

Serial: **223247**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-M-01493

**ELBERT DAVIS A/K/A ELBERT LEE
DAVIS A/K/A ELBERT L. DAVIS**

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

EN BANC ORDER

Before the Court is Elbert Davis's Application for Leave to Proceed in the Trial Court. Davis was convicted of sexual battery of his ten-year-old cousin. He appealed and argued that the circuit court erred when it limited his right to show his confession was involuntary, admitted hearsay testimony, and gave an improper jury instruction. The Court of Appeals affirmed. *Davis v. State*, 183 So. 3d 112 (Miss. Ct. App. 2015).

In Davis's first application for leave, he asserted that the verdict was against the overwhelming weight of the evidence, that evidence collected from the crime scene should have been suppressed for failure to obtain a warrant, and that he had received ineffective assistance of counsel. This Court denied in part and dismissed in part Davis's application.

In the instant application, Davis raises the same issues that he raised in his first application. Davis does not provide additional support for his arguments. After due consideration, the Court finds the instant application should be denied as a subsequent writ. Miss. Code Ann. § 99-39-27 (Rev. 2015). Moreover, the Court finds that the present

application is frivolous. We warn that future frivolous filings could result in monetary sanctions or in restrictions on his ability to file petitions 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 Elbert Davis's Application for Leave to Proceed in the Trial Court is hereby denied.

SO ORDERED, this the 13th day of February, 2019.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH,
CHIEF JUSTICE
FOR THE COURT

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

TO DISMISS AND ISSUE SANCTIONS WARNING: BEAM AND CHAMBERLIN, 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 Elbert Davis'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, Davis made reasonable arguments that the verdict was against the overwhelming weight of the evidence, that evidence should be suppressed for failure to obtain a warrant, and that he had received ineffective assistance of counsel. As such, I disagree with the Court's determination that Davis's application is frivolous.

¹See 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 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) (per curiam).²

²See 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 Davis'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.