Serial: **223736**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-M-01512

JOHN RAY KIDD ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

Now before the en banc Court are (1) John Ray Kidd's Application for Leave to Proceed in the Trial Court for Evidentiary Hearing on Post-Conviction Claim of Newly Discovered Evidence and (2) his Motion to Amend Brief of Application to Proceed in Trial Court.

Kidd was convicted of sexual battery and two counts of rape. ***Kidd v. State***, 793 So. 2d 675, 677 (Miss. Ct. App. 2001). He was sentenced to twenty-five years for sexual battery and to two consecutive thirty-year terms for the rape convictions. ***Id.*** The Court of Appeals affirmed. ***Id.*** This Court denied his petition for a writ of certiorari, and the mandate issued September 27, 2001.

Since then, Kidd has filed eight applications for leave to seek post-conviction relief. *See* Order, ***Kidd v. State***, 2017-M-01512 (Miss. April 5, 2018); Order, ***Kidd v. State***, 2014-M-00778 (Miss. Sept. 11, 2014); Order, ***Kidd v. State***, 2011-M-01537 (Miss. Mar. 27, 2014); Order, ***Kidd v. State***, 2011-M-01537 (Miss. July 26, 2013); Order, ***Kidd v. State***, 2011-M-01537 (Miss. May 2, 2013); Order, ***Kidd v. State***, 2011-M-01537 (Miss. Dec. 20, 2011);

Order, ***Kidd v. State***, 2010-M-01864 (Miss. Feb. 2, 2011); Order, ***Kidd v. State***, 2003-M-02680 (Miss. Mar. 17, 2004).

In this application and motion to amend, Kidd seeks leave based on newly discovered evidence: affidavits from Roy Ray and Manuel Shane Hicks. Kidd says the affidavits show his actual innocence.

Notably, Kidd has asserted newly discovered evidence in prior applications. He was even granted leave to proceed on such claim in 2014. Order, ***Kidd v. State***, 2014-M-00778 (Miss. Sept. 11, 2014). The circuit court held an evidentiary hearing and denied relief. ***Kidd v. State***, 221 So. 3d 1041, 1042 (Miss. Ct. App. 2016). The Court of Appeals affirmed the judgment, ***id.***, and this Court denied his petition for a writ of certiorari. Order, ***Kidd v. State***, 2015-CT-01182-SCT (Miss. June 15, 2017).

Newly discovered evidence is an exception to the time, waiver, and successive-writ bars. ***Havard v. State***, 86 So. 3d 896, 906 (Miss. 2012) (citing Miss. Code Ann. § 99-39-27(9) (Rev. 2007)). "The new evidence must be 'evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence.'" ***Id.*** (citing *id.*).

After due consideration, we find that Kidd does not meet the newly-discovered-evidence standard.

This Court has previously warned Kidd of possible sanctions for frivolous filings. Order, ***Kidd v. State***, 2011-M-01537 (Miss. Dec. 20, 2011); Order, ***Kidd v. State***, 2011-M-

01537 (Miss. May 2, 2013). And it once sanctioned him $100. Order, ***Kidd v. State***, 2011-M-01537 (Miss. July 26, 2013). He is hereby warned that any future filings deemed frivolous may result not only in additional 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 (Miss. Nov. 15, 2018).

IT IS THEREFORE ORDERED the Application for Leave to Proceed in the Trial Court for Evidentiary Hearing on Post-Conviction Claim of Newly Discovered Evidence 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 AND GRIFFIS, JJ.

TO DISMISS AND ISSUE SANCTIONS WARNING: CHAMBERLIN AND ISHEE, JJ.

TO DENY: KITCHENS AND KING, P.JJ.

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

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

¶1. Although John Ray Kidd'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 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). In his application for post-conviction relief, Kidd made reasonable arguments regarding his assertions of newly discovered evidence. As such, I disagree with the Court's determination that Kidd'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

[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).[2]

[2]*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.").

¶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.***

¶5. Therefore, although I find no merit in Kidd'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 future sanctions and restrictions.

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