No. 22-_____

SUPREME COURT OF THE UNITED STATES

The People of the State of New York,

Respondent,

vs.

John Wakefield,

Petitioner,

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

Does the Confrontation Clause of the Sixth Amendment to the United States Constitution require the disclosure of the source code of an artificial intelligence probabilistic genotyping software that analyzes and deduces raw information and renders an opinion as to the ultimate issue of fact in the case free from human participation and is it violated where the trial court permits a human witness to testify as to the conclusions of that software without disclosing its source code and hence how the evidence is actually analyzed and how the conclusions were reached?

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I. Petition for Writ of Certiorari

John Wakefield, an inmate currently incarcerated at the Elmira Correctional Facility in Elmira, New York by and through Matthew C. Hug, Esq., Hug Law, PLLC, respectfully petitions this Court for a writ of certiorari to review the judgment of the New York State Court of Appeals.

II. Opinions Below

The decision by the New York State Court of Appeals denying Mr. Wakefield's direct appeal is reported as People v. Wakefield, 2022 NY Slip Op 02771 (Apr. 26, 2022) and the denial of reargument is reported as People v. Wakefield, 38 N.Y.3d 1121 (3rd Dept. 2022).

III. Jurisdiction

Mr. Wakefield's petition for rehearing to the New York State Court of Appeals was denied on June 16, 2022. Mr. Wakefield invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the New York Court of Appeals judgment.

IV. Constitutional Provisions Involved:

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. Statement of the Case

Eleven years ago this Court held in Bullcoming v. New Mexico that "[t]he Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." 564 U.S. 647 (2011). As this Court concluded, "[t]he accused's right is to be confronted with the analyst who made the certification." *Id.*

This case poses the question of what happens when the analyst is not a human being but artificial intelligence created by a proprietary concern that protects the manner in which the program works as a trade secret. Here, the trial court permitted – over objection – the prosecution to present the testimony of Dr. Mark Perlin, the progenitor and sole owner of TrueAllele (a proprietary, black-box, artificial intelligence software program), that his secret computer program deciphered DNA evidence, that the sophisticated New York State Police Forensic Investigation Center found inconclusive and insufficient for comparison using the stochastic method promoted by the Federal Bureau of Investigation, and rendered a conclusion that the likelihood that a person other than Mr. Wakefield left his DNA on the murder weapon was an unfathomable 1 in 170,000,000,000,000,000,000 (scientists estimate that this number would be the equivalent of the sum total of every grain of sand on all of the beaches on the planet multiplied by 20).

On April 12, 2010, Brent Wentworth's body was found in his apartment. Police investigators concluded that his death resulted from ligature strangulation by use of an electric guitar amplifier cord. Police followed their perceived leads that items had been stolen at the time of Wentworth's death but it ended in a dead-end. Responses to monetary rewards offered in the community were sifted through and the police dragged the county jails offering get out of jail free cards in return for any information. Ultimately, the police set their gaze upon Mr. Wakefield – despite the fact that he was in the hospital or in jail for most of the time leading up to and including Wentworth's hypothesized time of death.

Forensic scientists with the New York State Police Forensic Investigation Center tested the ligature and the victim's clothing. The DNA extracted from these items was mixed and so low in quality that only a fraction of the loci typically examined in traditional DNA analysis could be utilized. The NYS FIC concluded that on two different samples taken from the decedent's shirt, the combined probability of inclusion ("CPI") was 1 in 1,088 and a paltry 1 in 422 for Mr. Wakefield. The swabs taken from the ligature could not be matched to Mr. Wakefield.

Desperate for any evidence to close the case, the prosecution paid Dr. Mark Perlin and his company Cybergenetics, to provide them with an answer they could use to solidify their case against Mr. Wakefield. The prosecution did not care that the New York State Police Forensic Investigation Center had just spent the last 5 years and almost $10,000,000 of taxpayer money to learn to simply use the software and became embroiled in a cheating scandal where State Police forensic scientists caught cheating on the test needed to become certified to use the system. Notably, not a single member of the New York State Police or any of their forensic scientists were ever permitted to examine the source code of Perlin's black-box computer program, and thus, the only person that knew how it worked and whether it contained malicious code was the very

person that stood to profit from the use of his artificial intelligence software by prosecutors and police against the criminally accused.

The prosecution sent the same samples examined by the NYS FIC that fell below the standards suitable for review imposed by the FBI to Dr. Mark Perlin and his secret machine produced mind-bendingly conclusive results. Because Perlin's machine churned out the results they paid for, the prosecution was content to remain blissfully ignorant of the source of the conclusions and fought mightily to join in Perlin's self-interested quest to keep how his machine arrived at its conclusions cloaked in secrecy. So far – though far from unanimously – the courts have shockingly abided.

On direct appeal, Mr. Wakefield argued – among other things – that he was deprived of his constitutional right of confrontation guaranteed by the Sixth and Fourteenth Amendments by the trial court's decision permitting Dr. Perlin to testify regarding the independently reached conclusions from the artificial intelligence platform without tendering the source code. The Appellate Division recognized the profound concerns raised by permitting a human being with a pecuniary interest to parrot, from the witness stand, the results of an artificial intelligence computer program derived entirely from independent and secret analysis. Despite recognizing the problem with allowing a human witness that conducted no analysis nor reached a conclusion to deliver the testimony in lieu of the actual declarant (here a computer program) the Appellate Division still considered Dr. Perlin to be the declarant and the TrueAllele artificial intelligence system a mere instrumentality.

In a divided decision, the New York Court of Appeals unanimously affirmed Mr. Wakefield's conviction. The majority favored the proposition that the confrontation clause was not implicated and inartfully tried to find differentiation between this case and this Court's holding in Bullcoming v. New Mexico. Dr. Perlin admitted at the *Frye*

hearing and at trial that his system acts wholly independently of the human operator, stating that his secret artificial intelligence system: "proposes possibilities for what different genotypes can be", it "thinks", it "hypothesizes", makes inferences from the raw data and then "solves" the problem. The human actor has almost no involvement in the process, and Perlin testified that the system operator simply uploads the raw data and "asks TrueAllele to solve everything…[and] the computer goes on, it solves everything" and "when the computer is done the answers are…written back to the computer's database." The artificial intelligence software selects all of the variables, decides how often the distribution should be sampled and how many times the process is run. Nevertheless, the majority opined that the human operator was the declarant and the artificial intelligence that performed all of the analysis independently from the human actor and delivered its opinion was nothing more than an instrument. The majority then erroneously opined that a machine cannot be a declarant and affirmed Mr. Wakefield's conviction.

The concurring opinion – though erroneous in result – correctly concluded that the DNA evidence was "clearly testimonial and subject to the Confrontation Clause" and since the defense did not have access to the source code and could not identify and challenge the underlying inferences made by the software and the application of those inferences to the DNA, he "could not mount a viable challenge to the conclusions based on the application of TrueAllele's algorithm that linked him to the murder." The concurring opinion recognized that Dr. Perlin was a declarant, but that he could only be effectively confronted with access to the source code, because "the computer does the work, not the humans, and TrueAllele's artificial intelligence provided 'testimonial' statements against defendant as surely as any human on the stand." The concurring opinion even conceded that the defense "makes a compelling argument that he was entitled to challenge TrueAllele's inferences and choices that led to the DNA

interpretations connecting him to the crime in the only way possible: by access to the source code and questioning those who served as the human translators of TrueAllele." Unfortunately, the concurring opinion stopped short and pivoted to a constitutional harmless error analysis – assuming a deprivation of the right of confrontation – and strained itself to artificially conclude that the introduction of conclusive evidence that formed the cornerstone of the People's case – without which the prosecution possessed contradictory and incredible testimony from jail house informants and convicts all of whom were receiving a benefit in return for their incredulous testimony – was somehow harmless beyond a reasonable doubt.

VI. Reasons for Granting the Writ

The concurring opinion in the Court of Appeals decision and in the mid-level appeals court artfully express why this Court must hear this case. The concurring opinion in the court below stated: "[t]he use of artificial intelligence within our system of justice presents challenging questions and may destabilize our established notions of the dividing line between opinion and uncontestable fact." The New York State Supreme Court, Appellate Division, Third Department stated that this case "raises legitimate and substantial questions concerning due process as impacted by cutting-edge science. Given the exponential growth of technologies such as artificial intelligence, to embrace the future we must assess, and perhaps reassess, the constitutional requirements of due process that arise where law and modern science collide. Defendant's novel Confrontation Clause challenge, specifically, that the source code itself is an out-of-court declarant, raises these profound questions."

The framers of the Constitution specifically considered this very concern in creating the confrontation clause. *See,* Mattox v. U.S., 156 U.S. 237 (1895). One could well imagine the framers reaction to a far starker example of trial unfairness than the mere production of *ex parte* affidavits – the primary ill sought to be prevented. *See, id.* Here

a computer algorithm programmed with the powers of independent deduction that swears no oath is permitted to deliver its conclusions without having the bases for those opinions tested; prolonged rumination to conclude that the framers would have done in this situation is not required, their answer would have been self-evident.

There is no question that blackbox, proprietary artificial intelligence systems and the conclusions they produce – when, as here, they are free from human analysis – are obviously declarants. While there may be a superficial concern that a computer cannot get on a witness stand and speak – at least not at this time – it is a practical problem easily overcome; simply tender the source code and allow the live witness to be cross-examined with any coding errors, biased code writing, malicious code and the like contained in the system. Notably, as pointed out in the brief submitted to the New York Court of Appeals, probabilistic genotyping software products whose source code has been evaluated by truly independent third-parties have all found errors sufficient to question the programs' ultimate conclusions. Even here, Perlin admitted that if you ran the same data through his program, it would not produce the same results.

The time is now to address the burgeoning and soon to be explosive growth of technological process and their intersection with the criminal justice system; and how computer programs and artificial intelligence will be confronted in our courts of law. The law has this opportunity to avoid trying to play catch up and to set ground rules now to preserve our most fundamental constitutional protections that serve to weed out the truly pure processes from snake oil peddlers looking to make a quick buck on the back of the system our profession is sworn to protect.

VII. Conclusion

For the foregoing reasons, Mr. Wakefield respectfully requests that this Court issue a writ of certiorari to review the judgment of the New York Court of Appeals.

Dated this 8th day of September 2022

Respectfully submitted,

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