STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Certiorari to Florence County

William H. Seals, Circuit Court Judge

GEORGIA WOODBERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001474

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding that defense counsel rendered effective assistance of counsel where he misadvised Petitioner regarding 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

On March 28, 2013, a Florence County Grand Jury indicted Petitioner for murder, discharging a firearm into a vehicle, stalking, and two counts of attempted murder. R. 142 – 144. On July 30, 2013, Petitioner appeared before the Honorable D. Craig Brown and pleaded guilty as indicted. R. 1; R. 3, ll. 8-12. Petitioner was represented by Scott Floyd and the State was represented by Ed Clements. R. 1.

The court accepted the plea and sentenced Petitioner to serve concurrent terms of imprisonment for forty years for murder, five years for discharging a firearm into a dwelling, five years for stalking, twenty-five years for one count of attempted murder, and twenty years for the second count of attempted murder. R. 19, ll. 6-7; R. 52, ll. 4-19; R. 145 – 149. Petitioner timely filed notice of appeal but this Court dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. R. 54 – 59.

On November 11, 2013, Petitioner filed an application for post-conviction relief (PCR). R. 60 – 67. On April 23, 2014, the State made its return. R. 68 – 74. A hearing was held on the matter on August 9, 2016, before the Honorable William H. Seals, Jr. R. 75. Petitioner was represented by Tristan Shaffer and the State was represented by Alicia Olive. R. 75. The PCR court heard testimony from Petitioner and from defense counsel. R. 76. On May 30, 2017, the PCR court issued an order of dismissal. R. 125 – 141. On April 15, 2020, this Court granted the petition for a writ of certiorari.

This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). "We review questions of law de novo, with no deference to trial courts." *Id*. (citing *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

The PCR court erred in finding that plea counsel rendered effective assistance of counsel where he misadvised Petitioner regarding 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

Defense counsel was deficient in advising Petitioner regarding her criminal responsibility for murder. Defense counsel erroneously advised Petitioner that South Carolina follows the proximate cause theory of felony murder, such that she was guilty of murder if the jury believed that Petitioner'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 injuries sustained in the crash.

However, the "proximate cause felony murder rule" is the minority rule around the country. While the appellate courts of this State have not explicitly adopted the majority "agency felony murder rule," the majority "agency felony murder rule" is consistent our appellate courts' past articulation of the felony murder rule and is consistent with South Carolina's legal theory of "hand of one, hand of all" accomplice liability. Under the majority "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. Here, Petitioner was not guilty of murder under the agency theory of felony murder because the decedent was killed by Petitioner's intended victims, not by co-felons.

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, and defense counsel erroneously advised Petitioner that South Carolina law was settled in its application of the proximate cause theory of felony murder. Further, Petitioner'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

Petitioner had been in a "toxic" and abusive relationship with Jimmy Askins for approximately three years and they had a child in common. Petitioner was suspicious that Askins was having a sexual relationship with another woman, Carolyn Gray. Petitioner eventually found Askins and Gray together in Petitioner's bed. 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; App. 105, ll. 3-24.

On the morning of April 5, 2012, Petitioner 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.

Petitioner 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 went to 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.

However, on the second day of trial, Petitioner changed her pleas to guilty. App. 95, ll. 1-12; 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, defense counsel Scott Floyd confirmed that Petitioner never denied shooting her gun at Gray and Askins or the stalking charge, and 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. Petitioner said that the car driven by Gray and Askins was out of her sight at the time of the collision. Defense counsel believed that the State would have presented contrary testimony from Gray and Askins. App. 83, l. 3 – 85, l. 12. Had trial continued, defense counsel was prepared to argue that Petitioner 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. Defense counsel explained his understanding and advice to Petitioner regarding the felony murder rule was as follows:

> [I]f 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, Petitioner told defense counsel that she wanted to plead guilty. App. 95, l. 1 – 96, l. 1; App. 107, ll. 16-18; App. 16, ll. 4-11. Petitioner pled "straight-up" to all offenses without any recommendations or negotiations. App. 87, ll. 17-21; App. 110, ll. 4-11; App. 8, ll. 13-23.

Petitioner agreed that defense counsel'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 Petitioner's guilty plea was not intelligently entered because defense counsel misadvised her regarding the felony murder rule. "If you're advising someone on the wrong law, she's not going to know the risk." App. 121, l. 25 – 122, l. 1. 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 [Petitioner] concerning the felony-murder rule." App. 135. This finding was not supported by the record, since, on the contrary, both defense counsel and Petitioner 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 counsel's testimony about proximate causation).

The PCR court further erred in finding that defense counsel properly advised Petitioner 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 Petitioner who committed the act that killed 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*. Defense counsel neither understood nor communicated this legal distinction to Petitioner, instead advising her solely regarding the proximate cause felony murder rule.

The PCR court further erred in finding that Petitioner 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 Petitioner 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

Defense counsel advised Petitioner that if the solicitor could prove that her acts were the proximate cause of Lori Pruett's death, then she was guilty of murder because of 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 South Carolina applies the "agency theory" of felony murder, which is followed by a majority of states and under which Petitioner would not have been guilty of murder. Defense counsel further erred in failing to advise Petitioner 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). In South Carolina, the offense of murder requires the killing of any person (actus reus) with malice aforethought (mens rea). But, here, Petitioner did not kill Pruett and the persons who did kill Pruett did not have malice aforethought—therefore, the actus reus and mens rea were never joined in Petitioner.

It was error for defense counsel to advise Petitioner she was guilty of murder based on an expansive interpretation of the felony murder rule—as seen, defense counsel told Petitioner that malice can be inferred from the commission of a felony. However, as will be discussed *infra*, South Carolina has not codified the felony murder rule, and, to the extent caselaw supports the application of the felony murder rule in South Carolina, caselaw indicates the agency theory of felony murder applies—a theory under which Petitioner would not be guilty of murder based on these facts.

No legal theory of liability existed which would hold Petitioner responsible for murder on these facts in South Carolina, and the statute criminalizing murder should not be construed so as to adopt one. "[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]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota v. United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). "[T]he rule of lenity is a rule of statutory construction." *State v. Samuels*, 403 S.C. 551, 558, 743 S.E.2d 773, 777 (2013). "When a *genuine* ambiguity exists as a result of the proposed application of [a penal statute] to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor." *Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (emphasis in original).

Given the rule of lenity, it should not be determined that the General Assembly intended to hold one criminally liable for murder where she did not kill the decedent and where the decedent was killed by a person who was not a co-felon and who did not have criminal intent—whether it be through a heretofore never-enunciated theory of proximate cause felony murder, through the legal fiction of transferred intent, or thorough proximate causation where there was

only one cause of death. Here, the rule of lenity disfavors defense counsel's expansive interpretation of South Carolina's criminal law in a way which would hold Petitioner criminally liable for murder.

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 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. Commonwealth*, 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 (his agent). *Campbell*, 444 A.2d at 1037. 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.

On the other hand, 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, the South Carolina Supreme Court noted its consistent application of the common law felony 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—which is consistent with the agency theory of felony murder:

> 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).

Gore contained an expansive discussion of felony murder and cited a number of South Carolina cases where the felony murder doctrine was applied. The cases cited in *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 robber 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.*

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 three 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.*

The Supreme 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, and not with the murder of his co-felon. *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 narrower application of the agency felony murder rule. *Id.* at 34, 310 S.E.2d at 808.

In 1985, the Supreme 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) (granting post-conviction relief where supplemental felony murder charge unconstitutionally shifted the burden of proof for

malice). It is notable that this "proper charge" provided by the Supreme Court in *Norris* removed the "proximate, direct result" language that was charged by the trial judge.

All of these cases are consistent with the application of the agency theory of felony murder in South Carolina, rather than the proximate cause theory of felony murder. Situations in which a jury may properly infer malice are limited and an expansive interpretation of South Carolina's murder statute to allow the application of the proximate cause theory of felony murder is improper. *See State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (penal statutes "must be strictly construed against the State and in favor of the defendant"); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (ambiguity about the ambit of criminal statutes should be resolved in favor of lenity). Consistent with the propriety of the rule of lenity being applied to these facts, the South Carolina Supreme Court recently took a step in the direction of limiting felony murder when it held that felony attempted murder is not a recognized crime in South Carolina. *State v. Smith*, Op. No. 27958 (S.C. Sup. Ct. filed June 17, 2020) (Shearouse Adv. Sh. No. 24 at 14).

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 defense counsel's advice that Petitioner "could potentially be convicted under the felony-murder doctrine." App. 135. The testimony in this case was that defense counsel advised Petitioner 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.

Defense counsel's statement of the proximate cause theory of felony murder was correct—but counsel was incorrect in telling Petitioner that it applied to her case. 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, Petitioner would not have been guilty of murder. Defense counsel was thus deficient in leading Petitioner 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 (emphasis added). Here, Petitioner did not kill the decedent. It was not Petitioner's act that killed an unintended victim—it was instead the act of Gray and Askins driving through the red light that killed the unintended victim.

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 (emphasis added). 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.* Here, unlike as was described in *Horne*, malice and an act which caused the death of a human being never both resided within Petitioner. Instead, the facts alleged by the State indicate a situation in which malice was present in Petitioner but the act was committed by others.

In *Fennell*, 340 S.C. at 276, 531 S.E.2d at 517, the Supreme Court "h[e]ld that the doctrine of transferred intent may be used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim." The *Fennel* Court recognized that "criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." 240 S.C. at 271, 531 S.E.2d at 515. Here, the two factors—act and mental state—never concurred in Petitioner, and so the doctrine of transferred intent is inapplicable. Critically, Petitioner's acts (driving her car and

shooting her gun) did not kill the decedent. Pruett was not killed by being struck by Petitioner's car or by a bullet shot by Petitioner. Instead, Pruett was killed when her car collided with the car of Gray and Askins—and Gray and Askins did not have malice.

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, and, as discussed *supra*, 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 Petitioner could have properly been found guilty of murder. App. 136 – 137. The cases cited in the Order of Dismissal both involve injuries by the defendant to 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. Critically, here Petitioner did not injure Pruett.

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 the defendant, 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 (emphasis added).

Accord State v. Jenkins, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981) ("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"); *State v. Prather*, 429 S.C. 583, 609, 840 S.E.2d 551, 564 (2020) (quoting *State v. Burton*, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (injury inflicted by the defendant may be proximate cause of death "if the injury inflicted contributes immediately to the death of the deceased").

Here, Petitioner did not inflict an injury on the decedent; rather, the injury was inflicted by Gray and Askins. There was no contention of two separate causes of Pruett's death. Pruett died from the injuries that she sustained in the collision with Gray and Askins.

Moreover, as discussed *supra*, Pruett was not killed by a co-felon. The appellate courts of this State "view the proximate cause theory of liability and the 'hand of one is the hand of all' theory of liability as overlapping theories, tightly intertwined with one another." *State v. Young*, 429 S.C. 155, 165, 838 S.E.2d 516, 521 (2020). Because Gray and Askins were not joined in criminal activity with Petitioner, it cannot be said that their hands were the hands of Petitioner.

Prejudice to Petitioner

The PCR court erred in its findings that Petitioner 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. Petitioner testified both that defense 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 Petitioner had in fact invoked her right to trial, with the sole intention of challenging the murder charge.

The PCR court found Petitioner'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, Petitioner 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 (and to advance her argument on direct appeal, if necessary).

In light of the fact that the prosecution made her no offer (she pled "straight-up" to all indicted offenses), and the fact that trial had commenced, there is a reasonable probability that Petitioner would have pursued this legal challenge to the murder charge.

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, Petitioner was sentenced to concurrent terms of twenty-five and twenty years for the two attempted murder charges. To the extent the PCR court implied that Petitioner would have been sentenced more harshly had she proceeded to trial, 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."). *Accord State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995) (consideration of defendant's exercise of jury trial right when declining to sentence under YOA was an abuse of discretion).

The PCR court further found that Petitioner 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. This was an error of law. 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)). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Petitioner made the decision to plead guilty because of defense counsel's advice that she could be found guilty of murder based on the proximate cause theory of felony murder. 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, Petitioner did not accurately understand the potential risks and benefits of a trial versus a plea. The PCR court erred in finding that Petitioner failed to show prejudice.

CONCLUSION

Based on the foregoing argument, this Court should reverse the PCR court and grant Petitioner a new trial.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of August, 2020.