

SUPREME COURT OF LOUISIANA

No. 2000-K-2998

STATE OF LOUISIANA

VERSUS

LARRY EVERETT

CALOGERO, Chief Justice, concurs in the result.

I concur in the result reached by the majority opinion, but I disagree with its ultimate reasoning, which has possible far-reaching consequences. Instead of applying the ten-year time limit of Rev. Stat. 15:529.1(C), as amended in 1995, to each step of the defendant’s multiple offender “ladder” to determine whether the State may link his first conviction in 1984 to his second in 1993, and his second conviction to his third in 1998, to charge the defendant as a third felony offender, the majority chooses to focus solely on the link between the 1998 underlying offense and the most recent prior conviction in 1993, i.e., the link between the second and third steps on the ladder. So long as that last link, between the 1993 conviction and the 1998 conviction, falls within the applicable time period, the majority concludes, then all of the prior convictions, no matter how far back in time they occurred, may be counted to adjudicate the defendant as a multiple offender. Ante, p. 8. For example, had the defendant’s first conviction occurred in 1964, rather than 1984, the defendant would remain, under the majority’s approach, a third felony offender, because the ten-year time limit had not elapsed between his second and third convictions, and because his total number of convictions would be three.

I also disagree with the defendant’s contention, as well as the court of appeal’s holding, that the five-year period applicable in 1993 should remain the applicable time

limit to link up the 1984 and 1993 convictions. There is no violation of the ex post facto clause in applying the ten-year period rather than the former five-year period. Because a defendant does not acquire a vested right to a particular offender status upon expiration of the time limit in Rev. Stat. 15:529.1(C), the legislature remained free to substitute a ten-year time limit on the State's ability to link steps on the multiple offender "ladder" for the former five-year time limit at any time before the defendant committed the underlying felony in 1998. See State v. Rolan, 95-0347 (La. 9/15/95), 662 So.2d 446; see also State v. Forest, 439 So.2d 404 (La. 1983).¹

The majority's reasoning to the contrary, see Ante, p. 10, in my view Rev. Stat. 15:529.1(C) is equally capable of being interpreted as requiring that each felony on the multiple offender "ladder" must link up within the time period set forth in Section C in order to charge the defendant as a multiple offender, not simply the underlying offense and the most recent prior conviction. The court in State v. Broussard, 213 La. 338, 34 So.2d 883 (1948), held that the Habitual Offender Law did not require that the sentences for all of the prior felony convictions had to have ended within the five years preceding the underlying offense. The Broussard court clearly noted that all of the prior convictions had been linked up within the five-year time limit. And, as the majority concedes, Rev. Stat. 15:529.1(C) envisions multiple ten-year periods, as provided in that Section:

In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods.

Because the statute has at least two plausible and reasonable interpretations, I am not comfortable with fashioning a new, pro-state rule, as the majority does today,

¹ The majority is correct that the use of the term "cleansing period" is a misnomer in that it may suggest a prescriptive period. See Ante, pp. 6-7.

from a confused area of the law, when the principle of lenity requires us to construe penal statutes strictly in favor of the accused. See State ex rel. Jackson v. Henderson, 283 So.2d 210 (La. 1973). Because applying the ten-year time limit of Rev. Stat. 15:529.1(C) to link up the convictions is as equally supported as the approach taken by the majority, the rule of lenity would compel us to construe the statute more favorably to the accused, rather than create this particular pro-state ruling. Accordingly, I would reverse the ruling of the court of appeal, find no violation of the ex post facto clause in applying the ten-year time limit of Rev. Stat. 15:529.1(C) as amended in 1995, and affirm the defendant's adjudication as a third-felony offender.