

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**GABRIEL MCDOWELL**

**APPELLANT**

**VS.**

**NO. 2008-KA-1139**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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### **STATEMENT OF THE ISSUES**

- I. McDowell's sentence of life in prison without parole was not barred by double jeopardy.
- II. The trial court correctly sentenced McDowell to life without parole.
- III. McDowell's challenge to the indictment has already been addressed by the Mississippi Supreme Court and is therefore .
- IV. McDowell's sentence is not illegal as a matter of law or in the interest of justice.
- V. The trial court and the appellate court did not abuse their discretion in their rulings on McDowell's sentence.
- VI. McDowell was not denied effective assistance of counsel at his re-sentencing hearing.

## STATEMENT OF THE CASE

McDowell is currently in the custody of the MDOC after being convicted of the transfer of a controlled substance in the Circuit Court of Hancock County, Mississippi. McDowell was originally sentenced pursuant to Section 99-19-81 of the Mississippi Code to serve a term of thirty (30) years without parole in the custody of the MDOC. However, McDowell was subsequently re-sentenced pursuant to section 99-19-83 of the Mississippi Code to serve a term of life imprisonment without parole in the custody of the MDOC.

McDowell appealed his original judgment of conviction and sentence to the Mississippi Supreme Court and assigned numerous errors. On October 31, 2001, the Mississippi Supreme Court affirmed McDowell's judgment of conviction and sentence in a written opinion, McDowell v. State, 807 So.2d. 413 (Miss. 2001), *reh'g. denied*, February 21, 2002. On May 7, 2002 McDowell filed an "Application for Leave to Proceed in the Trial Court for Relief Pursuant to the Mississippi Post Conviction Relief Act." in the Mississippi Supreme Court. McDowell alleged, among other things, that the trial court erred in sentencing him pursuant to section 99-19-93 [*sic*] of the Mississippi Code, that the indictment was defective and that he received ineffective assistance of counsel. The Mississippi Supreme Court held that the indictment referenced Miss. Code Ann. § 99-19-83 (Rev. 2000), which provides a life sentence for two underlying convictions, one of which being a crime of violence. The Mississippi Supreme Court further held that McDowell was convicted of assault with intent to ravish and that this was one of the underlying felonies of McDowell's habitual offender status. The Mississippi Supreme Court noted that McDowell was sentenced to thirty years imprisonment, when from the record it

appeared that life imprisonment, pursuant to Miss. Code Ann. . § 99-19-83 (Rev. 2000), was the only sentencing option open to the trial court. The Mississippi Supreme Court granted McDowell an evidentiary hearing for the limited purpose of determining whether he had been previously convicted of two felonies, one being a crime of violence, and whether McDowell could properly be sentenced as an habitual offender under Miss. Code Ann. § 99-19-83 (Rev. 2000).

On November 22, 2002, the Hancock County Circuit Court held an evidentiary hearing and determined that Miss. Code Ann. § 99-19-83 (Rev. 2000) was applicable to McDowell's judgment of conviction and that the only sentence permitted by state law was life without parole. On December 16, 2002, the circuit court re-sentenced McDowell to a term of life without parole in the custody of MDOC.

On August 28, 2003 and on September 26, 2003, respectively, McDowell filed, in the supreme court, a "Motion To Show Cause" and a "Motion For Leave To Appeal From The Lower Court To The Supreme Court" citing the following errors: (1) that he was denied his right to counsel at the evidentiary hearing and (2) double jeopardy. On October 23, 2003, McDowell filed an untimely "Notice of Appeal" in the Hancock County Circuit Court. He then filed, in the supreme court, an application seeking leave to pursue post-conviction relief in the circuit court in which he raised the same issues as he raised in his first post-conviction motion. On January 16, 2004, the circuit court entered an "Order" granting McDowell permission to proceed with the untimely appeal. On March 17, 2004, the supreme court entered an "Order" denying McDowell's post-conviction application and his motion for leave to appeal, both of which had been filed in the supreme court, stating, in pertinent part, as follows:

The panel finds that there is no showing that the petitioner had a right to counsel in the post-conviction proceedings, and even if there were, there is no showing of any possible prejudice that could have result from any denial of counsel. The panel further finds that any issues of effectiveness of counsel at trial or on appeal are barred by res judicata, Miss. Code Ann. § 99-39-21(2), and without merit under Strickland v. Washington, 466 U.S. 668 (1984). The panel further finds that the petitioner fails to show any newly discovered evidence that could undermine the conviction. Lastly, the panel finds that the petitioner's attempt to perfect an appeal from the sentence that the circuit court imposed on November 22, following his post-conviction relief hearing is untimely.

IT IS THEREFORE ORDERED that the Petitioner's Application for Leave to Proceed in the Trial Court and Motion for Leave to Appeal from the Lower Court are hereby denied, and the Motion to Vacate Sentence is dismissed with prejudice.

Thereafter, on November 22, 2004, McDowell filed his appellant's brief in which he alleged the following errors: (1) the stated failed during the evidentiary hearing to offer sufficient proof of his two prior felony convictions; (2) his re-sentencing amounted to double jeopardy, and (3) he was denied assistance of counsel during the evidentiary hearing. The Court of Appeals, in an unpublished opinion, dismissed McDowell's appeal on the ground that the court was without jurisdiction to hear an untimely appeal. Thereafter, on October 13, 2005, McDowell filed a motion for rehearing which was denied on January 3, 2006.

McDowell then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Mississippi, Southern Division, asserting four grounds:

**Ground One** - Denial of right of appeal, review and exhaustion, for purposes of federal habeas corpus review, on claim of illegal sentence.

**Ground Two** - Petitioner's re-sentencing to a term of life without parole is illegal and rests upon insufficient proof of prior convictions.

**Ground Three** - The trial court's re-sentencing to life without parole violated McDowell's double jeopardy rights and was in violation of petitioner's 6<sup>th</sup> and 14<sup>th</sup> amendment due process and equal protection rights.

**Ground Four** - McDowell was denied his due process rights to assistance of counsel during the sentencing states on November 22, 2002 in violation of the 6<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution.

The United States District Court entered its Judgment on March 14, 2008, and sent the matter back to the state court for re-sentencing with appointed counsel present to assist McDowell. On June 18, 2008, re-sentencing hearing was held in the Hancock County Circuit Court. McDowell was present with his court appointed counsel. The trial judge held that McDowell's sentence of life without parole would not be set aside. He therefore sentenced McDowell to life imprisonment as an habitual offender without the possibility of parole or probation pursuant to Miss. Code Ann. § 99-19-83. A corrected sentencing order was entered on July 8, 2008, to show the crime for which McDowell was sentenced. (C.P. 26) McDowell filed a Notice of Appeal from the Re-Sentencing Order on July 14, 2008. (C.P. 29)

#### **SUMMARY OF THE ARGUMENT**

The original sentence imposed did not comport with the indictment or the proof of McDowell's status as an habitual offender with a violent felony record. It is not a double jeopardy violation to correct a mistake of law. Willis v. State, 821 So.2d 888 (Miss.Ct.App.2002). Further, the record does not reflect, as McDowell intimates, that the trial judge ever made a finding of gross disproportionality as to the application of Miss. Code Ann. § 99-19-83, nor did it apply the *Solem* factors. Where there is no gross disproportionality, the trial court is without discretion and must sentence an habitual offender with a violent felony conviction to life imprisonment without parole pursuant to Miss. Code Ann. § 99-19-83. Further, the Mississippi Supreme Court, after reviewing the case on direct appeal, found that the record supported the application of Miss. Code Ann. § 99-19-83 and that the indictment cited



the same. The Mississippi Supreme Court therefore correctly instructed the trial court to sentence McDowell accordingly. There are numerous cases where the Mississippi appellate courts have upheld life sentences without parole for habitual offenders with a violent felony who are subsequently convicted of the possession or sale of illegal drugs.

The Mississippi Supreme Court ruled in McDowell's first Motion for Post Conviction Relief that his indictment was not defective. The issue is *res adjudicata*. There is nothing in the record to show that McDowell received ineffective assistance of counsel. He is unable to prove either prong of *Strickland*. Accordingly, the rulings and judgment of the trial court should be upheld.

### **ARGUMENT**

#### **I. McDowell's sentence of life in prison without parole was not barred by double jeopardy.**

In Willis v. State, 821 So.2d 888 (Miss.Ct.App.2002), Willis pled guilty to manslaughter and received a sixteen (16) year sentence with two years suspended. The trial court noticed its error when it discovered that Willis was a repeat offender. The trial court then re-sentenced Willis to sixteen (16) years with no years suspended. The trial court denied Willis's motion for post conviction relief holding that he was properly sentenced. Willis appealed and the Mississippi Court of Appeals held:

Sentencing within statutory guidelines is firmly within the trial court's discretion. Johnson v. State, 461 So.2d 1288, 1292 (Miss. 1984). Willis's unique argument is that even though he was sentenced illegally, to pronounce the legally correct sentence upon him would violate his constitutional rights. Recently the Mississippi Supreme Court held that a prisoner previously convicted of a felony is not eligible for suspended sentence under

Mississippi Code Annotated Section 47-7-3 (Rev.2000). *Goss v. State*, 721 So.2d 144, 146 (Miss.1998)(overruled on other grounds by *Carter v. State*, 754 So.2d 1207 (Miss.2000)). Mississippi law instead provides for a special form of suspension for habitual offenders, post-release supervision. Miss.Code Ann. § 47-7-34 (Rev.2000); see *Carter v. State*, 754 So.2d 1207, 1208 (Miss.2000).

Willis argues that removing the suspension from his sentence violates his constitutional protection against double jeopardy. This novel point of law aside, Willis is wholly incorrect to assert that he cannot be re-sentenced to correct a mistake of law. So long as Willis's sentence comports with the law, and the court did not abuse its discretion, Willis cannot sustain this assignment of error. Consequently, we affirm the trial court.

*Willis* at 890.

Similarly, McDowell was originally sentenced incorrectly pursuant to Miss. Code Ann. § 99-19-81 to 30 years in the custody of the MDOC. His indictment referenced only Miss. Code Ann. § 99-19-83 (Rev. 2000), under which the only proper sentence is life without parole where the offender has been previously convicted of two felonies, one being a crime of violence.

Thus, the Mississippi Supreme Court correctly remanded McDowell's case for determination as to whether he had two previous felony convictions, on being a crime of violence, and for re-sentencing pursuant to the correct statute. (Appellant's R.E. 15-16)

McDowell cites *Leonard v. State*, 271 So.2d 445 (Miss. 1973) and *Lambert v. State*, 904 So.2d 1150 (Miss.Ct.App. 2004) for the proposition that "once a circuit or county court exercises its option to impose a definite sentence it cannot subsequently set that sentence aside and impose a greater sentence." Lambert was re-sentenced when a hearing was held to revoke his post-release supervision. Due to violating the terms and conditions of his post-release supervision by begin under the influence of alcohol and by committing domestic violence, the

trial court added an addition condition and placed Lambert in the house arrest program. A witness reported being intimidated during the course of the hearing and the judge reopened the case and heard testimony regarding the domestic abuse. The trial judge then revoked three years of Lambert's suspended sentence. The Mississippi Court of Appeals held that this was not double jeopardy since it did constitute two sentences for one offense.

McDowell also relies on Ethridge v. State, 800 So.2d 1221 (Miss.Ct.App.2001), however as the trial judge noted, *Ethridge* is easily distinguished from the case at hand. (Tr. 18) Ethridge was originally sentenced to two, seven-year terms to run concurrently, plus a \$5,000.00 fine. Ethridge filed a Motion for Reconsideration of his sentence, whereupon the trial court re-sentenced Ethridge to two, thirty-year terms to run consecutively with one another for a total of sixty year, plus two \$30,000 fines. Id. at 1223. The judge then suspended the sentences and placed Ethridge in the electronic house arrest program with instructions that if Ethridge violated the house arrest program the suspension of his prison terms would be revoked and he would begin serving his time. Id.

As the trial court noted, there is not much difference between a 30 year sentence without parole and a life sentence without parole, consider McDowell's age. However, there is a huge difference between 7 years to serve and 60 years to serve. Further, in *Ethridge*, there was no error as to the statute under which the original sentence was pronounced. In the instant case, the sentence was corrected so that it conformed with the indictment and the proof and was pursuant to the correct statute. This does not constitute double jeopardy.

McDowell argues that the trial judge made a finding during the initial sentencing that the application of Miss. Code Ann. § 99-19-83 (Rev. 2000) would violate the requirement that a

criminal sentence must not be disproportionate to the crime for which the defendant is being sentenced. However, the trial judge states on the record that he is “concerned” about the constitutionality of applying the enhancement *as well as* the habitual portion of the indictment. The trial judge makes no “finding” that sentencing pursuant Miss. Code Ann. § 99-19-83 (Rev. 2000) would violate the constitution. He makes no application of the objective factors which guide a proportionality analysis. McDowell cites Clowers v. State, 522 So.2d 762 (Miss. 1988) for the proposition that the trial judge was not required to sentence McDowell pursuant to Miss. Code Ann. § 99-19-83 (Rev. 2000), but the court in *Clowers* makes a careful analysis of the proper factors. Such an analysis is not found in the initial sentencing record, nor is the trial judge’s statement of his concern directly strictly to the proportionality of Miss. Code Ann. § 99-19-83 (Rev. 2000), but rather to the simultaneous application of the enhancement of penalties for drug offenses and the habitual offender statute.

A criminal sentence must not be disproportionate to the crime for which the accused is found guilty. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (overruled in part by *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)). The Mississippi Supreme Court, in Hoops v. State, 681 So.2d 521, 538 (Miss.1996), determined that Harmelin, 501 U.S. at 991-92, 111 S.Ct. 2680 “makes [it] clear that the three[-]prong analysis of *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality.” Williams v. State, 784 So.2d 230, 236 Miss.Ct.App.2000 (internal quotations omitted).

McDowell's sentence of life without parole, which is mandatory under the circumstances, did not arise solely from his conviction of possession of cocaine. He was sentenced to life

without parole for his status as a habitual offender with a record as a violent offender. “The correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute.” Oby v. State, 827 So.2d 731, 735 (Miss.Ct.App.2002). A “sentence of life without parole [is] not grossly disproportionate to a habitual offender's crime of possession of a controlled substance.” Id. (citing Wall v. State, 718 So.2d 1107, 1114 (Miss.1998)). See also, Jenkins v. State, 997 So.2d 207 (Miss.Ct.App. 2008).

Further, the Mississippi Supreme Court made a clear finding that the record showed two felony convictions, one of which was for a violent crime, and directed the trial judge to sentence McDowell under the correct statute. The Supreme Court did not see fit to request a proportionality analysis as the record does not indicate the need for such an analysis.

This issue is without merit and the judgment of the trial court should be affirmed.

**II. The trial court correctly sentenced McDowell to life without parole pursuant to Miss. Code Ann. § 99-19-83 (Rev. 2000) and as directed by the Mississippi Supreme Court.**

McDowell argues that the trial court was incorrect in its belief that it was required to render a life without parole sentence pursuant to Miss. Code Ann. § 99-19-83 (Rev. 2000). Trial courts are required to sentence habitual offenders according to the terms of Miss. Code Ann. §§ 99-19-81 and 99-19-83 (Rev. 2000). They possess the authority to review the sentences only in light of the constitutional principles of proportionality and may reduce the mandated sentence only on the basis that it is disproportionate and cruel and unusual punishment. Clowers v. State, 522 So.2d 762 (Miss. 1988). The record does not support McDowell’s argument that the trial judge performed such an analysis or made a finding of disproportionality. Further, the

Mississippi Supreme Court, upon reviewing the first petition for post conviction relief, noted that the record clearly supported sentencing pursuant to Miss. Code Ann. § 99-19-83 (Rev. 2000) and that the indictment required sentencing according to Miss. Code Ann. § 99-19-83 (Rev. 2000) and ordered the trial court to impose the sentence accordingly. The original sentence imposed did not comport with the indictment or the proof of McDowell's status as an habitual offender with a violent felony record. It is not a double jeopardy violation to correct a mistake of law. Willis v. State, 821 So.2d 888 (Miss.Ct.App.2002).

This issue is without merit and the judgment and rulings of the trial court should be affirmed.

**III. McDowell's challenge to the indictment has already been addressed by the Mississippi Supreme Court and is therefore *res judicata*.**

McDowell asserts that his indictment was fatally flawed due to a typographical error whereby the Habitual Offender statute was cited at § 99-19-93 rather than at the correct cite, § 99-19-83. This issue was raised by McDowell's in a previous petition for post conviction relief and decided adversely to McDowell. *McDowell v. State*, 2002-M-0733, Supreme Court Order of October 2, 2002. McDowell has not demonstrated a novel claim or a sudden reversal of law relative to this issue which would exempt the claim from the procedural bar of *res judicata*. The Mississippi Supreme Court previously found the issue to be without merit. The issue is now barred. Miss.Code Ann. § 99-39-21(3) (Rev.2007); see also Lockett v. State, 614 So.2d 888 (Miss.1992).

**IV. McDowell's sentence is not illegal as a matter of law or in the interest of justice.**

See argument above in Issues I and II.

**V. The trial court and the appellate court did not abuse their discretion in their rulings on McDowell's sentence.**

See argument above in Issues I and II.

**VI. McDowell was not denied effective assistance of counsel at his re-sentencing hearing.**

The test for ineffective assistance of counsel is well-settled. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on this claim, a defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. Id. at 687, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Stringer v. State, 454 So.2d 468, 477 (Miss.1984) (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052).

Defense counsel is presumed competent. Washington v. State, 620 So.2d 966 (Miss.1993). However, even where professional error is shown, a reviewing court must determine whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Mohr v. State, 584 So.2d 426, 430 (Miss.1991). When reviewing a case involving the death penalty, the most important inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466

U.S. at 695, 104 S.Ct. 2052.

In this case, McDowell does not provide any evidence or affidavits to support his claim of ineffective assistance of counsel. There is nothing in the record to show that there is merit to this assignment of error and it should be promptly dismissed.



**CONCLUSION**

McDowell's assignments of error are without merit and the rulings and judgments of the trial court should be upheld.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge  
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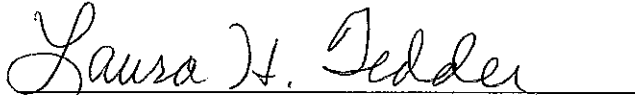
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This the 23<sup>rd</sup> day of March, 2009.

  
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