**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2018-M-00115-SCT**

***WINFRED FORKNER***

***v.***

***STATE OF MISSISSIPPI***

| | |
|---|---|
| ATTORNEY FOR APPELLANT: | WINFRED FORKNER (PRO SE) |
| ATTORNEYS FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: JASON L. DAVIS<br>LAURA H. TEDDER |
| NATURE OF THE CASE: | MISCELLANEOUS |
| DISPOSITION: | VACATED AND DISMISSED - 01/17/2019 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**CHAMBERLIN, JUSTICE, FOR THE COURT:**

¶1. This matter arises from the State's motion for rehearing of a panel order of this Court granting Winfred Forkner's Application for Leave to Proceed in the Trial Court. On reconsideration, we vacate the panel order and dismiss Forkner's Application for Leave to Proceed. We also deny Forkner's Motion to Remand Petitioner to the Wilkinson County Jail and his Petition for Immediate Release.

## FACTS AND PROCEDURAL HISTORY

¶2. On February 26, 2001, a Wilkinson County jury convicted Winfred Forkner of the crime of burglary of a storehouse. *See* Miss. Code Ann. § 97-17-33 (Rev. 2014). Forkner was sentenced to life without the possibility of parole as a habitual offender pursuant to

Mississippi Code Section 99-19-83 (Rev. 2015). Aggrieved, Forkner appealed his conviction and sentence, and the Court of Appeals affirmed. ***Forkner v. State***, 902 So. 2d 615, 626 (Miss. Ct. App. 2004) (***Forkner I***).

¶3. Aside from the current motion, Forkner has filed three prior motions for post-conviction relief ("PCR") with this Court. ***Forkner v. State***, 227 So. 3d 404, 405 (Miss. 2017) (***Forkner III***). The Court denied Forkner's first motion and dismissed his two subsequent motions as statutorily barred.[1] ***Id.***

¶4. Forkner filed the current PCR motion on January 18, 2018. He argued that his conviction and sentence were void and illegal because the indictment had not charged all of the essential elements of the crime of burglary of a storehouse. Specifically, Forkner alleged error concerning the second element of the crime: "in which any goods, merchandise, equipment or valuable thing shall be kept *for use, sale, deposit, or transport*." Miss. Code Ann. § 97-17-33(1) (Rev. 2014) (emphasis added). He argued that the indictment did not allege that items were kept in the storehouse "for use, sale, deposit, or transport." Miss. Code Ann. § 97-17-33(1). On April 4, 2018, a panel of this Court granted Forkner's petition

[1] Forkner also filed a motion for relief under Mississippi Rules of Civil Procedure 60(b)(4) and (6) directly with the circuit court. ***Id.*** The circuit court determined that the motion was a PCR petition in substance and denied the motion because it was filed outside the three-year limitations period under the Uniform Post-Conviction Collateral Relief Act ("UPCCRA"), Mississippi Code Section 99-39-5(2). ***Id.*** The Court of Appeals found that it lacked jurisdiction of Forkner's appeal and dismissed it. ***Forkner v. State***, 230 So. 3d 706, 709 (Miss. Ct. App. 2016) (***Forkner II***). On certiorari, this Court reversed the Court of Appeals and found that the circuit court had lacked jurisdiction because Forkner had failed to seek leave to proceed with the Supreme Court under Mississippi Code Section 99-39-27. ***Forkner III***, 227 So. 3d at 406. The Court also vacated the order of the circuit court. ***Id.***

and found that Forkner's indictment was defective.

¶5. The State now seeks en banc rehearing of the panel's April 4 panel order. Forkner opposes the State's motion and has filed a Motion to Remand Petitioner to the Wilkinson County Jail and a Petition for Immediate Release. After due consideration, the Court grants the State's motion for rehearing, vacates the April 4 panel order and dismisses Forkner's Application for Leave to Proceed in the Trial Court. Also, Forkner's Motion to Remand Petitioner and his Petition for Immediate Release are denied.

**ANALYSIS**

¶6. First and foremost, Forkner's Application for Leave to Proceed in the Trial Court is time-barred. The UPCCRA provides, "A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon . . . ." Miss. Code. Ann. § 99-39-5(2) (Rev. 2015). The Court of Appeals issued its mandate in Forkner's appeal on November 30, 2004. ***Forkner I***, 902 So. 2d at 626. Forkner's current motion was filed over thirteen years after the mandate issued in his appeal.

¶7. Further, Forkner's arguments concerning his indictment are waived. The UPCCRA states:

> Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

Miss. Code Ann. § 99-39-21(1) (Rev. 2015). Forkner objects that his indictment failed to allege an element of the crime, but the applicable statutory language has not changed since

his indictment, trial, conviction and appeal.[2] Yet Forkner did not previously raise this error at trial or on appeal. Instead, he raises it for the first time now. This, though, is not the first time that Forkner has attacked his indictment. The Court of Appeals rejected his argument on direct appeal that the indictment's lack of a date rendered it insufficient. ***Forkner I***, 902 So. 2d at 620. Also, Forkner, as discussed below, has not and cannot show cause and actual prejudice in order to overcome his waiver of the issue.

¶8. In addition to the time bar and waiver issues, Forkner's motion is barred as a successive motion. "The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article." Miss. Code. Ann. § 99-39-27(9) (Rev. 2015). The Court denied Forkner's first PCR motion on July 19, 2005. It also dismissed Forkner's two subsequent motions as successive. Thus, Forkner's current motion is also barred under Section 99-39-27(9).

¶9. While we normally refrain from addressing the merits of a dismissed PCR motion, we take this opportunity to address Forkner's alleged error in light of the April 4 panel order granting the motion. "[W]hether an indictment is defective is an issue of law and therefore deserves a relatively broad standard of review, or de novo review . . . ." ***Colburn v. State***, 201 So. 3d 462, 469 (Miss. 2016) (quoting ***State v. Hawkins***, 145 So. 3d 636, 638 (Miss. 2014)). "This Court has made it clear that the ultimate test, when considering the validity of an indictment on appeal, is whether the defendant was prejudiced in the preparation of his

[2] On February 14, 2000, a Wilkinson County Grand Jury indicted Forkner under Mississippi Code Section 97-17-33(1) (Supp. 1999). No material change to the language that Forkner contests in the current version of the code has occurred. *See* Miss. Code Ann § 97-17-33(1) (Rev. 2014).

defense." ***Id.*** (quoting ***Byrom v. State***, 863 So. 2d 836, 867 (Miss. 2003)).

¶10. Uniform Circuit and County Court Rule 7.06, then in effect, governed Forkner's indictment. URCCC 7.06.[3] Rule 7.06 provided, in part:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:
>
> 1. The name of the accused;
>
> 2. The date on which the indictment was filed in court;
>
> 3. A statement that the prosecution is brought in the name and by authority of the State of Mississippi;
>
> 4. The county and judicial district in which the indictment is brought;
>
> 5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
>
> 6. The signature of the foreman of the grand jury issuing it; and
>
> 7. The words "against the peace and dignity of the state."

URCCC 7.06.

¶11. The indictment complied with these requirements and was sufficient to "fully notify [Forkner] of the nature and cause of the accusation." URCCC 7.06. The indictment charged Forkner with two counts of burglary of a storehouse. In part, the indictment read:

---

[3]URCCC 7.06 has since been supplanted by Rule 14.1 of the Mississippi Rules of Criminal Procedure, which became effective July 1, 2017. URCCC 7.06 still applies to Forkner, though, because it governed his indictment, conviction, and appeal.

> Winfred "Wimp" Fo[r]kner . . . did willfully, unlawfully, feloniously, and burglariously break and enter the following storehouses, being hunting camps, with the feloniously intent . . . once therein to steal and carry away goods, merchandise, and other valuable items, and did, in fact, take, steal, and carry away the below described items found and kept in said storehouses:
>
> Count 1: from the camp of Eric Trevillion on the Bowling Green Road was taken one window air-conditioning unit;
>
> Count 2: from the camp of the Hobb's Hunting Club on the Bowling Green Road was taken one window air-conditioning unit;
>
> contrary to the form of the statute in such cases made and provided, against the peace and dignity of the State of Mississippi.

Upon review, we find that Forkner's indictment was not defective; instead, it fully notified him of the nature and cause of the accusation against him and did not prejudice him in his defense. *See* ***Colburn***, 201 So. 3d at 469. The indictment also informed Forkner that his offense was "contrary to the form of the statute" and directed him to Section 97-17-33.

¶12. In his PCR motion and on rehearing, Forkner argues that the Court's holdings in ***Brown*** and ***Cannon*** required his indictment to detail that the property that was stolen was kept in the storehouse for use, sale, deposit, or transport. ***Brown v. State***, 209 Miss. 636, 48 So. 2d 131, 132 (Miss. 1950); ***Cannon v. State***, 133 Miss. 567, 98 So. 63, 64 (Miss. 1923). ***Brown*** and ***Cannon***, though, were both decided prior to the Court's adoption of Rule 7.06, which became effective May 1, 1995. *See* URCCC 7.06. Rule 7.06 did not require the indictment to allege each element of the offense. URCCC 7.06. Instead, it required a "plain, concise and definite written statement of the essential facts constituting the offense charged . . . [to] fully notify the defendant of the nature and cause of the accusation." *Id.*

¶13. Further, Forkner's indictment satisfies the common-law requirement that an indictment "set out the elements of the crime charged." ***Brooks v. State***, 18 So. 3d 833, 838 (Miss. 2009). The indictment alleged that (1) Forkner broke and entered the camps (2) where the valuable items—the two window air-conditioning units—were "kept in said storehouses" (3) with the intent to commit larceny. *See* ***Gales v. State***, 131 So. 3d 1238, 1240 (Miss. Ct. App. 2013).[4] The indictment also directed Forkner to Section 97-17-33. ***Brown***, 48 So. 2d at 132 (emphasis added) ("Consequently, the purpose for which the goods, etc., are kept in the building is one of the elements of the offense created by the statute, and must be alleged in the indictment either in the words, of the statute *or their equivalent*."). Thus, we find that Forkner's indictment was not defective.

## CONCLUSION

¶14. For the above reasons, we grant the State's motion for rehearing and vacate the April 4 panel order of the Court. We dismiss as moot the State's request for a stay of enforcement of the April 4 panel order and dismiss Forkner's PCR petition. Forkner's other outstanding motions are denied.

¶15. **VACATED AND DISMISSED.**

**WALLER, C.J., RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM AND ISHEE, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.**

---

[4] ***Gales*** is factually distinguishable from this case. In ***Gales***, the State failed to charge two of the elements of the crime of burglary of a storehouse in the indictment. ***Gales***, 131 So. 3d at 1239. The indictment did not "mention . . . any valuable kept in the house" and did not "cite the particular crime [that] Gales allegedly intended to commit." ***Id.*** at 1240. Here, though, the valuable items were specifically alleged to have been "kept in . . . [the] storehouse," and larceny was charged as well.

**KITCHENS, PRESIDING JUSTICE, DISSENTING:**

¶16. Because the majority's decision is injurious to the fundamental federal and state constitutional rights to notice of the crime charged, I respectfully dissent.

¶17. The majority finds that Forkner's PCR is time-barred, that it is barred as a successive writ, and that Forkner waived any challenge to his indictment by failing to raise it at trial or on direct appeal. But this Court has held that "a challenge to an indictment for failure to charge the essential elements of a criminal offense affects a fundamental right, and may not be waived." ***Carson v. State***, 212 So. 3d 22, 31 (Miss. 2016) (quoting ***Ross v. State***, 954 So. 2d 968, 1015 (Miss. 2007)). Because errors affecting fundamental rights are excepted from the bars of the Uniform Post-Conviction Collateral Relief Act and because Forkner's PCR establishes such an error, this Court may entertain Forkner's untimely and successive PCR.

¶18. Forkner was convicted of one count of nondwelling burglary under Mississippi Code Section 97-17-33(1) (Supp. 1999), which provided then and provides now that

> Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, equipment or valuable thing shall be *kept for use, sale, deposit, or transportation*, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven (7) years.

Miss. Code Ann. § 97-17-33(1) (Supp. 1999) (emphasis added). He has filed a motion for post-conviction relief (PCR) arguing that his indictment omitted an essential element of the crime because it did not recite the purpose for which the goods were kept, that is, for "use,

sale, deposit, or transportation."

¶19. Forkner's indictment charged him with two counts of nondwelling burglary. The indictment provided, in pertinent part, that Forkner

> did willfully, unlawfully, feloniously, and burglariously break and enter the following storehouses, being hunting camps, with the felonious intent . . . once therein to steal and carry away goods, merchandise, and other valuable items, and did, in fact, take, steal, and carry away the below described items found and kept in said storehouses:
>
> Count 1: from the camp of Eric Trevillion on the Bowling Green Road was taken one window air-conditioning unit;
>
> Count 2: from the camp of Hobb's Hunting Club on the Bowling Green Road was taken one window air-conditioning unit . . . .

Forkner was acquitted of Count 2, but was convicted of Count 1, for which he was sentenced to life without parole as a habitual offender.

¶20. The indictment did not allege that the goods were kept for use, sale, deposit, or transportation. In ***Cannon v. State***, 133 Miss. 567, 98 So. 63 (1923), this Court examined an indictment drawn under a predecessor statute to Section 97-17-33(1) that omitted the purpose for which the goods were kept. The Court held that "Under this statute, the breaking and entering of a house of the character therein described with intent to steal therein is burglary only where goods, merchandise, or other valuable things are kept therein, 'for use, sale, deposit or transportation.'" ***Id.*** at 64. And the Court concluded unequivocally that "the purpose for which the goods, etc., are kept in the building is one of the elements of the offense created by the statute, and must be alleged in the indictment either in the words of the statute or their equivalent." ***Id.*** (citation omitted). In ***Brown v. State***, 209 Miss. 636, 640,

48 So. 2d 131, 132 (1950), the Court relied on ***Cannon*** to find that another indictment omitting the purpose for which the goods were kept was fatally defective.

¶21. In ***Gales v. State***, the Court of Appeals held that an indictment for nondwelling burglary must charge that crime's three elements: "(1) breaking and entering a building; (2) *where something of value is kept for use, sale, deposit, or transportation*; and (3) the intent to commit a specific crime therein." ***Gales v. State***, 131 So. 3d 1238, 1240 (Miss. Ct. App. 2013) (emphasis added). Because Gales's indictment omitted the second and third elements, the Court of Appeals found that Gales had not been charged with a crime cognizable under Mississippi law, constituting a plain, constitutional error. ***Id.*** at 1239-40. The Court of Appeals dismissed Gales's indictment and reversed his conviction. ***Id.*** at 1240.

¶22. The majority attempts to distinguish ***Gales*** from this case because the indictment in ***Gales*** omitted more essential information than Forkner's. Unlike in ***Gales***, Forkner's indictment charged that the valuable item was kept in the storehouse and that Forkner had entered the storehouse with the intent to commit a larceny. This distinction does nothing to erode Gales's reaffirmation that an indictment for nondwelling burglary must include as an essential element "where something of value is kept for use, sale, deposit, or transportation." While this essential element of nondwelling burglary may seem obscure or unimportant, it would be of utmost importance to a defendant who broke and entered a storehouse with the intent to steal, but only succeeded in removing items kept for disposal or some other nonlisted purpose. Because the legislature included this essential element in the statute, this Court is bound to give it effect.

¶23. If this Court were to adhere to its precedent, Forkner's conviction would be reversed and his indictment dismissed because his indictment omitted an essential element of the crime. While the majority intimates that Forkner's indictment alleged the purpose for which the goods were kept "in either the words of the statute or their equivalent," the purpose for which the air conditioner was kept is nowhere in the indictment. Under ***Brown***, ***Cannon***, and ***Gales***, the fact that Forkner's indictment did not recite the purpose for which the goods were kept, that is, for "use, sale, deposit, or transportation"—any one of the four— meant that it did not charge him with nondwelling burglary.

¶24. Although acknowledging ***Cannon***, ***Brown***, and ***Gales***, the majority attempts to smooth over the obvious deficiency in Forkner's indictment. Rule 7.06 of the Uniform Rules of Circuit and County Court Practice, extant at the time Forkner's case arose, provided,

> The indictment upon which the defendant is to be tried shall be a plain, concise[,] and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:
>
> 1. The name of the accused;
>
> 2. The date on which the indictment was filed in court;
>
> 3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
>
> 4. The county and judicial district in which the indictment is brought;
>
> 5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;

6. The signature of the foreman of the grand jury issuing it; and

7. The words "against the peace and dignity of the state."

The court on motion of the defendant may strike from the indictment any surplusage including unnecessary allegations or aliases.

URCCC 7.06.

¶25. As this Court has held on countless occasions, "[a]n indictment is required to set out the elements of the crime charged." ***Brooks v. State***, 18 So. 3d 833, 838 (Miss. 2009). "An indictment must contain (1) the essential elements of the offense charged, (2) sufficient facts to fairly inform the defendant of the charge against which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense." ***Gilmer v. State***, 955 So. 2d 829, 836-37 (Miss. 2007).We have so held because the federal and state constitutions guarantee the right to notice of criminal charges. U.S. Const. amend. VI; Miss. Const. art. 3, § 26; ***Hamling v. United States***, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 950 (1974) ("an indictment is sufficient if it, first, contains the elements of the offense charged . . . ."). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." ***Cole v. Arkansas***, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948) (citation omitted). And while Rule 7.06 provided that formal and technical words are unnecessary, they were unnecessary only if the offense could be substantially described without them. URCCC 7.06. Thus we have said that "using the exact language from the statute is not necessary if the words used have substantially the same

meaning and the indictment is specific enough to give the defendant notice of the charge against her." ***State v. Hawkins***, 145 So. 3d 636, 640 (Miss. 2014).

¶26. Here, neither the statutory language nor its equivalent was employed in Forkner's indictment, resulting in his not having been informed of the purpose for which the goods were kept, which this Court has declared to be an essential element of the crime of nondwelling burglary. The requirement that an indictment include the essential elements of the crime is constitutional and cannot be cast aside in the Court's zeal to disregard or forgive the fatal error in Forkner's indictment. Such an approach is repugnant not only to our constitutions, but also to the time-honored doctrine of *stare decisis*. I would reverse Forkner's conviction and dismiss the indictment.

**KING, J., JOINS THIS OPINION.**