to only four and three years respectively. Barnes takes particular offense to the fact that Varnado, admittedly the more violent of the three assailants, received only three years in confinement. The Mississippi Supreme Court has generally held that "when sentences are within the limits of the statute, the imposition of such sentences is within the sound discretion of the trial court and this Court will not reverse them." ***Hopson v. State,* 625 So. 2d 395, 404 (Miss. 1993)** (citations omitted). Mississippi's armed robbery statute, Section 97-3-79 of the Mississippi Code of 1972, sets sentencing limits at life imprisonment, if agreed upon by the jury, and at any time less than life imprisonment but more than three years of imprisonment if the jury does not agree on a sentence of life imprisonment. As to the crime of conspiracy, Section 97-1-1 of the Mississippi Code of 1972 limits the term of imprisonment to no more than twenty years. In the case *sub judice,*the jury did not recommend life imprisonment. Thus, the sentencing of Barnes was left to the trial judge, who set the term at twenty-five years on the armed robbery charge. Likewise, the judge sentenced Barnes to five years of confinement on the conspiracy charge. Both of these sentences were well within the statutory limitations placed on each crime. Under the general rule, we should let the sentence stand, assuming that the convictions are affirmed.

However, Barnes calls our attention to the case of ***McGilvery v. State,* 497 So. 2d 67 (Miss. 1986)**. In *McGilvery,* also an armed robbery case, the defendant challenged his sentence of forty-five years on the ground that his accomplice received a sentence of only twenty-five years. The facts in *McGilvery* are very similar to those in the case *sub judice*. In both cases, the accomplice who received the lighter sentence was the more physically aggressive during the commission of the crime. In *McGilvery,* the accomplice was the triggerman and in our case the accomplice assaulted a victim and told her to "hit the floor." In both cases, the accomplices pleaded guilty, cooperated with the

police and received lighter sentences. When faced with this situation, the *McGilvery* court remanded the case for a sentencing hearing by the trial judge "so that he can be given an opportunity to state for the record appropriate reasons for the disparity in the two sentences." ***McGilvery*, 497 So. 2d at 69**. In reaching this decision, our supreme court was troubled not with the length of the sentences received by the two men, but with the lack of an on-the-record justification for the disparity between the two sentences. The *McGilvery* court's rationale for this decision is quite clear and is found in ***Pearson v. State*, 428 So. 2d 1361 (Miss. 1983).** In *Pearson*, the Mississippi Supreme Court held that "[i]t is absolutely impermissible that a trial judge imposing sentence enhance the sentence imposed because the defendant refused to plea bargain and put the state and the court to the trouble of trial by jury." ***Pearson*, 428 So. 2d at 1364.** The court went on to discuss the importance of plea bargains, but asserted that "as important as these interests are, they may never justify penalizing one charged with a crime for claiming his absolute right to be tried by a fair and impartial jury of this peers." ***Id.***

The record in the case *sub judice* establishes that Barnes's sentence is far more severe than the sentences received by his accomplices. However, I note that Ellzey's conviction was on a robbery charge and not for armed robbery. Thus, Barnes cannot compare his sentence to the sentence received by Ellzey. That leaves the sentence of Barnes to be compared with the sentence received by Varnado, who was sentenced to twenty years of confinement, with the last twelve years suspended, and whose sentence was later reduced to three years of confinement, the statutory minimum, following his testimony against Barnes. It is possible that Varnado's sentence was a reward for his cooperation with the authorities. The only question is: was Barnes's sentence a penalty for not cooperating with the authorities and insisting on his constitutional right to a trial by an impartial jury? To answer this question, we can only look to the words of the trial judge used in imposing the sentence:

> Mr. Barnes, you have gone and committed the crime of armed robbery and conspiracy to commit armed robbery. You've affected some other people by being involved in this criminal adventure. It is very unfortunate that it occurred. It is fortunate that no one was hurt, including yourself. I look at your age, and you're twenty-four years of age. And I can't help but wonder what was going through your mind when you were planning that. And what was going through your mind when you were in that store. For the offenses committed, I hereby sentence you to a term of twenty-five years in the state penitentiary on the count of armed robbery, and five years on the count of conspiracy, to run concurrently, with the last eight years - - I'm sorry, the last eight years of the sentence to be suspended. And placed on probation for a period of five years.

Nothing in this statement separates Barnes's culpability from the culpability of Ellzey or Varnado. Therefore, because Barnes's conviction is being affirmed, I would hold that we should remand this case to the Walthall County Circuit Court for a new sentencing hearing in which the trial judge would be given the opportunity to further explain and justify the disparity between the sentences of Barnes and Varnado.

THOMAS, P.J., AND COLEMAN, J., JOIN THIS SEPARATE WRITTEN OPINION.
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1. Barnes attached a copy of an "Order Granting Post Conviction Relief" for one of the

accomplices to his reply brief. An amended copy of the docket reveals the inclusion of the order. Barnes failed to amend the record to include the order itself. Regardless, more evidence than just a lower sentence for a co-defendant is necessary to resolve this issue.