Serial: **220860**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-M-01425

DARRYL MIXON A/K/A DARRELL MIXON A/K/A DARYL MIXON A/K/A LARRY WILLIAMS A/K/A REGINALD WELLS ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

Now before the Court, en banc, is Darryl Mixon's Petition for Extraordinary Writ Seeking Collateral Relief.

Mixon filed this, his fifth, application for leave to seek post-conviction relief outside the three-year limitations period. Miss. Code. Ann. § 99-39-5(2). He raises three issues: (1) the trial court lacked jurisdiction because there was no "formal complainant"; (2) actual innocence; and (3) disproportionate sentence.

After due consideration, we find the following.

Mixon's first claim does not meet any recognized exception to the time, waiver, and successive-writ bars. ***Rowland v. State***, 98 So. 3d 1032, 1034–36 (Miss. 2012), *overruled on other grounds by* ***Carson v. State***, 212 So. 3d 22 (Miss. 2016); ***Bell v. State***, 123 So. 3d 924, 924–25 (Miss. 2013); *see also* ***Boyd v. State***, 155 So. 3d 914, 918 (Miss. Ct. App. 2014) ("[S]ince ***Rowland***, only four types of 'fundamental rights' have been expressly found to

survive PCR procedural bars: (1) double jeopardy; (2) illegal sentence; (3) denial of due process at sentencing; and (4) ex post facto claims."). Even if it did, it lacks any arguable basis to overcome those bars. ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010).

Second, an actual-innocence claim can constitute an exception to the time bar. *See* ***Lee v. State***, 78 So. 3d 330, 332 (Miss. 2012); *see also* **Sneed v. State**, 85 So. 3d 298, 300 (Miss. Ct. App. 2012). Yet Mixon's claim is insufficient to overcome either that bar or the waiver and successive-writ bars.

Finally, an illegal-sentence claim is a recognized exception to the bars. ***Rowland***, 98 So. 3d at 1034–36. Mixon's claim, however, lacks any arguable basis.

Mixon was previously sanctioned $100 for filing a frivolous application for leave to seek post-conviction collateral relief. Order, ***Mixon v. State***, 2013-M-01425 (Miss. July 20, 2016). We find this filing is frivolous. Mixon 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. En Banc Order, ***Dunn v. State***, 2016-M-01514 (Miss. Nov. 15, 2018); 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 petition 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., MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ.

COLEMAN, J., AGREES IN RESULT ONLY WITHOUT SEPARATE WRITTEN STATEMENT.

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

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-M-01425

DARRYL MIXON A/K/A DARRELL MIXON A/K/A DARYL MIXON A/K/A LARRY WILLIAMS A/K/A REGINALD WELLS

v.

STATE OF MISSISSIPPI

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

¶1. Although Darryl Mixon's application for post-conviction relief does not merit relief, I disagree with this Court's contention that the application merits the classification of frivolous.

¶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). Mixon made reasonable arguments regarding the trial court's lack of jurisdiction, his actual innocence, and his disproportionate sentence. As such, I disagree with the Court's determination that Mixon'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 Eighth Amendment of the United States Constitution provides that

"excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The imposition of monetary sanctions upon a criminal defendant proceeding *in forma pauperis* only serves to punish or to preclude that defendant from his lawful right to appeal. 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.***

¶4. Although I find no merit in Mixon's application for post-conviction relief and agree it should be dismissed, I disagree with the Court's finding that the application is frivolous and with this Court's warning of future sanctions and restrictions.

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