The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

July 3, 2017

Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Georgia Woodberry # 356361 v. State 2013-CP-21-2969

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,

Tristan M. Shaffer

CC:
Lindsey McCallister
Florence County Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Circuit Court Judge

Case No. 2013-CP-21-2969

Georgia Woodberry # 356361,

Petitioner,

v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of the Honorable William h Seals dismissing this post-conviction relief action filed on June 1, 2017. Petitioner received this Order on June 5, 2017.

July 3, 2017

Tristan M. Shaffer (SC Bar 77565)
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Other Counsel of Record:
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211 on the date listed below.

July 3, 2017

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Attorney for Petitioner

Other Counsel of Record:
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED
2017 JUN -1 PM 1:06
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2102969

Georgia Woodberry		South Carolina State Of	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	6/1/2017 Date

For Clerk of Court Office Use Only

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

This judgment was entered on **May 30, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **June , 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Tristan Michael Shaffer 225 Columbia Ave. Chapin, SC 29036

Lindsey Ann McCallister PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
Georgia Woodberry, #356361	)	Case No. 2013-CP-21-2969
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 11, 2013. Respondent made a Return on April 23, 2014. The Court convened an evidentiary hearing into the matter on August 9, 2016, at the Florence County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Applicant's plea counsel, Scott P. Floyd, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Florence County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In April 2013, the Florence County Grand Jury indicted Applicant for murder (2013-GS-21-0411, Count One), two counts of attempted murder (-0411, Counts Two and Three), discharging a firearm into a vehicle (-0411, Count Four), and stalking (-0411, Count Five). Scott P. Floyd, Esquire, represented Applicant.

On July 30, 2013, Applicant appeared before the Honorable D. Craig Brown and pleaded guilty as indicted to all charges. Judge Brown sentenced Applicant to incarceration for concurrent terms of 40 years for murder, 25 years for one count of attempted murder, 20 years for the other count, five years for discharging a firearm into a vehicle, and five years for stalking.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, on September 17, 2013. The Remittitur was returned to the Circuit Court on October 8, 2013.

II. ALLEGATIONS

In her application, Applicant alleged she is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
   a. "I was intimidated, scared and pressured to take the plea."
   b. "I was not informed of certain options and certain protocol involved in a criminal case."
2. "Evidence not seen and heard"
   a. "Certain documents to aid my defense was not presented"
3. "Judge was prejudiced and biased"
   a. "My court proceedings were continued with the same counsel even though I requested and stated reasons why I was not satisfied with my attorney prior to my guilty plea."

At the evidentiary hearing, Applicant orally amended her Application and alleged the following:

4. Ineffective Assistance of Counsel, in that:
   a. Counsel failed to move to quash the murder indictment;
   b. Counsel failed to advise Applicant that she could not be found guilty of murder when the death resulted from an automobile accident;
   c. Counsel failed to advise Applicant on the S.C. law involving the felony murder rule;
   d. Counsel failed to advise Applicant that she cannot be found guilty when she was not the proximate cause of the decedent's death;
   e. Counsel failed to argue that her sentence for attempted murder of Jimmy Askins should be subject to 16-25-90.
   f. Counsel failed to argue her other sentences should be subject to 16-25-90.

At the evidentiary hearing, Applicant proceeded only on allegations "a" through "f" listed in paragraph 4. Applicant waived her allegations in paragraphs 1-3 by presenting no evidence at the hearing as to those allegations.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Applicant testified that if she had been advised the "felony murder rule" did not apply, she would have gone to trial. Applicant agreed Counsel went over discovery with her, went over the elements of the offenses with her, and discussed possible defenses. Applicant admitted she agreed with the facts forming the basis of her plea.

Counsel testified he has been practicing since 1988 and has tried approximately ten murder cases. Counsel testified he met with Applicant about once every 30-45 days. He testified he discussed the availability of battered woman's syndrome and investigated the issue as to whether Applicant was the proximate cause of the victim's death. Counsel testified Applicant's version of the facts was that the driver of the vehicle separated from her and was out of her sight at some point. Counsel testified the State, however, was alleging that was not the case, and the testimony of the victims would have been that she was still in their view when the accident occurred. Counsel testified Applicant never denied firing at the victims. Counsel testified if Applicant had proceeded to trial, he would not have contested any offenses other than murder.

Counsel testified that in researching proximate causation, he searched for cases with this fact pattern in South Carolina and other states, but could find nothing with a similar factual scenario. Counsel thought he could argue that enough space and time had elapsed that Applicant did not proximately cause the death of the victim. However, Counsel stated this would be a question for the jury to decide. Counsel testified he discussed with Applicant her claims that the victim had previously abused her. Counsel testified according to Applicant, the victim had a prior magistrate-level criminal domestic violence offense. Counsel testified there were no witnesses who could testify to this and no records that Applicant had been treated for any injuries resulting from any such abuse. Counsel testified he could not recall if he considered arguing the parole eligibility statute. He testified he discussed battered woman's syndrome with Applicant, but could not recall if it was specifically discussed in the context of parole eligibility. Counsel could not recall whether he discussed battered woman's syndrome with an expert, but he did discuss with Applicant the possibility of raising the defense. Counsel testified he did not have grounds to move to quash the indictment. Counsel testified there were no plea offers in place when the trial started. Counsel testified that when Applicant decided to plead guilty, he explained to her that the sentencing range for murder was thirty years to life and the sentence would have to be served day-for-day. Counsel testified he went through the sentencing ranges on the other charges as well and discussed with Applicant her constitutional rights to a jury trial, to remain silent, and to confront witnesses against her.

Counsel testified the victim was very sympathetic because she was a nurse and was on the way to work when she was killed. Counsel testified he never tells clients they do not have a chance at trial. Counsel testified in a guilty plea a defendant needs to show the appropriate amount of remorse and ask for mercy to have a chance of being sentenced less harshly. Counsel

testified he discussed with Applicant that the commission of attempted murder is the same as murder without an actual death. He testified he would have gone over the elements of the charges with her. Counsel testified he would have addressed the proximate cause issue at trial.

B. Ineffective Assistance of Plea Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pleaded guilty but would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Hill v. Lockhart, 474 U.S. 52, 59 (1985). An applicant alleging her guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56. The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 664, 690 (1984). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the

information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)). In addition, statements "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

As a matter of general impression, this Court finds Counsel's testimony credible and gives it great weight. The Court finds Applicant's testimony neither credible nor legally relevant. The Court further finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

1. Failure to Move to Quash Murder Indictment

This Court finds Applicant has failed to show either deficiency or prejudice with respect to this allegation. An indictment is purely a notice document. S.C. Code Ann. § 17-19-20 (2012) ("Every indictment shall be deemed and judged sufficient and good in law which . . . charges the crime . . . so plainly that the nature of the offense charged may be easily understood."). "The primary purpose of an indictment is to put the defendant on notice of what he [charged with], by apprising him of the elements of the offense, and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgement to pronounce if the defendant is convicted." State v. Smalls, 364 S.C. 343, 346-47, 613 S.E.2d 754, 756 (2005). See also State v. Tumbleston, 376 S.C. 90, 97-98, 654 S.E.2d 849, 853 (2007) (citing Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005)) (noting all of the surrounding circumstances must be weighed to make an accurate determination of whether defendant was prejudiced by lack of notice and insufficient indictment).

The indictment sets forth the elements of the offenses and is sufficient on its face. Counsel testified he did not have grounds to move to quash the indictment. This Court finds Applicant has failed to satisfy her burden of showing Counsel was deficient for failing to move to quash the indictment. Further, this Court finds Applicant has failed to show that a challenge to the indictment would have been successful. Thus, it did not affect her decision to plead guilty rather than proceed to trial. Accordingly, this allegation is denied and dismissed.

2. Failure to Properly Advise as to Liability for Murder

Applicant alleges Counsel misadvised her concerning her criminal liability for murder. Specifically, Applicant alleges counsel was ineffective for: (1) failing to advise Applicant that she could not be found guilty of murder when the death resulted from an automobile accident; (2) failing to properly advise Applicant on the South Carolina law involving the "felony murder rule"; (3) failing to properly advise Applicant she could not be found guilty when she was not the proximate cause of the decedent's death, and (4) failing to properly advise Applicant regarding the elements of murder. This Court finds Counsel properly advised Applicant regarding the elements of murder and her criminal liability for the death of the decedent.

Applicant was charged with murder for causing the death of Lori Pruett. (Tr. at 15). Applicant chased a vehicle occupied by Jimmy Askins and Carolina Gray, and fired on the vehicle while chasing it. (Tr. at 15). Applicant chased them all the way through a red light where they collided with Pruett when she was passing through the intersection. (Tr. at 15). Pruett died as a result of the crash. (Tr. at 16).

Applicant and Askins previously had an intimate relationship and had a child together. (Tr. at 17). Gray and Askins would have testified at trial that Applicant began stalking them several days before the incident. (Tr. at 17). The State was also prepared to introduce incident

reports and recordings of harassing, obscene telephone calls Applicant made to Gray. (Tr. at 17). Applicant agreed with and admitted the underlying facts at her guilty plea. (Tr. at 18). Applicant also gave a statement in which she admitted she shot into the vehicle occupied by Askins and Gray. (Tr. at 35). She explained where she had the gun hidden. (Tr. at 35). The State was prepared to present expert testimony that Applicant tested positively for gunshot residue and that the slugs recovered from the scene could not be exclusively matched to the .45 caliber pistol, which Applicant led authorities to, but that the expert would have testified the .45 could have shot the projectile. (Tr. at 16). In addition, the evidence would have shown Applicant purchased the weapon about a month prior to the incident. (Tr. at 16). Notably, Applicant's PCR counsel did not dispute at the evidentiary hearing that the evidence pertaining to her charges for attempted murder of Gray and Askins was overwhelming.

Counsel testified he advised Applicant of the elements of the charges against her, including the elements of murder. The plea judge confirmed this at the plea hearing. (Tr. at 4). Counsel also testified he has been practicing law since 1988 and has tried many murder cases.

i. Elements of Murder

Applicant has failed to show Counsel's advice as to Applicant's liability for murder fell below an objective standard of reasonableness. This Court finds Counsel properly advised Applicant as to the elements of murder and her liability for the crime of murder.

Murder is defined as: "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. Murder is a general intent crime in South Carolina, requiring no specific intent to kill. Malice can be inferred from conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life. In re Tracy B.,

391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (citing State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957)). South Carolina long ago recognized:

> If one were to fire a loaded gun into a crowd, . . . **the law would infer malice** from the wickedness of the act: so also the law will imply that the prisoner **intended the natural and probable consequences of his own act**, as in the case of shooting a gun into a crowd, the law will imply, from the **wantonness** of the act, **that he intended to kill someone** . . . .

State v. Smith, 33 S.C.L. 77, 80–81, 2 Strob. 77 (S.C. App. L. 1847) (emphasis added). See also State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941) (stating malice does not necessarily imply ill-will, "but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief."). In a murder case, the *corpus delicti* consists of two elements: the death of a human being, and the criminal act of another in causing that death. State v. Weston, 367 S.C. 279, 293, 625 S.E.2d 641, 648 (2006) (citing State v. Martin, 47 S.C. 67, 25 S.E. 113 (1896)).

In the instant case, Applicant's conduct of driving at a high rate of speed on a public roadway while firing a deadly weapon into another moving vehicle demonstrated "a general malignant recklessness of the lives and safety of others" as well as "conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life." It matters not that Pruett was not the intended victim or that she died by vehicle impact rather than bullet. "It is a well-settled principle of law that where a slayer designs or intends to kill one person but, through mistake, kills another, 'his crime is the same as if he had executed his intended purpose.'" Heyward, 197 S.C. at 371, 15 S.E.2d at 672 (citations omitted). "This result is sometimes described as being a function of the doctrine of 'transferred intent' . . . . All that is required for murder is the mental state of malice, provided by the intent to kill a human being,

coupled with an act which caused the death of a human being." State v. Horne, 282 S.C. 444, 446, 319 S.E.2d 703, 704 (1984).

Furthermore, this Court finds Applicant's assertion that she would have gone to trial instead of pleading guilty but for the alleged erroneous advice is insufficient to establish prejudice in light of Counsel's testimony and the record of Applicant's plea. Applicant pleaded guilty the day trial began on her case. Counsel testified Applicant decided to plead guilty after hearing the 9-1-1 call in court. Counsel testified he felt she would be convicted if she went to trial. Further, Applicant does not dispute that the evidence against her on the attempted murder charges was overwhelming. See Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (holding "no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009))). Applicant also admitted to owning the firearm and firing into a vehicle. Had Applicant proceeded to trial on the attempted murder charges *alone*, she could have been sentenced up to 60 years if sentenced to consecutive maximum sentences. Accordingly, this Court finds Applicant has failed to demonstrate there is a reasonable probability that but for the alleged deficiency of counsel, she would have proceeded to trial rather than pleading guilty.

ii. Felony-Murder Rule

This Court finds Applicant has not shown Counsel misadvised her concerning the felony-murder rule. South Carolina has not codified the "felony-murder doctrine."[1] "South Carolina follows the common law rule of murder and makes no distinction between murder and

[1] PCR counsel provided the Court with the following persuasive authority in support of his argument on felony murder: People v. Lowery, 687 N.E.2d 973 (Ill. Sup. Ct. 1997); Commonwealth v. Redline, 137 A.2d 472 (Pa. Sup. Ct. 1958); King v. Commonwealth, 368 S.E.2d 704 (Va. Ct. App. 1988); State v. Bonner, 411 S.E.2d 598 (N.C. Sup. Ct. 1992). This Court finds these cases are not relevant to the question of whether Counsel was deficient.

felony-murder." State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) and State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, in Gore v. Leeke, the Court discussed the doctrine and recognized its establishment in common law. 261 S.C. 308, 199 S.E.2d 755 (1973) (holding appellant's conviction of murder under the felony-murder doctrine was fully justified under the circumstances of the case). Applicant was charged with discharging a firearm into a vehicle in violation of S.C. Code Ann. § 16-23-440(B), which provides:

> (B) It is unlawful for a person to discharge or cause to be discharged unlawfully firearms at or into any vehicle, . . . while it is occupied. A person who violates the provisions of this subsection *is guilty of a felony* . . . .

S.C. Code Ann. § 16-23-440(B) (emphasis added).

Counsel testified he explained to Applicant the elements of murder and what the State would have to prove to prove her guilty at trial. Counsel did not specifically advise her concerning the felony-murder rule. Nevertheless, that South Carolina has not specifically codified the rule does not specifically preclude a trial court from giving such an instruction in circumstances such as these. Therefore, even if Counsel had advised Applicant that she could potentially be convicted under the felony-murder doctrine, Applicant has failed to show that advice was deficient. Regardless of the applicability of the felony murder doctrine, Counsel properly advised Applicant that under the circumstances of the case, she could be found guilty of murder if she proceeded to trial.

Further, this Court finds Applicant's mere claim she would have proceeded to trial but for the alleged deficiency of Counsel's advice is not credible and is not sufficient to prove prejudice. Applicant did not dispute the evidence of attempted murder as to Gray and Askins was overwhelming. As to the murder, Counsel testified he discussed with Applicant the possibility of

asserting a battered woman's syndrome defense and the proximate-cause issue, but correctly observed that those issues would have been questions of fact for the jury. See State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986) (holding expert testimony regarding battered woman's syndrome is relevant to proving defense of self-defense, but failing to recognize as a separate defense); see also S.C. Code Ann. § 17-23-170 (A) ("Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress."). See also Hill v. Lockhart, 474 U.S. 52, 59 (1985) ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." (citation omitted)).

iii. Proximate Cause

This Court further finds Counsel properly advised Applicant concerning proximate cause. Proximate causation becomes an issue when there is evidence of an intervening superseding cause of death, often arising in situations where complications resulting from an injury hasten a victim's death. See, e.g., State v. Foote, 58 S.C. 218, 36 S.E. 551, 552 (1900) (holding the trial court properly instructed the jury that "if the death of the deceased was produced by a cause independent of the gunshot wound, the defendant could not be convicted, but that he was liable if the death was from a disease brought on by the wound."). See also State v. Riley, 219 S.C. 112, 118, 64 S.E.2d 127, 130 (1951) ("One who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of the other. The fact that other causes also contribute to the death does not relieve the actor from responsibility."). Counsel testified he considered proximate causation and discussed it with

Applicant, but that it ultimately would have been a question of fact for the jury. Counsel testified Applicant's version of the facts was that during the chase, Gray and Askins separated from her and she could no longer see them, at which point the accident occurred. However, Counsel testified that Gray and Askins would have testified at trial that Applicant was in their view the entire time, including when the accident occurred. Applicant has made no showing that she did not proximately cause the death of Lori Pruett as a matter of law, and has failed to demonstrate that Counsel gave deficient advice concerning proximate cause. Given the evidence the State was prepared to present at trial, the issue of whether Applicant proximately caused the death of Applicant would have been a question of fact for the jury. See State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004) ("When ruling on motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.") (citing State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002))). See also State v. Weston, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006) (citing Cherry, 361 S.C. at 593, 606 S.E.2d at 477–78) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [the reviewing court] must find the case was properly submitted to the jury."). Accordingly, Applicant has failed to demonstrate deficiency with respect to this allegation. Applicant has also failed to demonstrate prejudice resulting from the alleged deficiency. See Hill v. Lockhart, 474 U.S. 52, 59 (1985) ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." (citation omitted)). Therefore, this allegation is denied and dismissed.

iv. Automobile Death

That Lori Pruett's death resulted from an automobile accident does not negate Applicant's criminal liability for murder. See State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675-76 (1957) (holding evidence was sufficient to sustain a verdict of murder where death resulted from a vehicular accident because "[t]he conduct of the driver was such as to imperil human life[,]" regardless of "actual intent to kill or injure another, [where] there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice.").

Applicant's conduct consisted of driving at a high rate of speed on a public roadway while firing a deadly weapon on another moving vehicle. A vehicular accident occurred as a consequence of Applicant's actions. Applicant admitted she chased and fired on Gray and Askins as they were driving. While fleeing from Applicant, Askins ran a red light and struck Pruett while she was driving through the intersection, fatally injuring her. This Court finds Counsel's advice to Applicant that she could be found guilty of murder if she proceeded to trial did not fall below an objective standard of reasonableness. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (finding no deficiency where "it would have been futile for Attorney to have made such arguments").

Additionally, Applicant has filed to prove that but for the alleged deficient advice, there is a reasonable probability she would have proceeded to trial rather than pleading guilty because she has made no showing that this would have bene a viable defense at trial. See Lockhart, 474 U.S. at 59; Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (finding counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense). Therefore, this allegation is denied and dismissed.

3. Failure to argue Applicant's sentences should have been subject to section 16-25-90

Lastly, Applicant argues Counsel was ineffective for failing to argue Applicant's sentence for attempted murder of Askins, as well as her other sentences, should have been subject to section 16-25-90 of the South Carolina Code of Laws. Section 16-25-90 provides:

> Notwithstanding any provision of Chapters 13 and 21 of Title 24, and notwithstanding any other provision of law, an inmate who was convicted of, or pled guilty or nolo contendere to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty to, . . . an offense against the household member, *or in post-conviction proceedings pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.* This section shall not affect the provisions of Section 17-27-45.

S.C. Code Ann. § 16-25-90 (emphasis added). Persons who have a child in common are household members within the meaning of this section. S.C. Code Ann. § 16-25-10 to -20. Section 16-25-90 requires Applicant "to do more than produce evidence of a history of criminal domestic violence which she believes is credible." State v. Grooms, 343 S.C. 248, 253, 540 S.E.2d 99, 101 (2000). The use of the term "credible evidence" means Applicant's evidence must be "trustworthy, not simply plausible." Id. In other words, Applicant must "do more than simply present evidence; she must persuade the trial judge her evidence is reliable." Id. "Mere production of evidence does not automatically result in earlier parole eligibility; instead, the defendant must persuade the judge by presenting proof which leads the trier of fact to find that the existence of the contested fact is more probable than its nonexistence." State v. Blackwell-Selim, 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011). Importantly, the Supreme Court noted the following in State v. Hawes: "The legislative history of section 16–25–90 indicates that the statute was intended to confer early parole eligibility *only to long-term victims of repeated abuse at the hands of a household member.*" State v. Hawes, 411 S.C. 188, 190, 767 S.E.2d 707, 708

(2015) (citing Act No. 7, 1995 S.C. Acts 58–59 (indicating that section 16-25-90 was first enacted alongside the defense of battered spouse syndrome)).

Applicant has framed this issue as an allegation of ineffective assistance of Counsel. This Court finds Applicant has not satisfied her burden of producing credible evidence as to this allegation. First, as a matter of law, Applicant would not have been entitled to early parole for the offenses against Gray or Pruett under this statute because the statute only contemplates offenses against a household member. See Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." (citing Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992))).

With respect to Askins, Applicant presented no evidence other than vague testimony that she had been the victim of domestic violence. Counsel testified he discussed with Applicant her claims that the victim had previously abused her. Counsel testified according to Applicant, the victim had a prior magistrate-level criminal domestic violence offense. Counsel testified there were no witnesses who could testify to this and no records Applicant had been treated for any injuries resulting from any such abuse. Though Counsel testified Applicant alleged Askins had a magistrate level conviction for domestic violence, no further details or evidence of a history of domestic violence at the hands of Askins was presented to this Court. Furthermore, during sentencing, Officer McFadden indicated Applicant had an outstanding warrant for her arrest in connection with a previous incident in which Applicant attacked Gray and Askins while the two were on a date. (Tr. at 33-34). Given the legislative intent behind this statute, Applicant has failed to show she was entitled to early parole eligibility for the offense of attempted murder of

Jimmy Askins. Accordingly, she has failed to satisfy her burden of proving deficiency or prejudice with respect to this allegation, and it is therefore denied and dismissed.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within 30 days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 17 day of May, 2017.

THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Judge
Twelfth Judicial Circuit

Marion, South Carolina

FILED
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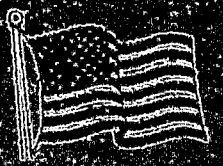

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