Serial: **223765**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-M-01645

TOMMIE LEE PAGE A/K/A TOMMIE PAGE ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

Now before the en banc Court is Tommie Lee Page's Application for Leave to Proceed in the Trial Court.

Page was convicted of aggravated assault and sentenced as a habitual offender to life in prison. ***Page v. State***, 843 So. 2d 96, 97 (Miss. Ct. App. 2003). The Court of Appeals affirmed, and the mandate issued on May 6, 2003. ***Id.***

Since then, Page has filed multiple applications for leave to seek post-conviction relief in the trial court. The order denying his last application said that application was his third. Order, ***Page v. State***, 2013-M-01645 (Miss. Aug. 15, 2018). Upon further review, however, he has filed a total of seven: Order, ***Page v. State***, 2013-M-01645 (Miss. Aug. 15, 2018); Order, ***Page v. State***, 2013-M-01645 (Miss. Dec. 17, 2015); Order, ***Page v. State***, 2013-M-01645 (Miss. Nov. 13, 2013); Order, ***Page v. State***, 2012-M-00840 (Miss. July 5, 2012); Order, ***Page v. State***, 2007-M-00432 (Miss. Feb. 18, 2009); Order, ***Page v. State***,

2007-M-00432 (Miss. Apr. 18, 2007); Order, ***Page v. State***, 2004-M-00448 (Miss. July 19, 2004).

In this application, Page raises the following claims:

(1) His sentence is illegal because (a) he was erroneously sentenced for a crime that was neither tried nor proved; (b) the indictment was fatally defective for erroneously charging the crime of aggravated assault; and (c) the indictment was defective, and his due-process rights were violated, because the word "did" was omitted.

(2) The trial court erred by allowing the multi-count indictment to proceed when it was not permitted under Mississippi Code Section 99-7-2 (Rev. 2015).

(3) The habitual-offender portion of his sentence is illegal.

(4) His conviction and sentence are illegal because the State failed to prove aggravated assault beyond a reasonable doubt.

After due consideration, we find the following.

First, although Page alleges illegal sentence in his first claim, his arguments are that the indictment and the jury instructions were defective. Such claims do not meet any recognized exception to the time, waiver, and successive-writ bars. ***Chapman v. State***, 167 So. 3d 1170, 1174–75 (Miss. 2015); ***Smith v. State***, 149 So. 3d 1027, 1031–32 (Miss. 2014), *overruled on other grounds by* ***Pitchford v. State***, 240 So. 3d 1061 (Miss. 2017); ***Bell v. State***, 123 So. 3d 924, 925 (Miss. 2013); ***Rowland v. State***, 98 So. 3d 1032, 1035–36 (Miss. 2012), *overruled on other grounds by* ***Carson v. State***, 212 So. 3d 22 (Miss. 2016); *see also* ***Bevill v. State***, 669 So. 2d 14, 17 (Miss. 1996); ***Brown v. State***, 187 So. 3d 667, 671 (Miss. Ct. App. 2016). And even if they did meet a recognized exception, Page's claims lack any arguable basis to warrant relief from the bars. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010).

Second, Page's claim challenging the multi-count indictment also does not meet any recognized exception to the procedural bars. ***Chapman***, 167 So. 3d at 1174–75; ***Smith***, 149 So. 3d at 1031–32; ***Bell***, 123 So. 3d at 925; ***Rowland***, 98 So. 3d at 1035–36; *see also* ***Bevill***, 669 So. 2d at 17; ***Brown***, 187 So. 3d at 671. And even if such claim did meet a recognized exception, his claim lacks any arguable basis to warrant relief from the bars. ***Means***, 43 So. 3d at 442.

Third, Page's challenge to the legality of the habitual-offender portion of his sentence constitutes a recognized exception to the procedural bars. ***Rowland***, 98 So. 3d at 1035–36. To warrant waiving the bars, however, the claim must have some arguable basis. ***Means***, 43 So. 3d at 442. We find that Page's claim does not.

Finally, Page's claim that the State failed to prove aggravated assault beyond a reasonable doubt is barred by the doctrine of res judicata. Miss. Code. Ann. § 99-39-21(2) (Rev. 2015). That issue was raised and decided on direct appeal. ***Page***, 843 So. 2d at 98 ("[Page] contends that the State failed to prove beyond a reasonable doubt that he committed an aggravated assault.").

After due consideration, we find that the application should be denied.

In its order denying Page's last application, we warned him that "future filings deemed frivolous may result not only in monetary sanctions, but also restrictions on filing applications for post-conviction collateral relief (or pleadings in that nature) *in forma pauperis*." Order, ***Page v. State***, 2013-M-01645 (Miss. Aug. 15, 2018) (citing En Banc Order, ***Fairley v. State***, 2014-M-01185 (Miss. May 3, 2018)). We find that this filing is

frivolous and that Page should be restricted from filing further applications for post-conviction collateral relief (or pleadings in that nature) that are related to this conviction and sentence *in forma pauperis*. *See* Order, ***Walton v. State***, 2009-M-00329 (Miss. Apr. 12, 2018).

IT IS THEREFORE ORDERED that the application is denied.

IT IS FURTHER ORDERED that Page is hereby restricted from filing further applications for post-conviction collateral relief (or pleadings in that nature) that are related to this conviction and sentence *in forma pauperis*. The Clerk of this Court shall not accept for filing any further applications for post-conviction collateral relief (or pleadings in that nature) from Page that are related to this conviction and sentence unless he pays the applicable docket fee.

SO ORDERED, this the 12th day of March, 2019.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH
CHIEF JUSTICE
FOR THE COURT

TO DENY AND ISSUE SANCTIONS: RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, ISHEE AND GRIFFIS, JJ.

TO DISMISS AND ISSUE SANCTIONS: CHAMBERLIN, J.

TO DENY: KITCHENS AND KING, P.JJ.

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

IN THE SUPREME COURT OF MISSISSIPPI

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TOMMIE LEE PAGE A/K/A TOMMIE PAGE

v.

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

¶1. Today, this Court prioritizes efficiency over justice and bars Tommie Page from its doors. Because the imposition of monetary sanctions against indigent defendants and the restriction of access to the court system serve only to punish those defendants and to violate rights guaranteed by the United States and Mississippi Constitutions, I strongly oppose this Court's order restricting Page from filing further petitions 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. . . ." Page has filed seven petitions in fifteen years. Yet this Court now deems the frequency of Page's filing to be too onerous a burden and decides to restrict Page from filing

subsequent applications for post-conviction collateral relief. *See* ***In re McDonald***, 489 U.S. 180, 186–87, 109 S. Ct. 993, 997, 103 L. Ed. 2d 158 (1989) (Brennan, J., dissenting) ("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.").

¶3. 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). Mississippi Code Section 99-39-7 provides that actions under the Uniform Post-Conviction Collateral Relief Act *are civil actions*. Miss. Code Ann. § 99-39-7 (Rev. 2015). Therefore, this State's Constitution grants unfettered access in civil causes to any tribunal in the State. The Court's decision to deny Page's filing actions *in forma pauperis* is a violation of his State constitutional right to access to the courts.

¶4. The decision to cut off an indigent defendant's right to proceed *in forma pauperis* is also a violation of that defendant's fundamental right to vindicate his 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). 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). Instead of simply denying or dismissing those motions that lack merit, the Court seeks to punish Page for filing seven motions in fifteen years.

¶5. Although each justice took an oath to do equal right to the poor and rich, this Court does not deny access to the court defendants who are fortunate enough to have monetary resources. Those defendants may file endless petitions, while indigent defendants are forced to sit silently by. 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/ (last visited Nov. 1, 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.

Samuel Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*, Washington Post (July 24, 2015), http://wapo.st/1SGHcyd?tid=ss_mail&utm_term=.4bed8ad6f2cc.

¶6. Rather than violating Page's fundamental rights by restricting his access to the courts, I would simply deny his petition for post-conviction relief.

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