

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Berkeley County

Honorable R. Kirk Griffin, Circuit Court Judge  
—————

DONTE S. BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001382  
—————

PETITION FOR WRIT OF CERTIORARI  
—————

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S.C. SUPREME COURT

**INDEX**

INDEX ..... i

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT

1.

The post-conviction relief (PCR) court erred by finding trial counsel were not ineffective when they failed to move to exclude testimony from the state’s DNA expert pursuant to Rule 702, SCRE, and Rule 403, SCRE, where the expert was allowed to testify that 97.8 percent of the black population of the United States could be excluded as a possible contributor to the mixture of DNA found on the gun that was used during the armed robbery and shooting, but Petitioner could not be excluded, since such testimony was unfairly prejudicial, confusing, and misleading, and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had objected and the evidence was properly excluded.....14

2.

The post-conviction relief (PCR) court erred by finding trial counsel were not ineffective when they failed to object to the state’s DNA expert’s repeated inadmissible remarks that implicated Petitioner’s lack of an alibi during the timeframe of the armed robbery and Petitioner’s overall failure to present evidence, since such testimony was an improper comment on Petitioner’s right to remain silent, was burden shifting, and undermined Petitioner’s right to rely on the insufficiency of the state’s evidence at trial, and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected. ....19

CONCLUSION.....22

## **ISSUES PRESENTED**

1.

Did the post-conviction relief (PCR) court err by finding trial counsel were not ineffective when they failed to move to exclude testimony from the state's DNA expert pursuant to Rule 702, SCRE, and Rule 403, SCRE, where the expert was allowed to testify that 97.8 percent of the black population of the United States could be excluded as a possible contributor to the mixture of DNA found on the gun that was used during the armed robbery and shooting, but Petitioner could not be excluded, since such testimony was unfairly prejudicial, confusing, and misleading\_and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had objected and the evidence was properly excluded?

2.

Did the post-conviction relief (PCR) court err by finding trial counsel were not ineffective when they failed to object to the state's DNA expert's repeated inadmissible remarks that implicated Petitioner's lack of an alibi during the timeframe of the armed robbery and Petitioner's overall failure to present evidence, since such testimony was an improper comment on Petitioner's right to remain silent, was burden shifting, and undermined Petitioner's right to rely on the insufficiency of the state's evidence at trial, and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected?

## STATEMENT OF THE CASE

The state alleged at trial that Petitioner and Christopher Wilson robbed a Zaxby's restaurant in Goose Creek minutes after midnight on December 24, 2011. Two masked men, one armed with a pistol and the other with a knife, forced their way into the back of the establishment. The pair stole nearly four thousand dollars before fleeing the restaurant on foot. Before fleeing, the man with the gun shot the manager. The evidence against Petitioner was mostly circumstantial.

After his shift at Zaxby's ended around 11:00 pm on December 23, 2011, Jeffrey Taylor walked to his car to listen to music and make some phone calls. App. 221, l. 17 – 222, l. 15. His car was parked next to the dumpster near the back of the restaurant. App. 224, ll. 23-25. While sitting in his car, Taylor saw a light flashing and heard someone say "turn around." App. 222, ll. 16-19. He turned around and saw three people walking towards Zaxby's. App. 222, ll. 20-23. He recognized one person as his coworker, Ronnie. The other two people had on black clothing. Taylor did not see their faces. App. 222, l. 24 – 223, l. 6. One of the men had a gun "poked" into Ronnie's side and was "pulling him back towards the restaurant." App. 223, ll. 7-20. Taylor called 911. App. 225, ll. 13-16. When law enforcement arrived, Taylor told them the two men fled into the woods behind the restaurant. App. 227, ll. 10-11. He pointed "which direction they went." App. 227, ll. 8-11.

Riley Kemp, a cook at Zaxby's, testified that he was taking the trash out to the dumpster behind the restaurant shortly after it closed when he heard footsteps behind him. Two men wearing dark clothing and ski masks grabbed him. App. 238, l. 10 – 239, l. 7. One had a knife and the other had a gun. App. 239, ll. 12-13. They smashed his phone and took his wallet. App. 238, l. 18; App. 242, ll. 1-4. The men led Kemp to the backdoor of the restaurant and demanded he let them inside. App. 241, ll. 21-25; App. 243, ll. 3-13. When Kemp hesitated, one of the men "shook his gun" at

Kemp and again demanded he let them inside. App. 243, ll.11-15. Kemp “rang the buzzer” and Kevin Lane, another employee, opened the door. App. 243, ll. 15-25. The men ordered Kemp, Lane, and a third employee, Daniel Auman, to get on the ground. They complied. App. 243, l. 21 – 244, l. 22.

Gerlinda Williams was the assistant manager at Zaxby’s on the night of December 23, 2011. App. 278, l. 21 – 279, l. 6. She was in the office completing paperwork when a man with a knife approached her. App. 280, ll. 14-21; App. 286, ll. 6-10. A second man with a gun then walked into the office and instructed the first man to go to “the back.” App. 286, ll. 1-13. The man with the gun then ordered Williams to lay down on the floor outside the door to the office. App. 280, ll. 14-20. While Williams was on the floor, the man with the gun “rifled through” her pockets. He took eighteen dollars in cash. App. 281, l. 1. As he was “rifling through her pockets,” he shot her in the back. App. 280, ll. 17-25; App. 282, ll. 12-15. Both men were wearing all black and ski masks. App. 280, ll. 3-5. They took about thirty eight hundred dollars during the robbery. App. 281, ll. 15-21. They fled out the back door, the same door they entered through. They dropped as money as they ran. App. 245, ll. 2-3; App. 287, ll. 1-5.

That same night, Melvin Powell and his wife went Christmas shopping at Wal-Mart, a quarter mile from Zaxby’s. App. 293, l. 20 – 294, l. 6. When they were leaving, they noticed “a lot of commotion” and police cars “swarming” the area. App. 294, ll. 7-13. As they were driving down St. James Avenue in front of Zaxby’s, two men “came from the wooded area and jugged across the street directly in front of [them].” Powell’s wife, who was driving, had to slam on the brakes. App. 294, ll. 7-22. The men “proceeded across the road” and disappeared behind some bushes. App. 295, ll. 4-10. Powell’s wife pulled into Zaxby’s and they reported the encounter to the police. App. 296, l. 18 – 297, l. 25.

Sergeant Scott Clark with the Berkeley County Sheriff's Office K-9 Unit was asked to assist the Goose Creek Police Department with the investigation. App. 314, ll. 9-11. Officers with Goose Creek told Clark two people were seen running across the highway into the Foxborough Subdivision, a residential neighborhood. App. 314, ll. 12-14. Clark "started [his] dog at the entrance of Foxborough." App. 314, ll. 15-18. The dog picked up a scent and led Clark through the neighborhood. The dog eventually lost the scent in the area in front of 318 [REDACTED] Lane. App. 316, l. 19 – 317, l. 18. Clark assumed the suspects got into a car at that location. App. 315, ll. 1-5. During the track, Clark found money on the ground. App. 314, ll. 15-23.

Clark returned to Zaxby's to search the area behind the restaurant where the men were originally seen fleeing. The dog picked up a scent near the dumpsters. App. 322, l. 21 – 323, l. 3. Clark noticed "fresh ground disturbance. There was pine straw that was turned up, tree branches broken." App. 323, ll. 3-6. The dog tracked along the wood line and "came out right" where the men were seen crossing the highway. The dog bit and picked up a black ski mask that was sitting next to a tree. There was some money on the ground near the mask as well. App. 323, ll. 1-11. Christopher Wilson's DNA was later found on the mask. App. 491, ll. 1-14.

Wendy Myers, a crime scene investigator with the Goose Creek Police Department, found and collected a .22 caliber shell casing and a projectile while she processed the scene. Both were located in the back of the establishment. App. 339, l. 11 – 342, l. 9. The shell casing was sent to the South Carolina Law Enforcement Division (SLED) for analysis. App. 344, l. 22 – 345, l. 2.

Marteeka Hamilton, Petitioner's "on and off" girlfriend, claimed Petitioner called her from Christopher Wilson's phone around midnight on December 24, 2011. App. 378, ll. 4-12. Petitioner allegedly said "he needed a ride." App. 378, ll. 4-18. Hamilton eventually picked Petitioner and Wilson up from the entrance of the Foxborough subdivision. App. 379, ll. 10-20.

Cynthia Garrett, who dated Petitioner for about a month in November 2011, told law enforcement that she had seen Petitioner cleaning a gun in her house. App. 416, l. 22 – 417, l. 23. She identified the gun connected to this case as the gun she had seen Petitioner cleaning. App. 418, l. 19 – 419, l. 6. However, she later admitted during cross-examination that she had never seen a gun. Garrett’s child allegedly saw Petitioner’s with a gun and told Garrett about it. App. 434, l. 21 – 435, l. 12.

Garrett claimed Petitioner called her from Wilson’s phone on December 24, 2011 around midnight. App. 420, ll. 11-20. He asked Garrett to pick him and Wilson up, but she refused. App. 420, l. 21 – 421, l. 21. Garrett also claimed that while she was with Petitioner on January 1, 2012, Petitioner admitted to robbing Zaxby’s with Wilson. App. 423, ll. 5-24. Petitioner allegedly told Garrett that he and Wilson scoped out the restaurant ahead of time, and later as they were fleeing Zaxby’s after the robbery, he dropped money. App. 423, l. 25 – 424, l. 23. Garrett said Petitioner had new clothes, shoes, and a phone. App. 424, ll. 9-18. After her encounter with Petitioner, Garrett “went to the police.” App. 426, ll. 1-3.

On January 5, 2012, law enforcement learned Wilson’s DNA was on the mask discovered in the woods near Zaxby’s. App. 490, l. 1 – 491, l. 14. As a result, officers obtained a search warrant for 318 [REDACTED] Lane in the Foxborough subdivision, the home Wilson shared with his parents. App. 491, ll. 15-19. Petitioner was the only person present at the home when officers arrived to execute the warrant. App. 479, l. 18 – 480, l. 11. During the search, officers found Riley Kemp’s social security card in a drawer in one of the back bedrooms. App. 493, l. 16 – 494, l. 10. They also found a Ruger Mark II semiautomatic .22 caliber pistol inside of a suitcase. The suitcase was outside near the “pedestrian door of the garage.” App. 480, ll. 12-23. It was later determined that the shell casing collected from Zaxby’s was fired by this gun. App. 574, l. 1 – 575, l. 8.

At the time of the armed robbery, Christopher Wilson was wearing a GPS ankle monitor that was monitored by the Department of Probation, Parole, and Pardon Services. Investigator Nicholas Powell with the Goose Creek Police Department obtained Wilson's GPS records from his probation agent. App. 502, ll. 1-22. Powell used the GPS records to coordinate Wilson's location with the phone calls that Petitioner allegedly made from Wilson's phone to Marteeeka Hamilton and Cynthia Garrett shortly after the robbery. App. 504, l. 15 – 514, l. 24. According to Powell, Wilson was at Zaxby's and in the wooded area next to the restaurant during the time period of the robbery, a few minutes after midnight. Wilson left the area around 12:57 am. App. 504, l. 15 – 514, l. 24.

The state's final witness was Daniel Demers. Demers was the director of IntelliGENETICS, a private "DNA identity testing laboratory" located in Hilton Head. App. 589, ll. 20-24. Demers founded the lab in 2003 and it was accredited by ASCLD/LAB. App. 589, l. 20 – 590, l. 5. The Goose Creek Police Department paid IntelliGENETICS to analyze all of its DNA evidence. Investigator Powell claimed the agency used IntelliGENETICS instead of SLED because of the "turnaround time." They "get quicker results from" IntelliGENETICS. App. 490, ll. 6-20.

Demers testified that he received several known DNA samples from various individuals, including Christopher Wilson and Petitioner. App. 591, l. 19 – 592, l. 12; App. 595, ll. 4-8. In addition to these samples, he received a ski mask, a five dollar bill, a twenty dollar bill, and a butcher knife. App. 594, l. 23 – 595, l. 3. Investigator Wendy Myers also brought in a Ruger handgun. Demers swabbed the handgun for DNA, but never took custody of it. App. 593, l. 17 – 594, l. 22.

Demers explained that in order to develop a DNA profile, one collects data from sixteen different regions and each one of those regions will contain one or two peaks. A "full DNA profile" contains twenty-eight to thirty-two peaks in total. App. 597, ll. 8-19. "Anything less than the full

16 would be considered a partial profile.” App. 599, ll. 17-25. Demers asserted, “[I]f all the peaks that the suspect has in his or her DNA profile is not in the mixture, then he’s excluded, he or she is excluded. They cannot be a contributor.” App. 602, ll. 5-8. When questioned about a “mixture profile” in which DNA from more than one person is present, Demers explained, “We can look at it and we can see that all of his data peaks are in the mixture sample, then we know that he is a possible contributor. We’re not saying he is, so what we can do is give you an idea, is this guy just unlucky? Did this guy really handle the item, or is he just unlucky? So if the probability of exclusion is 99.9 percent, then he’d have to be really unlucky to, number one, have come to the attention of the people as a suspect, and on top of that, he’s so unlucky that he match - - all of his components are present in the mixture sample. So that is really a compelling situation.” App. 603, l. 21 – 604, l. 13.

Demers testified that he found a “mixture” of DNA on the five dollar bill, the twenty dollar bill, and “the barrel and the butt” of the pistol, meaning there was more than one contributor on each of the objects. Petitioner and Wilson were excluded as possible contributors to the mixture of DNA on the paper bills and the barrel and butt of the gun. App. 605, ll. 15-21; App. 607, ll. 2-10. However, “the mask had DNA from only one person, so single contributor, and that matched to a suspect.” Christopher Wilson was the “suspect” who “matched.” In other words, according to Demers, Wilson’s DNA was allegedly found on the mask. App. 605, l. 22 – 606, l. 3.

Additionally, Demers concluded that four or five people contributed to the mixture of DNA found on the handle of the gun. App. 607, ll. 11-24. He calculated the “probability of exclusion” and determined that 97.8 percent of the black population of the United States could be excluded as a possible contributor to the DNA mixture of the handle. App. 608, ll. 2-15. The following exchange took place when the assistant solicitor asked Demers about his analysis of the handle:

Q: Were you able to determine whether or not Donte Brown [Petitioner] could be excluded as a contributor to the DNA on the gun?

A: **We can conclude that all of the peaks in his DNA profile could be found in the mixture profile from the handle of the gun, so we have to report that he is a possible contributor.** We're not saying he is the contributor, but we have to say he is not excluded because he's not excluded. **If all of his data peaks are there, he is one of those people - - he's either one of those unlucky people that, you know, came to the attention of the police and just by coincidence all of his data peaks are there, or he handled the gun. Those are the two possibilities.**

Q: And just so I can make sure I understand, 97.8 percent of the African American population in the United States would have been excluded as a contributor to this DNA?

A: Correct. . . . Quite honestly, I think you kind of have to - - that's just a statistical number, and, you know, statistics can mean a lot of things, so you kind of have to put a little bit of an explanation with it because what a lot of people say is if you took 100 U.S. blacks and profiled them all and compared them to this mixture profile, two of them on average that statistically we would expect to not be excluded from the handgun.

That, at its most basic level, is a true statement, but **what that doesn't take into consideration is the other evidence that may be associated with the case; the fact that the person came to the attention of the police as a suspect; the fact that maybe he or she did not have an alibi for that time, and then on top of that, you have this potentially coincidental match.**

So if we were to - - you know, you might have 100 people in this courtroom. Let's say, just for the sake of argument, we had 100 blacks here in this U.S. courtroom and we were to test all of them, and let's say two of them matched. Let's say one matched, not matched, but could not be excluded. Let's say three did. It's unimportant.

Most likely, those people had nothing to do with the case. **Most likely, they had an alibi as to their location at that critical time of the crime, so you have to kind of put it in perspective with these other elements. It is, on its most basic level, a measure of how unlucky the person is that their data peaks are part of this mixture profile. Are they just unlucky? They could be. Are they so unlucky that they're a suspect in the case, they have no alibi, and they cannot be excluded?** I don't know. That's for you all to decide.

App. 608, l. 16 – 610, l. 18 (emphasis added).

Demers then asserted, “**The most likely explanation for this mixture profile is that Christopher Wilson and Donte Brown [Petitioner] - - this is a possible explanation - - Christopher Wilson and Donte Brown both handled the gun.** *We could not exclude Christopher Wilson or Donte Brown, and that three other female individuals also handled the gun.* App. 610, l. 24 – 611, l. 4 (emphasis added). Demers went on to explained why he believed the other three possible contributors to the mixture found on the handle of the gun were female. App. 611, l. 4 – 612, l. 1. He concluded “one explanation is Christopher [Wilson] and Donte [Petitioner] collectively make up 53 percent - - 45 out of the 84 peaks can be attributed to Christopher or Donte. That’s 53 percent of the peaks on the handgun. So that could just be coincidence or, again, bad luck. App. 612, ll. 2-6.

Before Demers testified, trial counsel raised an objection to his testimony. She cited to State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), where this Court held the circuit court erred in failing to direct a verdict because the evidence presented merely raised a suspicion Bostick committed murder. Id. at 142, 708 S.E.2d at 778. Part of the evidence against Bostick was blood found on his jeans. A “DNA analysis was performed and cross-referenced with a standard from Polite [the decedent].” Id. at 137, 708 S.E.2d at 775. “The DNA analysis came back inconclusive, and the agent who reviewed the DNA analysis findings . . . testified that while ninety-nine percent of the population could be excluded as contributing to the same, she was unable to determine whether the blood sample actually came from Polite.” Id. at 137, 708 S.E.2d at 775-776.

Trial counsel argued, “Your Honor, I know this [Bostick] is talking about a directed verdict based on that with a 99 percent. What I would ask the Court to do is take the testimony of him [Demers] based on a 403 analysis. If 99 percent just raised a mere suspicion, I would

submit that what, in this case, is 98 - - less than 99, 98.7 something, and to put in something that is a mere suspicion under an expert where they're [the jurors are] going to be hearing from that expert, I think would be very prejudicial, and I just didn't know if you would like to take testimony in limine prior to the testimony." App. 545, l. 4 – 546, l. 18.

After the assistant solicitor explained what Demers would testify to, the trial judge ruled, "Well, if that were the only piece of evidence though the State had, I would say probably you have at least a very good chance of getting a directed verdict, if that was the only bit of evidence, especially that being circumstantial evidence, but there is substantial circumstantial evidence that he was involved with this, and this is just a piece of circumstantial evidence. You certainly can bring out in cross-examination that it does not definitely identify him as the sole [person] who it could be, but he is in a very small subset of people that it could be." App. 546, l. 19 – 547, l. 18.

The state then proffered Demers' qualifications and, at the conclusion of the proffer, trial counsel indicated they had no objection to Demers' qualification as an expert in "forensic testing of DNA." App. 575, l. 17 – 587, l. 21. No further objection pursuant to Rule 403, SCRE, or Rule 702, SCRE was made. Counsel did not renew the initial Rule 403 objection when Demers subsequently testified. There was no contemporaneous objection.

A Berkeley County grand jury indicted Petitioner on July 18, 2012 for three counts of armed robbery, five counts of kidnapping, second degree burglary, criminal conspiracy, attempted murder, and possession of a weapon during the commission of a violent crime. App. 1067-1086. His case was called to trial on May 5, 2014 before the Honorable Roger M. Young, Sr., and a jury. App. 1. Assistant Solicitors Colleen Taylor and Mason West represented the state. App. 1. David Schwacke and Debra Littlejohn represented Petitioner. App. 1.

On May 8, 2014, the jury acquitted Petitioner of attempted murder, the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), and the weapons offense. App. 713, ll. 13-22. However, the jury found Petitioner guilty of armed robbery, kidnapping, second degree burglary, and criminal conspiracy. App. 713, ll. 1-22. He was sentenced to thirty years for armed robbery, thirty years for kidnapping, fifteen years for burglary, and five years for conspiracy. Judge Young ordered the sentences for armed robbery and kidnapping to be served consecutively for an aggregate sentence of sixty years. App. 721, l. 23 – 722, l. 7.

Petitioner filed a timely notice of appeal. After briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentence in an unpublished opinion. State v. Donte Samar Brown, 2016-UP-447 (S.C. Ct. App. filed November 2, 2016); App. 776-778. This Court ultimately granted certiorari, and by opinion filed August 29, 2018, affirmed the decision of the Court of Appeals. State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018); App. 892-903.

On February 28, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 904-910. The state filed a return and partial motion to dismiss on July 2, 2019. App. 911-922. With the assistance of counsel, Petitioner filed an amended application on March 23, 2021, and a second amended application on March 25, 2021 raising the claims argued in this petition. App. 923-929. An evidentiary hearing was convened on September 9, 2021 before the Honorable R. Kirk Griffin. App. 930. Assistant Attorney General Lindsey McCallister represented the state, and Christopher Geel represented Petitioner. App. 930.

By order filed October 27, 2021, the PCR court denied Petitioner relief. App. 1043-1066. The PCR court found trial counsel were deficient for failing to object to Demers' testimony concerning alibi because it was "outside the scope of the expert's qualifications." App. 1060. The court emphasized that the state conceded this testimony was objectionable. App. 1060. However,

the court found Petitioner failed to prove he was prejudiced by counsels' deficient performance. App. 1060. This finding was based in part on Demers' testimony during cross-examination where he "unequivocally clarified he did not know the other evidence in the case, if there was any, and he was not trying to suggest that an alibi would factor into the statistical probabilities he calculated or offer a way to decrease the pool of people who could not be eliminated as a contributor to the sample." App. 1060. The court maintained that Demers' "testimony actually admits that the DNA of a 'falsely accused person' could be unable to be eliminated from the sample simply by bad luck or chance." App. 1060.

Moreover, in support of its finding that Petitioner failed to prove prejudice, the court cited to Counsel Schwacke's testimony during the evidentiary hearing where Schwacke maintained that he thought "the DNA evidence was helpful to [Petitioner] overall because of the high number or percentage of people in addition to [Petitioner] who could not be excluded." App. 1060. The court also referenced Counsel Littlejohn's testimony that, "in her estimation, the DNA evidence was relatively unimportant, and the key witnesses against [Petitioner] were Marqueeta [sic] Hamilton and Cynthia Garrett." App. 1060-1061. Garrett claimed Petitioner admitted to committing the robbery as did Lanier Daniels. App. 1061. Because the court found "the testimony of the DNA expert did not unfairly prejudice" Petitioner, "trial counsel were not constitutionally ineffective." App. 1061.

Additionally, the PCR court found trial counsel were not ineffective for failing to object to the admissibility of Demers' testimony pursuant to Rule 702, SCRE, and Rule 403, SCRE. App. 1063. The court maintained counsel did object pursuant to Rule 403 and cited to State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) in support of her argument. However, after considering her argument, the trial judge ruled the evidence was admissible. App. 1063. Therefore, the PCR court

concluded “the allegation trial counsel were deficient in not objecting to the admission of the DNA evidence on the basis of Rule 403 is plainly contradicted by the record.” App. 1063.

As to Rule 702, SCRE, the PCR court found trial counsel Littlejohn “credibly testified she did not believe a Rule 702, SCRE, objection would have been successful as Demers was clearly qualified as an expert.” App. 1065. Moreover, the court distinguished this case from Phillips by maintaining (1) the “statistical probabilities cited in Phillips were much larger than those” in Petitioner’s case; and (2) “the solicitor in Phillips repeatedly and drastically misstated the evidence and testimony presented by the DNA expert.” App. 1064.

Lastly, the Court found Petitioner was not prejudiced by the expert’s testimony regarding his inability to eliminate Petitioner as a possible contributor to the mixture of DNA on the gun, without given any reasoning as to why. App. 1065.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated, this petition for writ of certiorari follows.

## ARGUMENT

1.

The post-conviction relief (PCR) court erred by finding trial counsel were not ineffective when they failed to move to exclude testimony from the state's DNA expert pursuant to Rule 702, SCRE, and Rule 403, SCRE, where the expert was allowed to testify that 97.8 percent of the black population of the United States could be excluded as a possible contributor to the mixture of DNA found on the gun that was used during the armed robbery and shooting, but Petitioner could not be excluded, since such testimony was unfairly prejudicial, confusing, and misleading, and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had objected and the evidence was properly excluded.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “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) (citing Strickland, 466 U.S. at 668).

In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), this Court “set forth what has become the standard South Carolina formulation of the elements of the foundation for scientific evidence under Rule 702.” State v. Phillips, 430 S.C. 319, 325, 844 S.E.2d 651, 654 (2020) (citing Council, 335 S.C. at 20, 515 S.E.2d at 518). “When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” Council, 335 S.C. at 20, 515 S.E.2d at 518. “Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect.” Id. (citing Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”)). Unfair prejudice pursuant to Rule 403 “is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence.” Phillips, 430 S.C. at 328, 844 S.E.2d at 656 (citing State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014)).

In Phillips, this Court held the trial judge erred by admitting testimony from a DNA analyst that Phillips could not be excluded as a contributor to a mixture of DNA recovered from two samples taken from the crime scene: the grip of the gun used to kill the decedent and the decedent’s right front jeans pocket where cash was allegedly removed by the perpetrator. 430 S.C. at 321, 844 S.E.2d at 652. The analyst testified, however, that “the statistical probability that another person—not Phillips—could have been the contributor to the touch DNA sample taken from the gun was one in two hundred, and the probability another person was the contributor to the jeans pocket sample was one in two.” Id. at 325, 844 S.E.2d at 654.

This Court held the probative value of the expert’s testimony connecting Phillips to the DNA on the gun was minimal because Phillips admitted he touched the gun earlier in the day while he was at the decedent’s residence. Id. at 327, 844 S.E.2d at 655. It further concluded that “[a]t first glance” the probative value of the evidence “Phillips had his hand in the [decedent’s] pocket” appeared high because there was no innocent explanation. Id. at 328, 844 S.E.2d at 655. However, because the expert “testified that one in two people—half the population—could have been the person who left the DNA in [the decedent’s] pocket,” the probative value of the evidence is “minimal.” Id.

This Court then balanced the minimal probative value of the expert’s testimony “against the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Id. at 328, 844 S.E.2d at 655-656 (citing Rule 403, SCRE). After a thorough analysis, the Court determined the expert’s testimony, which “involved three fundamental concepts”—“touch DNA, non-exclusion DNA, and random match probability”—had a significant potential to confuse and mislead the jury. Id. at 330-331, 844 S.E.2d at 657 (internal quotation marks omitted). Pursuant to Council and Rule 702, this Court held the trial judge abused his discretion by admitting the expert’s testimony. The trial judge failed to require the state to present a factual and scientific foundation for the expert’s testimony as required. Id. at 341, 844 S.E.2d at 662. When this Court conducted such an analysis on appeal, it concluded the evidence should have been excluded. Id. The Court further held the evidence was not harmless and remanded for a new trial. Id. at 341-342, 844 S.E.2d at 662-663.

In this case, trial counsel were ineffective for failing to object to the admissibility of Demers’ testimony pursuant to Rule 702, SCRE, and Rule 403, SCRE. Although counsel initially objected pursuant to Rule 403, they did not request an *in camera* hearing to allow the

trial judge to hear Demers' testimony and conduct a proper balancing test. The assistant solicitor merely explained to the judge what his understanding of what Demers' testimony would be. See App. 546, l. 19 – 547, l. 2. The judge never conducted the required Rule 403 analysis when ruling the evidence was admissible. See App. 547, ll. 7-18. While an *in camera* hearing was eventually held, it only addressed Demers' qualifications and not his substantive testimony or conclusions. Moreover, trial counsel failed to make a contemporaneous objection when Demers testified thereby waiving any previous objection that may have been raised.

If counsel had properly objected pursuant to Rule 702, SCRE, and Rule 403, SCRE, there is a reasonable probability the trial judge would have excluded Demers' testimony that Petitioner could not be excluded as a possible contributor to the DNA mixture found on the handle of the pistol used to shoot Williams during the armed robbery. See Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010)(reversing the trial court's failure to exercise its role as gatekeeper and stating, "the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law."). First, as in Phillips with respect to the evidence that Phillips' DNA could not be excluded from the mixture found on the decedent's jeans pocket, the probative value of Demers' testimony that Petitioner could not be excluded as a possible contributor to the mixture found on the handle of the gun used to shoot Williams appears high "at first glance." In most cases, who touched the gun used during the armed robbery and shooting would be extremely important to the question of who committed the crime. See Phillips, 430 S.C. at 327, 844 S.E.2d at 655. However, because Demers testified that 2.2 percent of the black population in the United States also could not be excluded, his testimony had limited probative value. See Id., 430 S.C. at 328, 844 S.E.2d at 655.

This limited probative value must be balanced against the danger of unfair prejudice, confusion of the issues, and the risk of misleading the jury. See Rule 403, SCRE. Demers’ testimony involved “touch DNA” and “non-exclusion DNA,” which for the reasons explained by this Court in Phillips, have a significant risk of confusing and misleading the jury. Moreover, Demers claimed that because Petitioner and Christopher Wilson could not be excluded as possible contributors to the mixture found on the gun, “the most likely explanation” is that they both handled the firearm. As this Court emphasized in Phillips, “‘cannot be excluded’ most certainly does not mean ‘can be included.’” 430 S.C. at 338, 844 S.E.2d at 661. The state through Demers and the arguments of the assistant solicitor, repeatedly blurred this line, implying that the results offered in this case were similar to a mitochondrial DNA match, and that a “falsely accused” person would likely be excluded by this testing, and that only an extremely “unlucky” person would not be excluded as a contributor if he had not handled the firearm.

Without this unfairly prejudicial, confusing, and misleading testimony, there is a reasonable probability the outcome of Petitioner’s trial would have been different. Most of the evidence against Petitioner was circumstantial. The direct evidence—the allegations from Garrett and Daniels that Petitioner admitted his involvement—was unreliable at best. Garrett was a scorned ex-girlfriend and Daniels had pending charges demonstrating his motivation for lying in order to help himself.

Consequently, the PCR court erred by finding trial counsel were not ineffective. Respectfully, this Court should grant certiorari, reverse the PCR court, and remand for a new trial.

2.

The post-conviction relief (PCR) court erred by finding trial counsel were not ineffective when they failed to object to the state's DNA expert's repeated inadmissible remarks that implicated Petitioner's lack of an alibi during the timeframe of the armed robbery and Petitioner's overall failure to present evidence, since such testimony was an improper comment on Petitioner's right to remain silent, was burden shifting, and undermined Petitioner's right to rely on the insufficiency of the state's evidence at trial, and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "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) (citing Strickland, 466 U.S. at 668).

The state conceded below and the PCR court found that Demers' repeated improper references to an alibi were objectionable "as outside the scope of the expert's qualifications." App. 1060. Demers instructed the jury to consider not only his scientific opinion that Petitioner could not be excluded as a possible contributor to the mixture of DNA found on the firearm, but also to consider whether Petitioner was able to provide an alibi. He suggested the jury should draw a negative inference against Petitioner as a result of his failure to do so. This evidence was undisputedly inadmissible as a comment on Petitioner's right to remain silent. See Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000) ("It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right. Such comments may not be made either directly or indirectly. In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney.") (internal citations omitted). It was burden shifting. Moreover, it undermined Petitioner's right to rely on the insufficiency of the state's evidence at trial. See State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1977) ("It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove that the accused committed the crime charged. An accused has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him. He would clearly be deprived of that right if an adverse inference is permitted to be indulged against him because of its exercise."). Trial counsel provided no strategic reason for failing to object. Such failure was deficient pursuant to Strickland as any reasonably competent criminal defense attorney would have objected.

Petitioner was prejudiced by counsels' deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected to Demers' remarks and they were excluded or struck from the record. The state's case against

Petitioner was mostly circumstantial. The only direct evidence—the allegations made by Garrett and Daniels that Petitioner admitted his involvement in the robbery—was unreliable. Moreover, Demers' remarks were not isolated or offhand. He repeatedly made such comments when explaining the significance of his findings and opinions. Consequently, the PCR court erred by finding Petitioner was not prejudiced by counsels' deficient performance.

Respectfully, this Court should grant certiorari, reverse the decision of the PCR court, and remand for a new trial.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

Respectfully Submitted,

s/ Lara M. Caudy \_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2022.