

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TOMMY STEWART**

**APPELLANT**

**VS.**

**NO. 2010-KA-01471-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**THE STATE DOES NOT REQUEST ORAL ARGUMENT.**

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**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

Tommy Stewart ["Stewart"] was convicted in the Circuit Court of Lincoln County, Honorable Michael M. Taylor, Circuit Court Judge, presiding, of the crime of aggravated assault and shooting into a dwelling, for which he received twenty years in the custody of the Mississippi Department of Corrections with ten years suspended for five years post release supervision for the assault, and a consecutive five years for the shooting. (C.P. 41) Aggrieved of the judgment thus entered against him, Stewart appealed. His defense counsel filed a brief pursuant to the holding of *Lindsey v. State*, 939 So.2d 743 (Miss.2005), after which Stewart was given more time to file a *pro se* supplemental brief. No such brief was forthcoming within the time prescribed.

**SUMMARY OF THE ARGUMENT**

Pursuant to the procedure outlined by the Supreme Court 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

### **THE STATE RESPECTFULLY SUBMITS THAT THIS COURT SHOULD DETERMINE AT THIS JUNCTURE WHETHER THIS RECORD PRESENTS ANY ARGUABLE ISSUE.**

Counsel for Stewart filed in this Court a brief stating that he had “diligently searched the procedural and factual history of this criminal action and scoured the record searching for any arguable issues which could be presented on Mr. Stewart’s behalf in good faith for appellate review, and upon conclusion, [had] found none.” Brief for Appellant at p. 5. That is, counsel for Stewart represents 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 Stewart, and had advised him of his right to file a *pro se* supplemental brief. Brief for Appellant at p. 6. Finally, counsel asserts that he “stands ready to prepare supplemental memoranda of law on any issues requested by the court.” Brief for Appellant at 6. Stewart did not file a *pro se* supplemental brief in this Court.

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 the record to determine whether defense counsel should be required to file a supplemental brief on behalf of Stewart. If the Court finds the existence of any arguable issue, regardless of the probability of Stewart’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 Stewart’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 raising frivolous issues in court. Rule 3.1, Miss. Rules Prof. Conduct.<sup>1</sup>

If this Court finds the existence of no arguable issues, then under *Lindsey*, it should simply affirm the judgment entered in the court below. *Bradshaw v. State*, 6 So.3d 1123 (Miss.App.2009); *Neal v. State*, 5 So.3d 1166 (Miss.App. 2009).

### CONCLUSION

The State submits that in accordance with the procedure outlined in *Lindsey*, this Court must determine from 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,

JIM HOOD, ATTORNEY GENERAL

BY:



LISA L. BLOUNT

SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO [REDACTED]

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<sup>1</sup>“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, Lisa L. Blount, 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:

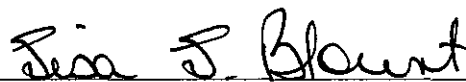
Honorable Michael M. Taylor  
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This the 16<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
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