Serial: **205845**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-M-00195

DAVID McFEE ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

This matter is before this Court, *en banc*, on the Application for Leave to Proceed into the Circuit Court with Motion for Post-Conviction Collateral Relief filed by David McFee, *pro se*. On July 22, 1987, this Court affirmed McFee's conviction and sentence for perjury. *See* ***McFee v. State***, 510 So. 2d 790 (Miss. 1987).

Nearly thirty (30) years later, well outside the three-year statute of limitations for post-conviction collateral relief claims and while also serving life sentences for murder and rape, McFee presents a claim that his perjury sentence is illegal. After due consideration, the Court finds that his claim is devoid of a legal basis and, therefore, is time-barred. Accordingly, the Court concludes that this application should be denied.

IT IS THEREFORE ORDERED that the Application for Leave to Proceed into the Circuit Court with Motion for Post-Conviction Collateral Relief filed by David McFee, *pro se*, is hereby denied.

SO ORDERED, this the 2nd day of August, 2016.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH,
PRESIDING JUSTICE

TO DENY: WALLER, C.J., RANDOLPH, P.J., LAMAR, COLEMAN, MAXWELL, AND BEAM, JJ.

COLEMAN, J., AGREEING IN RESULT WITH SEPARATE WRITTEN STATEMENT.

KITCHENS, J., OBJECTS WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, J.

NOT PARTICIPATING: DICKINSON, P.J.

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COLEMAN, J., AGREEING IN RESULT:

¶1. I agree that David McFee's petition for leave to proceed in the trial court should be denied as barred by the Uniform Post-Conviction Relief Act's three-year statute of limitations. I write separately because I disagree with the order to the extent that it appears to analyze, at least to the extent necessary to determine the absence of an arguable basis, the merits of the petitioner's claims in order to reach the conclusion that the three-year bar will apply. Pursuant to the Court's published opinions in cases such as ***Smith v. State***, 149 So. 3d 1027 (Miss. 2014), and ***Rowland v. State***, 98 So. 3d 1032 (Miss. 2014)[1], the procedural bars and the three-year statute of limitations do not apply in cases wherein a petitioner claims the violation of a fundamental right. In the case *sub judice*, McFee claims his sentence is illegal, which the ***Rowland*** Court, among others, has recognized is a claim of a violation of a fundamental right.

[1]The other separate statement issuing with the Court's order today primarily relies upon ***Rowland I***, or ***Rowland v. State***, 42 So. 3d 503 (Miss. 2010), but, with respect, I am of the opinion that ***Rowland II*** presents a more recent view of the pertinent issues.

¶2. It is the nature of statutes of limitations that they sometimes will operate to bar otherwise meritorious claims, and the merit of a claim is not relevant to their applicability. *See* ***Patterson v. State***, 594 So. 2d 606, 608 (Miss. 1992) (Petitioner's claim for post-conviction relief barred by statute of limitations "whether meritorious or not. . . ."). I cannot imagine another type of civil action, *e.g.*, a medical negligence case, where the Court would first look to the merits of a plaintiff's claims filed thirty years after the accrual of the same to determine whether to apply the statute of limitations.

¶3. However, I agree with the denial of McFee's petition as time-barred. The three-year statute of limitations is a reasonable, constitutional restriction on the right of a petitioner to bring his claims – even when the claim is of the violation of a constitutional right. *See* ***Cole v. State***, 608 So. 2d 1313 (Miss. 1992). McFee fails to demonstrate the existence of any statutory exemption to its application here, and absent a holding beyond a reasonable doubt that the statute of limitations is unconstitutional, the courts must apply it. Perhaps the Mississippi Supreme Court may take whatever power for itself it wishes, but according to our constitutional system of separate branches of government, we have no real, legal right to simply ignore statutes.

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KITCHENS, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶4. Because David McFee has presented a meritorious claim that he received an illegal sentence, I would find that his application for leave to proceed with a motion for post-conviction relief is excepted from the time bar of the Mississippi Uniform Post-Conviction Collateral Relief Act. I would grant McFee's application and vacate the habitual offender portion of his sentence.

¶5. McFee was charged and convicted of the crime of perjury under Mississippi Code Section 97-9-59 (1972), for giving perjured testimony at the trial of Eric Fuselier. The applicable sentencing statute provides that "[p]ersons convicted of perjury shall be punished by imprisonment in the penitentiary as follows: For perjury committed on the trial of any indictment for a capital offense or for any other felony, *for a term not less than ten years* . . . ." Miss. Code Ann. § 97-9-61 (1972) (emphasis added). This statute, which provides no maximum sentence for the crime, has not been altered by the Legislature since its inclusion in Hutchinson's Code in 1848. Hutchinson's Code, ch. 64 art. 12 (1848).

¶6. Although the Mississippi Code provides no maximum sentence for McFee's perjury crime, the trial court sentenced him to twenty years as a habitual offender. However, neither the indictment nor the sentencing order specifies the applicable habitual offender statute. The less severe of the two habitual offender statutes, Section 99-19-81, states that:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, *shall be sentenced to the maximum term of imprisonment prescribed for such felony*, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Miss. Code Ann. § 99-19-81 (Rev. 2015) (emphasis added). Section 99-19-83 provides that:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, *shall be sentenced to life imprisonment*, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections.

Miss. Code Ann. § 99-19-83 (Rev. 2015) (emphasis added).

¶7. Although McFee's indictment and sentencing order do not specify the applicable habitual offender statute, the fact that the trial court did not sentence him to life imprisonment indicates that Section 99-19-81 was applied by the sentencing judge. The impact of habitual offender sentencing is that the "sentence shall not be reduced or suspended

nor shall such person be eligible for parole or probation." *Id.*; Miss. Code Ann. § 99-19-81. Thus, as an habitual offender, McFee must serve the twenty years "day for day."

¶8. McFee argues that, because Section 99-19-81 states that an habitual offender shall be sentenced to the "maximum term of imprisonment prescribed" for the felony and the perjury statute has no maximum sentence, the habitual offender portion of his sentence is illegal. Without doubt, McFee's collateral attack on a sentence he received almost thirty years ago is time-barred. Miss. Code Ann. § 99-39-5(2) (Rev. 2015). But this Court has held unequivocally that errors affecting fundamental rights, including the right of freedom from an illegal sentence, are excepted from the three-year statute of limitations contained in the Uniform Post-Conviction Collateral Relief Act. ***Rowland v. State***, 42 So. 3d 503, 507 (Miss. 2010).

¶9. If our rules of statutory interpretation were followed by the majority, it is elementary that McFee would be granted relief from the habitual offender sentencing enhancement. "When the words of a statute are plain and unambiguous there is no room for interpretation or construction, and we apply the statute according to the meaning of those words." ***Coleman v. State***, 947 So. 2d 878, 881 (Miss. 2006). The plain language of Section 99-19-81 states that an habitual offender must be sentenced to the "maximum term of imprisonment prescribed for such felony." And this Court has held that the trial court has no discretion to impose a sentence less than the maximum under Section 99-19-81.[2] ***Clowers v. State***, 522 So.

[2] In fact, the only instance in which the trial court may reduce an habitual offender sentence is upon a finding that the sentence is disproportionate to the crime in violation of the Eighth Amendment of the United States Constitution. ***Clowers***, 522 So. 2d at 765.

2d 762, 764 (Miss. 1988). Because no maximum term of imprisonment was prescribed for McFee's perjury crime, the trial court lacked the authority to sentence him as an habitual offender under Section 99-19-81. Therefore, the habitual offender portion of McFee's sentence violated his right of freedom from an illegal sentence, and this claim is excepted from the time bar. I observe that, even if the sentencing statutes at issue were ambiguous, McFee would be entitled to relief because criminal statutes must be "strictly construed against the State and liberally in favor of the accused." ***Coleman***, 947 So. 2d at 881.

¶10. Because Section 99-19-81 provides that an habitual offender shall be sentenced to the "maximum term of imprisonment prescribed" for the felony, and the perjury statute prescribes no maximum sentence, McFee has received an illegal sentence and he is entitled to post-conviction relief. I would grant McFee's application and vacate the habitual offender portion of his sentence.

KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT.