IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-KA-01013-COA

LADARIUS ARMSTRONG A/K/A LADARIUS MAKEL ARMSTRONG A/K/A LADARRIUS ARMSTRONG A/K/A LADARRIUS MAKEL ARMSTRONG A/K/A LADARRIUS MARKEL ARMSTRONG — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	07/17/2017
TRIAL JUDGE:	HON. JUSTIN MILLER COBB
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: PHILLIP BROADHEAD
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: KAYLYN HAVRILLA MCCLINTON
DISTRICT ATTORNEY:	BILBO MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 04/16/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GREENLEE, J., FOR THE COURT:

¶1. A Lauderdale County jury convicted Ladarius Armstrong of armed robbery in violation of Mississippi Code Annotated section 97-3-79 (Rev. 2014) and for possessing a firearm as a felon in violation of Mississippi Code Annotated section 97-37-5 (Rev. 2014). For his armed robbery conviction, Armstrong was sentenced to serve twenty-eight years in the custody of the Mississippi Department of Corrections (MDOC) and ordered to pay $100 in restitution, a $1,000 fine, $500 to the Crime Victims' Compensation Fund, and $420.50

in court costs. For possessing a firearm as a felon, Armstrong was sentenced to a concurrent ten year term in the custody of MDOC and fined $1,000. On appeal, Armstrong argues the trial court erred by denying his motion to suppress, prohibiting the introduction of his petition for court-appointed counsel, and denying Jury Instruction D-11-A. We find no error and affirm.

BACKGROUND

¶2. On September 1, 2015, Brenisha Jackson was assisting customers at the Cefco on Highway 39 when she noticed a man pacing outside. The man, who was wearing a dark hoodie, gray jogging pants, and dark glasses, entered Cefco holding a gun. He ran toward the counter, jumped over it, and pointed the gun to Jackson's face. The man told Jackson, "Put the money in the bag and don't push the button [for the police]." Jackson complied and the man took the money, grabbing some Newport cigarettes and cigarillos before leaving the store. At trial, Jackson identified Armstrong as the robber. She testified that the gun he pointed to her face was black with a green slide.

¶3. Connie Davis testified that although she had been in Cefco during the robbery, she did not see it take place because she was in the back of the store when it occurred. Davis said she learned what happened after walking to the front of the store and talking with Jackson. Recalling that she had seen a man wearing a black top, gray joggers, and dark glasses exit the store, Davis decided to follow him. She watched as the man entered a dark blue Chevy Malibu with a Triple B dealer-issued license tag. Davis followed the man in the Malibu from within her own vehicle. She said the man drove to an apartment complex, where he got out

of the car and ran behind the apartments to another car that picked him up. Davis testified that the man she followed was the same one she saw exit Cefco. She reported her observations to the police.

¶4. Armstrong's co-defendant, Ladarrius Stephens, testified that Armstrong was a friend of his. Stephens said that on September 1, 2015, he saw Armstrong near Merrill Road. Armstrong told him that he was about to rob Cefco and needed a ride to the other side of town. Stephens testified that he drove Armstrong to Cefco in his brother's 2010 Chevy Malibu. He said that Armstrong entered Cefco and ran out with a Cefco bag containing cigarillos and a brown paper bag with money inside. Stephens testified that Armstrong had a black gun with a green slide. Stephens said that he was living at Cedar Bend Apartments at that time.

¶5. Dustin Allen testified that in September 2015, he was employed as an officer at the Meridian Police Department. He stated that the day after Cefco was robbed, he was informed of a possible sighting of a dark blue Chevy Malibu with a Triple B tag at Cedar Bend Apartments. Officer Allen reported to the apartment complex, found the vehicle, and made contact with a woman who advised him that the car belonged to her son. With the woman's consent, Officer Allen searched the apartment she shared with her sons and found a black gun with a green slide, which he identified at trial as Exhibit 3.

¶6. Armstrong was arrested on September 2, 2015, and was questioned by Meridian Police Department officers on two separate occasions. Detective Scott Hopewell was the first to interview Armstrong on the day of his arrest. During the interview, Armstrong gave

a signed statement denying any involvement in the Cefco robbery. Armstrong also executed a petition for appointment of an attorney indicating that he lacked sufficient funds to hire an attorney but desired legal representation in connection with his armed robbery charge.[1]

¶7. One day later on September 3, Sergeant Dareall Thompson transported Armstrong from the county jail to the Meridian Police Department for the purpose of an interview. Sergeant Thompson testified that he informed Armstrong of his *Miranda*[2] rights and Armstrong agreed to waive his rights and talk with him. Sergeant Thompson further testified that Armstrong confessed that he went inside Cefco, robbed the clerk at gunpoint, and took cash and cigarettes before fleeing the scene and being picked up by Stephens. Armstrong reviewed a written statement of his confession, initialed next to each statement, and signed at the bottom.

¶8. Prior to trial, Armstrong moved to suppress the statements he made to the law enforcement officers, arguing that his petition for appointed counsel constituted a request for an attorney. Although Sergeant Thompson testified at the suppression hearing, Detective Hopewell did not.[3] Sergeant Thompson testified that when he interviewed Armstrong on September 2, 2015, he was unaware that Detective Hopewell had already interviewed

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[1] The petition was notarized by a Meridian Police Department detective and filed on September 25, 2015.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] Sergeant Thompson testified that Detective Hopewell no longer worked at the Meridian Police Department and his subpoena was returned "not found."

Armstrong. Sergeant Thompson further testified that he read Armstrong his *Miranda*[4] rights prior to the interview and that Armstrong acknowledged he understood his rights and was willing to talk. Sergeant Thompson stated that Armstrong also signed a written waiver of his rights and acknowledged each right by initialing next to it. Armstrong's written waiver was presented at the hearing as Exhibit 2. On cross-examination, defense counsel asked Sergeant Thompson:

> [Defense:] And in reviewing . . . the file that you maintained . . . have you had occasion to see the summary that Detective Hopewell prepared regarding his interactions with Mr. Armstrong?
>
> [Thompson:] Yes, sir.
>
> [Defense:] And in that summary it says that, in fact, Mr. Armstrong did request an attorney.
>
> (PAUSE)
>
> [Thompson:] Are you talking about his summary of the –
>
> [Defense:] The summary. And if . . . you don't see it, then we can –
>
> [Thompson:] I don't see it. I see his statement that at one time Hopewell put in there that he asked for a lawyer.

The defense never moved to introduce Detective Hopewell's summary, and Armstrong did not testify at the suppression hearing. Throughout the hearing, the defense maintained that Armstrong's petition was the only means by which he requested counsel. Armstrong's petition for appointed counsel was presented as Exhibit 1.

¶9. Following the suppression hearing, the trial court found that Armstrong never invoked

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[4] *Id.*

his right to counsel during his first or second interview. The trial court found that the form Armstrong signed was customarily given to defendants booked in the county jail to determine whether they were indigent and eligible for court-appointed counsel, and was not an affirmative invocation of counsel.

¶10. During trial, Armstrong's statement to Detective Hopewell was admitted into evidence as Exhibit 10. Armstrong's waiver of rights and written confession to Sergeant Thompson were admitted as Exhibits 6 and 7.

¶11. Following deliberations, the jury found Armstrong guilty of armed robbery and possession of a firearm as a convicted felon. Armstrong timely appealed.

DISCUSSION

I. Motion to Suppress

¶12. The constitutional principles governing custodial interrogation are well established. Anyone subject to custodial interrogation must be advised of his right to remain silent and have an attorney present. *Miranda*, 384 U.S. at 479. If the right to remain silent is invoked, the interrogation must stop. *Id.* And if the right to have an attorney present is invoked, the interrogation must cease until counsel is present. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Under either circumstance, interrogation may commence or resume in the absence of an attorney if the defendant (1) initiates further discussions with the police *and* (2) knowingly, intelligently, and voluntarily waives the right invoked. *Holland v. State*, 587 So. 2d 848, 855 (Miss. 1991) (citing *Smith v. Illinois*, 469 U.S. 91, 95 (1984)).

¶13. "The right to have an attorney present must be 'specifically invoked.'" *Id*. at 856

(quoting *Edwards*, 451 U.S. at 482). "This may be accomplished 'in any manner and at any stage of the process.'" *Id.* (quoting *Miranda*, 384 U.S. at 444-45). A defendant is not required to use specific language such as "I want a lawyer" to invoke the right to counsel. *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992). *See also Downey v. State*, 144 So. 3d 146, 152 (¶13) (Miss. 2014) (finding Downy requested counsel by stating that she had an attorney and "could use him"); *Holland*, 587 So. 2d at 856-57 (holding that a suspect asking detectives "Don't you think I need a lawyer?" invoked his right to counsel). Instead, the right is asserted by "some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Wilcher v. State*, 697 So. 2d 1087, 1096 (Miss. 1997) (quoting *Wilcher v. Hargett*, 978 F.2d 872, 876 (5th Cir. 1992)). Once a defendant expresses his "unequivocal election of the right," his subsequent agreement to waive his rights is invalid unless he initiated further discussion. *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009).

¶14. On appeal, Armstrong claims that he requested counsel twice before waiving his rights and giving a full confession to Sergeant Thompson. Armstrong argues reversal is warranted because he did not initiate discussion with Sergeant Thompson and thus his waiver was invalid.

¶15. This Court "will reverse a trial court's denial of a motion to suppress if the court's ruling was a manifest error or contrary to the overwhelming weight of the evidence." *Downey*, 144 So. 3d at 150 (¶6). In order to determine whether Armstrong's rights were violated, this Court must first determine whether Armstrong affirmatively invoked his right

to counsel. As requests for counsel and *Miranda* waivers are fact specific, we review them on a case-by-case basis. *Id.* at (¶7).

¶16. Armstrong argues he requested counsel twice: once through his petition for appointed counsel, and once verbally during his interview with Detective Hopewell.

A. Petition for Appointed Counsel

¶17. The trial court found that the form Armstrong completed—the petition for appointed counsel—was a financial affidavit used by the court to determine whether a defendant taken into custody is indigent and eligible for appointed counsel pursuant to Mississippi Code Annotated section 99-15-13 (Rev. 2015). The trial court noted that the petition contained questions in the form of a sworn affidavit regarding an offender's income, liabilities, dependent children, bond, and support payments.

¶18. We agree with the trial court that Armstrong's petition alone was not an explicit request to have an attorney present. We proceed to analyzing the remainder of Armstrong's argument.

B. Interview with Detective Hopewell

¶19. During his suppression hearing, Armstrong did not argue that he requested counsel apart from his signing a petition for appointed counsel. But on appeal, Armstrong argues Sergeant Thompson's suppression-hearing testimony concerning Detective Hopewell's summary evinces a verbal request for counsel. We note that defense counsel did not present Detective Hopewell's summary and Armstrong did not testify at the suppression hearing. Without any direct evidence concerning Armstrong's interview with Detective Hopewell, the

trial court apparently found that the summary referred to Armstrong's petition and did not qualify as a request for counsel. We agree that Armstrong did not make such a request. And we find the trial court's ruling was not clearly erroneous or against the overwhelming weight of the evidence. *Downey*, 144 So. 3d at 150 (¶6). Armstrong's decision to talk with Sergeant Thompson—after signing a *Miranda* waiver and being reminded that he had the right to an attorney—indicates a voluntary, knowing, and intelligent waiver of his right to counsel. The trial court did not commit reversible error by deciding not to suppress Armstrong's confession.

II. Confrontation Clause

¶20. During trial, Armstrong sought to introduce his petition for indigent counsel while cross-examining Sergeant Thompson. Upon objection, the trial court prohibited Armstrong from further referencing the petition, noting that it had already determined the petition to be inadmissible. The trial court further noted that, at the suppression hearing, Armstrong failed to submit evidence suggesting the petition had any relevance, and that the petition would only confuse or mislead the jury. The trial court clarified that apart from referencing his petition for indigent counsel, Armstrong was permitted to cross-examine Sergeant Thompson in detail concerning the circumstances surrounding his confession.

¶21. On appeal, Armstrong asserts the trial court's ruling concerning his petition for indigent counsel violated his Sixth Amendment right to confrontation.

¶22. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *Barron v. State*, 130 So. 3d 531, 538 (¶23) (Miss. Ct. App. 2013). And we

review constitutional issues de novo. *Jenkins v. State*, 102 So. 3d 1063, 1065 (¶7) (Miss. 2012).

¶23. Mississippi law on the admissibility of a confession and the attendant circumstances in which it was given is well settled:

> It has long been the law of this state, that before a confession can be received in evidence, it must be shown to be competent in that it was freely and voluntarily given. This is a legal question to be determined by the court on a preliminary investigation out of the presence of the jury. If, after hearing all the testimony pertinent to the inquiry, the court is satisfied beyond a reasonable doubt that the confession was freely and voluntarily given, it becomes competent evidence. However, after a confession has been held by the court to be competent evidence either party has a right [(but is not required)] to introduce before the jury the same evidence which was submitted on the preliminary inquiry as well as any other evidence relative to the weight and credibility of the confession. The jury does not pass upon the competency of the confession, but the jury does pass upon the weight and credibility of the confession. The jury has the same freedom of action in relation to confessions which they have in regard to other testimony . . . . *Harvey v. State*, 207 So. 2d 108 (Miss. 1968); *Wright v. State*, 212 Miss. 491, 54 So. 2d 735 (1951); *Fisher v. State*, 145 Miss. 116, 110 So. 361 (1926); *Johnson v. State*, 107 Miss. 196, 65 So. 218, 51 L.R.A.(N.S.) 1183 (1914); *Ellis v. State*, 65 Miss. 44, 3 So. 188 (1887).

Rhone v. State, 254 So. 2d 750, 754 (Miss. 1971). Thus, after a confession is admitted into evidence, the defendant may "submit evidence and have the jury pass upon the factual issues of its truth and voluntariness and upon its weight and credibility." *Allen v. State*, 212 So. 3d 98, 104 (¶13) (Miss. Ct. App. 2016). Armstrong contends the trial court's ruling removed these factual issues from the jury's determination.

¶24. In this case, the trial court determined at the suppression hearing that Armstrong's confession was competent evidence to be admitted. But the trial court found Armstrong's petition for appointed counsel was not a request for counsel to be present during his

interrogation and was irrelevant to the voluntariness of Armstrong's confession; instead, the trial court found the petition was a standard form customarily given to offenders booked in the county jail to determine whether they qualified as indigent for the purpose of receiving appointed counsel. Moreover, the trial judge voiced that Armstrong's petition would only confuse or mislead the jury.

¶25. We find no error in the trial judge's ruling, much less prejudicial error. There is no evidence in the record supporting Armstrong's contention that he was denied the right to argue that his "confession was obtained by coercive, badgering, and deceptive tactics designed by police to wear him down . . . ." Instead, the record demonstrates that Armstrong was permitted to present his version of the circumstances surrounding his confession to Sergeant Thompson. A defendant's right to cross-examination is not unlimited, and "[t]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Goforth v. State*, 70 So. 3d 174, 184 (¶46) (Miss. 2011) (emphasis added) (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988)). This issue is without merit.

III. Jury Instruction D-11-A

¶26. Armstrong also asserts that the trial court erred in denying Jury Instruction D-11-A, which he argues would have instructed the jury to consider the attendant circumstances of his interviews with Detective Hopewell and Sergeant Thompson. Instruction D-11-A stated:

> You are the sole judges of the facts in this case. Your exclusive province is to determine what weight and credibility will be assigned to the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound judgement in considering

and weighing the testimony of each witness who has testified in this case.

> You may consider the alleged confession in the light of the manner by which you find it was obtained, and give it such weight and credibility as you think it is entitled. Unless you believe the evidence beyond a reasonable doubt that the alleged confession made by the defendant was truthful, was accurately (repeated) (recorded); that the defendant understood what was said; and that such confession was made by [the] defendant of his own free will and was not extorted by threat of harm or promise of benefit, then you must disregard the alleged confession to the extent that these facts tend to discredit it.

¶27. The giving or refusal of proposed jury instructions is within the sole discretion of the trial court. *Newell v. State*, 49 So. 3d 66, 73 (¶20) (Miss. 2010). "A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Victory v. State*, 83 So. 3d 370, 373 (¶12) (Miss. 2012). Further, a defendant is not entitled to an instruction that singles out a particular piece of evidence. *Manuel v. State*, 667 So. 2d 590, 592 (Miss. 1995). We will not find reversible error where "the instructions fairly announce the law of the case" and do not create injustice. *Victory*, 83 So. 3d at 373 (¶12).

¶28. Here, the trial court denied Instruction D-11-A because it believed the first portion of the instruction was fairly covered elsewhere in the instructions. Instruction C-1 instructed the jury that it was the sole judge of the facts in the case and that it had "exclusive province" to determine the weight and credibility of the testimony and supporting evidence of each of the witnesses. C-1 also instructed the jurors to use their good common sense and sound honest judgment.

¶29. The trial court found the second portion of D-11-A singled out a piece of evidence.

In reviewing D-11-A, we agree with the trial court's finding that this instruction improperly singled out Armstrong's confession; therefore, Armstrong was not entitled to have the instruction given.

¶30. We affirmed the refusal of a similar instruction in *Moore v. State*, 822 So. 2d 1100, 1107-08 (¶22) (Miss. Ct. App. 2002). In *Moore*, the defendant's submitted instruction stated:

> You may consider the alleged confession in the light of the manner by which you find it was obtained and give it such weight and credibility as you think it is entitled. Unless you believe from the evidence beyond a reasonable doubt that the alleged confession was made by the Defendant, was truthful, was accurately recorded, the Defendant understood what was said, and such confession was made by the Defendant of his own free will and was not extorted by threat of harm or promise of benefit, then you must disregard the alleged confession to the extent that these facts tend to discredit it.

We found Moore's instruction improperly singled out his confession. Further, the jury had already been instructed on its duty to weigh all the evidence, and we noted "the voluntariness of a statement and its admissibility in evidence is a question for the court to determine and not a question for the jury." *Id*. at 1108 (¶22). We find the same principles apply to the instruction Armstrong proposed and see no error in the denial of his instruction.

CONCLUSION

¶31. The trial court did not err by denying Armstrong's motion to suppress. Armstrong did not affirmatively invoke his right to counsel and he knowingly, intelligently, and voluntarily waived his right to an attorney. The trial court did not violate Armstrong's Sixth Amendment right to confrontation by prohibiting him from introducing his petition for appointed counsel. Further, Armstrong was not entitled to have Jury Instruction D-11-A given, as it improperly singled out a single piece of evidence. Finding no error, we affirm.

¶32. **AFFIRMED.**

BARNES, C.J., J. WILSON, P.J., TINDELL AND C. WILSON, JJ., CONCUR. LAWRENCE, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, C.J., GREENLEE AND C. WILSON, JJ. WESTBROOKS, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON, P.J., McDONALD AND McCARTY, JJ. McCARTY, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS AND McDONALD, JJ. McDONALD, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION.

LAWRENCE, J., SPECIALLY CONCURRING:

¶33. Federal, state, and county governments involved in felony prosecutions are constitutionally burdened with providing indigent defendants legal representation. In an effort to comply with this mandate, the government created a pre-printed form entitled "Petition for Appointment of Attorney." The form consists of eight questions that concern a defendant's background and financial status. That information, certified under oath, is used by the judge to determine if that particular defendant qualifies for a constitutionally required, tax-payer paid attorney.

¶34. The form's language is quite clear. It first asks if the defendant wishes to hire his or her own attorney. If the answer is no, the form instructs a defendant to complete the remaining questions. The second question specifically asks the defendant to confirm the following:

> I, the undersigned am under arrest for the alleged commission of a crime and I desire an attorney to represent me. I do not have sufficient funds to employ an attorney. **I therefore request that the Court appoint an attorney for the purpose of representing me in connection with the charge of _____**

(Emphasis added). A plain reading indicates that the pre-printed form is used to assist the first court that has an interaction with the felony-charged defendant in determining if the

court should appoint an attorney to represent the indigent defendant in connection with that charge. It does not, however, speak to a blanket representation that would be sufficient to claim an unequivocal request for an attorney to be present during any potential interrogation.[5]

¶35. On the day of his arrest, Armstrong signed the form petitioning the court for an attorney for the specific charge of armed robbery. Further, on that same day, Armstrong was read his *Miranda*[6] rights, waived those rights, and did not invoke his right to have an attorney present during questioning. In the first interview he flatly denied any involvement in the robbery. The next day, he was read his *Miranda* rights again and signed a separate form indicating he understood those rights. Once more, Armstrong waived his right to have an attorney present during the interrogation and then confessed to participation in the robbery.

¶36. I do not believe that, when Armstrong signed the form requesting an attorney based on indigence, he was unambiguously invoking his desire not to answer further questions without an attorney present. Nothing in the record indicates that Armstrong articulated his request in a way that the investigator could know he was requesting an attorney. Armstrong waived that right not once, but twice. Both waivers, under the totality of the circumstances,

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[5] The Mississippi Supreme Court has said that "an ambiguous mention of possibly speaking to one's attorney is insufficient to trigger the right to counsel." *Grayson v. State*, 806 So. 2d 241, 247 (¶11) (Miss. 2001) (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)). A mere suggestion or misunderstanding is not enough. "A suspect must articulate his or her desire to have counsel present with sufficient clarity that a reasonable police officer under the circumstances would understand the statement to be a request for an attorney." *Delashmit v. State*, 991 So. 2d 1215, 1220 (¶14) (Miss. 2008).

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

are further evidence that Armstrong's intent was to request the government pay for his attorney, not to invoke his right to have counsel present during the interrogation. To find otherwise would wipe away years of Fifth Amendment jurisprudence that requires an unambiguous invocation.

¶37. In this day and age when every citizen from middle school forward knows and understands their *Miranda* rights, it would burden common sense to hold Armstrong intended to invoke his right to have an attorney present when he signed the form petitioning the court for an attorney. Since Armstrong did not clearly and unambiguously invoke his right to an attorney, I concur with the majority that the second interview was not taken in violation of Armstrong's constitutional rights.

BARNES, C.J., GREENLEE AND C. WILSON, JJ., JOIN THIS OPINION.

WESTBROOKS, J., DISSENTING:

¶38. I believe the declaration in the "Petition for Appointment of Attorney" is not a mere examination of Armstrong's economic status. The first sentence says, "I . . . am under arrest for the alleged commission of a crime and I desire an attorney to represent me." It is an explicit request for an attorney that was made at the beginning of the petition before any inquiries about the defendant's financial commitments were made. The request to have an attorney was unambiguous and unequivocal. Because Armstrong was denied an attorney during the accusatory stage, I respectfully dissent. The "Petition for Appointment of Attorney" states as follows:

> I, the undersigned am under arrest for the alleged commission of a crime and **I desire an attorney to represent me**. I do not have sufficient funds to

> employ an attorney. **I therefore request that the Court appoint an attorney for the purpose of representing me in connection with the charge of ARMED ROBBERY**.

(Emphasis added).

¶39. The petition was first presented to Armstrong on September 2, 2015. It was signed by Armstrong and notarized on that day. This is the same day that Armstrong was arrested, handcuffed, placed in the back of a police vehicle, taken into custody, and detained before Detective Hopewell questioned him. Based on the record, a warrant was issued, and the petition was signed at the county jail. Sergeant Thompson testified that he picked Armstrong up from the county jail on the morning of September 3, 2015. It is also significant that at the time of the suppression hearing Detective Hopewell was no longer with the Meridian Police Department and did not testify. Sergeant Thompson admittedly was not present during the first interrogation but had with him Detective Hopewell's summary, which acknowledged Armstrong's request for an attorney.

¶40. It is well settled that "[t]he right to counsel attaches earlier under Mississippi law than it does under the Sixth Amendment." *Smith v. State*, 942 So. 2d 308, 320 (¶32) (Miss. Ct. App. 2006). "In Mississippi, the right to counsel attaches once the proceedings reach an 'accusatory stage.'" *Id*. "An accusatory stage occurs when a warrant is issued or, when the offender is compelled to appear and answer for the offense, as well as by indictment or affidavit." *Id*. (internal quotation marks omitted).

¶41. In *Dewitt v. State*, No. 2016-KA-01704-COA, 2018 WL 2110642, at *5 (¶27) (Miss. Ct. App. May 8, 2018), this Court held that:

> the accusatory stage is reached when the law enforcement arm of the state first charges the accused with a crime. A charge may be formally made when a warrant is issued for the arrest of the accused. It may be made less formally when, acting without a warrant, law enforcement authorities place an accused under arrest.

¶42. In addition to these rights guaranteed by the United States Constitution, the Mississippi Constitution also states that "[i]n all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself . . . ." Miss. Const. art. 3, § 26. Our supreme court has "construed this provision to be congruent with the right to counsel guaranteed by the Sixth Amendment of the [United States] Constitution, except for the fact that it attaches earlier: A person's § 26 rights attach when the police move from an investigatory phase to an accusatory phase, rather than at the actual start of adversary proceedings." *Grayson v. State,* 806 So. 2d 241, 247 (¶12) (Miss. 2001).[7] "Thus, a suspect has a right to an attorney at the time of his arrest, regardless of whether he has been arraigned or has otherwise triggered his Sixth Amendment rights." *Id*. at 247-48 (¶12) (citation omitted).

¶43. According to Sergeant Thompson's uncontradicted testimony, he believed Armstrong had been served with a warrant in connection with the armed robbery. Undoubtedly, the right to counsel attached at that instant. Moreover, the petition coupled with Detective Hopewell's uncontradicted acknowledgment of Armstrong's request for an attorney should have ceased

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[7] In *Grayson v. State*, 806 So. 2d at 247 (¶9), the defendant was convicted of capital murder and alleged that he was denied his right to counsel guaranteed by the Fifth and Sixth Amendments. The trial court found that "the police ceased their interrogation of [the defendant] when he invoked his right to counsel, that [the defendant] himself reinitiated communication with the authorities, and that [the defendant] signed a waiver of his rights prior to giving his statement." *Id*. at 248 (¶14).

any interrogation until Armstrong consulted with an attorney. There was no need for Armstrong to continuously invoke his right to counsel once he made his unequivocal request on paper and verbally. It could not be overcome by the custodial interrogations that were initiated by law enforcement, rather than Armstrong, because "when a suspect has invoked his right to counsel, interrogation must cease unless the suspect himself voluntarily reinitiates communication." *Grayson*, 806 So. 2d at 248 (¶12).

¶44. Therefore, I would find that Armstrong was denied an attorney during the accusatory stage because his petition alone was an explicit request for an attorney. As a result, the trial court erred by denying Armstrong's motion to suppress. Accordingly, I would reverse and remand this matter to the trial court.

¶45. For the aforementioned reasons, I respectfully dissent.

CARLTON, P.J., McDONALD AND McCARTY, JJ., JOIN THIS OPINION.

McCARTY, J., DISSENTING:

¶46. In trials where a person's liberty is at stake, we should allow the person a fair opportunity to mount a defense. For some reason, the trial court in this case was convinced that Armstrong should be barred from telling his version of the story – that his confession was obtained in violation of the law. This is not necessarily a persuasive story, given the facts arrayed against the defendant; but it was his story.

¶47. Yet in refusing to allow that story to be told, the trial court's errors began to mount and increase in size, and now we are faced with concerns that the Confrontation Clause was violated. It is far better to allow people faced with the loss of their liberty to present a fair

defense and not force them into a corner – when they already have the great forces of the State marshaled against them.

¶48. The majority opinion strains to affirm a case that was broken in multiple ways, and that denied the defendant his right to counsel and the right to confront witnesses. We should instead turn our focus to the federal and state constitutions, and whether they were faithfully followed. Because they were not in this case, I must respectfully dissent.

¶49. First, let us turn to Armstrong's request to be appointed a lawyer. The majority agrees that he signed a "Petition for Appointment of Counsel." The petition is solemnized by Armstrong as an oath and notarized. The document provides counsel to those who are indigent, which the Legislature has codified. *See* Miss. Code Ann. § 99-15-15 (Rev. 2015). "The accused *shall* have such representation available at every critical stage of the proceeding against him where a substantial right may be affected." *Id*. (emphasis added).

¶50. The first sentence of the petition states:

> I, the undersigned am under arrest for the alleged commission of a crime and *I desire an attorney to represent me*. . . . I therefore request that the Court appoint an attorney for the purpose of representing me in connection with the charge of ARMED ROBBERY.

(Emphasis added). Given the detailed and well-recited law set out by the majority, the inquiry of whether Armstrong requested counsel should end there. He did. There was an unambiguous invocation of the right to counsel. Indeed, there are at least *two* invocations of the right to counsel, in addition to the very title of the form, which is "PETITION FOR APPOINTMENT OF ATTORNEY." This even exceeds those cases where we have held that a person adequately invoked the right by barely referring to it verbally. Furthermore, the

request for an attorney is signed under oath by Armstrong.

¶51. This express invocation of the right to counsel should immediately end our inquiry, and the subsequent statement must be suppressed as obtained in violation of an invocation of counsel, and we should reverse for a new trial. *See* Miss. Const. art. 3, § 26 ("In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both . . . .").

¶52. Even if we did not halt our inquiry there, the testimony of the other detective in this case furthers the inevitable conclusion that Armstrong requested counsel. During the suppression hearing, the second detective was asked about the first detective's interrogation summary. The detective admitted that the summary reflected that Armstrong asked for a lawyer: "I see his statement that at one time Hopewell put in there that he asked for a lawyer." So now we have an acknowledgment that counsel was indeed requested. Again, any inquiry should end at this point with the understanding that the right to counsel was invoked.

¶53. The other two issues in this case, introduction of the signed form and the jury instruction, also conflict with very recent precedent from this Court. "Refusing to allow the defendant to attack the truthfulness of his confession is error of a constitutional dimension that denies a defendant fundamental constitutional rights," even though it could still be harmless. *Allen v. State*, 212 So. 3d 98, 104 (¶14) (Miss. Ct. App. 2016). While trial courts determine whether a confession is admissible, "[t]he admissibility of the confession, however, is to be distinguished from the issue of its credibility and its weight." *Id*. at (¶13)

(citation omitted). Ultimately, "the weight and credibility of a confession is for the jury to decide along with other testimony and physical evidence." *Id*. (citation omitted).

¶54. Therefore "[o]nce a confession is admitted into evidence, a defendant is entitled to submit evidence and have the jury pass upon the factual issues of its truth and voluntariness and upon its weight and credibility." *Id*. (citation omitted). This includes that a "defendant may offer proof to show that the confession is untrue and explain why he made the untrue statement." *Id*. (citation omitted).

¶55. "Once this rebuttal or impeachment testimony is offered, then the jury may conclude that the confession, though found by the court to be voluntary, is untrue and not entitled to any weight." *Id*. (citation omitted). This is because "[c]onfessions are not conclusive and *may be weighed as to their credibility under the circumstances* by the jury." *Id*. (emphasis added) (citation omitted).

¶56. As a matter of law, the signed request for a lawyer was incredibly important to attacking the weight a jury should give Armstrong's confession. Inexplicably, the trial court determined the request for counsel could not be admitted as it was "irrelevant." It was of course relevant to the theory of the defense that the confession should be discounted. This ruling is inaccurate specifically regarding our law on confessions, and inaccurate generally in terms of what our Rules of Evidence requires for admission. "Rule 401 favors admission if the evidence has any probative value *at all*." *Adcock v. Miss. Transp. Comm'n*, 981 So. 2d 942, 947 (¶15) (Miss. 2008) (emphasis added). So "[t]he threshold for admissibility of relevant evidence is not great." *Whitten v. Cox*, 799 So. 2d 1, 15 (¶35) (Miss. 2000). As a

result, Rule 401 "is a very low bar" for admission. *Encyclopedia of Miss. Law*, Evidence §33:15 (2d ed.). The signed request for a lawyer should have been admitted, and it was error in this case to exclude it. It also strains against our guarantee that a defendant will have the right "to be confronted by the witnesses against him . . . ." Miss. Const. art. 3, § 26.

¶57. I also believe that the jury instruction should have been given. It was a proper statement of the law under our precedent, and if it needed tailoring to allow the defendant to tell the full story, it would have been better to edit it than deny it outright. For as set out in *Allen*, a defendant is allowed to attack a confession. The majority's reasoning that the instruction is somehow wrong because it "singled out" the confession for attack is wrong in two ways. First, as set out in *Allen*, a defendant is allowed to vigorously attack the credibility to be given to a confession, which allows singling it out. Second, jury instructions single out specific points of law or evidence all the time. That is the point of them.

¶58. We want specificity in our jury instructions; it is vague instructions that are prohibited, not specific ones. *McCarty v. Kellum*, 667 So. 2d 1277, 1287 (Miss. 1995). It can be error to be too vague, since "[a]bstract instructions on legal principles unrelated to facts and issues set out in the instructions are dangerous, because, although they may be correct in principle, they require legal training to properly interpret." *Id*. (citation omitted). As a result, we have instructions that single out the issue of whether a case was untimely filed under the discovery rule of the statute of limitations. *Miss. Valley Silica Co. v. Barnett*, 227 So. 3d 1102, 1119-20 (¶42) (Miss. Ct. App. 2016) (abrogated on other grounds). We have instructions that note that the testimony of a jailhouse informant is to be accorded lesser weight. *Pitchford v. State*,

45 So. 3d 216, 239 (¶89) (Miss. 2010). There are instructions that the jury should not treat corporations differently than human beings. Miss. Model Jury Instr.: Civil § 1:21 (2012). And there is even a jury instruction that if you have a domesticated pet that you should keep it from getting on a county road. Miss. Model Jury Instr.: Civil § 5:7 (2012). We prefer specificity – which is exactly what the defendant attempted to bring forth in this trial.

¶59. There is nothing about this case that should be affirmed. The risks are simply too high. The rights to counsel and to confront witnesses in a criminal trial are simply too precious. We should not affirm rulings that harm those rights.

WESTBROOKS AND McDONALD, JJ., JOIN THIS OPINION.