

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES LEWIS FILLYAW

APPELLANT

VS.

NO. 2008-KA-00542-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

THE STATE DOES NOT REQUEST ORAL ARGUMENT.

JIM HOOD, ATTORNEY GENERAL

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STATEMENT OF THE CASE

James Lewis Fillyaw [“Fillyaw”] was convicted in the Circuit Court of the Second Judicial District of Panola County, Honorable Jimmy McClure, Circuit Judge, presiding, of the crime of possession of precursors. The Court thereafter sentenced him to serve a term of five years’ imprisonment, followed by five years of post-release supervision, and a fine of \$500.00. (C.P. 31-33) Aggrieved of the judgment thus entered against him, Fillyaw appealed. His defense counsel filed a brief pursuant to the holding of *Lindsey v. State*, 939 So.2d 743 (Miss.2005), after which Fillyaw was given time to file a *pro se* supplemental brief. He filed such a brief on October 31, 2008.

SUMMARY OF THE ARGUMENT

Pursuant to the procedure outlined in *Lindsey v. State*, 939 So.2d 743 (Miss.2005), this Court at this point must determine whether this case presents any arguable issue, and, if so, order defense counsel to file a supplemental brief which addresses said issue.

ARGUMENT

PREPOSITION

THE STATE RESPECTFULLY SUBMITS THAT THIS COURT SHOULD DETERMINE AT THIS JUNCTURE WHETHER FILLYAW'S *PRO SE* SUPPLEMENTAL BRIEF OR THE RECORD IN THIS CASE PRESENTS ANY ARGUABLE ISSUE.

Counsel for Fillyaw filed in this Court a brief stating that he had diligently searched the record in this case and had concluded that there are no arguable issues supporting the appeal, that is, that there are no non-frivolous issues to present to this Court. Counsel also confirmed that he had mailed a copy of his brief to Fillyaw and had advised him of his right to file a *pro se* brief. Finally, counsel asserted that he “stands ready to prepare supplemental memoranda of law on any issues requested by the Court.” Brief for Appellant at 4-6. Fillyaw filed a *pro se* supplemental brief of sorts in this Court, claiming, without citation to authority or the record, that he was set up in this case.

Pursuant to *Lindsey v. State*, 939 So.2d 743 (Miss.2005), citing *Smith v. Robbins*, 528 U.S. 259 (2000), the State respectfully submits that this Court now must review Fillyaw’s “brief” as well as the record to determine whether defense counsel should be required to file a supplemental brief on behalf of Fillyaw. If the Court finds the existence of any arguable issue, regardless of the probability of the defendant’s success on appeal, this Court should order defense counsel to file a supplemental brief. The State then would respond to defense counsel’s supplemental brief. Without finding that there are no arguable, that is, non-frivolous issues, this Court should not consider the merits of any issues it finds, lest it run afoul of Fillyaw’s right to be represented by counsel on appeal. On the other hand, this Court should only order defense counsel to brief issues which it has determined to be arguable, that is, non-frivolous, lest it require defense counsel to violate the Rules

of Professional Conduct, which prohibit counsel from arguing frivolous issues in court. Rule 3.1, Miss. Rules Prof. Conduct.¹

If this Court finds the existence of no arguable issues, then under *Lindsey*, it should simply affirm the judgment entered in the court below.

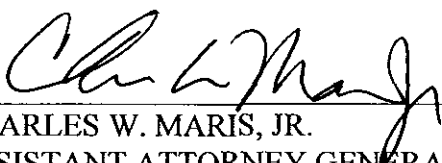
CONCLUSION

The State submits that in accordance with the procedure outlined in *Lindsey*, this Court must determine from Fillyaw's *pro se* supplemental brief, as well as the record in this case, whether any arguable issue exists, and if so, order defense counsel to file a supplemental brief on behalf of his client. If no arguable issue is found, this Court should simply affirm the judgment below.

Respectfully submitted,

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¹"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and in fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

CERTIFICATE OF SERVICE

I, Charles W. Maris, Jr., 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:

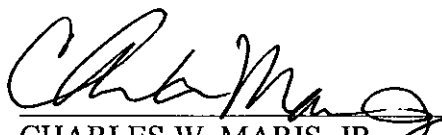
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This the 10th day of November, 2008.



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