Serial: **221220**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-M-01514

GREGORY DUNN A/K/A GREGORY TODD DUNN ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

This matter is before the Court, en banc, on Gregory Dunn's letter motion. Dunn was convicted of murder, among other crimes, and sentenced to life. In l997, the Court affirmed Dunn's convictions and sentences. ***Dunn v. State***, 693 So. 2d 1333 (Miss. 1997). Thus, the present filing is time barred. Dunn has filed multiple applications for post-conviction relief, making the present claim procedurally barred. *See* ***Dunn v. State***, 2016-M-01514; ***Dunn v. State***, 2006-M-02029.

Dunn now raises an illegal-sentence claim, arguing the trial court was not allowed to impose a life sentence upon him without a jury recommendation. Although an illegal-sentence claim may be excepted from the procedural bars, Dunn fails to raise an arguable basis for his claim to justify an exception. *See* ***Means v. State***, 43 So. 3d 438, 442 (Miss. 20l0); ***Kennedy v. State***, 732 So. 2d 184, 187 (Miss. 1999). Accordingly, the Court finds the current motion should be dismissed as procedurally barred.

We further find that Dunn's application is frivolous. Dunn is hereby warned that any future filings deemed frivolous may result not only in additional monetary sanctions, but also in restrictions on filing applications for post-conviction collateral relief (or pleadings in that nature) in forma pauperis. *See* En Banc Order, ***Fairley v. State***, 2014-M-01185 (Miss. May 3, 2018) (citing Order, ***Bownes v. State***, 2014-M-00478 (Miss. Sept. 20, 2017)).

While at this time we issue a warning only, imposing monetary sanctions for frivolous filings and denying leave to proceed in forma pauperis is consistent with this Court's precedent. ***Ivy v. State***, 688 So. 2d 223, 224 (Miss. 1997) (sanctioning the petitioner "$250 for having filed a frivolous petition in this Court" and prohibiting the petitioner "from filing any matter in forma pauperis in any court of this state, without the prior permission of this Court, until he shall have paid the sanction here imposed"). It is also in line with the Fifth Circuit's approach. ***United States v. Kates***, 736 Fed. Appx. 86 (5th Cir. Aug. 31, 2018) (denying previously sanctioned prisoner's request for in forma pauperis status); Order, ***In re Jackson***, No. 17-90005 (5th Cir. Aug. 22, 2017) (reminding petitioner "that he is barred from filing any pleadings in . . . any court subject to [the Fifth Circuit's] jurisdiction until the [previously imposed $100] sanction has been paid" and cautioning him "that the filing of additional meritless pleadings will subject him to additional and progressively more severe sanctions"); ***Green v. Carlson***, 649 F.2d 285, 286 (5th Cir. 1981) ("commend[ing] the contempt sanction to any panel" upon which Green sought to impose through his frivolous filings, "advanced in forma pauperis"). And denying in forma pauperis status to frivolous petitioners is also consistent with United States Supreme Court practice. Sup. Ct. R. 39.8 ("If

satisfied that a petition for writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis*.").

Our aim in issuing this warning is not to bar future access to the courts. But, as this Court has held before, Mississippi's constitutional right of access to its courts is not without bounds. ***Thomas v. Warden***, 999 So. 2d 842, 846 (Miss. 2008) (discussing Miss. Const. art. 3, § 24). *See also* ***Duncan v. Johnson***, 14 So. 3d 760, 765 (Miss. Ct. App. 2009) ("The Mississippi Constitution does not create an unlimited right of access to the courts."). Section 24 protects "a reasonable right of access to the courts—a reasonable opportunity to be heard." ***Thomas***, 999 So. 2d at 846. "No one, rich or poor, is [constitutionally] entitled to abuse the judicial process." ***Duncan***, 14 So. 3d at 765 (quoting ***Tripati v. Beaman***, 878 F.2d 351, 353 (10th Cir. 1989)). Of course, "Courts must carefully observe the fine line between legitimate restraints and an impermissible restriction on a prisoner's constitutional right of access to the courts." ***Id.*** (quoting ***Procup v. Strickland***, 792 F.2d 1069, 1072 (11th Cir. 1986)). We find that warning Dunn that any future *frivolous* filing may result in monetary sanctions or restrictions on his ability to proceed in forma pauperis is by no means unreasonable and, thus, does not impermissibly cross the constitutional line. As the United States Supreme Court has acknowledged, "*Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions." ***In re Sindram***, 498 U.S. 177, 180, 111 S. Ct. 596, 597, 112 L. Ed. 2d

599 (1991) (citing ***In re McDonald***, 489 U.S. 180, 184, 109 S. Ct. 993, 996, 103 L. Ed. 2d 158 (1989)).

"[I]t is vital that the right to file *in forma pauperis* not be encumbered by those who would abuse the integrity of our process by frivolous filings." ***Zatko v. California***, 502 U.S. 16, 18, 112 S. Ct. 355, 356, 116 L. Ed. 2d 293 (1991) (quoting ***In re Amendment to Rule 39***, 500 U.S. 13, 13, 111 S. Ct. 1572, 1573, 114 L. Ed. 2d 15 (1991)). While we do not deny Dunn leave to proceed in forma pauperis at this time, we do warn that any future filing deemed frivolous may subject him to sanctions and restrictions on his future ability to proceed in forma pauperis.

IT IS THEREFORE ORDERED that Dunn's letter motion is hereby dismissed.

SO ORDERED, this the 14th day of November, 2018.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

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

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

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KITCHENS, P.J., OBJECTING TO THE ORDER IN PART WITH SEPARATE WRITTEN STATEMENT:

¶1. I agree with the Court's decision to dismiss Gregory Dunn's application for leave to file a motion for post-conviction relief (PCR). But I join Justice King's separate statement and I write separately because this Court's decision to impose upon PCR applicants either a monetary sanction or a warning that future filings might result in monetary sanctions violates Mississippi's constitutional guarantees that all citizens will have access to the courts of this State and that our courts shall be open for the redress of grievances. Article 3, Section 24, of the Mississippi Constitution provides that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." Miss Const. Art 3, Section 24. Article 3, Section 25, provides that "[n]o person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. Art. 3, Section 25.

¶2. Further, motions for post-conviction relief are civil actions to which the Mississippi Rules of Civil Procedure apply unless the Uniform Post-Conviction Collateral Relief Act

provides otherwise. ***Sykes v. State***, 757 So. 2d 997, 999 (Miss. 2000). Rule 11 of the Mississippi Rules of Civil Procedure provides for the imposition of sanctions on litigants for frivolous filings. M.R.C.P. 11(b). Also, the Litigation Accountability Act authorizes sanctions for a filing that is "without substantial justification," which is defined as "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. § 11-55-3(a) (Rev. 2012). Under Rule 11, a claim is frivolous if it has no hope of success and its insufficiency is manifest to the court from a bare inspection, without argument or research. ***In re Estate of Smith***, 69 So. 3d 1, 6 (Miss. 2011). Because the insufficiency of Dunn's illegal sentence claim is not apparent from a bare inspection, it is not frivolous. This Court's decision to sanction those prisoners filing successive applications for leave to file a motion for post-conviction relief, or to bar their future filings, is likely to deter the filing of meritorious claims that rightfully are excepted from the bars of the Uniform Post-Conviction Collateral Relief Act.

KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT.

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

¶3. Although Gregory Dunn's application for post-conviction relief does not merit relief, I disagree with this Court's contention that the application warrants the classification of frivolous.

¶4. This Court previously has defined a frivolous motion to mean one filed in which the movant has "no hope of success." ***Roland v. State***, 666 So. 2d 747, 751 (Miss. 1995). However, "though a case may be weak or 'light-headed,' that is not sufficient to label it frivolous." ***Calhoun v. State***, 849 So. 2d 892, 897 (Miss. 2003). Dunn made reasonable arguments regarding the possible illegality of his sentence in his application for post-conviction relief. As such, I disagree with the Court's determination that Dunn's application is frivolous.

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

in forma pauperis.[1] The Eighth Amendment to the United States Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. This Court, in ***Rice v. State***, 2016-M-00507 (Miss. Oct. 23, 2017), imposed a $2,000 sanction on the defendant. 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). As United States Supreme Court Justice William 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.

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[1]Although the majority cites cases from the United States Court of Appeals for the Fifth Circuit to support its position, I find those cases unpersuasive. Article 3, section 25, of the Mississippi Constitution provides that "no person shall be debarred from prosecuting or defending *any civil cause for or against him or herself*, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. art. 3, § 26 (emphasis added). Pursuant to Mississippi Code Section 99-39-7, actions under the Uniform Post-Conviction Collateral Relief Act *are civil actions*. Miss. Code Ann. § 99-39-7 (Rev. 2007). Therefore, this State's Constitution grants unfettered access in civil causes to any tribunal in the State. The Fifth Circuit is not bound by the same constitutional provision.

In re McDonald, 489 U.S. 180, 186–87, 109 S. Ct. 993, 997, 103 L. Ed. 2d 158 (1989) (per curiam). This Court imposes sanctions and restrictions when it could more easily deny motions that lack merit.

¶6. 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). To justify its position, the majority cites ***Thomas v. Warden***, 999 So. 2d 842, 846 (Miss. 2008), stating "Mississippi's constitutional right of access to its courts is not without bounds." Yet the issue in the ***Thomas*** case was the failure to comply with a sixty-day notice requirement in a civil action. ***Id.*** at 844. I fail to see the correlation between civil actions for monetary damages and criminal actions in which an indigent defendant's sole avenue for regaining his freedom is revoked. The majority additionally cites ***Duncan v. Johnson***, 14 So. 3d 760, 765 (Miss. Ct. App. 2009), a Court of Appeals case that is not binding upon this Court.[2]

[2]The ***Duncan*** court also held that a circuit court's "authority does not extend to an absolute, permanent bar on future filings" and reversed the circuit court's injunction. ***Id.*** at

¶7. This Court seems to tire of reading motions it deems "frivolous" and threatens to restrict the defendant from filing subsequent applications for post-conviction relief.[3] Yet, "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/ (last visited October 23, 2018) (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.

See 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 (last visited November 13, 2018). 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.*** An individual

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765.

[3]In citing the Fifth Circuit order, ***In re Jackson***, No. 17-90005 (5th Cir. Aug, 22, 2017), which provides for progressively more severe sanctions, the majority abandons the pretext that the purpose of this action is to preserve the resources of the Court and clearly acknowledges that the purpose of the sanction is to punish.

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.

¶8. Therefore, although I find no merit in Dunn's application for post-conviction relief and agree it should be dismissed, I disagree with the Court's finding that the application is frivolous and with this Court's warning of future sanctions and restrictions.

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