

Serial: [225487](#)

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-M-00448

KEVIN DALE MCCAIN

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

ORDER

Now before the en banc Court is Kevin Dale McCain’s “Application for Leave to Proceed in the Trial Court with Post-Conviction Motion Miss. Code Ann. § 99-39-27.”

This Court affirmed McCain’s conviction and life sentence as a habitual offender under Mississippi Code Section 99-19-83 (Rev. 2015). *McCain v. State*, 81 So. 3d 1055, 1062 (Miss. 2012). The mandate issued March 22, 2012. Since then, he has filed one application, which was denied. Order, *McCain v. State*, 2013-M-00448 (Miss. Apr. 10, 2013).

McCain filed this application outside the three-year limitations period. Miss. Code. Ann. § 99-39-5(2) (Rev. 2015). He raises two claims.

First, he says his application should be excepted from the procedural bars based on the intervening decision of *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018). After due consideration, we find that *Dimaya* does not meet the intervening-decision exception under Section 99-39-5(2)(a)(i) (Rev. 2015).

Second, based on *Dimaya*, McCain argues that Section 99-19-83 was unconstitutionally vague because, at the time he was sentenced, it did not define “crime of violence.” In effect, he argues that his sentence is illegal. Although an illegal-sentence claim is a recognized exception to the time, waiver, and successive-writ bars, *Rowland v. State*, 98 So. 3d 1032, 1035–36 (Miss. 2012) (citing *Ivy v. State*, 731 So. 2d 601, 603 (Miss. 1999)), *overruled on other grounds by Carson v. State*, 212 So. 3d 22 (Miss. 2016), the claim must have some arguable basis to warrant relief from those bars. *Means v. State*, 43 So. 3d 438, 442 (Miss. 2010). After due consideration, we find that this claim has no arguable basis.

McCain is hereby warned that any future filings deemed frivolous may result not only in monetary sanctions but also in restrictions on filing applications for post-conviction collateral relief (or pleadings in that nature) *in forma pauperis*. See Order, *Dunn v. State*, 2016-M-01514, at *2 (Miss. Nov. 15, 2018) (warning of sanctions, including *in forma pauperis* restrictions); En Banc Order, *Dunn v. State*, 2016-M-01514, at *2 (Miss. Apr. 11, 2019) (restricting *in forma pauperis* status).

IT IS THEREFORE ORDERED that the application is denied.

SO ORDERED, this the 25th day of July, 2019.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

TO DENY AND ISSUE SANCTIONS WARNING: RANDOLPH, C.J., MAXWELL,
BEAM, CHAMBERLIN AND GRIFFIS, JJ.

TO DENY: COLEMAN AND ISHEE, JJ.

TO DISMISS: KITCHENS AND KING, P.JJ.

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

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

¶1. Although Kevin Dale McCain’s application for post-conviction relief does not merit relief, I disagree with this Court’s warning that future filings this Court deems frivolous may result in monetary sanctions or restrictions on filing applications 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. . . .”

¶3. I disagree with this Court’s warning that future filings may result in additional 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 that 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).

¶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.* 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).

¶5. Instead of simply denying or dismissing those motions that lack merit, the Court seeks to punish the defendant for the frequency of his motion filing. However, 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 R. Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*,

Washington Post (July 24, 2015), [http://wapo.st/1SGHcyd?tid=ss_mail&utm](http://wapo.st/1SGHcyd?tid=ss_mail&utm_term=.4bed8ad6f2cc)

[m_term=.4bed8ad6f2cc](http://wapo.st/1SGHcyd?tid=ss_mail&utm_term=.4bed8ad6f2cc).

¶6. Rather than imposing sanctions and threatening to restrict access to the courts, I would simply dismiss or deny motions that lack merit. Therefore, although I find no merit in McCain’s application for post-conviction relief, I disagree with this Court’s warning of future sanctions and restrictions.

KITCHENS, P.J., AND ISHEE, J., JOIN THIS SEPARATE WRITTEN STATEMENT.