STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

On Writ of Certiorari to Florence County
The Honorable D. Craig Brown, Plea Judge
The Honorable William H. Seals, PCR Judge

Appellate Case No. 2017-001474

Georgia Woodberry,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE ON CERTIORARI

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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

Did the PCR court correctly find Counsel was not constitutionally ineffective where Counsel correctly advised Petitioner she could be convicted of murder for the death of an unintended victim where Petitioner's actions were the proximate cause of the victim's death and malice existed through the doctrine of transferred intent, and additionally, Petitioner could have been convicted under the theory of depraved heart murder, so Petitioner was not prejudiced by Counsel's advice?

STATEMENT OF THE CASE

Georgia Woodberry (Petitioner) is presently confined in the South Carolina Department of Corrections. In April 2013, the Florence County Grand Jury indicted Applicant for one count of murder, two counts of attempted murder, discharging a firearm into a vehicle, and stalking (2013-CP-21-0411). Scott P. Floyd, Esquire, represented Petitioner. Petitioner proceeded to a jury trial, and on July 30, 2013, Petitioner decided to forego her right to continue her trial and pleaded guilty as indicted to all charges before the Honorable D. Craig Brown. Judge Brown sentenced her to incarceration for concurrent terms of forty years for murder, twenty-five years for one count of attempted murder, twenty years for the other count, five years for discharging a firearm into a vehicle, and five years for stalking.[1]

Petitioner filed a timely notice of appeal. However, on September 17, 2013, the South Carolina Court of Appeals dismissed the appeal for failing to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Remittitur returned to the circuit court on October 8, 2013.

Petitioner then timely filed an application for post-conviction relief on November 11, 2013. Respondent made its Return on April 23, 2014, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on August 9, 2016, at the Florence County Courthouse before the Honorable William H. Seals. Petitioner raised multiple issues, including that Counsel was ineffective for failing "to advise [Petitioner] on the S.C. law on the felony murder rule" and for failing "to advise [Petitioner] that she cannot be found guilty when she was

[1] Although Petitioner lists the murder and attempted murders as the charges she is challenging in her application, Counsel's testimony at the evidentiary hearing established she admitted to the other offense and never intended to contest any charge except the murder at trial. App. pp. 83-84; Brief of Petitioner p. 22.

not the proximate cause of the decedent's death." By order dated May 30, 2017, Judge Seals denied relief and dismissed the application with prejudice.

STATEMENT OF THE FACTS

Petitioner was charged with murder for causing the death of Lori Pruett. App. p. 15. Petitioner chased a vehicle occupied by her former boyfriend, Jimmy Askins (Askins), and Carolina Gray (Gray), Askins' new girlfriend, and fired on the vehicle while chasing it. App. p. 15. Petitioner continued to chase Gray and Askins all the way through a red light, where they collided with Pruett as she was passing through the intersection. App. p. 15. Gray and Askins suffered serious injuries, and Gray was trapped in the burning vehicle, which she barely managed to escape. App. pp. 34, 37-39. Pruett died as a result of injuries she sustained in the crash. App. p. 16.

Petitioner and Askins previously been in a relationship and had a child together. App. p. 17. Petitioner began stalking Gray and Askins near Gray's home several days before the incident. App. p. 17. Petitioner also made harassing, obscene telephone calls to Gray, which the State was prepared to introduce at trial. App. p. 17. Petitioner also gave a statement in which she admitted she shot into the vehicle occupied by Askins and Gray, chasing it until it crashed with Pruett's car at the intersection. App. p. 35. One of the investigators would have testified Petitioner also made a statement indicating she hoped Askins had been hurt in the crash. App. p. 36. The State was also prepared to present expert testimony that Petitioner tested positively for gunshot residue, and while the slugs recovered from the scene could not be exclusively matched to the .45 caliber pistol recovered from Petitioner, an expert would have testified the .45 could have shot the projectile. App. p. 16. In addition, the evidence would have shown Petitioner purchased the weapon about a month before to the incident. App. p. 16.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court correctly found Counsel was not constitutionally ineffective where Counsel correctly advised Petitioner she could be convicted of murder for the death of an unintended victim where Petitioner's actions were the proximate cause of the victim's death and malice existed through the doctrine of transferred intent, and additionally, Petitioner could have been convicted under the theory of depraved heart murder, so Petitioner was not prejudiced by Counsel's advice.

Petitioner argues Counsel was ineffective because he "advised [her] that if the solicitor could prove her acts were the proximate cause of Lori Pruett's death, that she would be liable under the felony-murder rule." Brief of Petitioner p. 9. However, Counsel actually advised Petitioner, according to his testimony at the evidentiary hearing, "[i]f you commit a felony that involves some inherently dangerous activity and a homicide – unintended homicide – results. . . from that, that the malice can be. . . inferred from the commission of the underlying felony." App. p. 85. Counsel further testified he believed and advised Petitioner that attempted murder would fit into the category of an "inherently dangerous" felony, and, in his opinion, the defense "might have problems with that rule." App. p. 85. This advice is a correct statement of the law of murder in South Carolina, and Petitioner is criminally liable for Pruett's death under this proximate-cause rule in combination with the theory of transferred intent.

Petitioner argues this advice by Counsel amounts to a statement of the proximate-cause theory of the felony-murder rule, rather than the agency theory Petitioner contends has been followed in this state instead. Brief of Petitioner pp. 9, 17. On the contrary, it is not clear which theory of felony-murder is applicable in South Carolina, if any, though this argument is a red herring. Counsel's advice was a correct statement of the law regarding the malice element of murder in South Carolina. Therefore, his advice was not deficient. Moreover, Petitioner is also liable for Pruett's death under the depraved heart theory of murder, so in any event, Petitioner

was not prejudiced by Counsel's advice regarding proximate cause. Therefore, this Court should affirm the PCR court's decision denying relief.

A. Felony-Murder in South Carolina

Under the agency theory of felony murder, "a participating felon is not guilty of murder when the killing is done by a person other than the participating felon or his co-felons." Campbell v. State, 293 Md. 438, 443, 444 A.2d 1034, 1037 (Ct. App. 1982) (surviving co-felon could not be guilty of murder where deceased co-felon was killed by shots from either attempted robbery victim or responding police officer). On the other hand, states following the proximate-cause theory of the felony-murder rule "hold a person responsible for deaths which occur as a direct and foreseeable result of a felony committed by that person." Taylor v. State, 41 Tex. Crim. 546, 572, 55 S.W. 961, 964 (Ct. Crim. App. 1900). The controlling issue in the proximate-cause theory is causation – if the acts of the defendant "set in motion the cause which occasioned the death of [the] deceased. . . he would be as culpable as if he had done the deed with his own hands." Miers v. State, 157 Tex. Crim. 572, 578, 251 S.W.2d 404, 408 (Ct. Crim. App. 1952) (finding defendant guilty of murder of robbery victim who accidentally shot and killed himself while attempting to resist robbery committed by defendant and co-felon).

The state of the law of "felony murder" in South Carolina, is confusing, at best, and as Petitioner concedes, South Carolina has not explicitly adopted either theory. Brief of Petitioner p. 4. The South Carolina Supreme Court has repeatedly stated, "South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder." State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1986), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Nevertheless, several cases purport to discuss the "felony-murder rule." However, the circumstances of those cases and the rules proscribed

therein are, in actuality, discussing the concept of accomplice liability summarized in South Carolina's jurisprudence by the axiom "the hand of one is the hand of all."

For example, in Gore v. Leeke, Gore was convicted of the murder of a policeman who was shot and killed by one of his codefendants as they fled the scene of an armed robbery. 261 S.C. 308, 313-14, 199 S.E.2d 755, 756-57 (1973). Gore challenged the application to his case of what this Court termed "the felony-murder rule," specifically an instruction by the trial court instructing the jury as follows:

> [I]f 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. This language is nearly identical to what is referred to in this Court's current jurisprudence as "the hand of one is the hand of all theory of accomplice liability." See, e.g., State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 278 (2017) (upholding murder conviction of defendant who participated in confrontation of victim over alleged theft of television but did not fire the fatal shots).

In Harry the trial court charged the jury, "[u]nder the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Id. (brackets in original). Petitioner argues the similarity between South

Carolina's theory of accomplice liability and what is known as the agency theory of the felony-murder rule in other states indicates South Carolina applies the agency theory, and therefore, Counsel's advice to Petitioner that she could be convicted for murder if the jury found her to be the proximate cause of Pruett's death was incorrect. Brief of Petitioner pp. 9, 17.

Although this state's accomplice-liability jurisprudence draws on agency-theory principles, there also exists a plethora of cases analyzing the role of proximate cause in criminal liability, sometimes concurrently. As the South Carolina Supreme Court in State v. Young, 429 S.C. 155, 165 n.6, 838 S.E.2d 516, 521 n.6 (2020), recently stated, "We 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." For example, in State v. Williams, in which a third-party was shot and killed by Williams' codefendant, Williams argued his murder conviction should not stand because "there [was] no evidence of common design or concerted action or conspiracy to commit murder." 189 S.C. 19, 199 S.E.2d 906, 908 (1938). The Williams Court explained

> the general rule of law that *a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which naturally flow or necessarily flow from it*, and that if he combines and confederates with others to accomplish an illegal purpose he is liable criminaliter for everything done by his confederates which follows incidentally in the execution of the common design. . . even though what was done was not intended as part of the original design or common plan.

Id. at __, 199 S.E.2d at 908 (emphasis added). The Williams Court immediately went on to explain another "well settled principle of law that a man will be 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." Id. Similarly, this Court has held "[o]ne who inflicts an injury on another is deemed by law to 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." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (upholding conviction for felony driving under the influence where defendant's speed and intoxication were found to be the proximate cause of the accident despite another motorist pulling out in front of defendant's vehicle moments before the crash).

A key distinction between the traditional application of either felony-murder theory and Petitioner's case, however, is that the rule is generally applied to determine criminal liability when a defendant engages in the commission of a felony *with another person* and a death results. In this case though, Petitioner was not acting in concert with a co-felon. Petitioner asserts she was therefore not criminally liable for Pruett's death because it was allegedly the action of her other victims, Gray and Askins, in wrecking their car which caused Pruett's death, and under the agency theory, proximate cause cannot be attributed to her because Gray and Askins were not co-felons acting in furtherance of a joint criminal enterprise. Brief of Petitioner pp. 20-21. This argument leads to an absurd result in which no one is responsible for Pruett's death, because as Petitioner repeatedly points out, Gray and Askins did not "act" with malice towards Pruett, and furthermore, it is inconsistent with South Carolina's jurisprudence on proximate cause.

B. Proximate cause

Petitioner argues she would not have pleaded guilty if Counsel had "correctly" advised her the proximate-cause felony murder rule did not apply. Brief of Petitioner p. 22; App. p. 104. However, as the PCR court pointed out, and as Petitioner concedes, Counsel could not advise her the proximate-cause felony murder did not apply because it is not clear which theory South Carolina uses, if any. App. pp. 120-21; Brief of Petitioner p. 4. Additionally, even if the agency

theory applies, it is a red herring because, as Petitioner repeatedly notes, she was not acting in concert with a co-felon, so there is no need to apply either theory of felony murder. Brief of Petitioner pp. 20-21. Petitioner *alone* was the proximate cause of the car crash and Pruett's death *as a principal*, so Counsel's advice was not deficient, even if he used a confusing or incorrect title for the legal theory he was describing.

Murder, at common law, is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2018). See also Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) ("There is no distinction between statutory and common law murder: the statute is merely declaratory of the common law."). If a killing occurs during the commission of a felony, the jury may, based on the facts and circumstances of the case, infer malice sufficient to support a conviction for murder. The commission of a felony, then, is simply a circumstance from which a jury can find implied malice. See, e.g., Lowry v. State, 376 S.C. 499, 502, 657 S.E.2d 760, 761-62 (2008) ("The murder charge specifically explained the finding of malice beyond a reasonable doubt and addressed inferences of malice which may be drawn from certain facts, such as the performance of an unlawful act, the use of a deadly weapon, and the commission of a felony (known as the felony-murder doctrine).") (reversing the PCR court's decision to deny relief but explicitly approving the original jury instruction that malice may be inferred from the commission of a felony).

For example, in Norris, the defendant became angry and beat the victim during the course of a sexual assault, although he maintained at trial he had no intention of killing her. 285 S.C. at 92, 328 S.E.2d at 343, 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). The Supreme Court of South Carolina approved the Norris jury charge as to the malice element of murder in which the

trial judge instructed "if [the killing] was during the commission of a felony, you can consider that as facts and circumstances from which malice can be inferred." Id. at 91-92, 406 S.E.2d at 342 (finding no error in the trial judge's "comment upon the felony-murder rule"). All that is needed, then, for a defendant to be guilty of "felony murder" in South Carolina is for the jury to find a defendant killed the victim, with malice, which may be inferred from the fact that the killing took place during the commission of another felony.

Petitioner argues her case is distinct from cases such as Norris because she was not the "one who inflict[ed] an injury" on Pruett, as Pruett collided with as Gray and Askins's car, not Petitioner's car. Brief of Petitioner pp. 19-21. Essentially, Petitioner argues Gray and Askins acted independently, and obviously not as co-felons or co-conspirators, to cause Pruett's death, such that Petitioner was not the proximate cause and cannot be liable. Brief of Petitioner pp. 19-21. This argument ignores the totality of the circumstances giving rise to the victim's death, and, as discussed above, leads to the absurd result in which no one is held criminally responsible for Pruett's death.

The State's evidence showed Petitioner was actively involved in stalking, chasing, and firing upon the car carrying Gray and Askins at the time the crash occurred. App. pp. 15, 35, 88. Gray was struck by a bullet, and Petitioner was pursuing Gray and Askins at a high rate of speed, crossing into oncoming traffic to pull up alongside their car. App. pp. 36-37. The State presented facts at the plea hearing to show Petitioner's pursuit of Gray and Askins was still in progress at the time of the collision. For example, Askins was on the phone with the 911 operator when shots were fired and the crash occurred. App. p. 16, 36.[2] If Petitioner had succeeded in killing them, either by shooting them or by injuries sustained in the crash, there can be no question it

[2] Notably, Petitioner decided to plead guilty immediately after this 911 call was played for the jury. App. pp. 16, 95.

would have been proper to charge Petitioner with their murders. See Simmons v. State, 264 S.C. 417, 422, 215 S.E.2d 883, 885 (1975) ("It is difficult to conclude that the killing of a person with malice using an automobile is less obnoxious than killing one with malice by the use of a gun. In either case the victim is dead."). The same is true regarding Pruett, despite the fact that she was not the intended victim.

In Dantonio, the defendant was driving drunk and speeding when he struck a car that pulled out in front of him, causing him to then careen across the highway and collide head-on with a second car, killing both occupants. 376 S.C. at 607, 658 S.E.2d at 344. This Court approved a jury instruction on proximate cause explaining:

> Proximate cause is the direct cause, the immediate cause, the efficient cause, the cause without which the death would not have resulted. Now, there may be more than one proximate cause. The acts of two or more persons may combine together to be a proximate cause of the death of a person. The Defendant's act may be regarded as the proximate cause if it is the direct cause to the death of the victim. The fact that other causes also contribute to the death of the victim does not relieve the Defendant from responsibility. The Defendant's act need not be the sole cause of death, but it has to be the direct cause, without which the death of the victim would not have resulted. . . .

Id. at 376 S.C. at 601, 658 S.E.2d at 341; see also Mellen v. Lane, 377 S.C. 261, 279–80, 659 S.E.2d 236, 246 (Ct. App. 2008) ("The touchstone of proximate cause in South Carolina is foreseeability. . . . Foreseeability is determined by looking to the natural and probable consequences of the act complained of.").

Here, *Petitioner's actions* of recklessly driving her car – speeding, pulling into oncoming traffic, discharging a firearm into another moving vehicle while driving her own – during the course of her attempt to murder Gray and Askins were the proximate cause of the death of a third party. Moreover,

> the law recognizes further there may be more than one proximate cause. The acts of two or more persons may combine and concur together as an efficient

> or proximate cause of the death of a person. The defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased.

State v. Burton, 302 S.C. 494, 496–97, 397 S.E.2d 90, 91 (1990) (approving above jury instruction as correct charge on the law of proximate cause). Although Petitioner did not strike Pruett's car herself, but for her actions in chasing and firing upon Gray and Askins, there would have been no car crash – which was a direct and easily foreseeable consequence of Petitioner's actions. See Mellen, at 286, 659 S.E.2d at 249 ("Lane shoved Mellen in the back, and... this act proximately caused the fracas, without which Mellen would not have been injured. But for Lane's action, there would have been no brawl and no injury. While it is not necessary for Lane to have contemplated the exact result of Mellen being struck with a bottle, the altercation and actions therein were the natural and probable consequences of Lane's initiation of the fight under the attendant circumstances."). There is no question, under these facts, that a car crash involving other members of the public using the roadway was a direct, foreseeable result of Petitioner's actions. Thus, Petitioner was the proximate cause of Pruett's death, which, in conjunction with the doctrine of transferred intent discussed below, is sufficient for a jury to find her guilty of murder.

Crucially, this is the exact advice Counsel gave Petitioner. Counsel testified he advised Petitioner, "[i]f you commit a felony that involves some inherently dangerous activity and a homicide – unintended homicide – results. . . from that, that the malice can be. . . inferred from the commission of the underlying felony. . . . I thought we *might* have problems with that rule." App. p. 85 (emphasis added). He also stated he discussed with Petitioner the argument that she may not have been the proximate cause of the death

and informed her that would be an issue to be decided at trial either by the judge through a motion for a directed verdict or by the jury. App. p. 97, 103. Moreover, Petitioner asserts she argued at the evidentiary hearing "she would have gone to trial to argue the felony murder rule had she been properly advised about its applicability or potential applicability." Brief of Petitioner p. 22. However, Petitioner was asked, "*outside of what [Counsel] just said about the proximate cause*, if you had been told the felony murder rule does not apply to your case, would you have plead guilty," and Petitioner answered, "no." App. p. 104 (emphasis added). However, this question is nonsensical, as Counsel gave Petitioner correct advice as to the potential issue with proximate cause (although he somewhat confusingly referred to the doctrine as "the felony murder rule" instead), and she chose to plead guilty freely and voluntarily. App. pp. 11-15, 100. Moreover, Petitioner testified Counsel's advice to her "played a role" in her decision to plead guilty, but she did not testify his *induced* her decision to plead guilty, which is insufficient to meet the prejudice standard under Hill v. Lockhart. 474 U.S. 52, 58-59 (1985) (holding the Strickland prejudice prong, with respect to a guilty plea"focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process").

Because Counsel's advice regarding proximate cause was not deficient, nor was Petitioner prejudiced by his advice, Counsel was not constitutionally ineffective, and this Court should affirm the decision of the PCR court to deny relief.

C. Applicability of the doctrine of transferred intent

During the plea hearing, Solicitor Clements informed the plea court the State would have presented its case based on the theory of transferred intent had Petitioner's trial continued. App. p. 16; see State v. Williams, 427 S.C. 148, 150, 829 S.E.2d 702, 703 (2019) ("Normally,

transferred intent applies to general-intent crimes."), cf. State v. Smith, 420 S.C. 226, 845 S.E.2d 495 (2020) (declining to reach the question of whether the Court of Appeals erred in finding transferred intent applied in prosecution for attempted murder, a specific-intent crime, but noting on retrial the State had expressed its intention to charge Smith with ABHAN in relation to the victim, so "there would be no question as to the applicability of the doctrine on remand" because ABHAN is a general-intent crime). Nonetheless, Petitioner contends transferred intent only applies in cases where a "direct act by the defendant. . . result[s] in the death of an unintended victim." Brief of Petitioner p. 18. Petitioner cites State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), among others, in support of this contention. However, this assertion is inconsistent with the broad interpretation of the doctrine of transferred intent set forth in Fennell, and moreover, as discussed above, Petitioner's actions in chasing and firing upon Gray and Askins' car directly – if not solely – caused Pruett's death.

In Fennell, Fennell shot and killed an acquaintance over a dispute about money. Id. at 269-70, 531 S.E.2d at 514. A stray bullet also struck a bystander, who survived his injuries, and who Fennell had no intent to injure or kill. Id. at 270, 531 S.E.2d at 514. Fennell was nonetheless charged with assault and battery with intent to kill (ABIK) as to the bystander. Id. "The required mental state for ABIK, like murder, is malice aforethought." Id. at 275, 531 S.E.2d at 517. Fennell moved for a directed verdict, arguing the State had failed to prove any intent to kill and the doctrine of transferred intent did not apply because the harm he intended to inflict on the acquaintance (the intended victim) was different than the harm inflicted on the bystander (the unintended victim) and because any intent to kill was "fully satisfied" by the death of the intended victim. Id. at 270-71, 531 S.E.2d at 514.

In analyzing whether the trial court properly denied Fennell's motion, the South Carolina Supreme Court explained the idea of transferred intent "like a spotlight emanating from its source – the defendant's mind – to its target – the intended victim," which "is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who is also injured or killed." Id. at 271, 531 S.E.2d at 515. Further, the Fennell court cited with approval cases from other jurisdictions standing for the proposition that "transferred intent [applies] to all crimes where an unintended victim is harmed as a result of defendant's specific intent to harm an intended victim, regardless of whether the intended victim is injured. . . ." Id. at 276, 531 S.E.2d 518 (citing Ochoa v. State, 981 P.2d 1201, 1205 (Nev. 1999)). The Court then explicitly concluded intent to kill is transferrable from one victim to another through the doctrine of transferred intent. Id. at 276-77, 531 S.E.2d at 517-18. As the South Carolina Supreme Court explained, "[a] person who, acting with malice, *unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim*." Id. at 273, 531 S.E.2d at 517 (emphasis added). This broad concept of intent clearly encompasses unintentional or indirect consequences and closely approximates the proximate-cause theory of felony murder discussed above.

Put another way, "transferred intent makes a whole crime out of two halves by joining the intent to harm one victim with the actual harm caused to another." Williams, 427 S.C. at 140, 829 S.E.2d at 702-03.Applying this broad concept of transferred intent to Petitioner's case, it is clear the "deadly force" unleashed by Petitioner was not just the bullets she fired from her gun, but also her conduct in stalking and pursuing Gray and Askins in her car. Petitioner used both her car and her gun to drive Gray and Askins into oncoming traffic, resulting injury and death to

Pruett. App. pp. 15-16. Petitioner's intent was to kill Gray and Askins, and had she succeeded, whether by a bullet or by causing them to wreck their car, she would have been guilty of murder. Instead, the deadly force she unleashed – not just the bullets from her gun by the overall chaos of the car chase and crash – merely injured its intended victims but killed an unintended victim, the opposite of what occurred in Fennell. Regardless, the doctrine of transferred intent requires Petitioner to answer for her actions as if her intent to kill had been directed towards Pruett all along. "When a defendant contemplates or designs the death of another, the purpose of deterrence is better served by holding that defendant responsible for the knowing or purposeful murder of the unintended as well as the intended victim." Id. at 276, 531 S.E.2d at 517 (quoting State v. Worlock, 117 N.J. 596, 569 A.2d 1314, 1325 (1990)). Therefore, under Fennell and Williams, the intent to kill motivating Petitioner's conduct in injuring and attempting to kill Gray and Askins was transferrable to Pruett.

Accordingly, Petitioner's murder conviction was proper under the theory of proximate cause combined with transferred intent, which the State indicated it would have argued had Petitioner continued with her trial. App. p. 16. Therefore, Counsel's advice to Petitioner was not deficient, and this Court should affirm the decision of the PCR court to deny relief.

D. Depraved-heart murder

Finally, even if Counsel's advice regarding proximate cause was incorrect, Petitioner was not prejudiced by the advice because she could have properly been convicted at trial under the depraved-heart theory of murder. Accordingly, because Petitioner cannot prove prejudice, Counsel was not constitutionally ineffective, and this Court should affirm the decision of the PCR court.

It is axiomatic that malice may be inferred from conduct showing a total disregard for human life. See, e.g., State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941) ("[M]alice as an essential ingredient of murder does not necessarily import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others. . ."). In State v. Mouzon, 231 S.C. 655, 661-2, 99 S.E.2d 672, 675 (1957), the seminal depraved-heart murder case in South Carolina, Mouzon was intoxicated, driving more than double the posted speed limit through town, and ignored his passenger's repeated pleas to slow down when he struck and killed a pedestrian crossing the highway. The Mouzon court upheld the murder verdict, noting that while "the facts in a motor vehicle accident will rarely sustain a conviction, since the element of malice is missing... [m]alice does not necessarily mean an actual intent to take human life. It may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." Id. at 662-63, 99 S.E.2d at 676. Similarly, in Petitioner's case, although she did not intend to kill Pruett, there can be no doubt her conduct in chasing Gray and Askins' vehicle with her own and firing upon them, "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." Id. at 662, 99 S.E.2d at 675.

Thus, even if Counsel improperly advised Petitioner as to the applicability of proximate cause and/or transferred intent in her case, the alternate theory of depraved-heart murder was sufficient to convict Petitioner, so there was no prejudice to Petitioner. Accordingly, Counsel was not constitutionally ineffective, and this Court should affirm the decision of the PCR court denying relief.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's finding Counsel provided effective assistance where he properly advised Petitioner as to her criminal responsibility for murder because she was the proximate cause of the victim's death and where there was no prejudice to Petitioner in any event because she was still liable for the murder under the theory of depraved-heart murder.

Respectfully submitted,

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December 14, 2020