

Serial: **221474**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2012-M-01135

***JAMES C. WINDING A/K/A JAMES
WINDING***

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

EN BANC ORDER

This matter is before the Court, en banc, on James C. Winding's pro se motion to set aside the \$100 sanction levied against Winding by prior order of this Court. After due consideration, the Court finds that the motion should be denied.

Also before the Court is Winding's application for leave to proceed in the trial court, along with several additional filings, which the Court has attached to and made a part of the application for leave.

Winding's conviction and sentence were affirmed by the Court of Appeals, and the mandate issued on August 23, 2005. *Winding v. State*, 908 So. 2d 163 (Miss. Ct. App. 2005). On at least four prior occasions, Winding has sought leave of this Court to file petitions for post-conviction relief in the trial court, and all of those applications for leave have been rejected. We find the current application for leave, Winding's fifth, is both time-barred and successive, and it does not meet any of the exceptions to the procedural bars. Miss. Code Ann. §§ 99-39-5(2), 99-39-27(9) (Rev. 2015). Accordingly, it should be dismissed.

Winding was previously sanctioned by the Court in the amount of \$100 on December 12, 2013, for having filed a frivolous application for leave despite a warning against doing so. We find that the instant filing is frivolous. Winding 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, **Brown v. State**, 2014-M-00478 (Miss. Sept. 20, 2017)).

IT IS THEREFORE ORDERED that the motion to set aside the previously ordered sanction in the amount of \$100 is denied.

IT IS FURTHER ORDERED that the application for leave, and the subsequently filed amendments/attachments thereto, are hereby dismissed as procedurally barred.

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. 2012-M-01135

**JAMES C. WINDING A/K/A JAMES
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v.

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

¶1. Today, this Court prioritizes efficiency over justice in its decision to deny James Winding’s motion to set aside the \$100 sanction levied against him. Additionally, although James Winding’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 additional 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). Winding made reasonable arguments in his motion for post-conviction relief. As such, I disagree with the Court’s determination that Winding’s application is frivolous.

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

¶3. 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. . . .”

¶4. 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 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).

¶5. 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).

¶6. Instead of simply denying or dismissing those motions which 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 November 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 Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*, Washington Post (July 24, 2015), http://wapo.st/1SGHcyd?tid=ss_mail&utm_term=.4bed8ad6f2cc. Rather than imposing sanctions and threatening to restrict access to the courts, I would simply dismiss or deny motions which lack merit. Therefore, although I find no merit in Winding’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 additional sanctions and restrictions. I also disagree with this Court's decision to deny Winding's motion to set aside the \$100 sanction levied against him.

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