

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JUL 30 2013

JEFFREY MICHAELSON,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002373

PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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1.

Whether the PCR court erred in finding defense counsel provided effective representation despite her failure to argue the state opened the door to examination about Katherine Feaster's statement that her stepfather, the decedent, touched her breast on the day of his death, and she told her husband and brother, which provided a motive for them, petitioner's codefendants, to kill the decedent that did not apply to petitioner, who was unrelated to the family, and

i.

the PCR court erred when it found the trial court's pretrial ruling about sexual abuse of Katherine Feaster by the decedent controlled during trial, since the trial court explicitly addressed its ruling only applied to opening statements, and

ii.

the PCR court erred when it found petitioner was not prejudiced by this error because trial counsel argued the issue of sexual assault in closing argument, since closing argument is not evidence?

STATEMENT

Dr. Erin Presnell, a forensic pathologist at MUSC, received the body of Parrish Reeves for autopsy on August 8, 2007, in an “oil barrel” that had been buried underground for “many years.” App. 808, ll. 18-20; App. 810, ll. 20-23; App. 810, ll. 21-25; App. 811, l. 21- 812, l. 6. Reeves had been shot the head and put headfirst into the barrel, along with a “Tazmanian devil” stuffed animal. App. 823, ll. 10-14; App. 811, l. 25 – 812, l. 3; app. 837 l. 25 – 838, l. 13. His pockets contained over \$1400 in cash. App. 837, ll. 20-21.

Reeves was killed in January of 2001. App. 295, ll. 11-15; App. 496, l. 24 – 497, l. 1. His wife Brenda did not initially report him missing, because she thought he “had run from his taxes.” App. 316, ll. 1-6. Until Reeves’ truck was found in 2003 or 2004, his wife thought he was “with some other girl, carrying on. Until they found the truck, then I got a little concerned.” App. 321, l. 24 – 322, l. 2. However, Brenda did call the police to report a burglary—at first she thought Reeves had been coming back in the house and taking things, but decided to report him missing. App. 961, ll. 14-19; App. 318, l. 6 – 320, l. 10.

Reeves was the stepfather of Brenda’s children: Jeremiah Scharer and Katherine Feaster. App. 603, ll. 8-10. App. 602, ll. 2-4. Reeves did not have a good relationship with his stepson because he thought Jeremiah Scharer “was a bad kid, who “used to get spankings and beatings and stuff.” App. 670, l. 17 – 671, l. 6. Reeves made Scharer “drink s[c]ummy dog water because he had forgot to change the water.” App. 1312. Once when Reeves’ wife (Scharer’s mother) “didn’t understand what he was saying . . . he slammed her head into a fence pole or something.” App. 671, ll. 8-13. Scharer left home at age sixteen because he “liked being with . . . other people better than my family.” App. 602, ll. 16-20; App. 672, ll. 4-8.

In 2006, the case of Reeves' disappearance had gone "cold." App. 961, ll. 19-21. Detective Merrithew was assigned the case, checked pawn shop records, and found that Katherine Feaster had pawned a piece of jewelry that was reported stolen in the unsolved burglary that occurred at Reeves' home around the time of his disappearance. App. 961, l. 21 – 962, l. 22. Katherine Feaster was arrested for possession of stolen goods, and Detective Merrithew and Sergeant Freeman interviewed her about Reeves' disappearance. App. 963; ll. 1-6; App. 1311 – 1314.

When Katherine Feaster was questioned about Reeves' disappearance, she told police that when she became eleven or twelve, Reeves "made me keep my door open," and started to "touch me around my breast." App. 1311. She said she tried to tell her mother, but her mother "said he was just being affectionate." App. 1312. Katherine Feaster said Reeves "made me pull down my pants and he beat me with a switch until I bled." App. 1312.

At the time of Reeves' disappearance, Scharer was eighteen years old, and Katherine was married to Treze "Trey" Feaster. App. 601, ll. 15-16; App. 602, ll. 5-6. Katherine married Trey when she was around age eighteen, and Reeves "hated Trey." App. 1312. Katherine said: "I didn't have to tell Trey what [Reeves] was doing, he could see it." App. 1312.

In addition to disclosing her childhood physical and sexual abuse by Reeves to detectives, Katherine said that on January 17, 2001, she had a young son, her husband was out of work, and she "couldn't pay the bills." App. 1312. Katherine said she went to Reeves' home and asked him to borrow some money, but that he "started laughing." App. 1312. He asked: "What are you going to do for me?" App. 1312. Katherine wrote in her statement to police: "**He went to put his arm around me, brushing my breast. Again he said, 'Oh, I didn't mean to touch you there.' I told him screw you and left.**" App. 1312 – 1313 (emphasis added). "I went home and told

Trey. My brother was there too. Trey stormed out really pissed off. My brother went with him. They were gone about an hour when they came back, they were with [petitioner] in his truck.” App. 1313 (emphasis added).

“I asked Trey what happen[ed.] He said I didn’t need to know, it was an accident. He then told me [petitioner] had a gun. He pulled the trigger. Trey went over there to beat [Reeves’] ass, not to kill him.” App. 1313. Katherine continued: “Several months later, after we moved from [redacted] Starbright Drive, Trey told me they had buried him in [petitioner’s] front yard. [Petitioner] lived in the trailer in front of us.” App. 1313.

Police had previously documented “that Trey Feaster had burglarized Parrish Reeves’ home prior to him going missing.” App. 544, ll. 17-20. After his eventual arrest for Reeves’ murder, Trey Feaster was transported from the jail to “identify the location of the barrel” so that law enforcement “knew where to dig.” App. 419, l. 15 – 420, l. 7. The barrel with Reeves’ body was found buried on a tract of land at Starbright Lane that had at least two mobile homes on it. App. 536, ll. 6-23. Petitioner had lived in one of the trailers, and the body was found in his “front yard.” App. 524, l. 23 – 525, l. 7.

Based on Katherine’s statement, police interviewed Trey Feaster, Jeremiah Scharer, and petitioner. App. 963, ll. 18-19. Katherine, her husband Trey, and her brother Scharer all named petitioner as the shooter. App. 1234, ll. 12-25. “[Petitioner] wasn’t in at all until they implicated him.” App. 1234, ll. 12-13. However, their statements were inconsistent in “terms of how it all came about. The plan to kill Mr. Reeves.” App. 969, l. 14 – 970, l. 4.

On November 18, 2009, a Berkeley County Grand Jury indicted petitioner for the murder of Parrish Reeves.¹ App. 1333 – 1334. Trey Feaster and Jeremiah Scharer were also charged with Reeves’ murder. App. 275, l. 15 – 276, l. 1; App. 608, ll. 14-15; App. 1309. At the time of trial, petitioner was the thirty-year-old father of two small children, and had no criminal record. App. 954, ll. 1-4; App. 954, l. 24 – 955 l. 1. No one was aware of any reason petitioner would want to harm Reeves. App. 637, ll. 4-6; App. 1236, ll. 8-9; App. 970, ll. 15-18; App. 637, ll. 4-6.

Petitioner was tried first, before the Honorable Kristi Lea Harrington and a jury, from June 28-30, and July 1, 2010. App. 1. Patricia Kennedy and David Schwacke represented petitioner. App. 1. Anne Williams and Bryan Alfaro represented the state. App. 1. Defense counsel thought petitioner and Trey Feaster were being tried together, but was told by the solicitor the morning of trial that the state had decided to “sever these cases.” App. 24, ll. 4-6.

The state argued a motion in limine to prevent defense counsel from referencing the “victim’s character” in her opening argument. App. 256, l. 10 – 257, l. 14. The solicitor said there was a “statement by one of the other defendants that [Reeves] had made improper sexual advances toward her. She is not going to be called as a witness. And that’s just not true, there’s no evidence of that, and [petitioner] never alleges that.” App. 257, ll. 5-9. The solicitor said that Katherine Feaster’s statement that Reeves touched her sexually was contradicted by a “jail tape [in which] she goes on and on about how she lied about that.” App. 265, ll. 20-24.

Defense counsel responded that she should be able to discuss “sexual overtures by the victim. That’s the whole rationale and motive for this happening. It has nothing to do with placing the victim’s character in evidence.” App. 261, ll. 18-23. “Your Honor, in Katherine

¹ Petitioner was also indicted for a second-degree burglary of Reeves’ dwelling, but the jury found him not guilty at trial. App. 1335 – 1336; App. 945, ll. 21-25.

Feaster's statement she makes a reference to the fact that he touched her breast." App. 263, ll. 23-25. "I'm allowed to explore motive. My client had no motive to do any of this." App. 264, ll. 16-17.

The state argued defense counsel should not be allowed to explore whether Reeves touched Katherine Feaster's breast because petitioner said that **he** was not aware of this allegation in his statement to police. App. 265, ll. 15-19; App. 266, ll. 4-10.

The parties and court framed this motion as one pertaining to opening statements, on four different occasions. App. 256, ll. 14-23; App. 262, ll. 2-4; App. 267, ll. 3-6; App. 268, ll. 7-9. The court ruled that defense counsel could refer to Reeves' "volatile and abusive" relationships with petitioner's codefendants in her opening statement. App. 268, l. 2 – 269, ll. 3. Defense counsel clarified that this ruling on the state's motion in limine applied to opening statements.

MS. KENNEDY: [I]f I am going to be restricted from exploring that in cross-examination of the witnesses, if we could just take care of that issue prior to my examination?

THE COURT: Yes, ma'am.

App. 269, ll. 4-9.

Sergeant Diana Freeman testified about the investigation, and defense counsel attempted to cross-examine her about whether Jeremiah Scharer and Katherine Feaster had a "good relationship" with Reeves, and the state objected to the line of questions as calling for hearsay. App. 571, l. 10 – 572, l. 6. An off-the-record bench conference was held, and when it was concluded, the court sustained the objection and instructed defense counsel to rephrase the question. App. 572, ll. 7-18. Defense counsel asked Sergeant Freeman: "[W]hat information did you learn about the relationship that each of these people had with the victim in this case?" App. 572, ll. 21-24. Freeman began answering, the state again objected, and another off-the-record

bench conference occurred. App. 572, l. 25 – 573, l. 13. The objection was sustained. App. 573, l. 14.

On redirect, the state asked Sergeant Freeman whether Katherine Feaster’s statement implicated petitioner, and Freeman responded that Katherine Feaster did, in fact, implicate petitioner. App. 595, ll. 3-19. Defense counsel did not object, and did not attempt re-cross of the witness, so the jury did not hear the context of this accusation. App. 597, ll. 18-21. Counsel was unable to call Katherine Feaster as a witness and compel her testimony on this matter, because her charges were still pending. App. 960, ll. 13-15; App. 1308 – 1310.

Despite the fact that Jeremiah Scharer’s statement to law enforcement “indicated deception” and he “flunked” a polygraph twice, the state chose to call him as a witness against petitioner. App. 205, ll. 20-25. Scharer was also charged with the murder, and did not have an agreement with the state. App. 608, ll. 6-15. Scharer claimed that while he was visiting his sister, petitioner was there, petitioner came out of a back room with Trey Feaster, and petitioner made a comment they were “going to deal with” Reeves. App. 604, ll. 8-11; App. 606, ll. 1-13.

Scharer claimed that he left with Trey Feaster and petitioner in petitioner’s truck. App. 606, ll. 16-24. Scharer said Trey Feaster dropped off Scharer and petitioner to walk up to Reeves’ house, and use a ruse to get him to come out by saying their truck was stuck. App. 609, ll. 1-14; App. 612, l. 21 – 613, l. 2. Scharer said the plan was that he would be dropped off by Trey Feaster “at the bottom of the road,” approach Reeves’ house on foot, knock on the door, and get his stepfather to come out of the house. App. 609, ll. 3-11. Scharer alleged that while they were walking up, petitioner showed him a pistol with a homemade silencer, and at that point Scharer knew his stepfather was going to be killed. App. 609, ll. 12-24; App. 610, ll. 10-21.

Although Scharer admitted he knocked on the door, Scharer alleged he did not speak at all with his stepfather. App. 643, ll. 14-16; App. 644, ll. 3-5; App. 645, ll. 18-22. Scharer claimed petitioner told Reeves something about a “truck stuck in a ditch.” App. 644, ll. 6-16.

Scharer said Reeves got in his own truck to take them “down the road” where the fictitious truck was supposedly stuck. App. 613, ll. 1-7. Scharer claimed Reeves drove, petitioner was in the passenger seat, and Scharer was in the truck bed. App. 613, l. 3-11. Scharer claimed that during the ride, he “felt the truck sway back and forth.” App. 614, ll. 11-13. He said the truck kept moving, and turned onto another road. App. 614, ll. 18-19. Scharer alleged that when the truck stopped, “the driver’s side door came open,” and maintained he saw that petitioner was now driving and Reeves was “slumped over on the floorboard.” App. 614, l. 21 – 615, l. 11. Scharer claimed petitioner told him to get back in the bed of the truck, and that he rode back to Reeves’ house with petitioner. App. 615, l. 20 – 616, l. 3. Scharer agreed on cross-examination that the “story” he was telling at trial was not the “same story” he gave to police officers. App. 684, ll. 9-13.

Petitioner’s statement to police was recorded and played during the trial. App. 513, l. 9 – 514, l. 16. Petitioner told detectives “that [Trey] Feaster shot Mr. Reeves in the head.” App. 965, ll. 9-10. Petitioner said that he was in the back of the truck, and Scharer was in the cab of the truck with Reeves, and that Trey Feaster killed Reeves when the truck stopped. App. 965, ll. 11-14. Petitioner said they got to “the bottom of the road and Trey Feaster jumps from the bushes and leans in the passenger side and shoots [Reeves].” App. 882, ll. 23-25.

Petitioner admitted renting a backhoe and helping Trey Feaster bury Reeves’ body in his yard. App. 527, ll. 18-20. Petitioner said it was his gun that Trey Feaster had used, and that he

later threw the gun into a canal. App. 528, l. 14 – 529, l. 2. Petitioner said Trey Feaster “threatened to kill me” too. App. 904, l. 23 – 905, l. 4.

Petitioner “was the only non-family member in this whole case.” App. 1235, ll. 17-19. There was no evidence that petitioner even knew Reeves. App. 1235, l. 21; App. 974, ll. 15-19; App. 970, ll. 5-18. Trey Feaster told Detective Merrithew that petitioner’s motive was that he **“wanted to shoot Mr. Reeves because his grandmother died that day and he just felt like killing somebody.”** App. 41, ll. 17-20; App. 974, ll. 12-17 (emphasis added). Defense counsel felt Trey Feaster’s claim that petitioner had a motive to kill Reeves because “his grandmother had died” to be bizarre and “not believable.” App. 1257, ll. 2-11. However, the jury never heard about this alleged motive at petitioner’s trial.

In closing, defense counsel remarked: “[T]here is reason to believe that **Mr. Reeves made improper—had made improper sexual advances toward Kat Feaster which, of course, is only going to inflame her husband, Trey Feaster.**” App. 906, ll. 2-6 (emphasis added). There was nothing in evidence about this matter, however, because defense counsel did not get into the alleged breast-touching by Reeves, as discussed above.

Petitioner was found guilty and sentenced to forty-five years in prison for the murder. App. 1332. Trey Feaster pleaded guilty to the reduced offense of voluntary manslaughter. App. 1247, ll. 2-6. This Court can take judicial notice Treze Feaster has a projected release date of 2024.² Jeremiah Scharer pleaded guilty to accessory after the fact, and Katherine Feaster pleaded guilty to receiving stolen goods. App. 1247, ll. 7-21.

² SCDC public inmate search, search performed July 30, 2018:
<https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000342959>.

On November 4, 2015, after his conviction and sentence were affirmed on direct appeal,³ petitioner filed an application for post-conviction relief (PCR).⁴ App. 1174 – 1181. A hearing was held before the Honorable Michael Nettles on July 31, 2017. App. 1193. Lance Boozer represented petitioner, and Lindsey McAllister represented the state. App. 1193.

At the PCR hearing, petitioner alleged defense counsel was ineffective for failing to argue the state opened the door for allowing hearsay testimony of Katherine Feaster. App. 1190; App. 1255, ll. 12-14. Katherine Feaster’s written statement to law enforcement was made an exhibit at the PCR hearing. App. 1256, ll. 8-20; App. 1311 – 1314.

Sergeant Freeman had written out Katherine Feaster’s statement. App. 1258, ll. 1-6. PCR counsel asked defense counsel about her unsuccessful attempts to elicit information about Katherine Feaster’s statement that Reeves was killed because she told her husband and brother that he had touched her breast again. App. 1259, l. 1. – 1260, l. 5. Defense counsel agreed she attempted to get into Katherine Feaster’s statement with Sergeant Freeman, but was “shut down” by the solicitor’s objection and the bench “conference with the trial judge.” App. 1263, ll. 8-18. Counsel admitted she “made a mistake by not requiring [the bench conference] to be on the record,” so the issue was not preserved for direct appeal. App. 1263, ll. 14-18.

Defense counsel admitted that she did not argue the state opened the door to Katherine Feaster’s statement by their questioning of Detective Freeman on redirect. App. 1260, l. 12 –

³ On appeal, petitioner argued the trial judge abused her discretion by denying the defense a continuance to secure the presence of Detective Merrithew, because he had voluntarily left the country for Afghanistan after being available for over thirty terms of court, had returned once to Berkley County after leaving the country, and the first trial judge had ruled the Detective was a material witness.

⁴ The state made its return on June 9, 2016. App. 1183 – 1188. Petitioner filed an amended application on July 13, 2017. App. 1190 – 1191.

1261, l. 5; App. 1263, l. 20 – 1264, l. 2. Defense counsel agreed this was a “believable motivation’ that did not involve petitioner, and that never came out at trial. App. 1263, ll. 1-7. Defense counsel agreed she should have made the argument the state opened the door to re-cross on Katherine’s statement because the solicitor asked Detective Freeman on redirect if Katherine implicated petitioner. App. 1264, ll. 3-16. Defense counsel said this evidence would have assisted petitioner at trial. App. 1264, ll. 17-20. However, defense counsel did not attempt any re-cross. App. 1263, l. 25 – 1264, l. 2.

PCR counsel explained that he was not arguing about Katherine’s entire statement regarding childhood sexual abuse by Reeves, but about the “particular incident” on the day of Reeves’ death. App. 1300, ll. 10-25.

The PCR court issued an order of dismissal on November 6, 2017, and addressed petitioner’s allegation that the state’s redirect of Detective Freeman “opened the door” for defense counsel to go into the statement, but that counsel “failed to make that argument” at trial. App. 1315; App. 1329. The order of dismissal states the PCR court: “finds **the issue of the victim’s alleged sexual misconduct was ruled upon during pre-trial motions, and this ruling controlled during trial.** Further, the Court finds the State’s question did not open the door or give Counsel a basis to challenge the previous ruling, despite Counsel’s assessment of her own performance.” App. 1330 (emphasis added).

Additionally, Counsel was able to cross-examine Scharer regarding physical abuse by the victim, and she **argued the issue of sexual assault during closing. Therefore, this Court finds Applicant has not met his burden of proving he was prejudiced** by the lack of testimony on these issues or that he would have been likely to prevail on this issue on appeal even if it had been preserved.

App. 1330 (emphasis added).

This petition for writ of certiorari follows.

ARGUMENT

1.

The court erred in finding defense counsel provided effective representation despite her failure to argue the state opened the door to examination about Katherine Feaster's statement that her stepfather, the decedent, touched her breast on the day of his death, and she told her husband and brother, which provided a motive for them, petitioner's codefendants, to kill the decedent that did not apply to petitioner, who was unrelated to the family, and

i.

the PCR court erred when it found the trial court's pretrial ruling about sexual abuse of Katherine Feaster by the decedent controlled during trial, since the trial court explicitly addressed its ruling only applied to opening statements.

The PCR court's finding that "the issue of the victim's alleged sexual misconduct was ruled upon during pre-trial motions, and this ruling controlled during trial," was error, because the trial court, solicitor, and defense counsel all couched the issue as one regarding opening statements only.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349

S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). “Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.” *Strickland*, 466 U.S. at 695-96.

A fair reading of this record shows that the trial judge’s ruling on the state’s motion in limine was only about counsel’s opening statements. As discussed *supra*, the parties and counsel framed the issue and the trial court ruled on the issue as pertaining to **opening statements** on four different occasions. App. 256, ll. 14-23; App. 262, ll. 2-4; App. 267, ll. 3-6; App. 268, ll. 7-9. Defense counsel clarified that this ruling on the state’s motion in limine applied to opening statements, not cross-examination, and the court agreed. App. 269, ll. 4-9.

“It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.” *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). *State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (where defendant “opened the door” about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out defendant’s prior criminal domestic violence conviction).

Cf. State v. Cabrera-Pena, 361 S.C. 372, 377, 605 S.E.2d 522, 524-25 (2004) (when part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited); Rule 106, SCRE (when a statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it).

Because the solicitor questioned Sergeant Freeman about Katherine Feaster's statement to the officers, it opened the door for defense counsel to explore the statement on re-cross. The state brought out that Katherine implicated petitioner on redirect, but the jury did not hear that accusation in context—it did not hear she told her husband and brother that Reeves, her stepfather, touched her breast that day. Katherine's statement provided a reason why petitioner's codefendants had a motive to kill Reeves, that petitioner did not possess. Because the state opened the door, petitioner was entitled to put Katherine's accusation in context.

Katherine Feaster's statement contradicted Jeremiah Scharer's testimony in a crucial regard—Scharer said petitioner was at the Feaster's house, that petitioner and Trey Feaster came out of a back room, and petitioner said they were “going to deal with” Reeves. App. 606, ll. 1-13. However, Katherine Feaster said she was with her husband and brother when she accused Reeves of touching her breast, that her husband “stormed out” after hearing the accusation, and that petitioner only “came back” with them. App. 1313. The jury never heard these details.

Moreover, Katherine Feaster's statement would not be hearsay, as it would **not** be offered for the truth of the matter asserted—that Reeves actually touched Katherine's breast. Instead, it would be offered to show motive. The solicitor argued the touching never happened, and that Katherine had subsequently said this allegation was false in a jail tape. Katherine Feaster's statement that her stepfather touched her breast, regardless of whether it was true, provided her husband and brother with a plausible motive to kill him. Moreover, Jeremiah Scharer and his mother had both been physically abused by Reeves; Trey Feaster and Reeves “hated” each other.

Petitioner had no motive to kill Reeves. Defense counsel was deficient when she failed to argue the state's questioning on redirect opened the door to this testimony. If the jury had heard Reeves' family members had this plausible motive, it is likely they would have found petitioner

was merely present, and assisted in hiding evidence of the crime after the fact, as he told police, because he was afraid of Trey Feaster.

The omission of this testimony altered the entire evidentiary picture. Petitioner was prejudiced because there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *Strickland*, 466 U.S. at 687.

ii.

The PCR court erred when it found petitioner was not prejudiced by this error because trial counsel argued the issue of sexual assault in closing argument, since closing argument is not evidence.⁵

The PCR court's determination petitioner was not prejudiced because defense counsel argued sexual assault in her closing was an error of law. This Court reviews questions of law de novo, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018). Closing arguments are not evidence. *State v. Charping*, 333 S.C. 124, 133, 508 S.E.2d 851, 856 (1998); *Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987); *State v. Parvin*, 413 S.C. 497, 508, 777 S.E.2d 1, 6 (Ct. App. 2015). "What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence." 23B Am. Jur. Pl. & Pr. Forms Trial § 247.

The order of dismissal stated that because defense counsel cross-examined Scharer on physical abuse and argued the issue of sexual assault during closing, petitioner failed to prove prejudice. App. 1330. The court erred as a matter of law, because counsel's closing argument was not evidence. *Charping*, 333 S.C. at 133, 508 S.E.2d at 856. For defense counsel to make this argument without the jury having heard any basis in evidence for such an assertion likely seemed desperate, offensive, and backfired on petitioner.

Nor did counsel's cross-examination of Scharer regarding his childhood physical abuse make up for the lack of evidence about the immediate and plausible motive that Scharer and Trey Feaster had to kill Reeves—Katherine's accusation of sexual misconduct by her stepfather on the

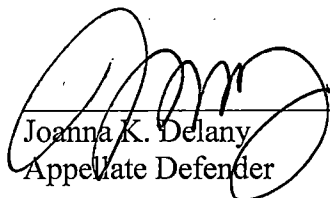
⁵ Petitioner incorporates the legal discussion section from Issue 1, section i, *supra*, into the discussion of section ii.

day of his death. Although there was evidence of this, the jury never heard it due to counsel's error.

"*Motive* is the actor's subjective reason for doing the act." *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 172, 383 S.E.2d 2, 7 (Ct. App. 1989) (emphasis in original). Although motive is generally not an element of a crime, it may be extremely probative where malice is an element of the offense. *State v. Sweat*, 362 S.C. 117, 124-25, 606 S.E.2d 508, 512 (Ct. App. 2004). The state failed to show any motive that petitioner had to kill Reeves. Counsel's failure to bring out the very plausible motive possessed by Reeves' family members was prejudicial error. The court erred when it found petitioner was not prejudiced by counsel's deficiency. *Strickland*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.

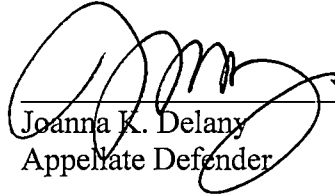

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

JEFFREY A. MICHAELSON,

PETITIONER

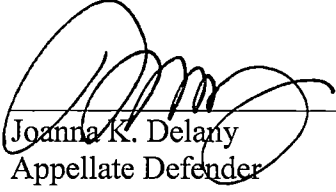
V.

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 Megan Harrigan Jameson, 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 Jeffrey A. Michaelson, #341675, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of July, 2018.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

Maia Henderson (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023