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October 12, 2022

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: PEOPLE v. JOHN WAKEFIELD
No. 22-5588

Dear Supreme Court Clerk:

Enclosed are 40 bound copies and 1 unbound copy of the People's response to a Petition for a Writ of Certiorari and proof of service regarding the above-captioned matter.

Very truly yours,

ROBERT M. CARNEY
District Attorney

By: William M. Lemon
Assistant District Attorney

WML/cd
Cc: Matthew C. Hug, Esq.

No. 22-5588

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 United States Supreme Court

Response to a Petition for a Writ of Certiorari

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I. STATEMENT OF FACTS

On Monday, April 12, 2010 Brett Wentworth was found strangled to death in his apartment at 1019 Wendell Avenue in the City of Schenectady. Paramedics found him at an approximate 45 degree angle; face down in the corner of his couch, with his knees on the ground. An electric guitar and amplifier were located several feet from Brett's body and the cord that connected them was found wrapped around his neck. The forensic pathologist who performed the autopsy found the cause of death to be asphyxia due to ligature strangulation, consistent with a compressed the carotid artery on the sides of the neck. The pathologist's testimony also demonstrated that pressure on the artery would have rendered Brett unconscious within 15 seconds of application and dead within a minute and a half of continued pressure. The pathologist also determined that the time of death was between 12 and 24 hours earlier, placing it sometime on the afternoon of Sunday, April 11th. The pathologist also swabbed various parts of the victim's body, including a scratch on his right, dorsal forearm.

The examination of the scene revealed that while the front door to the apartment had been locked with a dead bolt, the rear door had not been. Detectives spent over three days collecting hundreds of items of evidence, including the guitar cord, the clothing Brett was wearing and liquor and beer bottles found in and around the apartment. Some items, like the bottles, were swabbed for DNA analysis by Schenectady Police Department detectives. Other items, such as the guitar cord and Brett's clothing, were sent directly to the New York State Police Forensic Investigation Center (NYSPFIC). Detectives also extensively photographed the apartment, documenting items still present and the absence of other items that Brett was known to own.

Brett was known to have a laptop computer and a playstation 3 gaming system yet both items were gone from the apartment when the police entered. The first officer on scene,

Patrolman Mathew Hoy, noticed a distinct pattern in the dust on a TV stand in the front living room. Hoy testified that this pattern appeared to be consistent with a gaming console that had recently been moved. Additionally, while no playstation 3 was located, games that could only be played on the system were found. Later, it was determined that an orange, blue and white duffel bag was also missing.

A neighbor, Damian Pagano, testified that on the Saturday night before the discovery of Brett's body he had seen multiple people fight on the porch of 1019 Wendell.[1] Pagano saw one individual strike another and then leave in the direction of Union Street. He described this person as a heavy set, light skinned black male, wearing a winter coat, hat and glasses.

The police received several forensic leads based on DNA and fingerprints indicating that Martin DeSilva's DNA was found on one of the beer bottles and his fingerprint were discovered on other items inside of the home. DeSilva testified that in 2010 he was living on Eastern Parkway, approximately four minutes away from Brett's apartment and had sold him marijuana in the past. DeSilva testified that, on the night of the same fight seen by Pagano, Brett and the defendant, John Wakefield, had come to DeSilva's home on Eastern and he traded Brett marijuana for pills. During the sale Brett invited DeSilva back to his apartment for a party. Four to five hours later, DeSilva arrived at Brett's house and found him and the defendant drinking with another white male that DeSilva did not know. DeSilva testified they were drinking and playing video games in the front living room but that the party broke up after the other white male and the defendant got into a fight. He testified that the fight started inside the house but as it turned physical it spilled out onto the porch and the yard. DeSilva remembered seeing mostly pushing and a single punch before both men left the apartment.

[1] This would have been April 10, 2010.

The next morning (Pagano's testimony that the fight occurred on the Saturday night prior to the discovery of Brett's body, places this on Sunday, April 11) DeSilva was on his porch when Brett came to his house looking to again trade pills for marijuana. Brett left and returned with the defendant. After the exchange, Brett and the defendant walked back toward Brett's house. This testimony placed the defendant as the last person to be seen with Brett while he was still alive and on the day he was killed.

In 2010 Faith Wilson was a prostitute living in Schenectady who knew the defendant from seeing him at various drug houses they would both frequent. She also knew the defendant to regularly buy crack and, when he was without money, to trade various items for it. Wilson testified that she was incarcerated at the Schenectady County Jail starting at the end of 2009 into February of 2010. While at trial, her memory of the exact year was not precise, she was able to confidently locate her release as occurring in February of 2010 because she had found out that she was pregnant while still in jail and that after she was released in February, she gave birth to her son in August of 2010. She testified that, in the weeks after she was released, she was outside a crack house when she was approached by the defendant. She testified that the defendant told her that he had a laptop and newer playstation that he wanted to sell or trade for crack. She also testified the defendant had two duffel bags with him. One bag she described as black and orange. She was then shown a picture of Brett from a vacation taken several years earlier and identified the bag Brett was holding as the same one she had seen the defendant with.[2]

Wilson's pregnancy proved critical to identifying when she interacted with the defendant during the spring of 2010. When Wilson's testimony regarding when she was released from Schenectady County Jail is compared with the defendant's record of incarceration, it is revealed

[2] Brett's sister, Margaret Messner authenticated the photo and told police that the family had been unable to locate this bag when they cleared out Brett's things.

that the two were only out of jail at the same time between April 9, 2010 and April 14, 2010.[3] This five-day stretch, surrounding the day of the homicide, was the only time that Wilson and the defendant could have possibly interacted. This placed the defendant in possession of the items stolen from Brett's apartment with a day or two of when Brett was killed.[4]

Robert Evans testified that he had known the defendant for years and that they had often smoked crack cocaine and drank together. Evans testified that in April of 2010, several days before his birthday on April 15, he was sitting on the front porch of his home when the defendant approached him and called him by a familiar nickname. Evans responded in kind and, at the defendant's suggestion, the two of them began to walk. Evans could tell that the defendant was high on crack cocaine. As they walked the defendant pulled out a marijuana pipe and told Evans that he had taken it from "a gentleman which he had choked and took out". The defendant then told him that he had choked the man with a guitar string or chord and that he wanted to go back to his apartment on Wendell Avenue and steal his guitar, amplifier and musical equipment. Evans was shocked by the casual nature of the defendant's comment and immediately gave him back the pipe. The two men walked to the area of 24 ½ Columbia Street where the defendant began trying to contact its resident.[5] After getting nervous at the defendant's increasingly aggressive behavior Evans left and returned to his home.

Evans didn't call the police because he didn't want to believe the defendant. Evans also hadn't heard anything about a murder on Wendell Avenue. It was not until months later, in December of 2010, that Evans learned about the murder after Brett's family and the police held a

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[3] The petitioner incorrectly states that he was incarcerated at the time Wentworth was killed. He was not, and nothing in the trial record supports this grossly inaccurate statement.

[4] The police eventually tracked the playstation 3 to the home of Anthony Miller, a local drug dealer that would supply the crack houses that defendant frequented.

[5] Corroborating Evans, other evidence showed that the defendant knew the resident of that house and had stolen a lawn mower from the home on Saturday, April 10th.

press conference asking the public for help. Evans testified that he heard about fliers that had gone up in the neighborhood asking for help and promising a reward for information. Evans called the number on the flier and told the police what the defendant had admitted to him. He testified that he was not motivated by the promise of a reward, but rather because he felt that it was the right thing to do.

On cross-examination, defense counsel sought to impeach Evans for not coming forward until after he had found out about the promised reward. Defense counsel had actually begun his attack on Evans in his opening statement, insinuating that he only revealed the information in response to the reward offer, stating "Mr. Evans, apparently knew of this murder for six months, didn't say a word of it until the family published in the paper for a reward, then Mr. Evans stepped forward. 'I have evidence of the murder. John told me he did it and I want that cash.'" In response, the People petitioned the court to call Evans' friend David Jones, to testify that Evans told him of the defendant's admissions before the reward posters went up. The court allowed the testimony and Jones testified that Evans had told him of the defendant's statements weeks prior to the reward offer.

The defendant also admitted the killing to two separate inmates at the Schenectady County Jail. Kevin Allen testified that he had known the defendant for years from the streets of Schenectady where they had smoked crack together and frequented the same places. When the defendant was arrested he was placed on Allen's tier at the jail. While there the defendant told Allen that he had killed the victim and stolen his playstation, laptop and several other items from the apartment and sold them for drugs. The defendant gave Allen significant details about his interaction with Brett and the other men who had been to Brett's apartment around the time of

the murder, describing them as a Guyanese guy and guy named Jason.[6] The defendant also told Allen they were drinking O.E. and Baccardi while at the victim's apartment. An Old English Malt Liquor bottle from the victim's garbage had the defendant's DNA on it and a Baccardi rum bottle had Rector's DNA on it. The items the defendant told Allen he took out of the home were also consistent with the items Faith Wilson had seen the defendant with in the days after the murder. The defendant also repeatedly told Allen about a new type of DNA testing being done in his case.

Leon Horton also testified that the defendant admitted to going to the victim's apartment to rob him and steal his musical equipment and then killing him when things got out of hand.

Andrea Lester from the NYSPFIC performed the DNA analysis on items taken from Brett's apartment. Lester explained the process by which DNA is extracted from pieces of evidence, quantified, amplified and sent through a genetic analyzer. Lester testified this process results in the production of line graphs called electropherograms (EPGs) that record the amount DNA and its genetic location. From these EPGs Lester developed genetic profiles from the items of evidence.

Lester also tested control samples from the victim, defendant, Evans, DeSilva and Rector. Lester analyzed a cutting from the rear collar of the victim's shirt and concluded that it had a mixed DNA profile of at least two individuals. She compared this mixture to the victim and defendant and concluded that neither could be excluded from the mixture and that the odds of unrelated person being included were 1 in 1,088. She also analyzed the swab from the victim's right dorsal forearm and found a mixed DNA profile from which neither the defendant, nor the victim, could be excluded, and that the odds this time were 1 in 422.[7]

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[6] Martin DeSilva is Guyanese.

[7] Lester identified these numbers as a 'combined probability of inclusion' or 'CPI' statistic

Lester also analyzed the swabs taken from the guitar chord that had been wrapped around the victim's neck and several other cuttings from the neck region of the victim's shirt. Each produced a mixed DNA profile. However, she was unable to make any comparisons to these profiles based on the complexity of the mixtures and the level of DNA present.

Lester testified that the computer program that runs the genetic analyzer was called AmFSTR, that the program that interprets the information from the genetic analyzer was GeneMapper ID and that the digital electropherograms files are denominated by file identifier .fsa and typically referred to as the raw data produced during DNA analysis. This data was then transmitted to a company called Cybergenetics.

Dr. Mark Perlin, founder and chief scientific officer of Cybergenetics testified that Cybergenetics is a company based in Pittsburg, Pennsylvania that specializes in the analysis of DNA. Dr. Perlin founded Cybergenetics in the late 1990's as an outlet for work he was then doing at Carnegie Mellon University. Initially Cybergenetics was focused on the human genome project, an international project attempting map all of the genes in the human genome. The product that Cybergenetics had created for this work, FastMap, eventually became a computer program called TrueAllele.

TrueAllele specializes in analyzing and deconvoluting complex mixtures of forensic DNA evidence.[8] Dr. Perlin analyzed the information produced by Lester using TrueAllele and was able to deconvolute the mixtures and offer conclusions about the presence of the defendant's DNA. In particular, Dr. Perlin analyzed a swabbing of the guitar chord and found the defendant's DNA profile was 300 million times more probable than a coincidental match to an unrelated African American person. For the cutting from the outside rear portion of the collar

[8] TrueAllele is discussed in much more detail in response to the first point raised in defendant's brief.

from the shirt the victim was wearing Dr. Perlin found that the defendant was the major contributor to this mixture and that a match between his DNA profile and the mixture was a quintillion times more probable than a coincidental match to an unrelated African American person. From the cutting from the outside of the front collar Dr. Perlin found that the defendant was the minor contributor to this mixture and that it was 10 billion times more probable than a coincidental match to an unrelated African American person. Finally, Dr. Perlin analyzed the swab taken from the victim's forearm and determined that a match between defendant's DNA and the swab was 56.1 million times more probable than a coincidental match to an unrelated African American. After introducing these results Dr. Perlin testified to how specific these results were, or rather, what the chances would be of the defendant's DNA being falsely attributed to the sample. To highlight the specificity of the match statistics associated with the defendant's DNA profile Dr. Perlin prepared 4 charts, entered into evidence as People's 57A-D. These charts contained bar graphs on which Dr. Perlin had plotted the results of 10,000 randomly created genetic profiles that had been compared to each of the four items of evidence. The graphs demonstrated that nearly all of the randomly generated profiles had extremely low match statistics, indicating exclusion from the sample. The graphs also plotted the defendant's profile. In each case the defendant's match statistic was an extremely outlier, far away from the general population. These graphs illustrated and supported the conclusion that the defendant's DNA was present on each of the items.

After approximately two weeks of testimony the People rested their case. The defendant called Dr. Gary Skuse and Christopher Cullen as witnesses. Dr. Skuse, a professor of biological sciences at the Rochester Institute of Technology, testified generally to how DNA could be transferred between items. He also testified that he agreed with Dr. Perlin's conclusions that the

defendant's DNA was on the items TrueAllele analyzed, but that there was no way to know when it was deposited.

After roughly six hours of deliberations the jury convicted the defendant of all charges.

II. THE DEFENDANT'S CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED IS UNPRESERVED AND WITHOUT MERIT

Prior to trial the defendant moved for, and was granted, a *Frye* hearing to determine whether the DNA analysis produced by Cybergenetics by using TrueAllele was generally accepted as reliable by the relevant scientific community. Prior to the hearing the defendant filed a discovery motion which sought, among other things, the computer source code for the TrueAllele system. The People responded that the code was not discoverable under the provisions of New York's Criminal Procedure Law as codified in (then) NY CPL§240 and that, even if it was, it was not in the possession of the District Attorney's Office, nor any Police Department. The defendant never moved to compel production through discovery or sought to subpoena the code and proceeded to the hearing without it.

The trial court authored a comprehensive decision finding that TrueAllele was admissible, and the case proceeded to trial in March of 2015. During jury selection the defendant filed a motion seeking to allow his expert witness the ability to review the source code. The theory behind the defendant's request was, as is raised in his petition to this Court, that the defendant was entitled to review the code in order to be able to fully exercise his Sixth Amendment right to cross-examination. The trial court rejected the claim and the trial concluded as described above.

The defendant raised the claim on direct appeal and it was rejected by the Appellate Division of New York Supreme Court as well as the New York State Court of Appeals. The

defendant has now filed his petition for certiorari seeking this Court's review. This Court should deny the defendant's petition because 1) the claim is without merit and would entail this Court adopting a view of the confrontation clause that vastly exceeds, and would directly contradict, the holdings of this Court; 2) the defendant never properly raised the Sixth Amendment claim with the trial court; and 3) Even if it was error to deny production of the code, such an error was harmless in light of the overwhelming evidence of the defendant's guilt apart from the TrueAllele results.

A.) The defendant's claim that the confrontation clause was violated is unpreserved by the failure to object to the testimony of Dr. Perlin

To preserve a claim that a defendant's sixth amendment right to confrontation has been violated a defendant must object to the admission of such testimony on those specific grounds. U.S. v. Norman T., 129 F3d 1099 (10th Cir., 1997); cert denied 523 US 1099 (1998). The defendant's motion seeking to compel access to the source-code for TrueAllele so that it could be reviewed by a defense expert relied on this Court's rulings in Crawford v. Washington, 541 US 36 (2004) and Melendez-Diaz v. Massachusetts, 557 US 305 (2009) and the New York Court of Appeals ruling in People v. Rawlins, 10 NY3d 136 (2008)[9]. In his motion the defendant argued that the source code itself should be considered a 'declarant' in the same manner as a hypothetical forensic scientist who performed laboratory work and reported a conclusion. However, the motion **did not** seek to preclude Dr. Perlin's testimony as inadmissible hearsay in the absence of the code. Moreover, after the trial court denied the defendant's motion seeking to compel production of the source code, the defendant never moved to preclude Dr. Perlin's testimony or objected to the TrueAllele results as hearsay. Because the defendant characterizes

[9] This cite is also referred to as People v. Meekins the companion case decided along with Rawlins.

the code itself as the declarant, the natural evolution of that position is that testimony regarding the results reached by the system would be considered hearsay and inadmissible if offered through another source. However, unlike the defendants in Rawlins and Melendez-Diaz who both objected to the admission of disputed lab reports, the defendant never objected to Dr. Perlin's testimony on hearsay grounds.

The defendant made the first part of the argument, i.e. that the code was a 'declarant' but never made the second argument; that without disclosure Dr. Perlin's testimony constituted hearsay. As this Court held in Crawford, a violation of the confrontation clause occurs when a testimonial statement is offered without the opportunity to confront the speaker. Therefore, even if the defendant's original motion had merit, a hearsay objection to Dr. Perlin's testimony was necessary to preserve his claim.

The defendant's failure to preserve the argument that he advances cannot be overlooked. The entire body of case law that the defendant relies on addresses the question of whether specific testimony or evidence should, or should not have, been admitted at trial. None of the cases from Crawford through Melendez-Diaz, Bullcoming v. New Mexico, 564 US 647, (2011) and Davis v. Washington, 547 US 813 (2006) held that the confrontation clause was violated based on a trial court's ruling to deny the production of material. The cases each stand for the premise that specific testimony either was, or was not, admissible, not that the various defendants had the right to demand production of certain material. The defendant tacitly acknowledges this, characterizing the error as "allowing Perlin **to testify as a surrogate** about the conclusions made by TrueAllele".

The issue the Court sought to remedy in Crawford was that testimonial evidence was improperly admitted because the maker of the statement did not testify. Perlin testified without

objection as the author of the report and the creator of TrueAllele and was subjected to extensive cross-examination.

To have properly preserved his claim that Dr. Perlin's testimony constituted inadmissible hearsay the defendant was required to object to his testimony. He did not do so and therefore failed to preserve his claim that his right to confrontation was violated.

B.) The defendant's claim that his sixth amendment right to confrontation was violated is without merit

The defendant's motion to compel the production of TrueAllele's source code was properly denied by the trial court. Before discussing the merits of this application, it is important to distinguish what the motion was, and what it was not. The motion to compel did not seek a court ordered subpoena for the source code, nor was it a motion seeking to enforce a subpoena that had been served on Dr. Perlin or Cybergenetics. Therefore, in the absence of a subpoena, the trial Court only had the authority to compel disclosure of the material to the extent that the materials could be considered discoverable, *Rosario* or *Brady* material. "All three categories, i.e. disclosure required by the Constitution [see, CPL § 240.20(1)(h)], required by fundamental fairness (see CPL § 240.44, CPL § 240.45) and mandated by legislative policy, are codified within article 240, which defines the breadth of criminal discovery" Sacket v. Barlett, 241 AD2d 97, 101 (3rd Dept., 1997). Therefore, even before considering the defendant's claim it is clear that he failed to provide the Court with any authority to grant the motion.

There is no free-standing discovery right associated with the confrontation clause. "The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting

unfavorable testimony." Pa. v. Ritchie, 480 U.S. 39, 52-53 (1987). The petitioner asks this Court to reject the holding Ritchie and find that the confrontation clause does contain a right of discovery. Such a holding would encompass an enormous expansion of the confrontation clause that would not only be inconsistent with Ritchie, but would create a right that would be practicably impossible to define in scope, let alone establish judicial authority over.

The trial court also only had the authority to order production of materials to the extent that the sought-after materials were in the People's possession. People v. Santorelli, 95 NY2d 412 (2000) "CPL 240.45, which codifies the rule established by this Court in People v. Rosario, (9 NY2d 286, 289), obligates the prosecution to disclose any recorded statement in its possession or control... Indeed, 'the principal consideration for determining whether the prosecutors have a fairness obligation under *Rosario* to turn over various materials focuses on whether these items actually are in or subject to the possession or control of the particular prosecution office'" Id., at 422 citing People v. Kelly, 88 NY2d 248, 252 (1996). *Rosario* does not apply to the scientific "notes and articles here, which were written by the independent expert witness long before the events at issue took place, at a time when he was "working according to [his] own methods without being subjected to the control of the [People]". People v. Hodges, 66 AD3d 1228, 1233 (3rd Dept., 1997) citing People v. Gillis, 220AD2d 802, 805 (3rd Dept., 1995). The same requirement applies in connection with the production of *Brady* material (Santorelli, at 422-423.) and items identified in CPL § 240.20; People v. Wright, 225 AD2d 430 (2nd Dept., 1996) The record of both the Frye hearing and the trial established that the source code was not in the People's possession. Therefore, even if the defendant could successfully argue that the source code fell into one of the above categories, the Court still had no authority to compel disclosure from the People because the People did not possess or control it. The petitioner seeks an

expansion of the confrontation clause that would create a right to demand production of information from private citizens or corporations that simply does not exist.

For the defendant's position to have merit this Court would also have to conclude that the confrontation clause applies to a non-person entity. The confrontation clause does not apply to the source code because the code is not a person. For the purposes of hearsay and confrontation clause analysis a statement is "an oral or written expression .... of a ***person***." People v. Caviness, 38 NY2d 227, 230 (1975) "Only a person may be a declarant and make a statement. Accordingly, "nothing 'said' by a machine... is hearsay" United States v. Washington, 498 F3d 225, 231(4th Cir., 2007)[finding raw data that revealed the chemical composition of defendant's blood not a statement under Crawford); U.S. v. Lizarraga-Tirado, 789 F.3d 1107 (9th Cir., 2015)[holding that placement of a GPS tack was not hearsay because "the program makes the assertion... there's no statement as defined by the hearsay rule." Id., at 1110; *see also*; People v. Hamilton, 413 F.3d 1138, 1142 (10th Cir., 2005), People v. Khorozian, 333 F.3d 498, 506 (3rd Cir., 2003), United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir., 2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir., 2008); People v. Flores, 47 Misc.3d 1210(A) (Nassau County, 2015)

The code itself obviously cannot be cross-examined any more than it can be called as a witness. The defendant's request for expert access to the code reinforced the principle that the code itself could not be a witness; allowing the expert to then either prepare cross-examination questions for Dr. Perlin or testify themselves. Under either scenario, the code would be addressed through the live testimony of a witness. Crawford does not allow for the testimonial statement of a non-testifying declarant to be admitted merely because the defendant was given access to a particular piece of information. If the code itself were truly a declarant, as conceived

of under the sixth amendment and Crawford, no amount of cross-examination of Dr. Perlin would allow for its 'statement' to be admissible. That is not the state of the law under Crawford nor any construction of the confrontation clause.

The defendant's complaint is that he believes he was entitled to more information than he was granted and that his right to confrontation was therefore compromised. This was the claim confronted, and rejected, by this Court in Ritchie. The defendant attempts to buttress his claim by portraying the results from TrueAllele as the product of an unknowable-secret process. This simply isn't true and ignores the tremendous amount of information the defendant did have access to about TrueAllele.

The system is specifically and intimately described in the published literature admitted at the *Frye* hearing and contained in the record. The record of the *Frye* hearing also demonstrated that, after spending several years evaluating TrueAllele, the system was sufficiently understood by members of the New York State Commission on Forensic Sciences DNA subcommittee, which unanimously approved the use of TrueAllele in Forensic casework. The *Frye* hearing also demonstrated that the system was also sufficiently understood by leading DNA scientists at the U.S. Department of Commerce's National Institute for Standards and Technology (NIST) who used it to validate control samples and present on TrueAllele's effectiveness at conferences as well as for other leading scientists in the field to complement TrueAllele's approach and advocate its use.

The reality is that the defendant would rather remain willfully of ignorant of how the system works, than attempt to understand TrueAllele. This willful ignorance allows him to continue the fallacy that lack of access prevented him from understanding, and therefore confronting, the system. In addition to the plentiful descriptions of TrueAllele that the defendant

had access to, his complaint that he was prevented from adequately understanding TrueAllele must also be assessed in the light of the information he had from the New York State Police and Cybergenetics. Prior to the *Frye* hearing the raw data from the NYSPFIC was turned over to the defendant. This included the original EPG's and the underlying data that they represented. In addition, Cybergenetics provided a 200 page case packet of materials (People trial exhibit 57) containing information about the number of contributors the system was being asked to solve for, TrueAllele's generated EPG's, a table of the allelic probabilities used to calculate the final match statistic, the number of cycles that the system performed in its analysis and a host of other information specific to the defendant's case.[10] Despite this information, no defense expert has ever offered an opinion that TrueAllele's results were inconsistent from the raw data produced by the State Police. In fact, Dr. Skuse, the defendant's expert, agreed with Dr. Perlin's conclusions. It seems logical that, if there was an inconsistency between the raw data and the results produced by TrueAllele, Dr. Skuse would have identified it. It is therefore rather inconceivable to conclude that, had Dr. Skuse had access to the code, he would have been able to contribute any information that would have undermined the final results or Dr. Perlin's testimony.

As an example of the type of information that is publicly available (and which the defendant had access to) consider the following passage from *An Information Gap in DNA Evidence Interpretation*, [*Frye* hearing exhibit 3]; here Dr. Perlin describes the system.

> "Suppose that an allele produces a small amount of amplified product, with a correspondingly low peak height. Applying qualitative review, if that peak height were under some interpretation threshold, the peak would "drop out" from analysis and be lost to genotype inference. This drop out does not happen when using a quantitative probability model, however. Instead, the data variance model equations (2) and (4)[11] enter into the likelihood comparison (3) of the quantitative data pattern with any proposed genotype combination (1) in forming a

[10] The allelic probabilities set out the exact probabilities that TrueAllele used to calculate its final likelihood ratio. This would have allowed the defendant to challenge any one of those probabilities as being inconsistent with the raw data produced by the state police.

[11] These equations appear on pages 2 and 3 of the article.

genotype probability. Since the amplification variance component $y \cdot \sigma^2$ scales with the peak height y, the variance reflects the greater data uncertainty (viewed as a coefficient of variation) when y is small. Moreover, when the observed data pattern does not fit any genotype model particularly well, the dispersion factor σ^2 increases, further increasing modeled data uncertainty."

Now suppose that no detectable amplification occurs, so that an allele has no peak at all (e.g. rfu is zero). Here, the t^2 detection variation component of equation (2) comes into play. With low data, peaks have small heights, and so their variances $y \cdot \sigma^2 + t^2$ are comparable to the t^2 variance of missing alleles that have dropped out. When considering these peak variance values, the likelihood comparison (3) can assign genotype candidates non-negligible probability data value, even when their alleles show no peaks in the data"

This passage describes the basic method by which TrueAllele assesses the factors of drop-out and low-level peak heights in general, a facet of the STR process integral understanding and deconvoluting mixed and low level sample of DNA. This passage might be technical, but it is authored by Dr. Perlin, written in English, and accompanied by the mathematical formulas that it describes. This passage is just one example of the numerous mathematical descriptions that Dr. Perlin and Cybergenetics have published over the last twenty years for TrueAllele that are publicly available. The defendant has not demonstrated, or even attempted to demonstrate, how this material is insufficient. The defendant cannot simply stick his head in the sand and then complain that he is blind.[12]

[12] A Striking contrast to defendant's act of turning a blind eye is found in the article "Four model variants within a continuous forensic DNA mixture interpretation framework: Effects on evidential inference and reporting", Swaminathan, Qureshi, Grgicak, Duffy and Lun, *PloSONE*, Vol. 13, Issue 11 (November, 2018). In this article (which never mentions the need for source codes) the authors review four different continuous models including TrueAllele. The authors are very easily able to discuss the methods of analysis employed by TrueAllele and to compare those methods to other competing systems. For instance, the authors observe that "All continuous methods must include assumption about the distribution of the allele signal peak heights in the EPG. For example... Perlin (citing to one of the New York State Police validation papers) and Taylor (one of the creators of STRmix) use a normal distribution to model peak heights and the log of the ratio of observed to expected peak heights, respectively." In comparing methods for incorporating background noise and "other non-allele signal artifacts in their calculation" the authors observe that "the authors of (a competing system) do not account for either the possibility of 'drop in' or for a contribution from noise, while the authors of (TrueAllele, STRmix and another system) incorporate either drop in or noise in their models, but use distinct assumptions: Cowel, et. al. account for drop in by adding unknown contributors with low template masses and in turn high dropout rates; Taylor et al. employ a model in which drop in events either have a fixed probability of occurring or have a probability that is a function of the height of the observed peak; and Perlin et al. model background noise using a normal distribution." The authors (who were not given access to TrueAllele's source code) continue to describe a number of other features of TrueAllele as it compares to other competing continuous systems. This shows that TrueAllele can be, and is, understood by other experts in the field without the need to review the source code.

The combination of raw data, along with the published mathematical descriptions of the system contained in the articles admitted at the *Frye* hearing, was more than adequate to cross-examine Dr. Perlin. In the least, it was sufficient to raise a specific claim of what, if any material, needed to be disclosed for an effective and efficient cross-examination. The defendant and his attorneys have had access and information about TrueAllele and its results for nearly ten years, but have never proffered even the remotest attack on the actual results.

The defendant's position also ignores the impracticality that would have resulted if the code had been disclosed during jury selection. The code is 170,000 lines long and written in a computer language called MATLAB. The defendant has not demonstrated that a review of the code could have been effectively carried out by an expert qualified in both computer science and genetics in the two weeks between jury selection and Dr. Perlin's testimony. Even if the code had been reviewed, and an analysis provided to trial counsel, at best it would have resulted in counsel challenging Dr. Perlin on an alleged error in the code. While it is impossible to predict the outcome of such cross-examination, the obvious response to any alleged coding error would have been that the system had proven time and again to provide accurate results when compared to known samples.[13] Thus, any challenge based on an alleged coding error would be particularly unpersuasive if the system itself was shown to be reliable.

The Court should recognize the defendant's request for what it was, an attempt to place the People and/or Cybergenetics in the disadvantageous position of requiring disclosure of the code as the price for admitting TrueAllele results. The defendant never engaged in any action that would indicate he was prepared, or even intended, to analyze the source code in order to attack and undermine Dr. Perlin's testimony. If that had been the defendant's goal, the People

[13] This was unchallenged during the Frye hearing.

submit he should have at least analyzed the written materials and raw data, identified any inconsistencies or information gaps, and set forth an argument that access to the code was therefore necessary. Had the defendant made such an effort and presented a cogent and reasoned purpose for needing access to the code there would be more merit to his position, but he has never done this.[14]

While the defendant dismisses the impact that disclosure would have on Cybergenetics as irrelevant, such an impact cannot be disregarded so easily. The defendant never sought disclosure combined with a protective order, meaning that if the source-code had been disclosed it could have been disseminated widely without consequence. The criminal justice system relies on private companies to invest and develop technology such as TrueAllele. These companies would be substantially affected if the trade secrets that underlie such technology were forced into the public domain. As mentioned above, this would affect not only TrueAllele and other expert DNA systems, but the computer codes supporting every other aspect of DNA analysis, every automated aspect of drug, alcohol and ballistic analysis, and every other automated system that is involved in forensic analyses. Likewise, a holding that the source code for TrueAllele is a 'declarant' under the Sixth Amendment would similarly require disclosure of the source codes of each of the above systems, as well as any computer that contributed to the production or assembly of evidence. Additionally, because the petitioner's argument is based on a right of confrontation, it would require a criminal defendant who seeks to offer such evidence to obtain and disclose any relevant source code as well.[15]

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[14] If the defendant had sought to subpoena the source code perhaps this analysis could have occurred, but he did not.
[15] Cybergenetics has contributed to numerous exonerations over the last ten years, including Johnny Lee Gates a former death row inmate whose claim of racial discrimination during jury selection was acknowledged in state court, but relief was denied because the errors had not been properly preserved.

Even if this Court were to believe that the defendant's petition deserves consideration based on his confrontation clause claim, it should still deny certiorari because the New York State Court of Appeals determined that, absent the evidence produced by TrueAllele, the other evidence of the defendant's guilt was overwhelming. Therefore, regardless of this Court's determination, the defendant's verdict would remain unchanged.

Even if the defendant's claim had merit and the evidence were not overwhelming, if this Court were ever to determine that the code was improperly kept from defendant it would not require reversal. In that case the Court should order disclosure (pursuant to a protective order) and defendant could review the code to determine if it contained an error that would have discredited the results. If the defendant cannot demonstrate that he suffered prejudice from the lack of access he would not be entitle to reversal of his conviction.

III. CONCLUSION

The petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. CARNEY
District Attorney

By: William M. Lemon
Assistant District Attorney
Schenectady County District
Attorney's Office

Dated: October 12, 2022

No. 22-5588

IN THE

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF NEW YORK
RESPONDENT

VS.

JOHN WAKEFIELD
PETITIONER

PROOF OF SERVICE

I, Catherine A. Dobies, do swear or declare that on this date, October 13, 2022, as required by Supreme Court Rule 29 I have served the enclosed RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them.

The names and addresses of those served are as follows:

Matthew C. Hug, Esq.
Hug Law, PLLC
P.O. Box 14263
Albany, New York 12212

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 13, 2022

CATHERINE A. DOBIES

Sworn to before me
this 13th day of October, 2022
Denise M. Haley

DENISE M. HALEY
Notary Public, State of New York
Qualified in Schenectady County
#4789935
Commission Expires 1/31/2026