

Serial: **226291**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-00633

VICTOR HURNS

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

ORDER

Now before the en banc Court is Victor Hurns’s “Successive Application/Motion for Postconviction Relief Under Miss. Code Ann. 99-39-5(1)(a)–(99-39-1)” and his “Motion to Amend P.C.R. to Supplement Arguments.”

This Court affirmed Hurns’s murder conviction and life sentence, and the mandate issued in April 1993. *Hurns v. State*, 616 So. 2d 313, 322 (Miss. 1993). Since then, he has filed at least thirteen applications for leave to seek post-conviction relief.

In this application, Hurns raises four claims: (1) trial and appellate counsel rendered ineffective assistance; (2) the State failed to meet its burden of proof to show that he was the killer; (3) Dr. Steven Hayne’s autopsy report and eyewitnesses’ testimonies were inconsistent, which denied him a fair trial; and (4) the trial court plainly erred by granting Instruction S-5.

After due consideration, we find the following.

First, ineffective assistance of counsel can constitute an exception to the time, waiver, and successive-writ bars. *Chapman v. State*, 167 So. 3d 1170, 1174–75 (Miss. 2015). *See*

also *Bevill v. State*, 669 So. 2d 14, 17 (Miss. 1996); *Brown v. State*, 187 So. 3d 667, 671 (Miss. Ct. App. 2016). To warrant waiving those bars, however, the claim must have some arguable basis. *Means v. State*, 43 So. 3d 438, 442 (Miss. 2010). We find Hurns’s claim is insufficient to surmount the bars.

Second, Hurns’s remaining claims do not meet any recognized exception to the procedural bars. See *Chapman*, 167 So. 3d at 1174–75; *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*, 669 So. 2d at 17; *Brown*, 187 So. 3d at 671. And even if they did constitute an exception, they lack any arguable basis to warrant waiving the bars. *Means*, 43 So. 3d at 442.

The order denying Hurns’s last application said he has been sanctioned a total of \$350. Order, *Hurns v. State*, No. 2018-M-00633 (Miss. July 26, 2018). The order also warned that “future filings deemed frivolous may result not only in additional monetary sanctions, but also restrictions on filing applications for post-conviction collateral relief (or pleadings in that nature) *in forma pauperis*.” *Id.* We find that this filing is frivolous and that Hurns 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 En Banc Order, *Dunn v. State*, No. 2016-M-01514 (Miss. Apr. 11, 2019).

IT IS THEREFORE ORDERED the motion to amend is granted.

IT IS FURTHER ORDERED the application is denied.

IT IS FURTHER ORDERED Hurns 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 Hurns that are related to this conviction and sentence unless he pays the applicable docket fee.

SO ORDERED, this the 11th day of September, 2019.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

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

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

¶1. Today, this Court prioritizes efficiency over justice and bars Victor Hurns 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 Hurns 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. . . .” Yet this Court deems the frequency of Hurns’s filing to be too onerous a burden and decides to restrict Hurns 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 Hurns’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 Hurns for arguing his claims.

¶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 Hurns’s fundamental rights by restricting his access to the courts, I would simply dismiss his petition for post-conviction relief.

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