Serial: **223008**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-01436

ADAM CHISM ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

Now before the en banc Court is Adam Chism's Application for Leave to File Motion for Post-Conviction Relief, filed October 9, 2018, and November 6, 2018. The State of Mississippi's response and Chism's rebuttal are also before us.

Chism was convicted of burglary of a dwelling and sentenced as a habitual offender to life in prison. ***Chism v. State***, 253 So. 3d 343, 344, 349 (Miss. Ct. App. 2018). The Court of Appeals affirmed his conviction and sentence. ***Id.*** at 349. This Court denied his petition for a writ of certiorari, and the mandate issued October 4, 2018.

Chism raises one claim: The habitual-offender portion of his sentence is illegal, because neither of his prior convictions were crimes of violence. While this claim could have been raised on direct appeal, an illegal-sentence claim is a recognized exception to the waiver bar. ***Rowland v. State***, 98 So. 3d 1032, 1035-36 (Miss. 2012), *overruled on other grounds by* ***Carson v. State***, 212 So. 3d 22 (Miss. 2016). To overcome that bar, however, the claim must have some arguable basis. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010).

Here, there is no arguable basis for Chism's illegal-sentence claim. Mississippi Code Section 99-19-83 clearly mandated that Chism be sentenced as a habitual offender to life in prison. Before his current conviction, Chism had been convicted of burglary of a dwelling in 2009 and auto burglary in 2012. These two convictions arose out of separate incidents, and Chism was sentenced to and did serve separate terms in prison of one year or more. Further, the 2009 burglary of a dwelling was "a crime of violence, as defined by [Mississippi Code] Section 97-3-2." Miss. Code Ann. § 99-19-83 (Rev. 2015). *See* Miss. Code Ann. § 97-3-2(1)(o) (Rev. 2015).

Chism claims the application of Section 97-3-2 (Rev. 2014) to his 2009 burglary-of-a-dwelling conviction is *ex post facto*, and thus illegal, because Section 97-3-2 was not enacted until 2014. But this Court has long made clear that a sentence as a "habitual criminal is not to be viewed as either a new jeopardy *or additional penalty for the earlier crimes*. It is a stiffened penalty for *the latest crime*, which is considered to be an aggravated offense because a repetitive one." ***Smith v. State***, 465 So. 2d 999, 1003 (Miss. 1985) (emphasis added) (quoting ***Branning v. State***, 224 So. 2d 579, 580–81 (Miss. 1969)). Chism's life sentence—the one for which he seeks leave to file a PCR motion—is not retroactive additional punishment for his 2009 conviction. It is an enhanced penalty for his 2016 conviction.

This latest crime was committed *after* Section 99-19-83 was amended in 2014 to incorporate by reference Section 97-3-2's definition of "crime of violence." So the application of Section 99-19-83, which defines Chism's previous burglary-of-a-dwelling

conviction as a qualifying crime of violence, is not *ex post facto*. *See* ***Miller v. State***, 225 So. 3d 12 (Miss. Ct. App. 2017).

Thus, Chism fails to present a substantial showing of the denial of a state or federal right.

IT IS THEREFORE ORDERED that the application is denied.

SO ORDERED, this the 25th day of July, 2019.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

TO DENY: RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ.

TO GRANT: KITCHENS AND KING, P.JJ.

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

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-01436

ADAM CHISM

v.

STATE OF MISSISSIPPI

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

¶1. Because this Court appears to apply an incorrect standard that would require Adam Chism to prevail on the merits of his motion for post-conviction relief when he has only filed an application for leave, I object to the order denying his Application for Leave to File Motion for Post-Conviction Relief.

¶2. In a pro se Application for Leave to File Motion for Post-Conviction Relief, Chism alleges that he received an illegal sentence. Miss. Code Ann. §§ 99-39-7, -27 (Rev. 2015). While Chism did not raise his sentence on direct appeal, illegal sentence claims are excepted from the waiver bar. ***Ivy v. State***, 731 So. 2d 601, 603 (Miss. 1999). A procedural bar may be overcome when an *arguable basis* for the claim exists. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010). Further, an applicant must present a substantial showing of the denial of a state or federal right. Miss. Code Ann. § 99-39-27(5) (Rev. 2015). While the applicant need not prove the merits of his case in the application, he must only make the requisite showings that he has a basis for his claim; the outcome in the trial court may still be either for or against the applicant upon the grant of an application. Additionally, this Court takes

into account when a prisoner proceeds pro se, as Chism does, and may credit inartfully drafted or pleaded allegations. ***Hannah v. State***, 943 So. 2d 20, 23 n.1 (Miss. 2006).

¶3. Chism claims that the habitual-offender part of his sentence is illegal because neither of his prior convictions were statutorily classified as crimes of violence when he committed those crimes, and thus the application of a later statute is ex post facto. However, one of his prior convictions, burglary of a dwelling, was classified as a crime of violence in 2014, after he committed that burglary, but before he committed the most recent burglary. The order denying Chism's application cites a Court of Appeals case with a similar fact pattern, ***Miller v. State***, as dispositive. ***Miller v. State***, 225 So. 3d 12 (Miss. Ct. App. 2017). The Court of Appeals is not the highest appellate court in this state; this Court is. Moreover, the Court of Appeals was sharply divided in ***Miller***, voting six to four to uphold Miller's sentence. In ***Miller***, the majority determined that classifying a prior burglary as a crime of violence did not violate the Ex Post Facto Clauses. Four Court of Appeals judges disagreed. ***Id.*** at 16 (Greenlee, J., dissenting). The dissent began with the proposition that Mississippi is critical of retroactive laws. ***Id.*** at 16-17 (Greenlee, J., dissenting); Miss. Code Ann. § 99-19-1 (Rev. 2015). The dissent argued that "[a]pplying section 97-3-2 to Miller's dwelling burglary would make it a greater crime than when committed. It deems a finding of fact that the fact-finder did not find, violence." ***Id.*** at 18. It noted that at the time of the commission of Miller's dwelling burglary, "violence needed to actually be proven for it to be considered a violent crime for sentencing purposes." ***Id.*** The dissent concluded that using the new de facto classification of that prior crime "dispenses with the requirement of actually proving

that violence occurred. Thus, less is now required for the finding of violence than was previously required, negating the evidentiary proof of violence and deeming violence when, sixteen years prior, violence was required to be proven. Such is an ex post facto application of the law." ***Id.***

¶4. Certainly if four esteemed Court of Appeals judges agreed with Chism's reasoning and offered a well-reasoned argument on its behalf, Chism has an "arguable basis" for his claim and has made a sufficient showing to allow him to proceed in the trial court. The trial court and this Court may not ultimately agree with the merits of Chism's argument, but this Court is merely examining his application for leave at this juncture. He need not prove that he would win on the merits of his case to demonstrate a sufficient showing that he has some arguable basis for his claim in order to proceed in the trial court. Accordingly, I believe that this Court should grant Chism's application for leave.

KITCHENS, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT.