Serial: **221516**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-00947

ERIC SHAWN DAVIS ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

This matter is before the Court, en banc, on the Application for Leave to Proceed in the Trial Court filed pro se by Eric Shawn Davis. Davis's convictions and sentences were affirmed on direct appeal, and the mandate issued on January 6, 2004. ***Davis v. State***, 866 So. 2d 1107 (Miss. Ct. App. 2003). Davis subsequently filed an application for leave to proceed in the trial court, which was denied by a panel of this Court on January 28, 2005. This is Davis's second application for leave. The Court finds it to be barred by time and as a successive application, and it does not meet any of the exceptions thereto. Miss. Code Ann. §§ 99-39-5(2), 99-39-27(9) (Rev. 2015). Not withstanding these bars, there is no merit Davis's claim challenging the habitual offender portion of his indictment. Accordingly, the Courtpanel finds the application for leave should be dismissed.

We find the instant filing is also frivolous. Davis is hereby 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*. *See* 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 for Leave to Proceed in the Trial Court is hereby denied.

SO ORDERED, this the 27th day of November, 2018.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR.,
CHIEF 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-00947

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

¶1. Although Eric Shawn Davis'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*.[1]

¶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). Davis made reasonable arguments regarding the habitual offender portion of his indictment. As such, I disagree with the Court's determination that Davis's application is frivolous.

¶3. Additionally, I disagree with this Court's warning that future filings may result in monetary sanctions or restrictions on filling applications for post-conviction collateral relief *in forma pauperis*. The imposition of monetary sanctions upon a criminal defendant

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

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) (Brennan, J., dissenting) (per curiam).[2]

¶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

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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.").

> 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 Davis's application for post-conviction relief and agree it should be denied, 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.