Serial: **223119**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-M-00217

TIMOTHY STRATTON A/K/A TIMOTHY W. STRATTON ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

Now before the en banc Court is Timothy Stratton's Application for Leave to Proceed in the Trial Court with Motion to Vacate Convictions.

Stratton was convicted of two counts of sexual battery and sentenced to two concurrent life terms. ***Stratton v. State***, 132 So. 3d 1074, 1075 (Miss. Ct. App. 2014). The Court of Appeals affirmed his convictions and sentences, and the mandate issued on March 18, 2014. Stratton has filed one prior application. *See* En Banc Order, ***Stratton v. State***, 2016-M-00217 (Miss. Aug. 4, 2016).

In this application, Stratton claims that his sentences were obtained illegally and that his rights to due process and to a fair trial were violated in two ways.

First, he says the jury was not instructed on venue, which is an essential element of the crime. He raised this same issue in his prior application. After due consideration, we find that this claim does not meet any recognized exception to the time, waiver, and successive-writ bars. ***Chapman v. State***, 167 So. 3d 1170, 1174–75 (Miss. 2015); ***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 v. State***, 669 So. 2d 14, 17 (Miss. 1996); ***Brown v. State***, 187 So. 3d 667, 671 (Miss. Ct. App. 2016). And even if the claim did meet such an exception, it lacks any arguable basis to surmount the bars. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010). This Court recently rejected a similar argument. Order, ***Smith v. State***, 2013-M-00205 (Miss. Dec. 13, 2018) ("This Court will not consider venue questions raised for the first time in post-conviction proceedings." (citing Order, ***Page v. State***, 2013-M-01645 (Miss. Dec. 17, 2015))).

Second, Stratton claims that the jury instructions omitted four other essential elements. After due consideration, we find that this claim also does not meet any recognized exception to the procedural bars. And even if it did, it lacks any arguable basis for the following reasons.

The first concerns the dates of the crimes. Although the indictment charged that the crimes occurred between certain dates, the elements instruction omitted any date range. In a direct appeal, such omission warrants relief only if unfair surprise or prejudice is shown. ***Wilson v. State***, 515 So. 2d 1181, 1183 (Miss. 1987). Stratton's only asserted prejudice is that the jury could not discern his and the victim's ages without the dates. Yet the elements instruction showed that he was well over eighteen years old when the victim was born: it said that he was born July 4, 1964, and that she was born June 2, 1997. Furthermore, she was still under age sixteen at the time of the May 2012 trial.

Second, he asserts that the county and state were omitted. That relates to the venue

omission, which was discussed above.

Third, he says the indictment charged that he *forced* the victim to perform oral sex on him, but the elements instruction omitted "forcing." Force is irrelevant, however, because sexual battery of a child is a crime regardless of consent. Miss. Code Ann. § 97-3-95 (Rev. 2014).

Finally, Stratton complains that "human being" was omitted. Not only is that assertion frivolous, but also the elements instruction identified the victim as "a child."

Stratton is hereby warned that future filings deemed frivolous may result not only in monetary sanctions, but also restrictions on filing applications for post-conviction relief (or pleadings in that nature) *in forma pauperis*. *See* Order, ***Dunn v. State***, 2016-M-01514 (Miss. Nov. 15, 2018).

IT IS THEREFORE ORDERED that the application is denied.

SO ORDERED, this the 12th day of March, 2019.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH
CHIEF JUSTICE
FOR THE COURT

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

TO DISMISS AND ISSUE SANCTIONS WARNING: CHAMBERLIN, J.

TO DENY: KING, P.J.

TO GRANT: KITCHENS, P.J.

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

IN THE SUPREME COURT OF MISSISSIPPI

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v.

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

¶1. Although Timothy Stratton's application for post-conviction relief does not merit relief, I disagree with the Court's 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 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

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

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*, Wash. Post, (July 24, 2015), http://wapo.st/1SGHcyd?tid=ss_mail&utm_term=.4bed8ad6f2cc.

¶6. Rather than threatening to impose sanctions and restrict access to the courts, I would simply dismiss or deny motions that lack merit. Therefore, although I find no merit in Stratton's application for post-conviction relief and agree it should be denied, I disagree with this Court's warning of possible future sanctions and restrictions.