(D)

Serial: 254885

IN THE SUPREME COURT OF MISSISSIPPI

No. 2024-M-00654

ANDREW McGRAW ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

This matter is before the Court, *en banc*, on the Application for Leave to Proceed in the Trial Court filed by Andrew McGraw, *pro se*. On direct appeal, this Court unanimously affirmed McGraw's conviction and sentence for forcible rape. *See* ***McGraw v. State***, 306 So. 3d 715 (Miss. 2020). The mandate issued on January 4, 2021. Panels of this Court have since denied two petitions for post-conviction collateral relief filed by McGraw.

After due consideration, the Court finds that the claims now presented by McGraw are time-barred, successive-writ-barred, and/or waived and that they fail to meet any exceptions to the bars. Accordingly, the Court finds that this Application should be denied.

The Court further finds that this Application is frivolous. As McGraw has previously been warned about frivolous filings, the Court finds that sanctions are warranted.

IT IS, THEREFORE, ORDERED that the Application for Leave to Proceed in the Trial Court filed by Andrew McGraw, *pro se*, is hereby denied.

IT IS FURTHER ORDERED that Andrew McGraw is hereby restricted from filing further applications for post-conviction collateral relief (or pleadings in that nature) that are related to the subject conviction and sentence *in forma pauperis*.

Exhibit-"D"
1 of 6

The Clerk of the Court shall not accept for filing any further applications for post-conviction collateral relief (or pleadings in that nature) from McGraw that are related to the subject conviction and sentence unless he pays the applicable docket fee.

SO ORDERED.

TO DENY WITH SANCTION: RANDOLPH, C.J., MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ.

TO DENY: KITCHENS AND KING, P.JJ., AND COLEMAN, J.

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

DIGITAL SIGNATURE
Order#: 254885
Sig Serial: 100009605
Org: SC
Date: 11/25/2024

Robert P. Chamberlin, Justice

Exhibit "D"
2 OF 6

Exhibit "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-KA-01770-SCT

ANDREW McGRAW

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	10/30/2019
TRIAL JUDGE:	HON. CHARLES W. WRIGHT, JR.
TRIAL COURT ATTORNEYS:	DANA P. SIMS JAMES EDWIN SMITH, III ALAN D. RHEA
COURT FROM WHICH APPEALED:	KEMPER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAUREN GABRIELLE CANTRELL
DISTRICT ATTORNEY:	KASSIE ANN COLEMAN
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 12/10/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., MAXWELL AND BEAM, JJ.

RANDOLPH, CHIEF JUSTICE, FOR THE COURT:

¶1. Andrew McGraw appeals his conviction for forcible rape.[1] He argues there was insufficient evidence to support his conviction. Specifically, McGraw claims the State failed to provide sufficient evidence to establish that his victim was incapable of consenting to intercourse. After examining the record, we find there was sufficient evidence and affirm

[1] McGraw does not appeal his conviction for incest.

Exhibit "A"
1 OF 8

McGraw's conviction and we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. SR is a thirty-three-year-old woman with a standing condition of bacterial meningitis. SR lives in the county where the trial occurred. She contracted bacterial meningitis as a two-year-old; the infection was neurologically devastating. SR weighed less than fifty pounds. She spends most of her time bent in a fetal position. Muscles in her upper and lower body are severally underdeveloped. She experiences spasms, which cause her hands and arms to be tightly pulled into her body. Her underdeveloped feet are turned in. Her legs are far smaller than those of a normal thirty-three-year-old. SR cannot walk or talk. She requires twenty-four-hour care and supervision. She is essentially confined to her home.

¶3. SR's mother grew concerned with SR's health, so she took her daughter to Rush Hospital in Meridian. While there, SR was administered a pregnancy test. SR was pregnant. Four days later, SR was admitted to University of Mississippi Medical Center (UMMC). An ultrasound revealed that SR was nineteen weeks pregnant. A conception date of late August to early September 2017 was computed.

¶4. SR was unable to communicate with hospital staff. She was unable to consent to any procedures performed on her. All consents to treatment were provided by family. Some time after SR's admittance, her mother requested that SR's child be terminated. The UMMC Ethics Committee met and found this was an appropriate course of action. Three days later, SR was induced into labor. The child was born unresponsive. The child was weighed, and its weight was consistent with a gestational age of nineteen to twenty weeks.

Exhibit "A"
2 OF 8

¶5. Shortly after SR was admitted to UMMC, the hospital called Michael Mattox, an investigator with the sheriff's department. Mattox was informed that SR was a pregnant vulnerable adult. Mattox interviewed SR's mother and attempted to find out who could have impregnated SR. She was unable to provide any names. Since SR was unable to leave her home unassisted, Mattox identified individuals with access to the home. Only two men lived in the home. They were Andrew McGraw, SR's father, and SR's two-year-old sibling. SR's older brother lived next door to the home. SR also had an uncle who lives in the county. Finally, there was also a man who washed the McGraws' cars from time to time. Mattox collected DNA samples from all five.

¶6. In addition to the DNA samples from the five men, DNA samples were also taken from the deceased child. Mattox turned these over to the attorney general's office, which in turn submitted them to Scales Laboratory for testing. After testing the samples, the laboratory was able to say with 99.999999998 percent certainty that Andrew McGraw fathered his daughter's child.

¶7. McGraw was indicted on one count of forcible rape under Mississippi Code Section 97-3-65 (Rev. 2014) and one count of incest under Mississippi Code Section 97-29-5 (Rev. 2014). He was tried and convicted of both counts. He now appeals his conviction for forcible rape.

ISSUES ON APPEAL

¶8. McGraw states the issues on appeal *verbatim ac litteratim*:

> WHETHER THE EVIDENCE WAS SUFFICIENT IN COUNT I ON THE ELEMENT OF LACK OF CONSENT AND FORCE OR WHETHER THE

Exhibit "A"
3 OF 8

VERDICT IN COUNT I WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE ON THAT ELEMENT?

Because McGraw provides no argument regarding the weight of the evidence, our analysis is limited to his sufficiency-of-the-evidence claim. *See* ***McNeese v. McNeese***, 119 So. 3d 264, 269 (Miss. 2013) (quoting ***O.W.O Invs., Inc. v. Stone Inv. Co., Inc.***, 32 So. 3d 439, 446 (Miss. 2010); ***Touchstone v. Touchstone***, 682 So. 2d 374, 380 (Miss. 1996)).

STANDARD OF REVIEW

¶9. When reviewing challenges to the sufficiency of the evidence, three principles guide our analysis. First, the evidence is viewed "in a light most favorable to the State." ***Willis v. State***, 300 So. 3d 999, 1007 (Miss. 2020) (internal quotation mark omitted) (quoting ***Lenoir v. State***, 222 So. 3d 273, 279 (Miss. 2017)). Next, we extend to the State "all favorable inferences reasonably drawn from the facts." ***Id.*** (citing ***Lenoir***, 222 So. 3d at 279). "Finally, if a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt, this Court will not disturb the verdict." ***Id.*** (citing ***Lenoir***, 222 So. 3d at 279).

ANALYSIS

¶10. Forcible rape is statutorily defined as having occurred when any person has "forcible sexual intercourse with any person." Miss. Code Ann. 97-3-65(4)(a) (Rev. 2014). Under this statute, the state has the burden of proving a perpetrator had sex with a victim through the use of force. ***Expose v. State***, 99 So. 3d 1141, 1148 (Miss. 2012) (quoting ***Madere v. State***, 794 So. 2d 200, 212 (Miss. 2001)). "Forcible sexual intercourse, by its very nature negates the victim's consent." ***Id.*** (citing ***People v. Cruz***, 923 P.2d 311, 312 (Colo. App. 1996)). Our precedent holds when a victim is demonstrated as lacking the ability to consent, mere proof

Exhibit "A"
4 of 8

of sexual intercourse suffices to establish force. *See, e.g.*, ***Wilson v. State***, 221 So. 2d 100, 103 (Miss. 1969).

¶11. On appeal, McGraw does not contest his conviction for incest, nor does he contest that sexual intercourse occurred between his daughter and him. Instead, McGraw unconvincingly argues that insufficient evidence was produced to establish that SR lacked the ability to consent. He argues, "[t]he State presented no competent evidence that SR was totally incapable of communicating consent and offered no competent evidence that she was specifically unable to consent during the time frame suggested for conception." McGraw specifically argues that the obstetrician-gynecologists whom the State called could not "give competent psychological or neurological opinions about SR's ability to consent generally . . . ."

¶12. McGraw's argument fails to recognize the abundance of evidence presented on SR's lack of ability to consent to anything. Under our standard of review, we view the evidence adduced in a case "in a light most favorable to the State." ***Willis***, 300 So. 3d at 1007 (internal quotation mark omitted) (quoting ***Lenoir***, 222 So. 3d at 279). The State adduced testimony from two obstetrician-gynecologists, Drs. Charlene Collier and Taylor Massengill. Dr. Collier testified that she was the attending physician for SR when SR was admitted to UMMC on January 7, 2018. She testified that SR had a history of a "standing condition of bacterial meningitis" that had been documented as causing "neurologic devastation." She testified that this diagnosis had persisted since SR was two years old.

¶13. Dr. Collier further testified that SR was not able to communicate upon her admission

Exhibit "A"
5 of 8

and that this was consistent with SR's medical history. Moreover, Dr. Collier testified that SR "was not neurologically capable of consenting or verbally expressing anything during the course of the treatment, so all of her consents were provided by family." In concluding her testimony, Dr. Collier stated SR "was not able to consent to or deny or reject any of the treatments that she underwent or any of the physical exams. So she would always be addressed but could not - - could not consent to any exams or any of the treatment . . . ." Dr. Massengill was the resident on call when SR was admitted to UMMC on January 8, 2018. Dr. Massengill testified that SR was unable to consent to any procedures and was unable to communicate with her.

¶14. The State also called Michael Mattox, a criminal investigator from the sheriff's department. Mattox testified that UMMC contacted him after SR's admission because SR was a vulnerable adult unable to care for herself or communicate and was found to be pregnant. During his meetings with SR, Mattox testified that she was couched in a fetal position, unable to stand or walk, and appeared to weigh "from 30 to 50 pounds." Mattox further testified that SR was unable to communicate with him "in any shape or form," so he had to interview her family to begin his investigation.

¶15. Mattox also offered his personal knowledge regarding SR. Mattox knew the McGraw family before this incident. He testified that SR had to be physically carried from place to place or wheeled in a wheelchair since she is unable to walk.

¶16. The defense called Mary McGraw, McGraw's wife and SR's mother, ostensibly to create a jury issue on consent. She testified that SR required twenty-four-hour care. Mary

Exhibit "A"
6 OF 8

also testified that although SR could not walk, she could scream and make basic verbal noises indicating dissent. When asked how Mary would know if her daughter had been assaulted, Mary responded, "[i]f somebody did something to her, she's going to let me know it by her eyes." Mary was asked if her daughter let her know that she had been sexually assaulted; she responded, "[s]he didn't." Mary went on to affirm that her daughter had been sexually assaulted and that her daughter had never told her of it.

¶17. Viewed in a light most favorable to the State, the evidence established that SR's physical and communicative abilities were profoundly impaired to the point they were virtually nonexistent. We also grant all favorable reasonable inferences arising from the evidence. ***Willis***, 300 So. 3d at 1007 (citing ***Lenoir***, 222 So. 3d at 279). It is reasonable to infer from these facts and the testimony regarding her medical history that SR had borne these impairments since the onset of her illness when she was a child. Indeed, all the testimony indicated that she had been severely impaired since she was two years old. Nothing in the record indicates otherwise, and nothing in the record indicates that SR underwent any change in communicative or physical abilities before her arrival at UMMC.

¶18. McGraw's argument misrepresents the record. Multiple individuals offered sworn testimony regarding SR's reduced capacities. The obstetricians offered testimony regarding SR's inability to consent or communicate regarding any medical procedures. Mattox testified to SR's vulnerableness and dependence on her caretakers. The defense called SR's mother who testified to her physical incapacities and to her profound limitations in communicating. SR's inability to communicate was not disputed by any substantive evidence. It was

Exhibit "A"
7 of 8

reasonable for a jury to conclude that SR had been impaired since she was two years old. Sufficient evidence supported the jury's finding that SR was incapable of consenting when she was impregnated by McGraw.

CONCLUSION

¶19. This Court does not weigh evidence or determine witness credibility. ***Willis***, 300 So. 3d at 1007 (quoting ***Little v. State***, 233 So. 3d 288, 289 (Miss. 2017)). We examine the record and ask if sufficient evidence supported the determinations made by the jury. A reasonable finder of fact could find beyond a reasonable doubt that SR was incapable of consent and that McGraw forcibly raped her. We therefore affirm McGraw's conviction.

¶20. **AFFIRMED.**

KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.

Exhibit - "A"
8 OF 8

Serial: 252672

IN THE SUPREME COURT OF MISSISSIPPI

No. 2024-M-00654

ANDREW MCGRAW ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

This matter is before the panel of King, P.J., Maxwell and Ishee, JJ., on the Application for Leave to Proceed in the Trial Court filed by Andrew McGraw, *pro se*. On direct appeal, this Court unanimously affirmed McGraw's conviction and sentence for forcible rape. *See* ***McGraw v. State***, 306 So. 3d 715 (Miss. 2020). The mandate issued on January 4, 2021.

After due consideration, the panel finds that the claims for post-conviction collateral relief now presented by McGraw are time-barred and/or waived, and fail to meet any exceptions to such bars. Accordingly, the panel finds that McGraw's *pro se* Application should be denied.

IT IS, THEREFORE, ORDERED that the Application for Leave to Proceed in the Trial Court filed by Andrew McGraw, *pro se*, is hereby denied.

SO ORDERED.

DIGITAL SIGNATURE
Order#: 252672
Sig Serial: 100008890
Org: SC
Date: 06/27/2024

Leslie D. King

Leslie D. King, Presiding Justice

Exhibit-"B"
1 OF 1

(C)

Serial: 253587

IN THE SUPREME COURT OF MISSISSIPPI

No. 2024-M-00654

ANDREW MCGRAW ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

Now before the panel of Randolph, C.J., Coleman and Griffis, JJ., is the Application for Leave to Proceed in the Trial Court filed by Andrew McGraw, *pro se*. On direct appeal, the Court unanimously affirmed McGraw's conviction and sentence for forcible rape. *See* ***McGraw v. State***, 306 So. 3d 715 (Miss. 2020). The mandate issued on January 4, 2021. On June 27, 2024, a panel of the Court denied McGraw's first petition for post-conviction collateral relief.

After due consideration, the panel finds that the claims for post-conviction collateral relief now presented by McGraw are time-barred, successive-writ-barred, and/or waived, and fail to meet any exceptions to such bars. Accordingly, the panel finds that McGraw's Application should be denied.

The panel further finds that McGraw's Application is frivolous. Therefore, McGraw is hereby warned that any 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, e.g.*, En Banc Order, ***Dunn v. State***, 2016-M-01514 (Miss. Apr. 11, 2019) (restricting *in forma pauperis* status); En Banc Order,

Exhibit - "C"
1 of 2

Dunn v. State, 2016-M-01514 (Miss. Nov. 15, 2018) (warning of sanctions, including *in forma pauperis* restrictions).

IT IS, THEREFORE, ORDERED that the Application for Leave to Proceed in the Trial Court filed by Andrew McGraw, *pro se*, is hereby denied.

SO ORDERED, this the 21 day of August, 2024.

MICHAEL K. RANDOLPH,
CHIEF JUSTICE

(11)

Exhibit-"C"
2 OF 2

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2024-M-00654

In Re: Andrew McGraw

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

¶1. Today, this Court prioritizes efficiency over justice and bars Andrew McGraw from its doors. Because the imposition of monetary sanctions against indigent defendants and the restriction of access to the court system serve only to punish those defendants and to violate rights guaranteed by the United States and Mississippi Constitutions, I strongly oppose this Court's order restricting McGraw from filing further petitions for post-conviction collateral relief *in forma pauperis*.

¶2. 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 . . . ." Miss. Const. art. 6, § 155. Yet this Court deems the frequency of McGraw's filings to be too onerous a burden and decides to restrict McGraw from filing subsequent applications for post-conviction collateral relief. *See* ***In re McDonald***, 489 U.S. 180, 186–87, 109 S. Ct. 993, 997, 103 L. Ed. 2d 158 (1989) (Brennan, J., dissenting) ("I continue to find puzzling the

EXHIBIT - "D"
3 OF 6

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.").

¶3. Article 3, section 25, of the Mississippi Constitution provides that "*no person* shall be debarred from prosecuting or defending *any civil cause for or against him or herself*, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. art. 3, § 25 (emphasis added). Mississippi Code Section 99-39-7 provides that actions under the Uniform Post-Conviction Collateral Relief Act *are civil actions*. Miss. Code Ann. § 99-39-7 (Rev. 2020). Therefore, this State's Constitution grants unfettered access in civil causes to any tribunal in the State. The Court's decision to deny McGraw's filing actions *in forma pauperis* is a violation of his State constitutional right to access to the courts.

¶4. The decision to cut off an indigent defendant's right to proceed *in forma pauperis* is also a violation of that defendant's fundamental right to vindicate his 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). 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

Exhibit "D"
4 OF 6

> 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). Instead of simply denying or dismissing those motions that lack merit, the Court seeks to punish McGraw for arguing his claims.

¶5. Although each justice took an oath to do equal right to the poor and rich, this Court does not deny access to the court defendants who are fortunate enough to have monetary resources. Those defendants may file endless petitions, while indigent defendants are forced to sit silently by. 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/ (emphasis added) (last visited Sept. 9, 2021). 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.

Exhibit "D"
5 OF 6

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.

¶6. Rather than violating McGraw's fundamental rights by restricting his access to the courts, I would simply find his petition for post-conviction relief lacked merit.

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

Exhibit "D"
6 of 6