APPENDIX A (5 pages)

Serial: **221399**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-M-00796

EDDIE EARL PHILLIPS ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

Now before the en banc Court is Eddie Earl Phillips's "Application for Leave to File[] Motion for Post-Conviction Relief."

Phillips filed this, his second application outside the three-year limitations period. Miss. Code Ann. § 99-39-5(2) (Rev. 2015). He asserts three claims: (1) the indictment was defective; (2) the amendment to the indictment to charge him as a habitual offender constituted unfair surprise and thus violated his due-process rights; and (3) confusing and misleading jury instructions violated his due-process rights.

After due consideration, we find that Phillips's claims do not meet any recognized exception to the time, waiver, and successive-writ bars. ***Rowland v. State***, 98 So. 3d 1032, 1036 (Miss. 2012), *overruled on other grounds by* ***Carson v. State***, 212 So. 3d 22 (Miss. 2016); ***Bell v. State***, 123 So. 3d 924, 925 (Miss. 2013); ***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). And even if they did meet an exception,

the claims lack any arguable basis to warrant waiving the bars. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010).

Phillips is hereby warned 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*. 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)).

IT IS THEREFORE ORDERED that the application is dismissed.

SO ORDERED, this the 12th day of December, 2018.

WILLIAM L. WALLER, JR.,
CHIEF JUSTICE
FOR THE COURT

TO DISMISS: WALLER, C.J., KITCHENS, P.J., KING, COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ.

TO DENY: RANDOLPH, P.J.

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

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-M-00796

EDDIE EARL PHILLIPS

v.

STATE OF MISSISSIPPI

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

¶1. Although Eddie Earl Phillips's application for post-conviction relief does not merit relief, I disagree with the warning contained in this Court's order that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief *in forma pauperis*.[1]

¶2. 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

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[1] *See* Order, ***Dunn v. State***, 2016-M-01514 (Miss. Nov. 15, 2018).

> 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).[2]

¶3. In addition, 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

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

defendant from confinement should not be discouraged by the threat of monetary sanctions and restrictions on filings. ***Id.***

¶4. Therefore, although I find no merit in Phillips's application for post-conviction relief and agree it should be dismissed, I disagree with this Court's warning of future sanctions and restrictions.

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