

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Perry H. Gravely, Circuit Court Judge  
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RECEIVED

DEC 28 2016

S.C. SUPREME COURT

RASHAWN MURPHY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001415  
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PETITION FOR WRIT OF CERTIORARI  
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WANDA H. CARTER  
Deputy Chief Appellate Defender

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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Trial counsel erred in advising petitioner to reject the state's plea offer in the case.

## STATEMENT

Petitioner Rashawn Murphy was convicted of homicide by child abuse per jury trial held during the March 2011 term of the Spartanburg County General Sessions Court before Judge Letitia H. Verdin and sentenced to life imprisonment. App. 1 – 552. Chris Thompson represented petitioner at trial and Assistant Solicitors Barry Barnette and Tony Leibert appeared on behalf of the state. Petitioner appealed his conviction and sentence, but the case was affirmed on appeal by the South Carolina Court of Appeals. See State v. Murphy, Unpublished Opinion No. 2013-UP-028 (S.C. Ct. App. filed January 16, 2013). App. 585-586. Lanelle Cantey Durant, of the Office of Appellate Defense, represented petitioner on direct appeal. App. 554-568. Christina J. Catoe filed a brief on behalf of the state on direct appeal. App. 560-584.

On March 22, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 587-588. The respondent filed a return requesting that a PCR hearing be held in response to petitioner's PCR action in the case. App. 594-596.

A PCR hearing was convened on March 23, 2016, at the Spartanburg County Courthouse before Judge R. Keith Kelly. App. 598-646. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General Alicia A. Olive appeared on behalf of the state. On June 19, 2016, Judge Kelly filed an Order of Dismissal in the case. App. 648-660.

Petitioner appealed Judge Kelly's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in advising petitioner to reject the state's plea offer in the case.

This was a homicide by child abuse case. The baby's deceased body was found on the morning of January 3, 2009. The baby died from blunt force trauma to the head.<sup>1</sup> Four people (the baby's mother, her two little boys, and petitioner) were living inside an apartment at the time of the baby's death. There were no eyewitnesses who testified at trial regarding the baby's death. After police observed a hole in the wall in the room where the baby slept and found drywall paint pieces in the baby's hair,<sup>2</sup> the state's theory of the case was that petitioner inflicted the baby's injuries by hitting or smashing its head against that same wall where the hole was found.<sup>3</sup>

Samantha Hill, who was the baby's mother, testified that she left the apartment at 7:30 p.m. on January 2, 2009, and that petitioner stayed home and babysat the baby and her sons aged two and eight at that time. Hill stated that when she returned home at 10:00 p.m. on January 2, 2009, she told the boys to go to bed and noted that the baby was already in bed. Hill added that she checked in on all three children later and then went to sleep around 2:00 am on the couch with petitioner. Later on the morning of January 3, 2009, Hill stated that she found the baby unresponsive in the bed in the room where the baby slept. Hill admitted that petitioner punched a hole in the wall while they were in the bedroom with the dead baby. App. 353, l. 18 - p. 358, l. 1; App. 421, l. 17 25; App. 427, lines 2-19; App. 422, l. 21 – p. 424, l. 25.

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<sup>1</sup> See App. 308, lines 2-12.

<sup>2</sup> App. 162, l. 3-17; App. 151, l. 16-18.

<sup>3</sup> App. 634, l. 1 – 3.

The oldest son, who was in the apartment during the twenty-four hours leading up to the baby's death, testified that it wasn't until they were all in the baby's room after realizing that the baby was dead that petitioner punched a hole in the wall. He also testified that he heard bumping sounds while petitioner was in a bedroom upstairs with the baby who was crying on that night, and that petitioner explained the sounds were from him moving furniture around. App. 367, l. 20 - p. 387, l. 24; App. 395, l.2 – 25; App. 471, l. 3 – p. 471, l. 25; App. 474, l. 11-19.

Petitioner did not testify at trial, but gave the following pretrial statement<sup>4</sup> to police:

At that point, he goes to tell me, uh, that after a couple of minutes, uh, sitting there that he would put the baby upstairs and had left the door cracked to hear the baby. This is around 7 p.m. The two other kids were downstairs and they were watching television.

At some point, he went to go back upstairs and noticed that the baby was near the bottom of the stairs. He stated that he picked up the baby and appeared to be dazed and shaken a little. He said that he took the baby back upstairs....[and] played with the child for a little while. He stated that she was crying a little. He then goes on to say that he put the baby back to bed. Uh, that he put the baby back to bed and baby went to sleep. However, he tried to give her a bottle. She did not take it.

He said he checked on the baby a couple of time before Samantha got home...[and] said that he thought the child was okay when he put her to bed. He stated that he and Samantha stayed downstairs that night. App. 131, lines 3-22.

During the PCR hearing held in the case, petitioner testified that the state entered a plea offer on the first day of the trial. App. 608, l. 23 – p. 609, l. 5.

Trial counsel testified at the PCR hearing and explained that he created reasonable doubt with respect to nullifying the state's theory of the case and "disproved" the state's case, and that based on this, he did not in effect encourage taking the thirty-year plea offer from the state that was communicated to petitioner because he (trial counsel) believed that "we could get a verdict in our favor," particularly since petitioner claimed his innocence. Moreover, counsel stated that

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<sup>4</sup> Petitioner gave three statements to police which were all similar.

“to tell someone in their early twenties to plead to thirty years [and] they [are] just not going to deal with it.” App. 634, l. 1 – 9; App. 635, l. 18-24; App. 639, l. 9-25. Counsel concluded as follows:

Counsel: I don't believe he would have pled, but at no time did I think things looked so bad that he needed to plead. App. 640, 1–3.

The PCR judge ruled that counsel's assistance was not ineffective with respect to the handling of the state's plea offer in the case because his advice that “he would not generally advise a 20-year old to plead to a thirty year sentence” was in effect sound advice. Tr. 656-666.

The Sixth Amendment protects defendants against ineffective assistance of counsel in cases where counsel provides deficient representation in advising a client to reject a plea offer. See Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1995), overruled on other grounds in Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea bargaining stage can satisfy the prejudicial prong of the two-pronged test to be met in ineffective assistance of counsel cases. Therefore, incompetent advice directing a client to go to trial rather than accept a plea offer falls within the range of protections guaranteed by the Sixth Amendment.

In Lafler v. Cooper, 132 S.Ct. 1372 (2012), the Supreme Court held that petitioner was prejudiced by counsel's deficient performance in advising petitioner to reject a plea offer and go to trial. See Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), where the Court held that counsel was ineffective in advising the defendant to reject the state's plea offer. Kolle was sentenced to seven years after pleading guilty to trafficking in cocaine after rejecting a previously offered a plea bargain where he would have received a sentence of ten years suspended to three years probation in light of counsel's misadvice to reject the offer because it was not a “good deal” and that the deal would remain live even if the suppression hearing on the

cocaine was denied (and it was denied), and where the subsequent guilty plea was entered without a negotiated sentence and without the benefit of the initial plea offer which expired after the suppression motion (that was handled ineffectively without the entire discovery materials showing discrepancies) was denied.

Compare Toro v. Fairman, 940 F.2d 1065 (7<sup>th</sup> Cir. 1991), where the Court held that trial counsel was ineffective in failing to advise the defendant to accept a minimum sentence on a delivery of a controlled substance charge because the government's evidence was strong and there were few if any viable defenses available other than the argument that the case was not provable beyond a reasonable doubt and that he should not be convicted; but in the end prejudice was not shown, i.e. that the defendant would have accepted the plea but for counsel's bad advice to reject it. Toro introduced an undercover agent to a drug supplier, but proved to be more than a middleman in the case. Similarly, counsel was found ineffective in advising a defendant to reject a plea also in Turner v. Tennessee, 858 F.2d 1201 (6<sup>th</sup> Cir. 1988), where the defendant rejected a two-year plea offer and received a sentence of life after a trial on felony murder and aggravated kidnapping charges and where absent counsel's incompetent advice in suggesting trial as the better option, the defendant would have accepted the plea offer.

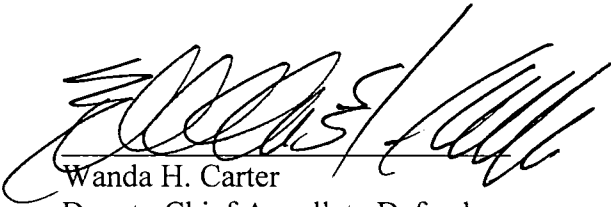
Like the attorneys in Toro and Turner, counsel in petitioner's case believed that the state's guilt beyond a reasonable doubt burden was not achievable and advised in effect that a trial was the better option. However, counsel apparently misjudged the strength of the state's circumstantial evidence in petitioner's case. The case likely boiled down to the fact that either petitioner or the mother of the baby was responsible for the death of the baby; and that based on the time sequence and opportunity, it appeared that petitioner was the one who was present with the baby and babysat for the majority of the time while the mother was out of their residence and

that petitioner appeared responsible for the injuries/death based on the circumstantial evidence. Moreover, though the state's theory that the hole in the wall pointed to petitioner as the one who bashed the baby's head there was difficult to prove; nonetheless, the jury was left with an impression that petitioner's predisposition for violence existed since he was the one who apparently used his body to punch a hole in the wall and as result, he might have been violent with the baby as well. In other words, although the case was one consisting of admittedly weak circumstantial evidence, said weak circumstantial evidence nevertheless pointed to petitioner's connection to the baby's death and therefore, counsel underestimated the strength of the state's case and overestimated his belief that the bar of proof beyond a reasonable doubt was apparently unreachable by the prosecution. Additionally, as in the Turner and Kolle, the sentencing result indicated prejudice existed here as a result of counsel's misadvice to petitioner to reject the plea offer because petitioner received a sentence of life imprisonment when he could have received a thirty-year sentence per the plea offer.

Under the instant scenario, petitioner established his receipt of ineffective assistance of counsel in his case regarding the rejection of the plea offer in violation of the Sixth Amendment to the extent that counsel's advice to reject the plea offer was incompetent advice and that prejudice resulted from his misadvice. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984), and Hill v. Lockhart, 484 U.S. 52 (1985).

**CONCLUSION**

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

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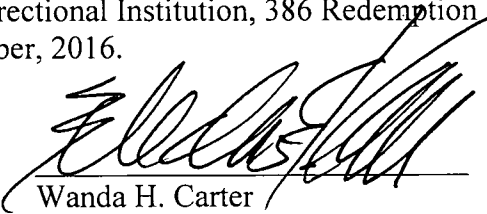
RESPONDENT

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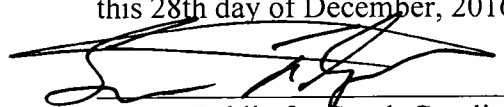
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Rashawn Murphy, #323547, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of December, 2016.

  
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Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 28th day of December, 2016.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022