

Serial: 247902

IN THE SUPREME COURT OF MISSISSIPPI

No. 2023-M-00783

**JAMES FAIR, JR.**

*Petitioner*

v.

**STATE OF MISSISSIPPI**

*Respondent*

**EN BANC ORDER**

Before the en banc Court are James Fair Jr.'s Application for Leave to Proceed in the Trial Court and amendment thereto.

A jury convicted Fair of capital murder, and the trial court sentenced him to life without parole. *Fair v. State*, 766 So. 2d 787, 789 (Miss. Ct. App. 2000). The Court of Appeals affirmed. *Id.* And the mandate issued on September 19, 2000.

In this, his second post-conviction application, *see* Order, *Fair v. State*, No. 2001-M-01572 (Miss. Aug. 21, 2002), and amendment thereto, Fair asserts ten claims.

First, he claims the indictment was fatally flawed. This claim is not only time and successive-writ barred, *see* Miss. Code. Ann. §§ 99-39-5(2), -27(9) (Rev. 2020), but also this claim has been waived. *See* Miss. Code. Ann. § 99-39-21(1) (Rev. 2020). No statutory exception to those bars is met. *See Howell v. State*, 358 So. 3d 613, 616 (Miss. 2023). And regardless, the claim has no arguable basis. *See Means v. State*, 43 So. 3d 438, 442 (Miss. 2010).

In claims two through five, Fair argues that (a) the prosecution engaged in misconduct during closing arguments by calling him “a killer,” and the trial court erred by not telling the jury to disregard that statement; (b) his sentence violates Mississippi Code Section 99-19-101(2) (Rev. 2020) because the trial court, not the jury, sentenced him; (c) the trial court erred by allowing Teresa Catchings to offer hearsay testimony; and

(d) the trial court erred by admitting the contents of the victim's wallet into evidence. Each of these claims were addressed on direct appeal. *See Fair*, 766 So. 2d at 791-94. So res judicata applies. *See* Miss. Code. Ann. § 99-39-21(3) (Rev. 2020).

In claims six through nine, Fair argues that (a) the trial court erred by not instructing the jury on conspiracy; (b) his confrontation rights were violated; (c) the trial court erred by not holding a competency hearing; and (d) the prosecutor erred by describing how the victim died. These claims are not only time and successive-writ barred, *see* Miss. Code. Ann. §§ 99-39-5(2), -27(9), but also these claims have been waived. *See* Miss. Code. Ann. § 99-39-21(1). No statutory exception to those bars is met. *See Howell*, 358 So. 3d at 616. And regardless, the claims have no arguable basis. *See Means*, 43 So. 3d at 442.

Tenth, Fair claims trial counsel was ineffective. This claim is time and successive-writ barred. *See* Miss. Code. Ann. §§ 99-39-5(2), -27(9). No statutory exception to those bars is met. *See Howell*, 358 So. 3d at 616. And the claim has no arguable basis. *See Means*, 43 So. 3d at 442.

After due consideration, then, we find the application should be denied. We further find the application is successive and frivolous. Fair is hereby warned that 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*, No. 2016-M-01514, at \*2 (Miss. Nov. 15, 2018) (citing En Banc Order, *Fairley v. State*, 2014-M-01185 (Miss. May 3, 2018)).

IT IS THEREFORE ORDERED the application is denied.

SO ORDERED.

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

TO DENY: KITCHENS AND KING, P.JJ., AND COLEMAN, J.

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


**DIGITAL SIGNATURE**

Order#: 247902

Sig Serial: 100007577

Org: SC

Date: 09/08/2023

  
James D. Maxwell II  
James D. Maxwell II, Justice

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2023-M-00783

James Fair, Jr.

v.

State of Mississippi

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

¶1. Although I agree that James Fair Jr.’s application for post-conviction relief should be dismissed, I disagree with the Court’s finding that the application is frivolous and with its 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, Fair made reasonable arguments. As such, I disagree with the Court’s determination that Fair’s application is frivolous.

¶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 on a criminal defendant proceeding

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<sup>1</sup>See Order, *Dunn v. State*, No. 2016-M-01514 (Miss. Nov. 15, 2018).

*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).<sup>2</sup>

¶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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<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.”).

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 Fair's application for post-conviction relief, 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.**