Serial: **227708**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-00798

GARRETT EUGENE RAY A/K/A GARRETT E. RAY A/K/A GARRETT RAY ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

This matter is before the Court on the Application for Leave to Proceed in the Trial Court filed pro se by Garrett Eugene Ray on June 20, 2019. This Court affirmed Ray's conviction and sentence on direct appeal, and the mandate issued on April 5, 2018. ***Ray v. State***, 238 So. 3d 1118 (Miss. 2018). Ray filed his first application for leave to pursue post-conviction relief in the trial court on June 5, 2018. Before this Court ruled on that application, Ray filed a second application for leave on August 6, 2018. Those filings were treated as a single application for leave and were denied by a panel of this Court on October 10, 2018. Ray's motion for reconsideration was dismissed on June 3, 2019.

The Court finds that today's application is successive and that it does not qualify under any of the successive-writ bar exceptions. Miss. Code Ann. § 99-39-27(9) (Rev. 2015). Additionally, Ray's first two claims regarding the right to confront witnesses and the illegal seizure of evidence were raised on direct appeal and in his August 6, 2018 post-conviction filing. They are barred by the doctrine of res judicata. Miss. Code Ann. § 99-39-21(3) (Rev. 2015). Ray's third claim that his sentence exceeded the maximum allowed by law was raised

in his previous application for leave and was found to be without merit. It is now barred by res judicata and the successive-writ bar. Finally, the Court finds that Ray's new claim of ineffective assistance of counsel was capable of being raised on direct appeal or in his first application for leave, and it has been waived. Notwithstanding waiver, the claim fails to pass the first prong set forth in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Accordingly, the Court finds that Ray's application for leave is successive and should be denied. Miss. Code Ann. § 99-39-27(9) (Rev. 2015).

The Court also finds that the successive application for leave is frivolous. Ray is 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***, 2016-M-01514 (Miss. Nov. 15, 2018).

IT IS THEREFORE ORDERED that the Application for Leave to Proceed in the Trial Court filed pro se by Garrett Eugene Ray on June 20, 2019, is hereby denied.

SO ORDERED, this the 2nd day of October, 2019.

/s/ David M. Ishee

DAVID M. ISHEE, JUSTICE
FOR THE COURT

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

TO DENY: COLEMAN, J.

TO DISMISS: KITCHENS AND KING, P.JJ.

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

IN THE SUPREME COURT OF MISSISSIPPI

No. 2018-M-00798

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GARRETT E. RAY A/K/A GARRETT RAY

v.

STATE OF MISSISSIPPI

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

¶1. Although Garrett Eugene Ray'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, Ray made reasonable arguments that he was denied the right to confront witnesses, that evidence in his case was illegally seized, that his sentence exceeded the maximum, and that he received ineffective assistance of counsel. As such, I disagree with the Court's determination that Ray's application is frivolous.

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

¶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 *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]

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[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 Ray'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. COLEMAN, J., JOINS THIS SEPARATE WRITTEN STATEMENT IN PART.