

Serial: **221773**

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2018-M-00939**

***KENNETH CARTER***

***Petitioner***

***v.***

***STATE OF MISSISSIPPI***

***Respondent***

**ORDER**

This matter is before the en banc Court on the Application for Leave to Proceed in the Trial Court filed pro se by Kenneth Carter. Carter was convicted in the Warren County Circuit Court of armed robbery and felon in possession of a weapon as a habitual offender, and received concurrent sentences of life imprisonment without parole. The Court of Appeals affirmed on appeal. *Carter v. State*, 941 So. 2d 846 (Miss. Ct. App. 2006). Carter has previously filed seven unsuccessful requests for postconviction relief in this Court. He now alleges that his indictment was invalid, that Mississippi Code Section 99-19-83 is void for vagueness, that he received ineffective assistance of counsel, and that the circuit court made findings outside his presence.

The Court finds that the issues Carter raised lack sufficient merit to warrant an evidentiary hearing. This application is barred by the statute of limitations, is barred as a successive application, and does not meet any of the exceptions to these bars. Miss. Code Ann. § 99-39-5(2); § 99-39-27(9). The Application for Leave to Proceed in the Trial Court should be dismissed.

The Court further finds that this application is Carter's eighth request in this Court for post-conviction relief and is frivolous. Carter 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, *Dunn v. State*, 2016-M-01514 (Miss. Nov. 15, 2018); Order, *Bownes v. State*, 2014-M-00478 (Miss. Sept. 20, 2017); Order, *Walton v. State*, 2009-M-00329 (Miss. April 12, 2018); Order, *Fairley v. State*, 2014-M-01185 (Miss. May 3, 2018).

IT IS THEREFORE ORDERED that the Application for Leave to Proceed in the Trial Court filed pro se by Kenneth Carter is dismissed.

SO ORDERED, this the 5th day of December, 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.**

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

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-00939

*KENNETH CARTER*

v.

*STATE OF MISSISSIPPI*

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

¶1. Although Kenneth Carter’s application for post-conviction relief does not merit relief, I disagree with the Court’s finding that the application is frivolous and with the warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief *in forma pauperis*.<sup>1</sup>

¶2. 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). In his application for post-conviction relief, Carter made reasonable arguments that his indictment was invalid, that Mississippi Code Section 99-19-83 (Rev. 2015) was vague, that he received ineffective assistance of counsel, and that the circuit court’s findings were erroneous. As such, I disagree with the Court’s determination that Carter’s application is frivolous.

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<sup>1</sup>See Order, *Dunn v. State*, 2016-M-01514 (Miss. Nov. 15, 2018).

¶3. 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*. 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 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).<sup>2</sup>

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<sup>2</sup>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.”).

¶4. 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).

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.*

¶5. Therefore, although I find no merit in Carter's application for post-conviction relief and agree it should be dismissed, I disagree with this Court's contention that the application merits the classification of frivolous and with its warning of future sanctions and restrictions.

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