

Serial: 222722

IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-CT-00214-SCT

**JOHN BARTHOLOMEW LOWE A/K/A
JOHN B. LOWE A/K/A JOHN LOWE**

Appellant/Petitioner

v.

STATE OF MISSISSIPPI

Appellee/Respondent

ORDER

This matter is before the Court on the Motion for Writ of Certiorari filed on behalf of Appellant John Bartholomew Lowe by the Office of State Public Defender, Indigent Appeals Division. After due consideration, the Court finds this motion should be denied.

IT IS THEREFORE ORDERED that the Motion for Writ of Certiorari filed on behalf of Appellant John Bartholomew Lowe by the Office of State Public Defender, Indigent Appeals Division, is hereby denied.

SO ORDERED, this the 13th day of December, 2018.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE

TO DENY: WALLER, C.J., RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM,
CHAMBERLIN AND ISHEE, JJ.

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

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v.

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

¶1. I would grant the petition for writ of *certiorari* filed by John Bartholomew Lowe to “[r]esolve an issue of general importance in the administration of justice.” M.R.A.P. 5(a)(3). Although the crimes for which Lowe twice has been convicted are abhorrent in the extreme, it is this Court’s duty to recognize and correct legal errors such as those that occurred in this case. Not only did the trial court give an erroneous circumstantial evidence instruction, but Lowe’s counsel rendered ineffective assistance by requesting the erroneous instruction. The State’s case against Lowe was entirely circumstantial, lacking either a confession or eyewitness testimony to the gravamen of the offense which, in this case, was downloading child pornography from the internet. Instruction D-4A was given and provided as follows:

The Court instructs the jury that if the State has relied on circumstantial evidence to establish its theory of guilt of the Defendant, then the evidence for the State must be so strong as to establish the guilt of the Defendant, not only beyond a reasonable doubt, but the evidence must be so strong as to exclude every other reasonable hypothesis other than that of guilt.

¶2. “This Court long has stood by the precept that, “[w]here the State “is without a confession and wholly without eyewitness testimony to the gravamen of the offense

charged,” the defendant is entitled to an instruction requiring the jury to “exclude every other reasonable hypothesis other than that of guilt before a conviction can be had.”” *Moore v. State*, 247 So. 3d 1198, 1203 (Miss. 2018) (quoting *Burleson v. State*, 166 So. 3d 499, 509 (Miss. 2015)). The determination of whether the case is wholly circumstantial is for the court, not the jury. But Instruction D-4A charged the *jury* with determining whether the evidence was circumstantial, a task with which the jury is neither permitted by the law nor equipped by virtue of training in the law to undertake. Thus, the erroneous instruction was the equivalent of no instruction at all. Because no proper circumstantial evidence instruction was given, Lowe is entitled to a new trial with a properly instructed jury. *Moore*, 247 So. 3d at 1205.

KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT.