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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**FREDERICK C. ELLIS A/K/A
FREDERICK CHARLES ELLIS**

APPELLANT

VS.

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SUPREME COURT
COURT OF APPEALS**

NO. 2006-KA-1163

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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NO. 2006-KA-1163

STATE OF MISSISSIPPI

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STATEMENT OF THE CASE

This is the sordid tale of sex gone excruciatingly askew.

FREDERICK C. ELLIS prosecutes a criminal appeal from the Circuit Court of Harrison County, Jerry O. Terry, Sr., Circuit Judge, presiding.

Following trial by jury conducted on March 23, 2005, Ellis was convicted of the crimes of sexual battery (Count I) and statutory rape (Count II). (C.P. at 7-8, 59-61) Ellis was sentenced on March 23, 2005, to twenty (20) years in the custody of the MDOC on each count with the sentences to run concurrently with one another for a total of twenty (20) years to serve day for day. (R. 180-81; C.P. at 61)

Ellis's appellate lawyer, W. Daniel Hinchcliff, an attorney with the Mississippi Office of Indigent Appeals, has filed a thorough "no arguable issues" brief tracking the procedure first contemplated in *Killingsworth v. State*, 490 So.2d 849, 851 (Miss. 1986), later revisited and modified in *Turner v. State*, 818 So.2d 1186, 1189 (Miss. 2001), and subsequently refined, if not

reformed, in **Lindsey v. State**, 939 So.2d 743 (Miss. 2005), which overruled, in part, the procedure articulated in **Turner v. State**, *supra*.

A two count indictment returned on May 10, 2004, charged in Count I that Ellis

“ . . . on or about July, 1999 . . . being at the time in question twenty-four (24) or more months older than C.B., did wilfully, purposely, unlawfully and feloniously commit Sexual Battery upon C.B., a child who was at the time in question under fourteen (14) years of age, by engaging in the act of sexual penetration, to wit: by inserting his penis into the vagina of the said C. B., . . . ” (C.P. at 7)

The indictment charged in Count II that Ellis

“ . . . on or about July, 1999, did feloniously and unlawfully have sexual intercourse with C.B., a child under the age of fourteen (14) years and twenty-four (24) or more months younger than the said Fredrick Charles Ellis and not the spouse of the said Fredrick Charles Ellis at the time in question, . . . ” (C.P. at 7)

The appellate brief filed by Mr. Hinchcliff states, *inter alia*, that he “ . . . has diligently searched the procedural and factual history of this criminal action and scoured the record searching for any arguable issues which could be presented in good faith for appellate review to this Honorable Court on behalf of Frederick Charles Ellis . . . [and] hereby asserts, that upon conclusion of said search, has found no such issue.” (Brief of the Appellant at 4)

Counsel has followed with great skill and expertise the procedure articulated in **Lindsey v. State**, *supra*, 939 So.2d 743 (Miss. 2006), and finds “no arguable issues in the record.” (Brief of the Appellant at 4)

We wholeheartedly concur.

STATEMENT OF FACTS

Appellee respectfully defers to Mr. Hinchcliff’s statement of the case and statement of the facts which contain the basic “who, what, when, and where” with respect to the sex crimes involved

in the case at bar.

It is enough to say that C.B., at the time of trial, was an eighteen (18) year old student at Jefferson Davis. (R. 33) According to C.B., Frederick Ellis, who had lived with her and her family for “[a]bout ten years,” had been sexually molesting her with regular frequency since she was six (6) years of age. (R. 36)

Testimony from C.B. (R. 41) and her sister, Miranda (R. 59), coupled with a DNA analysis establishing paternity (R. 111), indicated that Ellis, who C.B. considered her “step-daddy” (R. 38-39), was the father of C.B.’s four (4) year old child to whom C.B. gave birth at the age of thirteen. (R. 34, 39)

Frederick Ellis, at the time of his trial by jury for statutory rape and sexual battery, was a forty-six (46) year old African American male and gainfully employed resident of Gulfport living with the victim’s mother. (R. 36, 61, 127-29, 134; C.P. at 61, 85-86) Ellis, the biological father of C.B.’s twelve (12) year old sister, Miranda (R. 58), testified he had never had sexual relations with C.B. (R. 126)

At the close of the State’s case-in-chief, the defendant’s motion for a directed verdict was overruled. (R. 122-24)

The defendant, Frederick Ellis, testified in his own behalf and presented a general denial in his defense. (R. 126-36)

At the close of all the evidence, Ellis’s renewed motion for a directed verdict and request for peremptory instruction was denied. (R. 149, C.P. at 50)

The jury retired to deliberate at 1:45 p.m. and returned at 2:25 p.m. with verdicts of “ . . . guilty on Count I of the indictment for the crime of sexual battery . . . and guilty on Count II of the indictment for the crime of statutory rape.” (R. 180; C.P. at 59-60)

A poll of the jury reflected the verdicts returned were unanimous. (R. 180)

Ellis was thereafter sentenced to serve twenty (20) years in the custody of the MDOC for the crime of sexual battery and to serve twenty (20) years for statutory rape, said sentences to run concurrently. (R. 181; C.P. at 60)

Ellis's out-of-time motion for new trial (C.P. at 66-67) was overruled on September 25, 2006. (C.P. at 68)

Frank Philip Wittmann, IV, a practicing attorney in Gulfport, represented Ellis effectively and with great vigor during the trial of this cause and perfected the defendant's appeal. (C.P. at 69-74)

W. Daniel Hinchcliff, an attorney with the Mississippi Office of Indigent Appeals, is representing Ellis in his appeal to this Court. Mr. Hinchcliff has "scoured" the record and found "no arguable issues" supporting Ellis's appeal.

SUMMARY OF THE ARGUMENT

We concur with the observations of appellate counsel that the present appeal is devoid of "arguable issues" supporting Ellis's appeal. *Lindsey v. State*, *supra*, 939 So.2d 743, 748-49 (Miss. 2005).

ARGUMENT

**ELLIS'S APPEAL IS DEVOID OF ARGUABLE ISSUES.
ACCORDINGLY, HIS CONVICTIONS AND SENTENCE
SHOULD BE FORTHWITH AFFIRMED.**

In *Lindsey v. State*, 939 So.2d 743, 749 (Miss. 2006), this Court, citing *Smith v. Robbins*, 528 U.S. 259, 273-74, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), refined, if not reformed, the procedures for indigent criminal appeals first appearing in *Killingsworth v. State*, 490 So.2d 849 (Miss. 1986). The *Killingsworth* procedures were subsequently overruled in *Turner v. State*, 818

So.2d 1186 (Miss. 2001), which itself was overruled, at least in part, by **Lindsey v. State**, *supra*, 939 So.2d at 748-49.

We too have examined the record filed in this cause and fully concur with the observations of appellate counsel. Ellis's appeal is devoid of arguable issues. Rather, Ellis, as is often the case, is hopelessly guilty.

Mr. Hinchcliff has certified in paragraph 3. of his brief that he has mailed to Ellis, postage prepaid, a copy of " . . . this brief and correspondence informing Frederick Charles Ellis that counsel finds no arguable issues in the record and that Mr. Ellis has a right to file a *pro se* brief in this cause." (Brief of the Appellant at 4-5)

In the event Ellis files, *pro se*, a brief or other pleading in this cause, appellee respectfully invites this Court to grant the undersigned a period of thirty (30) days to respond thereto.

CONCLUSION

Appellee concurs with the "trained legal eye" of Mr. Hinchcliff, Ellis's appellate counsel, who observes there are no "arguable issues" in the record.

We respectfully submit that no reversible error, plain or otherwise, took place during the trial of this cause and that Ellis's appeal, for want of "arguable issues," has no appeal on appeal.

Accordingly, the judgments of conviction of sexual battery and statutory rape and the twenty (20) year concurrent sentences imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

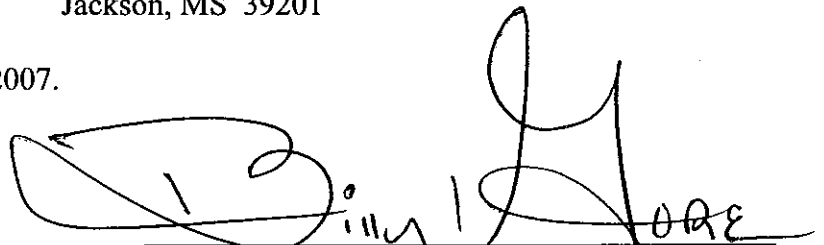
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Jerry O. Terry, Sr.
Circuit Court Judge, District 2
421 Linda Drive
Biloxi, MS 39531

Honorable Cono Caranna
District Attorney, District 2
Post Office Drawer 1180
Gulfport, MS 39502

W. Daniel Hinchcliff, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 6th day of June, 2007.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680