Serial: **218782**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-M-01424

OTTIS J. CUMMINGS, JR. A/K/A OTTIS JUNIOR CUMMINGS A/K/A OTIS CUMMINGS A/K/A OTTIS J. COMMINGS A/K/A OTIS J. CUMMINGS ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

Now before the en banc Court is Ottis J. Cummings's Application for Leave to Proceed in the Trial Court.

Cummings filed this, his fourth, application outside the three-year statute of limitations. Miss. Code Ann. § 99-39-5(2). He raises seven issues: (1) he lawfully refused blood-alcohol testing, and his statements concerning that should have been suppressed; (2) he was not advised of his rights under Mississippi Code Section 63-11-13; (3) the amendment to his indictment to charge him as a habitual offender unfairly surprised him and violated ***Boyd v. State***, 113 So. 3d 1252 (Miss. 2013), an intervening decision; (4) an insufficient number of qualified grand jurors indicted him; (5) the post-indictment appointment of counsel prejudiced him; (6) his trial counsel was ineffective; and (7) the trial was "polluted with false and misleading testimony."

After due consideration, we find that claims (1), (2), (4), (5), and (7) do not meet any recognized exception to the time, waiver, and successive-writs bars. ***Rowland v. State***,

98 So. 3d 1032, 1034 (Miss. 2012), *overruled on other grounds by* ***Carson v. State***, 212 So. 3d 22 (Miss. 2016); ***Bell v. State***, 123 So. 3d 924, 924–25 (Miss. 2013); *see also* ***Boyd v. State***, 155 So. 3d 914, 918 (Miss. Ct. App. 2014) ("[S]ince ***Rowland***, only four types of 'fundamental rights' have been expressly found to survive PCR procedural bars: (1) double jeopardy; (2) illegal sentence; (3) denial of due process at sentencing; and (4) ex post facto claims.").

Claim (3) not only fails to meet any recognized exception to the time, waiver, and successive-writs bars, but Cummings has challenged the amendment to his indictment in prior applications for post-conviction relief. That claim, then, is barred by the doctrine of res judicata as well. *See* ***Crawford v. State***, 218 So. 3d 1142, 1152–55, 1160-61 (Miss. 2016).

As for claim (6), Cummings has raised ineffective assistance in prior applications for post-conviction relief; therefore, that claim too is barred by the doctrine of res judicata. ***Id.*** Notwithstanding the res judicata bar, ineffective assistance of counsel can conceivably constitute an exception to the time, waiver, and successive-writs bars. *See* ***Bevill v. State***, 669 So. 2d 14, 17 (Miss. 1996). But merely raising the claim is insufficient. ***Id.*** To surmount the bars, there must be some arguable basis for the truth of the claim. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010). We find Cummings's claim fails to surmount the bars.

For the above reasons, we find the application should be dismissed.

We now turn to the issue of sanctions. In dismissing Cummings's second application, the panel warned that "[s]anctions may be imposed for any future filings deemed frivolous." Order, ***Cummings v. State***, 2010-M-00800 (Miss. Jan. 14, 2015). Cummings is hereby

warned that future filings deemed frivolous may result not only in monetary sanctions, but also restrictions on filing applications for post-conviction relief (or pleadings in that nature) in forma pauperis. En Banc Order, ***Dunn v. State***, 2016-M-01514 (Miss. Nov. 15, 2018); Order, ***Bownes v. State***, 2014-M-00478 (Miss. Sept. 20, 2017); Order, ***Walton v. State***, 2009-M-00329 (Miss. April 12, 2018); En Banc Order, ***Fairley v. State***, 2014-M-01185 (Miss. May 3, 2018).

IT IS THEREFORE ORDERED that the application is dismissed.

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

/s/ James D. Maxwell

JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

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

COLEMAN, J., AGREES IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN STATEMENT.

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

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v.

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

¶1. Although Ottis Cummings's application for post-conviction relief does not merit relief, I disagree with this Court's warning that future filings which this Court deems frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief *in forma pauperis*.

¶2. This Court seems to tire of reading motions that it deems "frivolous" and imposes monetary sanctions on indigent defendants. The Court then bars those defendants, who in all likelihood are unable to pay the imposed sanctions, from future filings. In choosing to prioritize efficiency over justice, this Court forgets the oath that each justice took before assuming office. That oath stated in relevant part: "I . . . solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich. . . ."

¶3. I disagree with this Court's warning that future filings may result in additional monetary sanctions or restrictions on filling applications for post-conviction collateral relief

in forma pauperis. The imposition of monetary sanctions upon a criminal defendant proceeding *in forma pauperis* only serves to punish or preclude that defendant from his lawful right to appeal. Black's Law Dictionary defines sanction as "[a] provision that gives force to a legal imperative by either rewarding obedience or *punishing disobedience*." *Sanction*, Black's Law Dictionary (10th ed. 2014) (emphasis added). Instead of punishing the defendant for filing a motion, I believe that this Court should simply deny or dismiss motions which lack merit. As Justice Brennan wisely stated,

> The Court's order purports to be motivated by this litigant's disproportionate consumption of the Court's time and resources. Yet if his filings are truly as repetitious as it appears, it hardly takes much time to identify them as such. I find it difficult to see how the amount of time and resources required to deal properly with McDonald's petitions could be so great as to justify the step we now take. Indeed, the time that has been consumed in the preparation of the present order barring the door to Mr. McDonald far exceeds that which would have been necessary to process his petitions for the next several years at least. I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused, even when so doing actually increases the drain on our limited resources.

In re McDonald, 489 U.S. 180, 186–87, 109 S. Ct. 993, 997, 103 L. Ed. 2d 158 (1989) (per curiam).

¶4. The same logic applies to the restriction on filing subsequent applications for post-conviction relief. To cut off an indigent defendant's right to proceed *in forma pauperis* is to cut off his access to the courts. This, in itself, violates a defendant's constitutional rights, for

> Among the rights recognized by the Court as being fundamental are the rights to be free from invidious racial discrimination, to marry, to practice their religion, to communicate with free persons, to have due process in disciplinary proceedings, and to be free from cruel and unusual punishment. As a result of the recognition of these and other rights, the right of access to courts, which

> is necessary to vindicate all constitutional rights, also became a fundamental right.

Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court-It May Be Effective, but Is It Constitutional?*, 70 Temp. L. Rev. 471, 474–75 (1997). This Court must not discourage convicted defendants from exercising their right to appeal. ***Wisconsin v. Glick***, 782 F.2d 670, 673 (7th Cir. 1986). Novel arguments that might remove a criminal defendant from confinement should not be discouraged by the threat of monetary sanctions and restrictions on filings. ***Id.*** As United States Supreme Court Justice Thurgood Marshall stated,

> In closing its doors today to another indigent litigant, the Court moves ever closer to the day when it leaves an indigent litigant with a meritorious claim out in the cold. And with each barrier that it places in the way of indigent litigants, and with each instance in which it castigates such litigants for having 'abused the system,' . . . the Court can only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here.

In re Demos, 500 U.S. 16, 19, 111 S. Ct. 1569, 1571, 114 L. Ed. 2d 20 (1991) (Marshall, J., dissenting).

¶5. Instead of simply denying or dismissing those motions which lack merit, the Court seeks to punish the defendant for the frequency of his motion filing. However, an individual who, even incorrectly, believes that she has been deprived of her freedom should not be expected to sit silently by and wait to be forgotten. "Historically, the convictions with the best chances of being overturned were those that got *repeatedly reviewed on appeal* or those chosen by legal institutions such as the Innocence Project and the Center on Wrongful Convictions." Emily Barone, *The Wrongly Convicted: Why More Falsely Accused People*

are Being Exonerated Today Than Ever Before, Time, http://time.com/wrongly-convicted/(emphasis added). The Washington Post reports that

> the average time served for the 1,625 exonerated individuals in the registry is more than nine years. Last year, three innocent murder defendants in Cleveland were exonerated 39 years after they were convicted—they spent their entire adult lives in prison—and even they were lucky: We know without doubt that the vast majority of innocent defendants who are convicted of crimes are never identified and cleared.

Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, Wash. Post, July 24, 2015, http://wapo.st/1SGHcyd?tid=ss_mail&utm_term=.4bed8ad6f2cc. Rather than imposing sanctions and threatening to restrict access to the courts, I would simply dismiss or deny motions which lack merit. Therefore, although I find no merit in Cummings's application for post-conviction relief and agree it should be denied, I disagree with this Court's contention that the application merits the classification of frivolous and with its warning of additional sanctions and restrictions. I also disagree with this Court's decision to deny Cummings's motion to set aside the $100 sanction levied against him.

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