IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CT-01865-SCT

KEVIN DALE MCCAIN

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	10/30/2009
TRIAL JUDGE:	HON. ISADORE W. PATRICK, JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KEVIN DALE MCCAIN (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: STEPHANIE BRELAND WOOD
DISTRICT ATTORNEY:	RICHARD EARL SMITH, JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 03/01/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, JUSTICE, FOR THE COURT:

¶1. Kevin Dale McCain was convicted of robbery pursuant to Mississippi Code Section 97-3-73. *See* Miss. Code Ann. § 97-3-73 (Rev. 2006). On writ of certiorari, we address the permissibility, *vel non*, of a post-conviction amendment of McCain's indictment to include habitual-offender status.

¶2. In ***Gowdy v. State***, 56 So. 3d 540 (Miss. 2011), this Court held a post-conviction amendment of an indictment to include habitual-offender status "was prohibited[,]" such that the "enhanced portion" of Gowdy's sentence was vacated and his case was remanded for

resentencing. ***Id***. at 541. This Court determined that, while the Uniform Rules of Circuit and County Court Practice do *not* address the timing of a post-conviction amendment of an indictment to include habitual-offender status, they do require that the defendant be "afforded a fair opportunity to present a defense" and not be "unfairly surprised." ***Id***. at 545 (quoting URCCC 7.09). Under the unique facts presented in ***Gowdy***, those requirements were not satisfied, as the State informed the defendant and circuit court of its intention to amend the indictment *after* the conviction and then filed its motion to amend the indictment on the scheduled date of the sentencing hearing. *See* ***Gowdy***, 56 So. 3d at 544. As a result of the amendment, Gowdy went from receiving a plea offer of "one year in custody with two years' post-release supervision and a $2,000 fine" on the morning of his trial for felony driving under the influence of alcohol, to a post-conviction sentence of "life imprisonment without the possibility of parole." ***Id***. at 542, 544.

¶3. Here, however, the State's Motion to Amend Indictment to Include Habitual Criminal Enhancement was filed nearly *seven months* prior to trial, a significant factual distinction from ***Gowdy***. Based thereon, McCain could neither be said to have been "unfairly surprised," nor denied "a fair opportunity to present a defense." URCCC 7.09. Although the State's Motion to Amend Indictment was not ruled upon by the Circuit Court of Warren County until after McCain's conviction, the concerns of fair notice, "unfai[r] surpris[e]," and "fair opportunity to present a defense" collectively are absent. *Id*. Applying the requirements of Uniform Rule of Circuit and County Court Practice 7.09 on a case-by-case basis, we affirm McCain's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶4. On May 8, 2008, McCain was indicted for robbery. The indictment stated that McCain:

> on or about January 30, 2008, . . . did willfully, unlawfully, and feloniously rob and take United States Currency, the personal property of Trustmark Bank from the person or from the presence of Cheryle Jinkins against his/her will by force, threat of violence or by putting him/her in fear of injury to his/her person in violation of [Section 97-3-73].[1]

On January 14, 2009, an Omnibus Hearing Summary Memorandum filed by the circuit court stated that, during plea negotiations, the State "acknowledged that it does plan to introduce at trial . . . prior criminal convictions of [McCain]. . . . [T]hey are listed as follows: bank robbery." McCain responded by filing a Motion in Limine seeking an Order from the circuit court "that evidence of prior convictions of [McCain] are inadmissible . . . ." On February 24, 2009, the State disclosed in a hearing that it intended to file a Motion to Amend Indictment to Include Habitual Criminal Enhancement, pursuant to Mississippi Code Section 99-19-83. *See* Miss. Code Ann. § 99-19-83 (Rev. 2007). The circuit judge responded that once the motion was filed, "we will give you a date set [for hearing]." On the very next day, February 25, 2009, the State filed its Motion to Amend Indictment to Include Habitual Criminal Enhancement, pursuant to Section 99-19-83. The motion gave full notice to

[1]Details of the bank robbery and McCain's subsequent arrest were well-summarized by the Mississippi Court of Appeals. *See* ***McCain v. State***, 2011 WL 1122941, at *1 (Miss. Ct. App. March 29, 2011).

McCain of two prior convictions for bank robbery, with the judgments and sentencing information attached.[2]

¶5. On September 14, 2009, the jury trial began. During proceedings in chambers, the State reminded the circuit judge and counsel opposite that its seven-month-old Motion to Amend Indictment had not yet been addressed by the circuit court. A hearing transcript reveals the State once again announced that "[i]f [McCain] is convicted then we will ask for a sentencing hearing because I believe under the rules we have to actually put somebody on to testify for the type of habitual that we are asking for." McCain was convicted of robbery pursuant to Section 97-3-73 on September 15, 2009. The circuit court had yet to rule upon the Motion to Amend Indictment. At the sentencing hearing, counsel for McCain[3] asserted that:

> I was completely unaware of this ["Motion to Amend Indictment"] even though I did obtain a copy of the file that was on record but apparently some items were not in there at that time and this being one of those items. It appeared that this motion was mixed in with some evidence that was part of the February 24, 2009 hearing. But my client was unaware that the State had moved to enhance the penalty in this case. *I became aware of that on September 2, 2009* and I went back to the court file[,] . . . and did locate the motion . . . . But I was unable to contact my client until September 8, 2009

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[2]The January 8, 2003, Judgment of the United States District Court for the Southern District of Mississippi provided that McCain had pleaded guilty to two separate charges of bank robbery. The first offense occurred on April 12, 2002, at a Regions Bank in Smith County, Texas. The second offense occurred on April 19, 2002, at a BancorpSouth in Richland, Mississippi. McCain was "committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of seventy-two (72) months," with the sentence for each charge to run concurrently. Upon his release, McCain was to be placed on supervised release for three years, to run concurrently for each charge.

[3]On March 10, 2009, McCain and his court-appointed counsel, Louis Field, filed a Motion to Withdraw based upon "irreconcilable differences[,]" which was granted on March 20, 2009. By April 3, 2009, McCain was represented by new counsel, Eugene A. Perrier.

> because he had since been transferred to Issaquena County Correctional Facility . . . . Essentially, what our objection would be is that the whole purpose of the omnibus is to prevent any surprise and to make sure that everything is available to all sides . . . .

(Emphasis added.) The circuit court determined that Rule 7.09 "allows amendments up until the date of trial, and even at the date of trial[,]" and granted the Motion to Amend Indictment. McCain was sentenced as a habitual offender to life imprisonment in the Mississippi Department of Corrections, without eligibility for parole or probation.

¶6. On March 29, 2011, the Court of Appeals affirmed McCain's conviction and sentence.[4] *See* ***McCain***, 2011 WL 1122941, at *9. Two days later, on March 31, 2011, this Court's mandate issued in ***Gowdy***. McCain's Motion for Rehearing before the Court of Appeals contended, *inter alia*, that "***Gowdy*** should apply to this case" and requested that the Court of Appeals "vacate [his] sentence and . . . have him resentenced under [Section] 97-3-73." The Court of Appeals denied McCain's Motion for Rehearing.

ISSUE

¶7. This Court has granted McCain's Petition for Writ of Certiorari to address whether ***Gowdy*** mandates that his sentence be vacated and his case remanded for resentencing under Section 97-3-73.[5]

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[4]Irving, P.J., authored the opinion. Lee, C.J., Griffis, P.J., Myers, Ishee, Roberts, Carlton, and Maxwell, JJ., concurred. Barnes, J., concurred in part and in result.

[5]While other issues were raised in McCain's Petition for Writ of Certiorari and were addressed by the Court of Appeals in its opinion, this Court "may limit the question on review." Miss. R. App. P. 17(h).

ANALYSIS

¶8. Preliminarily, this Court must address the retroactivity, *vel non*, of ***Gowdy***. We conclude that ***Gowdy*** applies retroactively here, because McCain's case was not yet final when the mandate issued in ***Gowdy***. *See* ***Whitaker v. T&M Foods, Ltd.***, 7 So. 3d 893, 901 (Miss. 2009) (quoting ***Thompson v. City of Vicksburg***, 813 So. 2d 717, 721 (Miss. 2002)) ("newly enunciated rules of law are applied retroactively to cases that are pending trial or that are on appeal, and not final at the time of the enunciation."); ***Beard v. Banks***, 542 U.S. 406, 411, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004) (quoting ***Caspari v. Bahlen***, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994)) ("State convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'"); ***Griffith v. Kentucky***, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

¶9. In ***Gowdy***, the defendant was indicted under Mississippi Code Section 63-11-30 for felony driving under the influence of alcohol. *See* ***Gowdy***, 56 So. 3d at 542. On the morning of trial, the defendant was involved in plea negotiations in which "[t]he State expressed a willingness to recommend to the court a sentence of one year in custody with two years' post-release supervision and a $2,000 fine . . . ." ***Id***. at 544. The defendant rejected that offer, proceeded to trial, and was convicted. *See* ***id***. According to this Court:

> *[i]mmediately after Gowdy had been convicted*, the State informed the court that it had "just received" information about Gowdy's prior convictions in Iowa and would seek to amend the indictment to include his habitual offender status. The prosecutor further informed the court that he was "not certain whether there will be an amendment to 99-19-83 or whether it will be 99-19-81."

Id. (emphasis added). Subsequently, the State failed to file its Motion to Amend the Indictment, pursuant to Section 99-19-83, until "[n]early two months later, on . . . the day for which Gowdy's sentencing hearing was scheduled . . . ." ***Id***. After the sentencing hearing was rescheduled for three weeks later, "the trial judge overruled Gowdy's objection to the amendment, concluding that 'there is no prejudice.'" ***Id***. at 545. Ultimately, "[t]he trial judge adjudicated Gowdy an habitual offender and sentenced him to life imprisonment without the possibility of parole." ***Id***. at 542.

¶10. On appeal, this Court began its analysis by considering Rule 7.09, which provides, in pertinent part, that:

> [i]ndictments may . . . be amended to charge the defendant as an habitual offender or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement . . . . *Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised*.

URCCC 7.09 (emphasis added). According to this Court, while Rule 7.09 "does *not* speak to the timing of the amendment," it requires "that the defendant be . . . afforded due process of law and be given fair notice of 'the nature and cause of the accusation.'" ***Gowdy***, 56 So. 3d at 545 (quoting U.S. Const. amends. VI, XIV; Miss. Const. art. 3, §§ 14, 26) (emphasis added). This Court then considered the pre-Rules case of ***Akins v. State***, 493 So. 2d 1321

(Miss. 1986),[6] where "this Court held that [a post-conviction] amendment to the indictment which changed the habitual offender charge from the 'little' enhancement (Section 99-19-81) to the 'big' enhancement (Section 99-19-83) was an impermissible amendment." ***Gowdy***, 56 So. 3d at 545 (citing ***Akins***, 493 So. 2d at 1322). This Court stated that:

> [i]t logically follows that if the State may not amend the indictment to charge the "big" enhancement after conviction when the original indictment charged only the "little" enhancement, then the State may not amend the indictment to add an enhanced penalty after conviction. Our Uniform Rules of Circuit and County Court Practice support this interpretation . . . . We find that, in line with ***Akins***, *an amendment to the indictment to allege habitual offender status after conviction is an unfair surprise*.

Gowdy, 56 So. 3d at 545 (emphasis added). This Court concluded that "[p]ursuant to ***Akins*** . . . and our uniform rules, . . . the State should not have been permitted to amend the indictment after Gowdy's conviction. . . . Thus, we vacate the enhanced penalty and remand the case for resentencing under Mississippi Code Section 63-11-30(2)(c)." ***Id***. at 546.

¶11. ***Gowdy*** is factually distinguishable from the case *sub judice*. In ***Gowdy***, plea negotiations took place on the morning of trial; the State's receipt of information regarding the defendant's prior convictions occurred following the jury verdict; in informing the circuit court that the State intended to amend the indictment to include habitual-offender status, the prosecutor did not specify whether the amendment would be pursuant to Section 99-19-81 or Section 99-19-83; and the State's motion to amend the indictment was not filed until the scheduled date of the sentencing hearing. *See* ***id***. at 544-45. Furthermore, Gowdy went from receiving a plea offer on the charge of felony driving under the influence of alcohol of one

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[6]The Uniform Rules of Circuit and County Court Practice were adopted effective May 1, 1995.

year in custody with two years of post-release supervision and a $2,000 fine on the day of trial (pre-amendment), to a sentence of life without parole as a habitual offender (post-amendment). *See* ***id***. at 542, 544. Under such uniquely draconian circumstances, the post-conviction amendment of Gowdy's indictment to include habitual-offender status was deemed an impermissible "unfair surprise."[7] ***Id***. at 545.

¶12. But ***Gowdy*** itself acknowledged that Rule 7.09 "does *not* speak to the timing of the amendment . . . ." ***Id***. (emphasis added). Rather, Rule 7.09 states that an "[a]mendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." URCCC 7.09. Amendments to include habitual-offender status involve additions which strictly relate to sentencing and "are not substantive elements of the offense charged . . . ." ***Adams v. State***, 772 So. 2d 1010, 1020-21 (Miss. 2000) (quoting ***Swington v. State***, 742 So. 2d 1106, 1118 (Miss. 1999)). *See also* URCCC 11.03(1), (3) ("[t]he indictment shall not be read to the jury[,]" and only if "the defendant is convicted or enters a plea of guilty on the principal charge" will "a hearing before the court without a jury . . . be conducted on the previous convictions."). With regard to such amendments, satisfaction of the Rule 7.09 requirements should be considered on a case-by-case basis.

¶13. In McCain's case, plea negotiations took place in January 2009, *eight months* before trial. The Omnibus Hearing Summary Memorandum reflects that, during those plea negotiations, the State disclosed its intention to introduce McCain's prior bank-robbery

[7]Significantly, that holding mooted Gowdy's argument that "the sentence was disproportionate to the crime and amounted to cruel and unusual punishment." ***Gowdy***, 56 So. 3d at 542, 546.

convictions at trial. In response, McCain filed a Motion in Limine seeking to prevent the admission of such evidence. Thus, eight months before trial, the State had disclosed its intention to utilize McCain's prior convictions at trial and received a motion from McCain opposing the use of that information. In February 2009, nearly *seven months* before trial, the State filed its Motion to Amend Indictment, pursuant to Section 99-19-83. That motion placed McCain on express notice of the State's intention to sentence him as a habitual offender, as it referenced and included judgment and sentencing information regarding two of McCain's prior convictions for bank robbery. Thus, nearly seven months before trial, McCain had clear notice of the State's intent to include habitual-offender status pursuant to Section 99-19-83, the basis for it, and the possibility of being sentenced to life imprisonment without the possibility of parole.[8]

¶14. Such notice negates McCain's claims of "unfai[r] surpris[e]" and/or denial of "a fair opportunity to present a defense." URCCC 7.09. Even accepting the dubious argument of counsel for McCain that he did not see such information in the record when he became involved in the case in April 2009, he concedes he "became aware" of the Motion to Amend Indictment nearly two weeks before trial. Regarding any alleged impact on McCain's plea negotiations,[9] the Omnibus Hearing Summary Memorandum reflects that, eight months before trial, McCain rejected the State's plea offer while well-aware that the State would offer his prior bank-robbery convictions for consideration in sentencing if he was convicted.

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[8]As such, McCain was clearly provided with ample "notice of the applicable maximum and minimum penalties." ***Gowdy***, 56 So. 3d at 546.

[9]Counsel for McCain contended that McCain "would have taken a plea but by the time we got to trial the offers had been withdrawn . . . ."

Relatedly, the discussion of McCain's prior bank-robbery convictions eight months before trial renders the concern expressed in ***Gowdy*** about the State lacking "incentive . . . to be diligent in obtaining a prospective indictee's criminal record" absent in the case *sub judice*. ***Gowdy***, 56 So. 3d at 546.

¶15. Under these circumstances, McCain received fair notice, was not "unfairly surprised" by the habitual-offender addition, and was "afforded a fair opportunity to present a defense." URCCC 7.09. As Rule 7.09's requirements were satisfied, this Court concludes that McCain's sentence as a habitual offender was lawful.

CONCLUSION

¶16. In considering a post-conviction amendment of an indictment to include habitual-offender status, the requirements of "a fair opportunity to present a defense" and no "unfai[r] surprise" are assessed on a case-by-case basis. URCCC 7.09. In McCain's case, both requirements were satisfied. We affirm the judgments of the Court of Appeals and the Circuit Court of Warren County of conviction for robbery and sentence of life as a habitual offender in the custody of the Mississippi Department of Corrections, without eligibility for parole or probation.

¶17. **CONVICTION OF ROBBERY AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AS A HABITUAL OFFENDER, AFFIRMED. SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR SHALL APPELLANT BE ELIGIBLE FOR PAROLE OR PROBATION.**

WALLER, C.J., CARLSON, P.J., AND CHANDLER, J., CONCUR. DICKINSON, P.J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED IN PART BY RANDOLPH, LAMAR AND KITCHENS, JJ. PIERCE, J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED IN PART BY RANDOLPH, J. LAMAR, J., CONCURS IN PART

AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.

DICKINSON, PRESIDING JUSTICE, CONCURRING IN RESULT ONLY:

¶18. The plurality – relying on a line of poorly-worded opinions (including one of mine) – incorrectly holds that trial judges should be allowed to amend indictments handed down by grand juries. I respectfully concur in result only.

The primary purpose of an indictment is NOT to provide the defendant with notice.

¶19. As provided under Article 26 of our Constitution, the primary purpose of ***serving*** an indictment on a defendant is to place the defendant on notice of the "nature and cause of the accusation."[10] The plurality's error in this case can be traced to a long line of this Court's opinions that have not carefully and sufficiently distinguished Article 26's purpose from Article 27's. I am one of the most recent offenders.[11]

¶20. In numerous opinions, including mine in ***Decker***, we have inartfully stated that the primary purpose of an indictment is 'to provide the defendant with a concise statement of the crime so that he may have a reasonable opportunity to prepare and present a defense to those charges," or words to that effect.[12] These cases cite Article 26, an article that discusses notice to the defendant, but does not address (or even mention) an indictment. Instead, it establishes a defendant's right to notice of "the nature and cause of the accusation," which certainly may

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[10] Miss. Const. art. 3, § 26 (emphasis added).

[11] ***Decker v. State***, 66 So. 3d 654, 656 (Miss. 2011).

[12] ***Id.*** *See also* ***Burrows v. State***, 961 So. 2d 701, 705 (Miss. 2007); ***State v. Berryhill***, 703 So. 2d 250, 255 (Miss. 1997); ***Williams v. State***, 445 So. 2d 798, 804 (Miss. 1984); ***Bullock v. State***, 391 So. 2d 601, 606 (Miss. 1980).

be (but is not required to be) accomplished by service of the indictment. In fact, our constitution has no requirement whatsoever that the indictment itself ever be served on the defendant. It requires nothing beyond informing the defendant of "the nature and cause of the accusation . . . ."[13]

¶21. So why do we have indictments? Article 27 – the article that actually requires the State to obtain an indictment before proceeding with a prosecution – has nothing to do with notice to the defendant. The purpose of Article 27's requirement of an indictment is to place the grand jurors – not the prosecutor or the trial judge – in a position to decide whether, and on what charges, the State will be allowed to proceed.[14]

¶22. In discussing the purpose of an indictment, the United States Supreme Court has stated that

> the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.[15]

¶23. Let's think about it logically. If the primary purpose of obtaining an indictment is to place the defendant on notice, why is the defendant not allowed to attend the grand-jury proceedings? And if notice is our goal, why wouldn't we just dispense with grand-jury indictments altogether, and let the prosecutor (who knows better than anyone else what crimes will be prosecuted) put the defendant on notice? The answer is that grand-jury

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[13] Miss. Const. art. 3, § 26.

[14] ***State v. Berryhill***, 703 So. 2d 250 (Miss. 1997); ***State v. Sansome***, 133 Miss. 428, 97 So. 753 (1923). *See also* URCCC 7.03 (only the grand jury "has the power to indict any person," and indictments require "affirmative vote of 12 or more grand jurors).

[15] ***Stirone v. United States***, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

indictments serve the very different and important purpose of allowing the grand jurors – and no one else – to decide the charges.[16]

¶24. As for today's case, the issue is whether the defendant was on proper notice of the State's intent to seek sentencing based on habitual-offender status. For the reasons stated in Justice Randolph's plurality opinion, I believe he was. But the question is notice, not indictment. I find nothing whatsoever in our Constitution that remotely suggests a defendant must be indicted for habitual-offender status, which is nothing more than a request to enhance the defendant's sentence.

¶25. So I agree that McCain's conviction and sentence should be upheld, not (as the plurality suggests) because the trial judge was authorized to amend the indictment, but because McCain's constitutional right to notice under Section 26 was satisfied.

RANDOLPH, LAMAR AND KITCHENS, JJ., JOIN THIS OPINION IN PART.

PIERCE, JUSTICE, CONCURRING IN RESULT ONLY:

¶26. I agree with the plurality's opinion to affirm the judgment of the Court of Appeals, because the amendment to McCain's indictment was proper. Further, Rule 7.09 of the Uniform Rules of Circuit and County Court Practice explicitly allows indictments to be amended to charge a defendant as a habitual offender as long as "the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised."[17] As the plurality correctly notes, the rule does not address the timing of such amendment.[18]

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[16] Miss. Const. art. 3, § 27; URCCC 7.03.

[17] URCCC 7.09.

[18] Plurality Op. ¶11.

¶27. Recently, this Court decided ***Gowdy v. State***, and in that case, this Court found that an amendment to an indictment prior to sentencing but after conviction was improper.[19] The majority in ***Gowdy*** found that the State cannot amend an indictment to seek a greater sentence than one originally charged, as that would constitute an unfair surprise to the accused.[20] To the extent that the current plurality relies on ***Gowdy***, I part ways. It is my position that ***Gowdy*** was wrongly decided, and this Court should retreat from its erroneous position.

¶28. A motion to amend an indictment to reflect the proper habitual-offender status has no bearing on a grand jury's decision to return an indictment. The habitual-offender status becomes an issue only at sentencing. Sections 99-19-81 and 99-19-83 are not "offenses" as referenced in the Uniform Rules of Circuit and County Court Practice. As long as an accused has notice that the State seeks to amend an indictment as to the habitual-offender status prior to sentencing and is given a reasonable opportunity to answer and defend against the amendment, the amendment is proper, as "it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood, or materially alter a defense to the indictment as it originally stood."[21]

RANDOLPH, J., JOINS THIS OPINION IN PART.

KITCHENS, JUSTICE, DISSENTING:

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[19] ***Gowdy v. State***, 56 So. 3d 540, 545 (Miss. 2011) (citing ***Akins v. State***, 493 So. 2d 1321, 1322 (Miss. 1986)).

[20] ***Id.***

[21] ***Nathan v. State***, 552 So. 2d 99, 107 (Miss. 1989) (citing ***Ellis v. State***, 469 So. 2d 1256, 1258 (Miss. 1986); ***Shelby v. State***, 246 So. 2d 543, 546 (Miss. 1971)).

¶29. I write separately to express my disagreement with the plurality's attempt to undermine, if not abrogate, this Court's holding in ***Gowdy v. State***, 56 So. 3d 540 (Miss. 2010), and to reiterate the need for a bright-line rule prohibiting the amendment of an indictment after a defendant has been convicted.

¶30. In the instant case, Kevin Dale McCain was indicted for robbery in violation of Mississippi Code Section 97-3-73 (Rev. 2006). His trial commenced on September 14, 2009, and he was convicted on September 15, 2009. The State's Motion to Amend Indictment to Include Habitual Criminal Enhancement under Mississippi Code Section 99-19-83 was neither heard nor granted until after conviction, and McCain was then sentenced as an habitual offender to life without parole in the custody of the Mississippi Department of Corrections.

¶31. This amendment drastically altered the indictment. The grand jury had indicted McCain for robbery, a felony for which the statutorily prescribed sentence can range from one year to fifteen years in prison. *See* Miss. Code Ann. § 97-3-75 (Rev. 2006). The post-conviction amendment changed the crime charged by the grand jurors, months after they had voted on it and without their approval, from robbery to robbery as an habitual criminal, which resulted in McCain's receiving a mandatory sentence of life without possibility of parole. Clearly, this was a substantial change in the charge, and resulted in McCain's being sentenced for an offense for which he was not indicted, tried, or convicted.

¶32. The plurality distinguishes this case from ***Gowdy*** based on the following facts: (1) during plea negotiations, eight months before trial, the State disclosed its intention to adduce evidence at trial of McCain's prior convictions, and (2) the State's motion to amend the

indictment, which included the judgment and sentencing details of McCain's prior robbery convictions, was filed some seven months before trial. Plur. Op. at ¶13. The State's having revealed to McCain, eight months in advance of trial (during January 2009), that it intended to offer proof, during trial, of McCain's prior bank robbery convictions, did not serve to inform him that in actuality, he would be tried for robbery as an habitual criminal. The prosecution's disclosure pertained to evidence it hoped to adduce, not to a major upgrade of the charge itself. Although citing evidence from the record that McCain was not actually made aware of the State's motion to amend the indictment by his trial counsel until September 8, 2009 (less than one week before trial), the plurality fails to find this fact significant, given that McCain's trial counsel was aware of the motion "nearly two weeks before trial." Plur. Op. at ¶14.

¶33. Rule 7.09 of the Uniform Rules of Circuit and County Court Practice provides, in part: "Amendment [of an indictment] shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." The plurality mischaracterizes the holding in ***Gowdy*** as having been limited to that case's facts. Moreover, the plurality undertakes to craft a new rule by suggesting that all inquiries into whether an amendment made to an indictment post-conviction has constituted an "unfair surprise" to the defendant are to be made on a case-by-case basis. Plur. Op. at ¶12. In support of this premise, the plurality cites ***Adams v. State***, 772 So. 2d 1010, 1020-21 (Miss. 2000). In

Adams, however, the indictment was amended one week prior to trial, not after conviction. ***Id.*** at 1019.[22]

¶34. This Court in ***Gowdy*** explicitly ruled that "an amendment to the indictment to allege habitual offender status after conviction is an unfair surprise." ***Gowdy***, 56 So. 3d at 545. To hold otherwise in the instant case is to negate the holding of ***Gowdy***. In applying ***Gowdy*** to the facts of this case, it matters not when the State's motion to amend was filed. The trial court heard and granted it post-conviction and, in so doing, deprived McCain of "a fair opportunity to present a defense" to the heavily amended indictment. URCCC 7.09.

¶35. Pursuant to Uniform Circuit and County Court Rule 11.03, in order for an enhanced punishment indictment to be sufficient:

> The indictment *must* include both the principal charge and a charge of previous convictions. The indictment *must* allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

(Emphasis added.) In order to "have a reasonable opportunity to prepare and present a defense" the indictment must be amended, if at all, prior to trial, not after. *See* ***Decker***, 66 So. 3d at 656. The indictment's function as the charging instrument of the crime to be tried

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[22] The timeline in ***Adams*** was as follows: On February 22, 1999, the State filed a motion to amend the indictment to charge Adams as an habitual offender with the proposed amended indictment attached. On February 25, 1999, the motion was heard along with other pretrial motions. There was no objection to the motion by Adams. The motion to amend the indictment to charge Adams as an habitual offender was granted. The trial commenced March 1, 1999. ***Adams***, 772 So. 2d at 1020-21.

ceases to exist after conviction. Furthermore, in ***Gowdy***, this Court articulated the need for a bright-line rule that would prohibit the State's amending an indictment post-conviction, since permitting post-conviction amendments to indictments diminishes any "incentive for the State to be diligent in obtaining a prospective indictee's criminal record in advance of presenting a new charge to a grand jury and timely complying with Rule 11.03 . . . ." ***Gowdy***, 56 So. 3d at 546. Here, the State easily could have ascertained and obtained documentation of McCain's prior felony convictions before it presented the case to the grand jury. Had it done so, it could have made the grand jury aware of the prior felony convictions so that body–the only body that can formally charge a felony in our state's trial courts–could have decided whether McCain should be charged as an habitual offender. As it turned out, that decision was made by the prosecutor and the trial judge, and now, by a plurality of this Court. Robbery is one crime. Robbery as an habitual offender is another. The grand jury indicted McCain for the former, but not for the latter. Thus, the constitutional duties and prerogatives of the grand jurors have been supplanted and usurped. *See* Miss. Const. art. 3, § 27.[23]

¶36. Assuming *arguendo* that an indictment alteration of this magnitude could have been made without the grand jury's consent, the State should have sought the Court's leave to amend with far more diligence than it did. While it was the defense's burden to object and respond in opposition to the State's motion to amend the indictment, it was the State's

[23]I join Justice Dickinson's concurring opinion to the extent that it concludes that Article 3, Section 27, of the state Constitution provides the grand jury, and *only* the grand jury, the authority to decide what charges to bring against an accused.

responsibility to seek a hearing and disposition of its own motion prior to trial. Rule 2.04 of the Uniform Rules of Circuit and County Court states:

> It is the duty of the movant, when a motion or other pleading is filed, including motions for a new trial, to pursue said motion to hearing and decision by the court. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, said motion may be heard after the commencement of trial in the discretion of the court.

As noted by the plurality, the State did not bring the outstanding motion to the attention of the trial court until *after* trial had commenced during proceedings in chambers. Plur. Op. at ¶5. Thus, the State is deemed to have abandoned that motion. Had the State pursued its motion prior to trial, the trial court, in its discretion, could have heard the motion after trial commenced; however, the trial court erred in hearing the pretrial motion after the conclusion of trial.

¶37. For the foregoing reasons, it is clear to me that the plurality is remiss in finding that McCain's sentence should be affirmed. I would reverse and remand this case for sentencing under Mississippi Code Section 97-3-75 (Rev. 2006), which is the sentencing statute applicable to the crime for which the duly constituted grand jury of Warren County voted to indict McCain.

KING, J., JOINS THIS OPINION.