

Serial: **221476**

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2018-M-00909**

***DAVID R. GRAY***

***Petitioner***

***v.***

***STATE OF MISSISSIPPI***

***Respondent***

**EN BANC ORDER**

Before the Court is David Gray’s Application for Leave to Proceed in the Trial Court. Gray was convicted of capital murder and sentenced to life as an habitual offender. ***Gray v. State***, 472 So. 2d 409 (Miss. 1985). This is his first application for post-conviction relief. Because his conviction and sentence were affirmed more than thirty years prior to his filing, Gray’s claim is time-barred.

To the extent Gray argues he is serving an illegal sentence—a claim that is excepted from the time bar—his claim lacks merit. Gray asserts his indictment did not properly notify him of the prior convictions that formed the basis of his habitual-offender status. But the list of prior convictions attached to his indictment included all the information required under Uniform Rule of Circuit and County Court 12.03 and clearly “suppl[ied] enough information to [Gray] to identify with certainty the prior convictions relief upon by the State for enhanced punishment.” ***McIlwain v. State***, 700 So. 2d 586, 589 (Miss. 1997). Further, a life sentence was the only sentencing option for his non-death-penalty capital-murder conviction, regardless of whether Gray was a habitual offender under Mississippi Code Section 99-19-81

or Mississippi Code Section 99-19-83. Thus, it is immaterial that the indictment did not mention Gray had *served* a year or more on his separate prior convictions.

Gray's life sentence is clearly legal. Therefore, the application for post-conviction relief should be denied.

IT IS THEREFORE ORDERED that David Gray's Application for Leave to Proceed in the Trial Court is hereby denied.

SO ORDERED, this the 5th day of December, 2018.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE  
FOR THE COURT

**AGREE: WALLER, C.J., MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ.**

**JOIN: RANDOLPH, P.J.**

**COLEMAN, J., AGREES IN RESULT ONLY WITHOUT SEPARATE WRITTEN STATEMENT.**

**KITCHENS, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, P.J.**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-00909

*DAVID R. GRAY*

v.

*STATE OF MISSISSIPPI*

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

¶1. Today’s order mischaracterizes David Gray’s claim by stating, “Gray asserts his indictment did not properly notify him of the prior convictions that formed the basis of his habitual-offender status.” I agree that there is no apparent deficiency in that aspect of the indictment. But that is not what Gray claims. What Gray actually does claim is that he “never [was] indicted as a[n] habitual offender . . . .” Because it is true that the State never indicted Gray as an habitual offender, I would grant his application for leave to proceed in the trial court for post-conviction relief.

¶2. Gray argues he is serving an illegal sentence, a claim exempt from the time bar. *Rowland v. State*, 42 So. 3d 503, 507 (¶ 12) (Miss. 2010). His argument is based on the State’s failure to indict him as an habitual offender. Gray was convicted of capital murder, then was sentenced under Mississippi Code Section 99-19-83 (Supp. 1981).<sup>1</sup> Incorporated

---

<sup>1</sup>Gray originally was sentenced to death, a judgment this Court affirmed. *Gray v. State*, 472 So. 2d 409, 423 (Miss. 1985). The United States Supreme Court reversed this Court’s judgment, vacating Gray’s death sentence. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S. Ct. 2045, 2057, 95 L. Ed. 2d 622 (1987). On remand, Gray was sentenced to life as an habitual offender under Section 99-19-83.

by reference, a list of Gray's previous convictions were included in the indictment by way of an exhibit, which reads, *in toto*,

EXHIBIT "A"

When he the said David Randolph Gray was convicted and sentenced for the crime and felony of aggravated assault upon a law enforcement officer, said conviction having been had in the Circuit Court of Jones County, Mississippi, First District, being cause number 1055, and whereat on the 4th day of March, 1976, said defendant was sentenced to serve a term of three (3) years in the Mississippi State Penitentiary, suspended and placed on probation for a period of three (3) years, said probation being revoked on the 9th day of January, 1979, and the said defendant was sentenced to serve a [sic] three (3) years in the Mississippi State Penitentiary, and when he the said David Randolph Gray was convicted and sentenced for the crime and felony of grand larceny, said conviction having been had in the Circuit Court of Jones County, First District, Mississippi, being cause number 1111, and whereat on the 19th day of September, 1980, said defendant was sentenced to serve a term of two (2) years in the Mississippi State Penitentiary; and when he the said David Randolph Gray was convicted and sentenced for the crime and felony of cattle theft, said conviction having been had in the Circuit Court of Jones County, Mississippi, First District, being cause number 1120, and whereat on the 19th day of September, 1980, the said defendant was sentenced to serve a term of two (2) years in the Mississippi State Penitentiary, said sentence to run concurrently with the sentence imposed in cause number 1111[.]

¶3. Although Gray's previous convictions were listed, neither the indictment proper nor the incorporated exhibit charges Gray as an habitual offender; this Court's precedent unequivocally requires reversal in the face of such an omission. *Hentz v. State*, 542 So. 2d 914, 918 (Miss. 1989) (An "indictment against an habitual offender *must include* a charge of habitual offender status sufficient to satisfy notice/due process requirements and double jeopardy concerns.") (emphasis added); *Joiner v. State*, 61 So. 3d 156, 160 (¶ 13) (Miss. 2011) (Chandler, J., dissenting) ("This Court has held that if a defendant is not indicted as a habitual offender, the defendant *cannot be convicted and sentenced as a habitual*

*offender.*”) (emphasis added) (citing *Feazell v. State*, 761 So. 2d 140, 142-43 (¶ 13) (Miss. 2000) (quoting *Keyes v. State*, 549 So. 2d 949, 951 (Miss. 1989)); see *Gowdy v. State*, 56 So. 3d 540, 545 (¶ 16) (Miss. 2011) (a criminal “defendant must be afforded due process of law and be given fair notice of ‘the nature and cause of the accusation.’”); see also U.S. Const. amends. VI, XIV; Miss. Const. art. 3, §§ 14, 26.

¶4. It is true that, “if an indictment [is] sufficient to apprise a defendant that the [S]tate [is] seeking to impose a life sentence without chance for probation or parole, the inclusion of the statutory section number [is] not essential to the validity of the indictment.” *Akins v. State*, 493 So. 2d 1321, 1322 (Miss. 1986). But the indictment here lacks not only the statutory section number; it also omits any charge of Gray as an habitual offender or any indication that the State was seeking a sentence enhancement. “[A] defendant has a right to be indicted as a[n] habitual offender before he properly may be convicted and sentenced as a habitual offender.” *Joiner*, 61 So. 3d at 158 (¶ 6). Gray’s sentence could not be enhanced under the habitual offender statutes when he was not indicted as an habitual offender. As presented, the information about Gray’s prior convictions falls into the category of mere surplusage.

¶5. Compounding the deficiency, the indictment does not allege that Gray had served separate terms of one year or more in prison, which also constitutes reversible error for defendants sentenced under Section 99-19-83. *Akins*, 493 So. 2d at 1322. That code section requires that the accused “shall have . . . served separate terms of one (1) year or more . . . in any state and/or federal penal institution[.]” Miss. Code Ann. § 99-19-83. That statutory

requisite is essential to the establishment of habitual offender status under Section 99-19-83, and its omission nullifies the sentencing court's determination that Gray was a Section 99-19-83 habitual offender. *Akins*, 493 So. 2d at 1322.

¶6. Gray is serving an habitual offender sentence for which he was not indicted. He should be resentenced without the habitual offender enhancement.<sup>2</sup> Therefore, I object to the Court's denial of Gray's meritorious application for post-conviction relief.

**KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT.**

---

<sup>2</sup>The Court's order suggests that, regardless, Gray would receive a life sentence without the possibility of parole; however, if Gray were to be sentenced appropriately under Mississippi Code Section 97-3-21 (Supp. 1981), then he potentially could receive a life sentence with the possibility of parole; so the error is not harmless.