STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

GEORGIA WOODBERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001474

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel where he misadvised Petitioner regarding the her criminal responsibility for the death of an unintended victim and where Petitioner testified that she would have continued with her trial and not pled guilty to murder had she been properly advised regarding the law applicable to her case?

STATEMENT OF THE CASE

On March 28, 2013, the Florence County Grand Jury returned a multi-count indictment against Petitioner Georgia Woodberry for murder, two counts of attempted murder, discharge of a firearm at or into a vehicle, and stalking. App. 142 – 144.

On July 29, 2013, Woodberry proceeded to trial before the Honorable D. Craig Brown and a jury. Woodberry was represented by Scott Floyd, and the State was represented by solicitor Ed Clements. On July 30, 2013, prior to completion of her trial, Woodberry pled guilty without recommendation or negotiation to all of the indicted offenses. App. 1. Judge Brown sentenced her to concurrent terms of forty years for murder, twenty-five years for attempted murder of Carolyn Gray, twenty years for attempted murder of Jimmy Askins, five years for discharge of a firearm, and five years for stalking. App. 52, ll. 4-19; App. 145 – 149.

Woodberry timely appealed from her guilty plea but the appeal was dismissed. App. 54 – 58. The remittitur was sent on October 8, 2013. App. 59.

On November 11, 2013, Woodberry filed an application for post-conviction relief ("PCR"). App. 60. The State filed its return on April 23, 2014. An evidentiary hearing was held on August 9, 2016, before the Honorable William H. Seals Jr., where Woodberry orally amended the application to include additional allegations Woodberry was represented by Tristan Shaffer, and the State was represented by assistant attorney general Alicia Olive. App. 75; App. 79 – 80. The witnesses at the PCR hearing included Woodberry and plea counsel Floyd. App. 76. Judge Seals took the matter under advisement, but on May 30, 2017, he filed a written order of dismissal. App. 125.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel rendered effective assistance of counsel where he misadvised Petitioner regarding the her criminal responsibility for the death of an unintended victim and where Petitioner testified that she would have continued with her trial and not pled guilty to murder had she been properly advised regarding the law applicable to her case.

Introduction

Plea counsel Floyd was deficient in advising Petitioner Woodberry regarding her criminal responsibility for murder. Floyd erroneously advised Woodberry that South Carolina follows the proximate cause felony murder rule, such that she would be found guilty if the jury believed that Woodberry's actions in shooting at and following her intended victims were what caused them to run a red light and collide with an innocent third party, who died from the injuries she sustained in the car accident. On the contrary, the "proximate cause felony murder rule" is the minority rule around the country. While our Courts have not explicitly adopted the majority "agency felony murder rule," it appears consistent with the Court's past articulation of the felony murder rule and with the legal concept of "hand of one, hand of all" accomplice liability that is applicable to all crimes. Under the "agency felony murder rule," a felon is only criminally responsible for their own acts or the acts committed by a co-felon in furtherance of the felony.

The solicitor simply overcharged Woodberry. If a jury had accepted the State's version of the facts, it would have more properly supported a conviction of reckless vehicular homicide rather than murder. S.C. Code Ann. § 56-5-2910(A) ("When the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless vehicular homicide. A person who is convicted of, pleads guilty to, or pleads nolo contendere to reckless vehicular homicide is guilty of a felony, and must be fined not less than

one thousand dollars nor more than five thousand dollars or imprisoned not more than ten years, or both. The Department of Motor Vehicles shall revoke for five years the driver's license of a person convicted of reckless vehicular homicide.").

As will be discussed more fully *infra*, the PCR court erred in its analysis of both deficiency and prejudice. Neither transferred intent nor a separate legal theory of proximate causation were applicable to the facts of this case. Rather, the only potential theory of criminal liability for murder was the felony murder rule, about which plea counsel erroneously advised Woodberry that South Carolina law was settled in its application of the proximate cause felony murder rule. Further, Woodberry's failure to contest her criminal responsibility for the other, lesser offenses with which she was charged did not affect the credibility of her testimony that, but for counsel's erroneous advice regarding the felony murder rule, she would have continued with trial and not pled guilty to murder. See App. 132 – 138.

Relevant Facts

Woodberry had been in a toxic and abusive relationship with Jimmy Askins for approximately three years and they had a child in common. Woodberry was suspicious that Askins was having a sexual relationship with another woman, Carolyn Gray. Those suspicions were confirmed and Woodberry eventually found Askins and Gray together in bed in the home that Woodberry regularly shared with Askins. App. 17, l. 19 – 18, l. 17; App.41, l. 20 – 43, l. 12; App. 45, l. 24 – 47, l. 5; App. 48, ll. 16-20; see also App. 105, ll. 3-24. On the morning of April 5, 2012, Woodberry saw Askins and Gray driving down the road and fired multiple shots from her handgun into their car. Askins and Gray subsequently ran a red light and collided with a car driven by Lori Pruett, an innocent third party. Pruett died as a result of her injuries sustained in the car accident. App. 15, l. 17 – 18, l. 17; App. 45, ll. 15-23; App. 91, l. 22 – 93, l. 5.

Woodberry never disputed that she was guilty of attempted murder as to both Askins and Gray, discharge of a weapon at their car, or stalking. Rather, she commenced trial because she disputed her criminal liability for murder as a result of Pruett's death. App. 43, l. 22 – 44, l. 9; App. 83, l. 21 – 84, l. 3; App. 91, l. 12-16. On the second day of trial, Woodberry changed her pleas to guilty. App. 95; App. 107, ll. 16-18. At the plea hearing, the solicitor explained that the State pursued the murder charge under the theory of transferred intent. App. 15, l. 19 – 16, l. 3.

At the PCR hearing the first witness called was plea counsel Scott Floyd. Floyd confirmed that Woodberry never denied shooting her gun at Gray and Askins or the stalking charge, such that they were only planning to contest the murder charge at trial. App. 83, l. 21 – 84, l. 3; App. 91, l. 12-16; App. 99, l. 20 – 100, l. 3. Woodberry said that the car driven by Gray and Askins was out of her sight at the time of the collision. Floyd believed that the State would have presented contrary testimony from Gray and Askins. App. 83, l. 3 – 85, l. 12. Had trial continued, Floyd was prepared to argue that Woodberry was not the proximate cause Pruett's death such that the felony murder rule did not apply. App. 82, l. 25 – 85, l. 12; App. 97, ll. 11-21; App. 99, ll. 16-17; App. 102, l. 19 – 103, l. 24. He explained his understanding and advice regarding the felony murder rule:

> If you commit a felony that involves some inherently dangerous activity and a homicide -- unintended homicide results as a -- you know, from that, that the malice can be I guess inferred from the commission of the underlying felony. And certainly, I thought, you know, attempted murder was -- would certainly fit into that category as a -- as a felony that was inherently dangerous.

App. 85, ll. 4-11. There were no plea offers made prior to trial. App. 87, ll. 11-16; App. 107, ll. 13-15. However, shortly after the 911 call made by Gray was played for the jury, Woodberry told Floyd that she wanted to plead guilty. App. 95, l. 1 – 96, l. 1; App. 107, ll. 16-18; see also

App. 16, ll. 4-11. There was still no offer made, such that she pled "straight-up" to all offenses without any recommendation or negotiation. App. 87, ll. 17-21; App. 110, ll. 4-11.

Woodberry also testified before the PCR court. Woodberry agreed that Floyd's advice to her regarding the felony murder rule was essentially the same as his testimony at the PCR hearing. The advice played a role in her decision to change her plea to guilty. Had she understood that the felony murder rule was not applicable to her case, she would not have pled guilty and instead continued with trial. App. 104, l. 20 – 105, l. 2; App. 110, l. 19 – 111, l. 4.

PCR counsel argued that Woodberry's guilty plea was not intelligently entered because Floyd misadvised her regarding the felony murder rule. Further, the concept of transferred intent, mentioned at the plea hearing, was inapplicable to the facts of this case. App. 111, l. 14 – 117, l. 9; App. 120, l. 12 – 123, l. 17. The PCR judge took the case under advisement. App. 123, ll. 18-20.

In the Order of Dismissal, the PCR court inaccurately wrote that plea counsel "did not specifically advise her [Woodberry] concerning the felony-murder rule." App. 135. On the contrary, both plea counsel Floyd and Woodberry testified they discussed the proximate cause felony murder rule. App. 84, l. 4 – 85, l. 12; App. 97, ll. 11-21; App. 99, ll. 14-18; App. 102, l. 19 – 103, l. 24; App. 104, l. 22 – 105, l. 2; App. 110, l. 19 – 111, l. 4; see also App. 127 – 129 (discussing plea counsel's testimony about proximate causation). The PCR court further erred in finding that plea counsel properly advised Woodberry with respect to the felony murder rule and in telling her that "she could potentially be convicted under the felony-murder doctrine." App. 135. Where, as here, it was not Woodberry whose committed the act that caused the death of the unintended victim, she would only be criminally responsible for the death only if the proximate cause felony murder rule applies, but not if the agency felony murder rule applies. See

discussion *infra*. Plea counsel neither understood nor communicated this legal distinction to Woodberry, instead advising her solely regarding the proximate cause felony murder rule. The PCR court further erred in finding that Woodberry could have been convicted of murder under separate legal theories of transferred intent or proximate causation. App. 132 – 134; App. 136 – 138. Finally, the PCR court erred in its findings that Woodberry could not prove prejudice from any deficient advice as to the murder charge because she did not contest her guilt for the lesser offenses of attempted murder, discharge of a firearm, and stalking, and because she did not prove "as a matter of law" that she was not the proximate cause of the victim's death. App. 134 – 137.

Discussion

Right to Effective Assistance of Counsel

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Rule 71.1(e), SCRCP. The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "A reasonable probability

is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Counsel's Deficient Advice

Plea counsel advised Woodberry that if the solicitor could prove that her acts were the proximate cause of Lori Pruett's death, that she would be criminally liable under the felony murder rule. App. 84, l. 4 – 85, l. 12; App. 97, ll. 11-21; App. 99, ll. 14-18; App. 102, l. 19 – 103, l. 24; App. 104, l. 22 – 105, l. 2; App. 110, l. 19 – 111, l. 4. This advice was inaccurate, as our State has not codified the felony murder rule and discussions of it in case law indicate the application of the agency felony murder rule, which is followed by a majority of states and under which Woodberry would not have been guilty of murder. Plea counsel further erred in failing to advise Woodberry regarding the inapplicability of transferred intent or some separate theory of proximate causation to render her liable for murder.

Murder is "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10; State v. Sterling, 396 S.C. 599, 621, 723 S.E.2d 176, 188 (2012) (Hearn, J., concurring in part and dissenting in part) ("It is hornbook law that most crimes require both an *actus reus* and a *mens rea.*"). The corpus delicti in a murder case 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). "[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

A. Felony Murder Rule

"Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the

application of the rule." People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980). "Courts have developed two 'mutually exclusive' concepts of the felony murder doctrine. These views are currently referred to as the 'agency theory' and the 'proximate cause theory.' The rationale of each theory reflects concepts of natural justice." James W. Hilliard, Felony Murder in Illinois the "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues, 25 S. Ill. U. L.J. 331, 344 (2001). The majority trend is to employ the agency theory and limit criminal culpability under the felony-murder doctrine to lethal acts committed by the felons themselves or their accomplices, and do not to employ the proximate cause theory to extend criminal culpability for lethal acts of nonfelons. See, e.g., State v. Branson, 487 N.W.2d 880, 882, 885 (Minn. 1992); State v. Bonner, 411 S.E.2d 598 (N.C. 1992); King v. Commonwelth, 368 S.E.2d 704 (Va. Ct. App. 1988); Campbell v. State, 444 A.2d 1034, 1037, 1040-41 (Md. 1982); State v. Canola, 374 A.2d 20, 23 (N.J. 1977); People v. Austin, 120 N.W.2d 766, 773-74, 775 (Mich. 1963); State v. Garner, 115 So. 2d 855 (La. 1959); Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958); Commonwealth v. Moore, 88 S.W. 1085 (Ky. 1905).

Under the agency theory of felony murder, a felon is not guilty of murder when the homicide is done by a person other than the felon or a co-felon. Campbell v. State, 444 A.2d 1034, 1037 (Md. 1982). In other words, the agency theory limits the reach of the felony murder doctrine to homicides committed by the felon or a co-felon. Campbell, 444 A.2d at 1037. The classic statement of the agency theory is: "No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose." Commonwealth v. Campbell, 89 Mass. (7 Allen) 541, 544 (1863)).

One reason for applying the felony-murder doctrine narrowly is that "the purpose of deterring felons from killing by holding them strictly responsible for killings they or their co-felons commit is not effectuated by punishing them for killings committed by persons not acting in furtherance of the felony." Campbell, 444 A.2d at 1041. Moreover, "the tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide." Id. Tort law and criminal law have differing rationales, with the former primarily concerned with who shall bear the burden of loss and the latter concerned with the imposition of punishment. Id. "Tort concepts of foreseeability and proximate cause have shallow relevance to culpability for murder in the first degree." Id. (quoting Canola, 73 N.J. at 226, 374 A.2d at 30). Because of the extreme penalty attaching to a conviction of felony murder, a closer and more direct causal connection between the felony and the killing is required than the causal connection ordinarily required under the tort concept of proximate cause. Id.

Under the proximate cause theory of felony murder, a felon is guilty of murder for any death proximately resulting from the felony, regardless of who actually killed the victim. Moore v. Wyrick, 766 F.2d 1253, 1256 (8th Cir. 1985). One court described the underlying rationale for the proximate cause theory as: "The whole question here is one of causal connection. If the appellant here set in motion the cause which occasioned the death of deceased, we hold it to be a sound doctrine that he would be as culpable as if he had done the deed with his own hands." Miers v. State, 251 S.W.2d 404, 408 (Tex. Crim. App. 1952); People v. Hickman, 319 N.E.2d 511 (Ill. 1974).

In most states, the felony murder rule is a creature of statute. Gore v. Leeke, 261 S.C. 308, 315, 199 S.E.2d 755, 757 (1973). Though South Carolina has not codified the felony murder rule, this Court noted its consistent application to the common law federal murder rule,

quoting an early case: "Whenever an unlawful act, an act malum in se, is done in prosecution of a felonious intention, and death ensues, it will be murder." Gore, 261 S.C. at 315, 199 S.E.2d at 757-58 (quoting State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891)). However, the jury charge provided in Gore was a blend of accomplice liability and the felony murder rule, consistent with the agency theory:

> Now, ladies and gentlemen of the jury, **if several persons agree or conspire to commit a felony** such as grand larceny or robbery or burglary, **each of those persons is criminally responsible for the acts of his associates or confederates** which are done in furtherance or in prosecution of the common purpose for which they combined. The common purpose, ladies and gentlemen, may have not included or may not have been involved in the killing and the murder of anyone but if in executing this common design and purpose and if it were unlawful as, for instance, breaking in and stealing, and in the execution of this common purpose a homicide is committed **by one of the confederates or one of the associates** and you, the jury, determine from the proof beyond a reasonable doubt that the homicide was a probable or natural consequence of the acts which were done in pursuance of this common design then, ladies and gentlemen, **all who are present, either actually or constructively, and participating in the unlawful, common design are as guilty as the slayer himself.**

Id. at 314-15, 199 S.E.2d at 757 (emphasis added).

The cases cited by Gore as examples of previous applications of the felony murder rule in South Carolina all involved acts committed either by the felon or by a co-felon. In State v. Levelle, 34 S.C. 120, 13 S.E. 319, 321 (1891), the defendant was attempting to commit suicide, when in the course of his wife's attempt to prevent him from doing so, he unintentionally killed his wife. In State v. Cannon, 49 S.C. 550, 27 S.E. 526, 530 (1897), the Court upheld the felony murder charge in a burglary case where there was a dispute as to which armed robbery fired the fatal shot. The Cannon Court wrote:

> The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in, and steal, and in the execution of this common purpose a homicide is committed by one, as a probable or natural consequence of the acts done in pursuance of the common design, then **all present participating in the unlawful common design are as guilty as the**

> **slayer**. But if the killing has no connection with the common purpose, and did not ensue as a probable result of an attempt to execute it, then the slayer, alone is responsible for the killing. The circuit judge correctly charged in this connection that **"if there were two present, and they were acting in concert, it matters not which one fired the fatal shot."**

49 S.C. at 550, 27 S.E. at 530 (emphasis added). In State v. Johnson, 156 S.C. 63, 152 S.E. 825, 827-28 (1930), though the facts are limited, the Court found no valid objection to the following charge at the co-defendants joint trial:

> And further, **if 'A' and 'B' set out on an unlawful enterprise**, such as the commission of a felony, and in their efforts to further their design and complete their design, complete their enterprise, of committing the felony, **they take the life** without fault on the part of the deceased, then in that case the law says it is murder. As if you were riding down the highway tomorrow in your car, or on your horse, or walking, and a person should approach you with the preconceived idea and purpose of robbing you of your watch, or of your money, knowing at the time that they were entering upon the commission of a felony, an unlawful act, even though they didn't intend primarily to take your life at the time they attempted to rob, if during the process of putting their unlawful purpose into practice into realization, **they take your life**, then the law says that is murder.

(emphasis added).

In State v. Williams, 189 S.C. 19, 199 S.E. 906, 907-08 (1938), the defendant was convicted of murder though the shooting was committed by his alleged co-felon and there was conflicting evidence regarding whether the decedent was the intended victim. The Williams Court wrote:

> It may also be regarded as a well settled principle of law that a man will be held guilty of murder or manslaughter who in the attempt to kill one person by mistake kills a third person, although there is no intention or design to kill such third person. **The three defendants participated in a felonious assault**, and if, while engaged in the effort to kill Moseley, **either one had fired the shot which killed the deceased, all would have been guilty of the crime**, although they had no design or intention to injure or kill the deceased. Under the circumstances detailed by this testimony, the jury were warranted in finding that **the act of one of the defendants was the act of all.**

Id. at 19, 199 S.E.at 908 (emphasis added). In State v. Woods, et al., 189 S.C. 281, 1 S.E.2d 190, 193 (1939), the co-defendants were convicted of the murder of a prison guard who they held hostage as a part of an escape plan and whom Woods fatally stabbed. The trial judge properly instructed the jury that it was up to them to determine whether or not the act of Woods was in furtherance of the common design or whether it was the natural and probable consequence flowing from the execution of the common design. 189 S.C. at 281, 1 S.E.2d at 193. The Woods Court found that "[b]y this instruction, the jury was plainly told that if the life of Captain Sanders was taken while the appellants were carrying out their plan or scheme for escape, then the act of one would be the act of all, but that it was for the jury to say whether or not such act was the natural and probable consequence flowing from the execution of the common design." Id. Finally, in State v. Ciesiellski, 213 S.C. 513, 515-16, 50 S.E.2d 194, 194-95 (1948), three co-defendants were all charged with murder, where all there participated in the underlying robbery and burglary but only one of them shot the decedent. The Ciesiellski Court repeated the legal principle discussed supra, that "[i]f several parties agree or conspire to commit a robbery or burglary, either of which is a felony, each party is criminally responsible for the acts of his associates or confederates in furtherance or in prosecution of the common purpose for which they combine." 213 S.C. at 517-18, 50 S.E.2d at 196. "The test is whether the homicide was committed in furtherance of the plan and was a probable result of its execution." Id.

This Court's next discussion of felony murder following Gore was in State v. Yates, 280 S.C. 29, 210 S.E.2d 805 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Yates and a confederate robbed a rural store armed with a pistol and knife. Yates at 33, 310 S.E.2d at 807-08. Yates shot the clerk, but did not kill him. Id. The clerk's mother entered the store and Yates ran with the money. Id. Yates' accomplice stabbed

the clerk's mother to death, but the clerk got a gun and killed the accomplice. Id. Notably, Yates was tried and convicted only for the murder of the clerk's mother, Mrs. Wood, and not with the murder of his co-felon Henry Davis. See id. at 34–35, 310 S.E.2d at 808. Thus, while the prosecution contended that it was not relying on the felony murder doctrine, Yates is consistent with the more narrow application of the agency felony murder rule. Id. at 34, 310 S.E.2d at 808.

In 1985, this Court promulgated a jury charge on implied malice and the felony murder rule. State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 342-43 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The trial judge in Norris gave the following charges related to felony murder:

> The law also allows the jury to infer malice if you conclude that the homicide was a proximate, direct result of the commission of a felony. And for that regard, criminal sexual conduct in the first degree would be a felony under our law. You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow.
>
> But, for it to be murder it has to be committed with malice aforethought and that's where you look at all the facts and circumstances. If it was during the commission of a felony you can consider that as facts and circumstances from which malice can be inferred. You don't have to infer it, but you can.

Id. at 91, 328 S.E.2d at 342 (emphasis removed). The Norris Court noted that South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder. Id. at 92, 328 S.E.2d at 342-43. The Court further provided the following "proper charge on implied malice":

> The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id.; see Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) (reversing denial of post-conviction relief where supplemental felony murder charge unconstitutionally shifted the burden of proof for malice). It is notable that this charge removed the "proximate, direct result" language.

In the present case, despite the articulate arguments presented by PCR counsel, the PCR court failed to acknowledge the distinction between the two theories of felony murder and the differing results they would yield in this case. Rather, the Court found no error in plea counsel's advice that Woodberry "could potentially be convicted under the felony-murder doctrine." App. 135. The testimony in this case was that plea counsel advised Woodberry that she ***would*** be convicted under the proximate cause felony murder rule if the jury believed the State's evidence regarding how the events unfolded. The discussion of our case law indicates that to the extent the felony murder rule is followed in South Carolina, it is the agency theory that applies. Under that theory, Woodberry would not have been guilty of murder. Plea counsel was thus deficient in leading Woodberry to believe that the law applicable to her case was well-settled in favor of the prosecution when the opposite was true. She could not knowingly and intelligently enter a guilty plea to murder under these circumstances and is accordingly entitled to a new trial.

B. Transferred Intent

The PCR court ruled: "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." App. 135. In a separate section of the Order of

Dismissal, the court discussed the applicability of the doctrine of transferred intent. App. 132 – 134. The PCR court misapprehended the applicability of transferred intent, which is a concept typically applied to cases of bad or mistaken aim and which requires that the defendant have committed "an act which caused the death of a human being." See App. 132 – 134; State v. Fennell, 340 S.C. 266, 271-72, 531 S.E.2d 512, 515 (2000); State v. Horne, 282 S.C. 444, 446, 319 S.E.2d 703, 704 (1984).

The cases discussed in the Order of Dismissal all involved a direct act by the defendant that resulted in death of an unintended victim. In State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941), the defendant shot the deceased, thinking that the he was another man who had threatened to kill him earlier in the day. It was in light of those facts that the Court wrote:

> [I]t 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. If there was malice in appellant's heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake. Our inquiry, therefore, will be whether there was such legal justification or excuse for the shooting as would eliminate the element of malice.

197 S.C. at 371, 15 S.E.2d at 672. In Horne, the Court held that an action for homicide based on killing of an unborn child may be maintained even where the child was the unintended victim of the crime. 282 S.C. at 447, 319 S.E.2d at 704. Citing Heyward, the Horne Court wrote: "If there was malice in appellant's heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." Id. at 446, 319 S.E.2d at 704. The Court went on to write: "This result is sometimes described as being a function of the doctrine of 'transferred intent' whereby the actor's intent to kill his intended victim is said to be transferred to his actual victim." Id. "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." Id. Under the circumstance of this case, there was no coupling of the act and mental state in order to support conviction under the theory of transferred intent. Rather, criminal responsibility for murder in the present case could have only been proven under the felony murder rule, the agency theory of which would not have resulted in a murder conviction.

C. Proximate Causation

The PCR court further erred in finding that proximate causation was a separate legal theory upon which Woodberry could have been found guilty of murder. App. 136 – 137. The cases cited in the Order of Dismissal both involve overt acts committed against an intended victim where death did not immediately result, such that it was up to the jury to determine whether the act perpetrated by the defendant caused the victim's death. In State v. Foote, 58 S.C. 218, 36 S.E. 551, 552 (1900), the defendant shot the decedent but contended at trial that the cause of death was peritonitis. The Court found no error in the trial court's instruction to the jury, which communicated 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." 58 S.C. at 218, 36 S.E. at 552.

Similarly, in State v. Riley, 219 S.C. 112, 64 S.E.2d 127 (1951), the decedent suffered from typhoid fever in addition to the bullet would inflicted by Riley. The defense argued that directed verdict should have been granted because the State did not prove that the victim died as a result of a wound inflicted by appellant, but rather from typhoid fever. 219 S.C. at 116, 64 S.E.2d at 129. The Riley Court ruled that "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." Id. at 117-18, 64 S.E.2d at 130. These cases are distinguishable from the present

case, as there was no contention of two separate causes of Pruett's death. Pruet died from the injuries that she sustained in the collision with Gray and Askins. To the extent proximate case could have become an issue in Woodberry's trial, it would have been under the theory of reckless vehicular homicide, which provides: "When the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless vehicular homicide." S.C. Code Ann. § 56-5-2910(A).

Prejudice to Petitioner

The PCR court erred in its findings that Woodberry could not prove prejudice from any deficient advice as to the murder charge because she did not contest her guilt for the lesser offenses of attempted murder, discharge of a firearm, and stalking, and because she did not prove "as a matter of law" that she was not the proximate cause of the victim's death. App. 134 – 137. Woodberry testified both that plea counsel's advice regarding the felony murder rule was part of her decision to plead guilty and that had she understood that she would not have been criminally responsible for murder under the felony murder rule, she would not have pled guilty. App. 104, l. 20 – 105, l. 2; App. 110, l. 19 – 111, l. 4. It is further notable that Woodberry had in fact invoked her right to trial, with the sole intention of challenging the murder charge.

The PCR court found Woodberry's testimony incredible, finding that "Applicant did not dispute the evidence of attempted murder as to Gray and Askins was overwhelming" and noting that the assertion of a battered woman's defense and "the proximate-cause issue" would have been questions of fact for the jury. App. 135 – 136. Here, Woodberry was not contending that she would have gone to trial to pursue those defenses. Rather, she argued that she would have gone to trial to argue the agency felony murder rule had she been properly advised about its

applicability or potential applicability. In light of the fact that the prosecution made her no offer – she pled "straight-up" to all indicted offenses – there is a reasonable probability that Woodberry would have pursued this legal challenge to the murder charge. Obviously there was the potential that Woodberry could have been found guilty of a lesser offense of reckless vehicular homicide or involuntary manslaughter. S.C. Code Ann. § 56-5-2910(A); S.C. Code Ann. § 16-3-60. However, the maximum ten year penalty for that offense is far less than the range of thirty years to life imprisonment that she faced for murder.

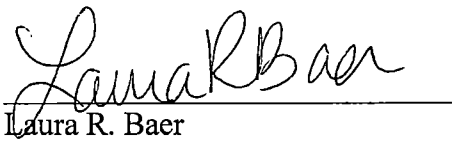
Elsewhere the PCR court wrote: "Had Applicant proceeded to trial on the attempted murder charges *alone,* she could have been sentenced up to 60 years if sentenced to consecutive maximum sentences." App. 134 (emphasis in original). Following her guilty plea, Woodberry was sentenced to concurrent terms of twenty-five and twenty years for the two attempted murder charges. To the extent the PCR court implies that Woodberry would have been sentenced more harshly had she proceeded to trial, even where she did not plan to put up a defense to the attempted murder charges, it would be improper for the sentencing court to consider the defendant's exercise of their right to jury trial. Castro v. State, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) ("When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion.").

The PCR court further found that Woodberry failed to show prejudice because she did not prove that she was not the proximate cause of Pruett's death as a matter of law. App. 137. The proper standard for prejudice is that "the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Lee v. United States, 137 S.Ct. 1958, 1965

(2017) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). It is significant that plea counsel admitted that the murder charge was the only offense they intended to challenge at trial, as Woodberry never denied shooting into the car of Gray and Askins or the stalking allegation. Woodberry made the decision to plead guilty based upon trial counsel's advice that she could be found guilty of murder if the jury found that she was the proximate cause of decedent's death. As discussed more fully *supra*, that was not accurate advice regarding the current status of South Carolina law. See Hill, 474 U.S. at 60 (explaining prejudice may be demonstrated by evidence that the accused "placed particular emphasis" on the specific incorrect advice by counsel in deciding to plead guilty). As a result, Woodberry did not accurately understand the potential risks and benefits of a trial versus a plea. The PCR court erred in finding that Woodberry failed to show prejudice.

CONCLUSION

Based on the foregoing, Petitioner Georgia Woodberry respectfully requests that this Court grant the petition for writ of certiorari and order further briefing of the issue raised herein. In the event that this Court dispenses with further briefing, Petitioner requests that her conviction for murder be reversed and her case remanded for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

GEORGIA WOODBERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Georgia Woodberry, at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 19th day of March, 2018.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .

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