

Serial: **225916**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2014-M-00428

***ARTIS F. POWER A/K/A ARTIS POWER
A/K/A ARTIS FRANKLIN POWER***

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

EN BANC ORDER

This matter is before the Court on Artis Power’s “Application for Leave to File Post-Conviction Motion into the Circuit Court of Choctaw County, Mississippi.”

Power’s conviction and sentence were affirmed on appeal, and the mandate issued on August 18, 2011. *Power v. State*, 66 So. 3d 155 (Miss. Ct. App. 2011). Power’s third application for post-conviction relief is time barred and is barred as a successive writ. *See Power v. State*, 2014-M-00428; Miss. Code Ann. §§ 99-39-5(2), 99-39-27(6) (Rev. 2015).

Power argues the State lost DNA evidence. The claim is without merit. For the first time, he claims issues involving the jury denied his right to a fair trial. The issue was capable of being raised at trial or on direct appeal and, thus, is barred from review. Miss. Code Ann. § 99-39-21(1) (Rev. 2015). He also asserts he has newly discovered evidence the witness fabricated the allegations. The issue was raised and considered by the Court previously and, as a result, is barred under the doctrine of res judicata. Miss. Code Ann. § 99-39-21(3) (Rev. 2015). Furthermore, Power fails to raise an arguable basis for his claims to surmount the

procedural bars. *See Means v. State*, 43 So. 3d 438, 442 (Miss. 2010). Accordingly, the Court finds the application should be denied.

The Court also finds the successive application is frivolous. Power 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*. Order, *Dunn v. State*, 2016-M-01514 (Miss. Nov. 15, 2018).

IT, THEREFORE, IS ORDERED that Artis Power's "Application for Leave to File Post-Conviction Motion into the Circuit Court of Choctaw County, Mississippi" is hereby denied.

SO ORDERED, this the 17th day of July, 2019.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

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

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.

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

¶1. Although Artis F. Power’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, Power made reasonable arguments that the State lost evidence, that his right to a fair trial was denied, and that he had discovered new evidence. As such, I disagree with the Court’s determination that Power’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

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

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

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 Power'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.

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