

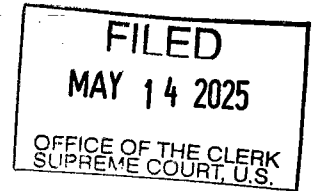
24-7329

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



NICCO KAWON PLEDGER — PETITIONER
(Your Name)

vs.

SHAWN JENKINS — RESPONDENT(S)
Commissioner of Massachusetts D.O.C.
ON PETITION FOR A WRIT OF CERTIORARI TO

MASSACHUSETTS COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NICCO KAWON PLEDGER #2059556
(Your Name)

3521 WOODS WAY
(Address)

State Farm, VA. 23160
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I.) Trial Counsel renders ineffective assistance when they fail to challenge the admissibility of Junk Science which forms the primary evidence of guilt. Here, Counsel failed to challenge the testimony of a CSI "expert" who offered the opinion that Pledger was near the scene of the crime at the time it was committed. Is a new trial required where this evidence was critical to the jury's verdict?

II.) Trial Counsel renders ineffective assistance when they fail to call a rebuttal expert who would have established that the Commonwealth's expert's opinion was flawed. Here, Counsel failed to call a CSI expert to rebut the Commonwealth's expert's "opinion" that Pledger was at the scene of the crime at the time it was committed. Is a new trial required where competent performance likely would have resulted in an acquittal?

III.) Trial Counsel renders ineffective assistance when they fail to object to hearsay evidence which allows the Commonwealth to defeat a motion for required findings. Here, Counsel failed to object to hearsay which formed the only evidence connecting Mr. Pledger to the phone that generated the disputed CSI evidence. Is a new trial required where an objection would have resulted in insufficient evidence for the case to reach the jury?

IV.) A criminal defendant is entitled to a jury of his peers. Here, the Juror Compensation statute caused four otherwise qualified Black jurors to be excused for financial hardship, resulting in

QUESTION(S) PRESENTED

a Due process Violation. IS a new trial required due to this Structural error?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Commonwealth v. Niccokawon PLEDGER and DARTANYAN PLEDGER, NO. 1684CR0740, Consolidated with NO. 1684CR00742 (2022) - Suffolk Superior Court of Massachusetts
- Commonwealth v. Niccokawon PLEDGER, 103 Mass. App. Ct. 1127
~~103 Mass. App. Ct. 1127~~ Massachusetts Court of Appeals
- Further Appellate Review - FAR-30085, - Massachusetts Supreme Judicial Court. - ordered Denied without opinion.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☒ reported at 103 Mass. App. Ct. 1127; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Massachusetts Superior (Suffolk County) court appears at Appendix B to the petition and is

- ☒ reported at 1684 CR 00743 (2022); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 2/21/25.
A copy of that decision appears at Appendix A .

☐ A timely petition for rehearing was thereafter denied on the following date: N/A , and a copy of the order denying rehearing appears at Appendix N/A .

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Article XII of the Massachusetts Declaration of Rights
- Sixth Amendment to the United States Constitution

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On September 28, 2016, a Suffolk County grand jury indicted Nicco² on six counts related to the March 21, 2016 shooting death of Alex Bryant. Specifically, Nicco was indicted on one count of Murder, in violation of G.L.c. 265 § 1 (count one), one count of Armed Assault to Murder, in violation of G.L.c. 265 § 18 (count two), one count of Assault and Battery with a Dangerous Weapon, in violation of G.L.c. 265 § 15A (count three), one count of Carrying a Firearm without a License, in violation of G.L.c. 269 § 10 (count four), one count of Possession of Ammunition, in violation of G.L.c. 269 § 10 (count five), and one count of Carrying a Loaded Firearm, in violation of G.L.c. 269 § 10 (count six).

After a nineteen-day jury trial, Nicco was found guilty of second-degree Murder on Count one, and guilty as charged on the remaining counts. Count five was then dismissed on motion of the Commonwealth as duplicative of Count six. On ~~September~~ May 31, 2018, Nicco was sentenced to Life with parole eligibility after 20 years on Count one, a concurrent 9-10 years on Count Two and Three, a concurrent 3-5 years on Count Four, and a concurrent 1 year on Count six.

Notice of appeal was timely filed on June 4, 2018. The matter was docketed in the Appeals Court on June 4, 2019, where it was stayed pending disposition of a motion for New Trial. The motion for new trial was filed in the trial court on July 16, 2021. The motion was denied without

¹ References herein to the trial transcript will be abbreviated as (Tr. [Trial day] / [Page number]).

² Since Nicco pledger Shares the same last name as his codefendant, Dartanyan Pledger, the brother's first names are used throughout this brief.

STATEMENT OF THE CASE

an evidentiary hearing on May 26, 2022. A notice of appeal from the denial of the Motion for new trial was filed on June 21, 2022. The record was compiled and the direct appeal, docket number 2019-P-0829 was consolidated with the appeal, ~~but~~ of the motion for new trial as docket number 2022-P-0872.

On March 18, 2024, the Appeals Court affirmed the Murder and assault convictions in a rule 23 opinion. It vacated the gun ~~counts~~ counts on Commonwealth v. Guardado grounds and remanded them for a new trial. Those charges remain pending.

II. Statement of Facts

A. The Shooting

On the evening of March 20, 2016, a birthday party was held at Kline's Neal's apartment at 71-73 Humboldt Avenue in Roxbury. Tr. VIII/68; IX/42-43.

Roughly ten to fifteen people were in attendance, interchangeably.

Tr. IX/44. One of the guests was Aneka Smith, who is Nicco's half-

sister. At around 9:30 pm, after Smith arrived at the apartment, another partygoer named Tyquan asked her if he could call Nicco on her phone. Tr. VIII/70-71. Smith dialed Nicco's number and handed the phone to Tyquan. Tr. VIII/71. She stated that Nicco's number on that night was 857-930-1940, which is a different number than that used for the CSLI evidence in this case. Tr. VIII/88. This happened again roughly twenty to thirty minutes later. Tr. VIII/72-73.

Around 11:30 pm, Nicco arrived at the party. Tr. IX/44-45. Nicco stayed for somewhere between five to fifteen minutes, during which

STATEMENT OF THE CASE

time he took a picture with Smith. Tr. VIII/73-75. He was wearing a black t-shirt, black pants, and a burgundy hoodie. Tr. VIII/75. After leaving, he did not return. Tr. VIII/79.

After Nicco left, Alex Bryant and Dequan Brown came to the party. At some point, Tyquan asked Smith to call Nicco a third time, though it is unclear whether this occurred prior to or after the time that Bryant and Brown arrived. Tr. VIII/78, 109-110. The party ended between 2:30 and 3:00 AM. Tr. VIII/79. Various people, including Bryant and Brown left the party together at roughly 3:00 AM. Tr. IX/49.

After leaving the party, Brown got into the driver's seat of his car and Bryant got into the front passenger seat. Tr. XI/167. Shortly thereafter, gunshots rang out. Tr. XI/168-169. Klinisha Neal believed that there were multiple shooters. Tr. IX/52. When she looked out the window, she saw Tyquan speeding away in his red Toyota Camry. Tr. IX/52. She next saw Brown shooting up towards Monroe Street, though she could not see who he was shooting at. Tr. IX/52-55. Neal then saw Brown on the ground in pain, and she ran downstairs to help, at which point most of the people who had left the party had run back into the building. Tr. IX/55. Brown was brought back into the building where he passed something to Neal. Tr. IX/57, VIII/83. Brown stated that he had been shot. Tr. IX/57.

Nellie Knight - who lived in a nearby apartment, Tr. XI/121-124 - awoke to the sound of shots fired. She saw two men

STATEMENT OF THE CASE

firing at each other, one of which was a black male in a maroon shirt. Tr. VIII/125-127. The man in the maroon shirt - said by the Commonwealth to be Dequan Brown, Tr. XIII/79-80 - ran out of sight while the person he was shooting at - said to be Dartanyan, Tr. XIII/82 - opened the driver's side door of a car parked on the street, threw something into it and shut the door. Tr. VIII/129-132. He was then picked up by a dark sedan that came driving down Monroe Street in the wrong direction, Tr. VIII/132. The shooter, alleged to be Dartanyan, jumped in the passenger side of the car, Tr. VIII/133-134. The car then sped off. Tr. VIII/132-134.

Another neighbor, Victor Suarez, was also awakened by the sound of shots fired. Tr. IX/8. He saw a black Nissan ~~1988~~ with tinted windows and its headlights turned off driving the wrong way down Monroe Street towards Humboldt Avenue. Tr. IX/9-11. The Nissan passed a police cruiser at the intersection of Humboldt and Townsend, before turning left onto Townsend. Tr. IX/11-12.

B) The Investigation

Boston Police Officers Albison Gunther and Chris Smerz responded to the scene after several 911 calls and the Shotspotter activation. Tr. VI/206-207. On arrival, they discovered a black Honda Crosstour parked at the corner of Monroe Street with the passenger-side door open. Tr. VI/207-208; XI/108-109. Gunther discovered Bryant slumped over in the seat. Tr. VI/209, 218. EMS

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arrived and declared Bryant dead shortly after arrival. Tr. VI/210. The cause of death was listed as a gunshot wound to the torso. Tr. XI/147.

The car had ballistic damage to the passenger side. Tr. XI/109. Officer Gunther observed several shell casings on the sidewalk nearby. Tr. VI/210. Shortly thereafter, Gunther and several other officers went to Apartment 7 at 71-73 Humboldt to investigate a commotion. Tr. VI/211. There they discovered Brown who had stated he been shot in the leg. Tr. VI/211. The Apartment was then frozen pending the issuance of a search warrant. Tr. VI/212.

Numerous shell casings were found on the ground. Tr. XI/116-117. A .45 caliber Glock pistol was found on the sidewalk on Monroe St. Tr. XI/116-117, 120. A Toyota Camry parked on the street had a firearm inside, and a magazine underneath the car. Tr. XI/116-117.

This Toyota Camry was registered to Dartanian Pledger. Tr. XI/117-118. After the execution of a search warrant, the gun was identified as a black SIG Sauer .45 caliber semiautomatic pistol. Tr. XI/15, 19-20, 62. Several other items were seized from the car for analysis, including a cellphone registered to Dartanian and related paperwork, a wallet containing a Massachusetts ID, and other cards in Dartanian's name. Tr. XI/26-27, XI/133, 141.

STATEMENT OF THE CASE

A Search Warrant was executed on 71-73 Humboldt Ave., Apartment 7. Tr. VIII/241-249. During that Search, a Glock 9mm Semi-automatic pistol with a fully emptied magazine was found inside a Utility closet in the kitchen. Tr. VIII/245, 248-249, X/74-75.

A fourth gun, a black Ruger SR9 pistol with one live round in the chamber and ten rounds in the Magazine, was also discovered behind the apartment building. Tr. VI/265, VIII/21, XI/129. None of the ballistic evidence from the scene matched this gun, Tr. XI/129.

At Some Point, Officers learned that Lisa Lewis worked as a dancer at Centerfolds in Boston. Tr. XI/153. They received Surveillance video for the evening of the murder, which showed Lewis arriving at work at 7:09 pm and leaving at 2:38 am. Tr. XI/163, XI/114-116. On April 13, 2016, Lisa was pulled over while driving a black Nissan Maxima with tinted rear Windows. Tr. XI/185. On May 4, 2016, Dartanyan went to the B-2 Police Station to file a police report about his Toyota which had been impounded on the night of the Murder Tr. XI/118, 187-188.

C.) The Phone Records

Sergeant Detective Lewis testified that he ~~"obtained"~~ "obtained" that the number 857-492-2364 ("2364") was "a potential phone number that might belong to Nicco Kawon Pledger," Tr. XI/131 (emphasis added). No other evidence was introduced confirming that this

STATEMENT OF THE CASE

number belonged to Nicco. On the Contrary, as discussed above, Aneka Smith testified that she called Nicco on a different number that evening. Tr. VIII/88. Sgt. Det. Lewis obtained phone records for the ("2364") number, which revealed that it was subscribed to Lisa Lewis. Tr. XI/131-132. Sgt. Det. Lewis was then given the number 617 704 2775. Tr. XI/132. He received records for that number as well, which revealed that it was also subscribed to Lisa Lewis. Tr. XI/132. Sgt Det. Lewis was also able to determine that Dartanyan pledger's phone number was 774-517-0777 ("0777"), and he received records for that number as well. Tr. XI/134-135.

The toll records revealed that the 2364 number was in regular contact with 0777 starting at 2:am and ending at 3:07am on the morning of the shooting. Tr. X/114, XI/154-158. All three sets of phone records were sent to a company called ZetX for the purpose of analyzing the cell tower information. Tr. XI/77-79.

D.) CSLI "Expert" Sy Ray

Sy Ray, a Supposed Cell Site Location Information ("CSLI") expert, testified without objection that he could estimate approximate locations for the cell phones based on a method that he invented and kept proprietary. Specifically, he claimed that the 2364 number-alleged to belong to Nicco-was in the area of centerfolds where Lewis worked. Tr. XII/62-64. The phone then returned to the Monroe Street area, where it remained, according to Ray, until immediately after the Murder took place. Tr. XII/67-71.

STATEMENT OF THE CASE

Ray agreed that the locations he provided are only estimates and are not exact. Tr. XII/46, 74. Indeed, he ~~conceded~~ conceded that "there's no way they're ever going to be exactly precise." Tr. XII/46. He noted that the area covered by an individual tower differs by location; in Montana it may cover up to 60 or 70 miles away, whereas in a city it may only be a quarter mile. Tr. XII/75. Yet, despite that dramatic difference based on location, he failed to explain how he concludes what the specific coverage area is for any given tower, let alone the particular towers in this case.

He did not complete any validation studies on the tower's involved in this case. Tr. XII/78. No drive tests were performed to verify the accuracy of his assumptions about their coverage zones. Tr. XII/74, 78-79. According to Ray himself: "The only thing that I would - that I do that I guess you could kind of say is a validation is before I testify in any case, I'll look at the entire dataset," in order to look for "any anomalies or anything that I need to be concerned of." Tr. XII/78-79. He never explained what anomalies he would look for, or what he would do if he found one.

As described more fully below, had trial counsel called a rebuttal expert, he would have testified (at trial or in a Daubert hearing) that a cellphone will connect to the tower with the "best" signal, which does not necessarily mean the tower closest to it. Affidavit of Joseph Nicholls, at ¶ 8, 24, attached as Exhibit A. See also

STATEMENT OF THE CASE

Report of Joseph Nicholls, attached as Exhibit B. Since "CSLI records do not contain enough information to calculate such an estimate," it would not be possible for Ray to determine, as he claims he could, the point at which a phone would switch to a different tower. Report of Joseph Nicholls, at ¶ 4.11. Claiming that it is possible to make sure an estimate "is misleading and inaccurate." Id., at ¶ 24. In fact, "[t]here are too many ~~sections~~ unknown parameters with just CSLI data to be able to make such a calculation" or to calculate the "boundary lines" of what constitutes the "best signal" or "handoff area." Id. at ¶ 4.16; Affidavit, at ¶ 26. See also Attachment 2 to Nicholls Report.

REASONS FOR GRANTING THE PETITION

CLAIM ONE

PLEDGER IS ENTITLED TO THE ISSUANCE OF A WRIT OF CERTIORARI, TO ADDRESS THE ISSUE OF IF TRIAL COUNSEL IS INEFFECTIVE WHEN HE FAILS TO CHALLENGE THE ADMISSIBILITY OF UNRELIABLE EVIDENCE THAT WAS PUT FORTH THROUGH THE TESTIMONY OF AN INADMISSABLE. THE TESTIMONY AND EVIDENCE IF CHALLENGED WOULD HAVE FAILED A DAUBERT/LANIGAN TEST AND BECAUSE IT WAS EVIDENCE CRITICAL TO ESTABLISH THE LOCATION OF THE PETITIONER, THE CASE WOULD HAVE BEEN INSUFFICIENT TO PUT FORTH TO A JURY OR WOULD HAVE HAD A SIGNIFICANT LIKELIHOOD OF PLEDGER BEING GIVEN A NOT GUILTY VERDICT.

TRIAL COUNSEL ALSO WAS INEFFECTIVE FOR FAILING TO HIRE A REBUTTAL CSLEI EXPERT WHO WOULD HAVE TESTIFIED THAT SY RAY'S TESTIMONY WAS FLAWED AND SHEER SPECULATION AND GUESSWORK, BASED OFF OF JUNK SCIENCE.

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE ADMISSIBILITY OF RAY'S TESTIMONY. RELATEDLY, HE WAS INEFFECTIVE IN FAILING TO HIRE AN EXPERT TO TESTIFY AT BOTH A DAUBERT/LANIGAN HEARING ON THE ADMISSIBILITY OF RAY'S TESTIMONY, AND AT TRIAL TO REBUT THAT TESTIMONY. HAD COUNSEL CHALLENGED THE RELIABILITY OF RAY'S "ESTIMATES" THEY WOULD HAVE BEEN EXCLUDED, RESULTING IN EITHER INSUFFICIENT EVIDENCE TO GET THE CASE TO THE JURY, OR A SIGNIFICANT LIKELIHOOD OF A NOT GUILTY VERDICT. ALTERNATIVELY, A DEFENSE EXPERT WOULD HAVE TESTIFIED AT GREAT LENGTH, THAT THE ZETX "ANALYSTS" WAS NOTHING MORE THAN SHEER ~~guesswork~~ SPECULATION AND GUESSWORK, THEREBY GREATLY INCREASING THE LIKELIHOOD OF AN ACQUITTAL.

REASONS FOR GRANTING PETITION

Under both the Sixth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights, a defendant in a Criminal Case is entitled to the "effective assistance of Counsel." "McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Commonwealth v. Saferian, 366 Mass. 89 (1974). The Trial Counsel renders ineffective assistance when "there has been serious incompetency, inefficiency, or inattention of Counsel - behavior of Counsel falling measurably below that which might be expected from an ordinary fallible lawyer." Saferian, 366 Mass. at 96-97; see also Strickland v. Washington, 466 U.S. 668 (1984) ("the defendant must show that Counsel's performance was deficient"). A new trial is required when such ineffective assistance "likely deprived the defendant of an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96.

Failing to Challenge inadmissible testimony may form the basis of an ineffective assistance of Counsel claim. See e.g. Commonwealth v. Lally, 473 Mass. 643, 703 (2016); Commonwealth v. Burgos, 462 Mass. 53, 63 (2012). The decision not to call an expert witness may likewise amount to ineffective assistance of Counsel. See e.g. Commonwealth v. Alicea, 464 Mass. 837, 852 (2013); Commonwealth v. Seino, 479 Mass. 463, 474 (2018); Commonwealth v. Frank, 433

REASONS FOR GRANTING PETITION

Mass. 185, 188 (2001).

A witness may not testify as an expert unless the Proponent can show that the science behind their opinions is reliable. If the offering party can demonstrate "general acceptance in the relevant community of the theory and process on which an expert's testimony is based." that is normally sufficient. Commonwealth v. Patterson, 445 Mass. 626, 640-41 (2013).

Where there is no such general acceptance, the party must establish that the expert opinion is the product of reliable principles and methods through an analysis of the factors discussed in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Commonwealth v. Lanigan, 419 Mass. 15, 26 (1984). see also Mass. G. Evid. 702.

In Contrary, many Circuits evaluate this issue of Expert testimony being ~~admissible~~ admissible quite differently. Where Daubert list of factors to determine if the Expert's testimony would be admissible, certain Circuits have adopted their own test, see United States v. White, 2023 U.S. Dist. LEXIS 73841,

"The Third circuit has enumerated several factors to guide the court's reliability inquiry:

(1) whether a method consist of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is

REASONS FOR GRANTING PETITION

generally accepted; (6) the relationship of the technique's ~~applicability~~ to methods which has been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non judicial uses to which the method has been put.

Pineda, 520 F.3d at 247-48 (citing In re Paoli, 35 F.3d at 742 n.8). This list of factors is a "convenient starting point," but is "neither exhaustive nor applicable in every case."

The ruling above focused mainly on the "reliability" prong as its acceptance of the expert testimony and erroneously left out all the other factors that their circuit listed as "combined factors" by using the word "and" instead of "or" when listing all the factors to consider. Even going by the third circuit ruling, for this argument, Sy Rays testimony would have not been admissible, as the Commonwealth conceded in this case that the testimony of Sy Ray ~~was not admissible~~ methods were both flawed and unreliable. See Comm. Opps. at pg. 18 ("on the contrary, Ray relentlessly testified that the handoff areas were mere estimations, even rough estimations...")

The Commonwealth contends that, since Ray admitted his handoff areas are just "estimates", the jury would have considered everything he said about them as meaningless jargon to be ignored. According to the Commonwealth, even the prosecutor knew that the Ray evidence was worthless, now insisting that the only use he made of it was to argue that the phones ~~evidence~~ were connected to certain towers

REASONS FOR GRANTING PETITION

in the general area. Commonwealth's opposition, at. 21.

These arguments ignore the entire purpose of Rule 702, which is to keep Junk Science out of Courtrooms. That is specifically what Daubert/Lanigan hearing would have done. Since, Sy Rays testimony would have failed the entire standard, ~~entire~~ and even going by the third circuit standard as the referenced to in U.S. v. White, supra, even the reliability standard alone would have failed.

The Daubert factors include whether the theory or technique can be or has been tested. Daubert, 509 U.S. at 593. The Court must also consider whether it "has been subjected to peer review and Publication." Id. publication is "a relevant though not dispositive, consideration," and "Submission to the scrutiny of the Scientific Community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." Id. at 593-594. The reviewing Court must consider the known or potential rate of error," as well as "the existence and maintenance of standards controlling the technique's operation." Id. at 594. The Court should also consider the level of general acceptance within a particular Scientific Community. Id. Here, Ray's testimony failed under both the Daubert and Lanigan test and thus should have been challenged.

A.) Trial Counsel's failure to challenge the admissibility of the testimony of Sy Ray fell measurably below that which might be expected of an ordinary, fallible attorney.

REASONS FOR GRANTING PETITION

Had Counsel requested a Daubert/Lanigan hearing, Ray's testimony would have been excluded since the Commonwealth could not have established either "general acceptance in the relevant community of the theory and process on which an expert's testimony is based," Commonwealth v. Patterson, 445 Mass. 626, 641 (2005), or reliability under Daubert and Lanigan. Moreover, had Counsel hired an expert to testify at the Daubert hearing or the trial, he would have established that Ray's method are profoundly flawed and based on erroneous assumptions and guesswork. This would have resulted in the testimony being excluded, or, at the very least, he would have demonstrated to the jury that Ray's opinions are far from reliable.

In denying the motion for new trial, the Judge did not address the Daubert/Lanigan factors and instead concluded - having apparently ignored the entirety of Nicholls's affidavit - that "it cannot be disputed that cell site location information (or CSLI) does in fact include data from which one can approximate the location of a cell phone when it is used to make a call or send a text message." See Memorandum of Decision and Order on Defendants Motions for New Trial, at 6. The Court then suggested that Pledger's attack on Ray's testimony amounted to a distinction between an open pie wedge and a closed pie wedge. *Id.* at 6. Worse, the Court ~~opined~~ opined that a defense expert "would presumably still have

REASONS FOR GRANTING PETITION

to acknowledge that the CSLI put the phone within a certain coverage area and, in a densely populated city such as Boston, that coverage area is relatively small. Id.

~~degree~~ In fact, it is impossible to estimate to any reasonable degree of scientific certainty where a cell phone must be located for it to connect to a certain tower using CSLI data alone. See Nicholls Affidavit, App. at 62-71. Moreover, no other expert would have testified in a similar way to Ray.

What the trial court seems to have missed is that the traditional open pie wedge used to demonstrate a cell tower's location and direction of signal does not represent a coverage range and are used to convey the fact that the coverage area is unknown. Report of Joseph Nicholls, at ¶ 4.3. See also Affidavit of Joseph Nicholls, at ¶ 10; Report at ¶ 4.6. Thus, Ray's use of a closed blob which he calls a "handoff area" and his "best estimation based on all the data that we've collected" of where the phone was located during the call, id. at ¶ 4.10, is not real science.

Despite Ray's claims that his sector graphic edges represents the point at which a phone would switch to a different tower, "there are too many unknown parameters with just CSLI data to be able to make such a calculation" or to calculate

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the "boundary lines" of what constitutes the "best signal" or "handoff area." *Id.* at ¶ 4.16; *Affidavit*, at ¶ 26. See also Attachment 2 to Nicholls Report. While Ray assumes that his handoff areas represent the "best" signal area, in fact it is impossible "to make such a calculation with any degree of scientific certainty. Any statement to the contrary is misleading and inaccurate." *Id.*, at ¶ 24.

As it relates to this case, it is thus pure speculation to say that Nicco was near Monroe Street at the time that the relevant calls were made and a potential defense expert such as Nicholls would not have to concede this point, contrary to the Commonwealth's argument and the lower Court's decisions. *Id.* at ¶ 4.25-4.29.

Expert testimony from ZetX has at least twice been excluded in the Commonwealth after a Daubert/Lanigan hearing. See e.g. Commonwealth v. Amanda Algarin, 1784CR0046; Commonwealth v. Michael Viola, 1681CR00255. Both Algarin and Viola were decided shortly after the trial in this case. Thus, had Counsel challenged the admissibility of Ray's testimony and the ZetX maps and called an expert at a hearing pursuant to

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Daubert/Lanigan, the evidence would have been excluded. If not, a rebuttal expert could have called the reliability of the Zetx maps into question.

B.) Counsel's deficient performance in failing to challenge Ray's testimony deprived Nicco of an otherwise available, substantial ground of defense.

Counsel's failures in this case "likely deprived the defendant of an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. Specifically, without Ray's testimony, there would have been little to no evidence that Nicco was at the scene of the crime at the time of the murder.

And, contrary to Counsel's claim and the Judge's findings, no other expert would have testified similarly to Ray. An actual CSLI expert would have limited their testimony to the location of the cell tower itself and the signal direction, because they would have recognized that it was improper to opine any further. This is a material difference from Ray's testimony in terms of its impact on the jury, as to what the prosecution could say in closing,

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and to how forcefully they could say it.

The Appeals Court and the motion Judge credited trial Counsel's assertions that, based on consultation "with other Counsel as well as [unidentified] individuals with professional training relative to CSLE," and the fact that Ray had previously been admitted as an expert, he "did not think a Daubert Challenge would bear fruit." Affidavit of Trial Counsel, attached as App., at 164-165. His stated strategy for not challenging its admissibility was that he did not want to "alert the Commonwealth to whatever useful information I had gathered." Id. at ¶ 9. Instead, he "believed that [he] had a sufficient grasp of the issues in order to effectively cross examine at trial without assistance of [his] own expert." Id.

Yet, had Counsel challenged Ray's testimony, it would have been excluded, and thus there was no risk of preemptively alerting the Commonwealth to his cross-examination. Saving facts for cross-examination such as "Ray's employment history, limited educational background, the obvious pro-law enforcement slant of his company, the use of methods which departed from the norm and the inclusion [of] implicitly (if not

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explicitly) racist products being sold on his website," cannot be used to justify the failure to keep the evidence out in the first place, Id. at ¶ 8.

Counsel further asserts that he feared, based on "other [cases] involving CSII" that he was aware of, that if he succeeded in excluding Ray, the Commonwealth could have substituted him with some unknown witness from either the Massachusetts State Police or federal law enforcement, Id. at ¶ 7. Yet even if the Court allowed a substitution, no one else would have testified to anything similar to what Ray said because no one else makes the claims that ZetX makes ~~the same claims~~ about the existence of so-called "handoff areas" and claimed that they represent the areas in which the phone was located when it connected to a specific cell tower. Thus trial counsel rationales are illogical.

CLAIM II

Trial counsel was ineffective in failing to object to HEARSAY EVIDENCE which attempted to establish that phone number 857-492-2364 belonged to Nicco.

Sgt. Det. Lewis testified that he "obtained" through his

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Investigation that the 2364 number was "potentially" Nicco's Phone. Tr. XI/131. Counsel was ineffective in failing to object to this hearsay testimony which was the only evidence directly connecting Nicco to that number. Without the phone evidence, there was no basis to conclude that Nicco was even at the scene of the crime when it occurred. So there could have been no trial strategy justifying the decision not to object, where the failure deprived Nicco of either a required finding of not guilty or a substantial likelihood of a not guilty verdict.

The trial Court gave short shrift to this argument, holding that it had "no merit... for the reasons set forth in the Commonwealth's opposition." Memorandum and order at 8. The Commonwealth argued that this statement "was not hearsay, was minimally incriminating, and related only to an issue that trial counsel could not credibly have contested." Commonwealth's opposition, at 1.

yet the key evidence at trial was the cell site location information and call records for the 2364 phone

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Provide any strategy to justify the failure, ~~to establish~~ it stands to reason, then, that Counsel did not have one, and instead just missed this glaring evidentiary issue.

This incompetence "likely deprived the defendant of an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. Specifically, as discussed above, if "2364" was not Nicco's number, there was no evidence connecting him to the scene of the ~~murder~~ murder at the time it occurred or the disputed CSLI maps. Without any connection to the scene, there was insufficient evidence to convict.

CLAIM III

THE Juror Compensation Statute is Unconstitutional on its Face and as Applied Since it Resulted in the EXCLUSION of Four Otherwise Qualified Black Jurors, Thereby Depriving Pledger of a Jury of His Peers in Violation of Article XII and the Sixth Amendment.

The Jury Compensation Statute, M.G.L.C. 234A, § 51,

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is unconstitutional on its face and as applied to Pledger since it resulted in the exclusion of four otherwise qualified Black Jurors, thereby violating Pledger's rights under both Article XII of the Massachusetts Declaration of Rights and the Sixth Amendment to the United States Constitution.

Article XII of the Massachusetts Declaration of Rights guarantees any Criminal defendant "the right to be ~~tried~~ tried by an impartial Jury of Peers." Commonwealth v. Soares, 377 Mass. 461, 492 (1979) (citing Commonwealth v. Gilday, 367 Mass. 474 (1975)). See Also Article XII of the Massachusetts Declaration of Rights ("and no Subject Shall be arrested, imprisoned, despoiled, or deprived of his Property Immunities, or privileges, Put out of the protection of the law, exiled, or the law of the land.") (emphasis added). A fair of one's peers requires that it "represents a cross section of community concepts." Soares, 377 Mass. at 478 (citing

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Commonwealth v. Ricard, 355 Mass. 509, 512 (1969)).

Indeed, it "is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the

community." Commonwealth v. Martin, 357 Mass. 190, 191

(1970), Article XII "mandates that a jury be drawn

from a fair and representative cross-section of the

community." Soares, 377 Mass. at 478. So too does

the Sixth Amendment to the United States Constitution. See

e.g. Taylor v. Louisiana, 419 U.S. 522, 58 (1975) ("the selection

of a petit jury from a representative cross-section of the

community is an essential component of the Sixth

Amendment right to a jury trial."). To effectuate

these rights, the "defendant is constitutionally entitled to

a jury selection process free of discrimination against

his grouping in the community." Commonwealth v. Rodriguez,

364 Mass. 87, 92 (1973).

Yet here, the jury selection process requires the

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Court to Strike Jurors for financial hardship when they cannot afford to be paid the below-minimum-wage sum of \$50 per day for any service beyond three days, M.G.L.c. 234A §51. This disproportionately impacts potential Jurors from the Black Community and therefore Violates the defendant's right to a Jury "truly representative of the Community." Martin, 357 Mass. at 191.

Countless authorities have examined the disproportionately impact that financial hardship exclusions have on Black Jurors. These studies have found that "[e]xclusion of individuals [who earn low incomes] has a heightened adverse impact on Communities of color, whose members disproportionately are low-income wage earners." Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, 49 (2010). See also Anna Offit, Antidiscrimination Law through a Sociolegal Lens, 73 Ala. L. Rev., 753, 756 (2022) ("[S]ome of the common reasons for dismissing Jurors for cause, including financial hardship, are more likely to register among Jurors of color."); Scott W. Howe, Deselecting Biased

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Juries, 2015 Utah L. Rev. 289, 322-23 (2015) (Financial hardship exclusion "disproportionately excuses minorities," though this disparity could easily be eliminated "by paying jurors well and covering all of their expenses."); Anna Offit, Benevolent Exclusion, 96 Wash. L. Rev. 613, 632-633 (2021) ("[E]ven in the absence of explicit racial animus or bias, financial hardship stands as a persistent obstacle to representative jury participation." "Keeping people who are poor out of venires deepens the marginalization of already underrepresented group, resulting in juries that are neither socio-economically nor racially representative of American society."); Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change, 74 B.U.L. Rev. 777, 800 (1994) ("Minorities are disproportionately represented in low-skill, blue collar jobs, and are disproportionately excused because of the economic hardship that jury service would present."); Equal Justice Initiative, Race and the Jury: Illegal Discrimination in Jury Selection, (2021), available at <https://eji.org/report/race-and->

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the-Jury/ ("Predictably, exemptions designed to protect Prospective Jurors from undue financial hardship tend to deny People with low incomes and limited resources the opportunity to serve on Juries."); Chief J. Juan R. Sanchez, A Plan of our own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity, 91, 14 (2019)

(Although the loss of a few days income may be inconsequential to certain demographic groups, it poses a greater impediment to adults of color, whose median household incomes, on a national basis, hover between 61% and 77% of their white peers.").

~~These exemptions~~

It's not surprising that this Statute would disproportionately impact People of color who are disproportionately in lower income brackets, since Jurors who are accepting payment of \$50 for a full day trial are ~~accepting~~ working for far less than minimum wage. The current minimum wage in Massachusetts is \$15.00/hr; it was \$11/hr in 2018 at the time of the trial in the instant case. See St. Louis FED, State Minimum Wage Rate for Massachusetts, available at <https://fred.stlouisfed.org/series/STTMINWGMMA>. Yet

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assuming a full trial day, as was the case here, including the lunch hour, Jurors put in at least a seven or eight-hour workday. For an eight-hour workday, \$50/day amounts to \$6.25/hr. For a seven-hour workday \$50/day amounts to \$7.14/hr. If we remove the lunch hour from the equation, a full trial day is between six and seven hours or between \$7.14/hr and \$8.33/hr. Under either scenario, the wage is far below the minimum wage.

Further, this statute went into effect in 1982, when the minimum wage was \$3.35/hr, and the payment amount has not increased in those 40 years. See St. Louis FED, State Minimum Wage Rate for Massachusetts. Thus when the statute was passed, Jurors were earning roughly twice the amount of minimum wage - for a six hour day, they're earning 2.49x the minimum wage; for a seven-hour day, they were earning 2.49x the minimum wage; for an eight-hour day, they were earning 1.87x the minimum wage. For Jurors to earn a similar multiple of the minimum wage based on 2018's minimum wage, they would need to be earning \$164.34 for a six-hour day, \$164.01 for a seven-hour day, or, \$164.56

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for an eight-hour day. Using the minimum wage for 2023, Jurors would need to be earning \$224.10 for a six hour day, \$223.65 for a seven-hour day, or \$224.40 for a eight hour day. Even if Jurors were only paid minimum wage that would require, ~~\$90 for a six-hour day~~ based on 2018 rates, \$66 for a six-hour day, \$77 for a seven-hour day or \$88 for a eight-hour day. Based on Current rates, that would require \$90 for a six-hour day, \$105 for a seven-hour day, or \$120 for an eight-hour day. Whatever calculus is used, it is clear that \$50/day is outdated and Jurors today are earning substantially less than the 1982 equivalent.

This outdated and unacceptable low wage had the effect of depriving Pledger of a Jury truly representative of the Community. Specifically, as discussed above, four Black Jurors were excused due to financial hardship. Considerations over the objection of Pledger. Everybody agreed that the first Juror, who was a maintenance worker, would have been a good Juror. Tr. II/145-147. So, in essence, there is no dispute that the Statute deprived Pledger of an otherwise qualified Black Juror. Id. This went on to happen 3

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additional times, Tr. III/172-173; Tr. IV/170-171; Tr. VI/67. While the parties did not offer their opinions on the qualifications of these three other jurors, there is nothing on the record to support the notion that these jurors were otherwise unqualified. Thus, the fact that the Juror Compensation Statute requires individuals to accept payment well below minimum wage violated Pledger's rights under Article XII of the Massachusetts Declaration of Rights and the Sixth Amendment to the United States Constitution.

This Court should thus grant this petition for Certiorari and rule that the Jurors Compensation Statute deprives defendants of color, including Nicco, of a trial by a jury which is drawn from a fair cross-section of the community.

CONCLUSION

For the reasons above, Mr. Pledger respectfully request this Honorable Court grant his ~~petition~~ for Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

N. Pledge pro se

Date: 5/14/25