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Jan 30 2025

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Edward W. Miller, Circuit Court Judge

JOSHUA WARREN HOPKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000790

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Should this case be remanded pursuant to Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) for the PCR court to consider the issue of trial counsel's failure to object to the solicitor's improper closing argument asking for a verdict to show that this "must be the last time" a child dies in Lexington?

STATEMENT

Petitioner was charged in Lexington County with homicide by child abuse and aiding and abetting homicide by child abuse and on October 3, 2016, was tried before the Honorable R. Knox McMahan and a jury. App. 1. Suzanne Mayes and Micah Caskey represented the State and Robert R. Williams represented petitioner. App. 1. The jury convicted petitioner on both charges. App. 713. Judge McMahan sentenced petitioner to life imprisonment. App. 726.

After petitioner's conviction was affirmed on appeal, he filed a PCR application on March 4, 2020. App. 735. On June 23, 2023, the Honorable Edward Miller held a hearing. App. 762. Tommy Thomas represented petitioner and Donald Zelenka represented the State. App. 763. On June 31, 2024, Judge Miller denied relief. App. 855. This petition follows.

ARGUMENT

This case should be remanded pursuant to Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) for the PCR court to consider the issue of trial counsel's failure to object to the solicitor's improper closing argument asking for a verdict to show that this "must be the last time" a child dies in Lexington.

In any case concerning the death of a child, emotions run high. The solicitor in petitioner's case appealed to the jury on the basis of these emotions and asked them to base their verdict on the improper consideration of sending a message that the citizens of Lexington County would exact retribution. App. 671. The solicitor argued:

It is inconceivable for a crime of this nature to happen anywhere in this country but near Lexington County, it can't be tolerated.

Let this be the last time that a child dies under these circumstances, this be the last time that a child dies in his care. This must be the last time. It is too late to save Minor but it's not too late for Lexington. It's never too late.

App. 671. Trial counsel did not object. App. 671.

The State charged petitioner and his girlfriend with homicide by child abuse because of the death of Minor. Petitioner called 911 at 9:30 AM on November 27, 2013, because Minor was having trouble breathing. App. 89. The night before, Minor slipped and fell on his buttocks on the stairs. App. 288. He had a scrape from the fall. App. 288. He also threw up his dinner after the fall. App. 288. Minor's mother put him to bed and they went to sleep. App. 288.

The next morning, the child's mother left for work at McDonald's at 5:30 AM. App. 289. Around 7:30-8:00 AM, petitioner and Minor woke up. App. 290. Minor had a wet diaper so petitioner drew a bath. App. 290. Petitioner went downstairs to get them breakfast and when he went back up, he saw Minor on all fours making moaning sounds. App. 290-91. Petitioner

began performing CPR. App. 292. He called Minor's mother then called 911. App. 292. Petitioner denied beating Minor in his statements to the police.

The State's theory of the case revolved around testimony from two pathologists who claimed Minor died from a beating. App. 565-73. App. 604-06. The pathologists did not agree on the mechanism of the child's death. The State credited the theory of the second pathologist who testified, Dr. James Fulcher, who opined that Minor died from a fat embolism in his lungs. App. 603-06; 615-16. Dr. Fulcher only examined slides of tissues taken from the original autopsy. App. 603. He claimed a beating administered to Minor's buttocks caused fat to enter the bloodstream and clog the tiny vessels in the lungs, causing asphyxiation. App. 603-06; 615-16.

The pathologist who actually performed the autopsy, Dr. John Spalding, made no such finding. App. 590-591. Dr. Spalding testified that fat embolisms are associated with bone fractures. App. 591. Because Minor had no fractures, he did not consider a fat embolism as a cause of death. App. 591. Dr. Spalding said, "I have never made that diagnosis in someone that did not have fractures." App. 592.

At the PCR hearing, trial counsel said he did not remember the solicitor's argument about not tolerating such crimes in Lexington until he read the transcript for the PCR hearing. App. 823. When asked if he thought it was objectionable, trial counsel answered, "I do now." App. 823. He added that the argument was "in poor taste." App. 823. During his summation at the PCR hearing, the Attorney General said the solicitor's argument "wasn't so obviously objectionable that counsel is acting either through neglect or ignorance." App. 852.

Nothing about the solicitor's improper argument made it into the thirty-page Order denying relief. App. 855-84. PCR counsel did not file a Rule 59(e) motion seeking a ruling on this ground.

In Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019), this Court remanded a case to the PCR court to rule on an issue that was not addressed in the lower court's order. The Fishburne Court remanded the case despite PCR counsel's failure to file a Rule 59(e) motion seeking a ruling. The Court wrote that because of the Sixth Amendment's guarantee of the effective assistance of counsel, "we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80." Fishburne at 516, 832 S.E.2d at 589.

Trial counsel's failure to object to an argument that he considered to be "in poor taste" is as issue of significance worthier of a Fishburne remand. The solicitor's argument about taking a stand in Lexington County evokes the improper argument that a defendant was a "domestic terrorist" in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). It invited the jurors to take sides against criminals as a whole and is not addressed to the evidence in petitioner's case. A solicitor's argument is bound by rules of fairness and may not be calculated to arouse a juror's passions or prejudice. Id. at 458, 698 S.E.2d at 566; State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). It violated the prohibition against arguments which invite jurors to place themselves in the shoes of the victims or of a party. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). In White, the solicitor told the jury, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" Id. at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of such an argument is to

“completely destroy and nullify all sense of impartiality in a case of this kind.” Id. at 506, 144 S.E.2d at 482.

The solicitor’s comments here “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). She directly appealed to the passions and prejudices of the Lexington jurors. In this case where the pathologists could not agree on the exact mechanism of death, the solicitor’s argument was sufficiently prejudicial to require reversal. This Court should remand the case under Fishburne so that petitioner can get his “bite at the apple.”

CONCLUSION

For the foregoing reasons, this Court should remand this case to the PCR court.



David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR PETITIONER

This 30th day of January, 2025.

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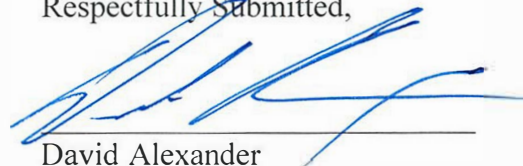
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua Warren Hopkins states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Edward W. Miller, which was held on June 23, 2023. and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Joshua Warren Hopkins.

Respectfully Submitted,



David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR PETITIONER

This 30th day of January, 2025.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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