IN THE

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NO. 73 WDM 2016

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

V.

CHELSEA ARGANDA and
CHESTER WHITE,
Petitioners.

ANSWER TO PETITION FOR REVIEW

Appeal from the Order dated June 8, 2016 refusing to certify for appeal the trial court's discovery Order dated April 13, 2016 at No. CC 201317748 and 201317753 in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division

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COUNTER STATEMENT OF JURISDICTION

Presently under review is the Petitioners' Petition for Review, which is purported to be filed after the trial court in this case failed to rule on Petitioners' Application for Amendment to Include Certification of the trial court's April 13, 2016 Order as appealable. By way of background, the Commonwealth notes that on October 14, 2015, Attorney Geary filed a Motion to Compel Discovery seeking the source code of the TrueAllele program. On October 19, 2015, the Commonwealth filed a pleading requesting quashal of the Subpoena. On April 13, 2016, the Honorable Jeffrey A. Manning issued an Order granting the Commonwealth's Motion to Quash.

On May 13, 2016, Petitioners filed the above mentioned Application for Amendment to Include Certification of the trial court's April 13, 2016 Order as appealable. On June 9, 2016, the trial court filed an Order and Memorandum Opinion, including a certificate of service upon counsel for Petitioners, denying the request to certify the order for interlocutory appeal (see **Exhibit AA**). Nonetheless, the Petition for Review avers that the trial court failed to rule on the Application for Amendment. (See Petition for Review ("PR") at p. 3.) Without citation to any authority, Petitioners aver, "[u]nder the rules of procedure, the Application was deemed denied after 30 days elapsed. This timely Petition for Review follows." Petitioners are incorrect.

Where, as here, a trial court denies a request for amendment to include the language of 42 Pa. C. S. section 702(b) Interlocutory appeals by permission[1], the next

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[1] (b) Interlocutory appeals by permission.--When a court or other government unit, in making an interlocutory order in a matter in which its final order (continued …)

step to obtaining appellate review is set forth in the Comment to Pa. R.A.P. 1311(d).[2] The comment provides that if the trial court "refuses to amend its order to include the prescribed statement [of section 702(b)], a petition for review under Chapter 15 of the unappealable order of denial is the proper mode of determining whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." Chapter 15 (Petition for Review), instructs as follows:

> (a) Appeals authorized by law. Except as otherwise prescribed by subdivision (b) of this rule:
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> (1) A petition for review of a quasijudicial order, or an order appealable under 42 Pa.C.S. § 763(b) (awards of arbitrators) or under any other provision of law, **shall be filed with the prothonotary of the appellate court within 30 days after the entry of the order.**

Pa. R.A.P. 1512 (a)(1) (emphasis supplied). Furthermore, Pennsylvania Rule of Appellate Procedure 1311(b) states that that "[p]ermission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. § 702(b) may be sought by filing a petition for permission to appeal with the prothonotary of the appellate court within 30 days after entry of such order." Insofar as the trial court's Order was

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> would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.
> 42 Pa. C. S. § 702 (b).

[2] Pennsylvania Rule of Appellate Procedure 1311(b) provides that if the trial court fails to act on the application to amend the interlocutory order to include the section 702(b) certification, that application "shall be deemed denied."

docketed and served on counsel on June 9, 2016, the deadline for filing an appeal from the Order expired on July 11, 2016. The time stamped Petition for Review and Certificate of service attached to the Petition indicate it was filed on July 12, 2016 in Superior Court.[3]

This Court recognizes that when "an appellant seeking to appeal from an interlocutory order that is not appealable as of right fails to adhere to the procedure outlined in the rules, an appeal by permission is inappropriate." *Estate of Considine v. Wachovia Bank*, 966 A.2d 1148, 1153 (Pa. Super. 2009) citing *Patton v. Hanover Ins. Co.,* 417 Pa.Super. 351, 612 A.2d 517, 518 (1992). See also *Commonwealth v. Brister*, 16 A.3d 530, 535 (Pa. Super. 2011). Accordingly, the Commonwealth respectfully submits that the Petitioners' instant Petition for Review challenging the Honorable Jeffrey A. Manning's denial of certification is not properly before this Court, which lacks jurisdiction to address it. Therefore, it should be quashed. *Commonwealth v. McMurren*, 945 A.2d 194, 197 (Pa. Super. 2008) (initial petition for review in Superior Court was filed more than thirty days after issuance of trial court order and would appear to be untimely), citing Pa.R.A.P. 1512(a)(1); *Brister, supra,* 16 A.3d at 534 ("If the trial court's Order from which the appeal is sought to be taken contains the requisite certification and if a Petition for permission to appeal is filed pursuant to Chapter Thirteen, only then may we exercise our discretion to permit the appeal.")

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[3] Notwithstanding the fact that the July 12, 2016 filing date is reflected by the Certificate of Service, the Verification attached to the Petition for Review inaccurately cites Title 42 rather than Title 18 (Crimes Code) section 4904 and is dated March 7, 2016.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER THIS COURT SHOULD QUASH THE PETITIONERS' PETITION FOR REVIEW BECAUSE IT WAS NOT TIMELY FILED?

II. IN THE ALTERNATIVE, WHETHER THIS COURT SHOULD DENY THE PETITIONERS' PETITION FOR REVIEW BECAUSE THE UNDERLYING INTERLOCUTORY ORDER PETITIONERS SEEK TO APPEAL DOES NOT INVOLVE A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION, IMMEDIATE APPEAL FROM THE ORDER WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS MATTER, AND THE TRIAL COURT'S REFUSAL TO AMEND WAS NOT EGREGIOUS?

COUNTER-STATEMENT OF THE CASE

The Petitioners in the above-captioned case are charged with firearms violations. A firearm was recovered in a vehicle driven by Petitioner Arganda in which Petitioner White was a passenger. Neither was legally permitted to possess a firearm. The Commonwealth seeks to introduce at trial DNA evidence that utilizes the TrueAllele Casework System ("TrueAllele"). TrueAllele, a probabilistic genotyping computer system that interprets DNA evidence using a statistical model, was created by Dr. Mark Perlin, who is a Commonwealth expert witness. Dr. Perlin's corporation, Cybergenetics, owns the TrueAllele software and its proprietary source code. The source code is a list of instructions in the form of a computer program that is translated into computer-readable software. The source code gives the computer step-by-step instructions that describe what to do to data that is fed to the computer. The TrueAllele source code is a trade secret of Cybergenetics. Application of the TrueAllele program to a DNA mixture found on the firearm described above produced a DNA match to Petitioner Chester White.

On October 12, 2015, counsel for Petitioners, Noah Geary, Esquire, filed a Subpoena Duces Tecum upon Dr. Mark Perlin and Cybergenetics. On October 14, 2015, Attorney Geary filed a Motion to Compel Discovery seeking the source code of the TrueAllele program (**Exhibit BB**). On October 19, 2015, the Commonwealth filed a pleading requesting quashal of the Subpoena. On April 13, 2016, the Honorable Jeffrey A. Manning issued an Order quashing the Subpoena Duces Tecum (**Exhibit CC**).

On May 2, 2016, a discovery hearing was held before Judge Manning (**Exhibit DD**). On May 13, 2016, counsel for Petitioners filed a Motion requesting that Judge Manning enter a separate Order certifying the interlocutory appeal of the denial of the

Motion to Compel Discovery to the Superior Court (**Exhibit EE**). On June 8, 2016 (docketed June 9), Judge Manning issued an Order that: 1) denied Petitioners' Motion to reconsider the Order of April 13, 2016; 2) denied the Petitioners Motion for Discovery filed on May 2, 2016; and 3) denied the Petitioners' request for certification of the issue as immediately appealable, so as to facilitate an interlocutory appeal (**Exhibit AA**). On June 9, 2016, Judge Manning issued a Memorandum Opinion in support of the Order (**Exhibit AA**). Petitioners' Petition for Review was filed on July 12, 2016. The Commonwealth's Answer follows.

FACTUAL HISTORY

The facts underlying the charges in this case were set forth in the Police Criminal Complaint filed on December 18, 2013 in Petitioner White's case, as follows:

> On 12-17-13 Officer Deloplaine and I, Officer Modena were conducting a directed patrol in the Uptown Area of the City of Pittsburgh. At approximately 2232 hours we observed a gray Pontiac G6 PA registration JKG 9395 traveling inbound on 5th Avenue and make a left turn onto Stevenson Street. As the vehicle entered onto Stevenson Street it quickly pulled over to the right side of the roadway while failing to use its turn signal. As we pulled our marked Police Vehicle behind the gray Pontiac G6 to initiate a traffic stop, both the driver and passenger doors opened and the occupants began to exit. We activated our lights and ordered the occupants to return inside the vehicle, which they complied. Officer Deloplaine approached the drivers side of the vehicle and I approached the passenger side of the vehicle. Officer Deloplaine and I smelled a strong odor of burnt marijuana coming from within the vehicle. I informed the driver, Chelsea Arganda, of our reason for the traffic stop (VC 3334 --Turning Movements and Required Signals) and asked her for her license, registration, and insurance paperwork at that time. Arganda stated that the information was in the trunk of the vehicle. I asked Arganda to provide me verbally with her name and date of birth which she did. I also obtained the passenger of the vehicles PA State ID card, identifying him as Chester White. I informed

the occupants that I could smell marijuana coming from within the vehicle and both denied possessing any marijuana. I asked Arganda and White if there were any weapons in the vehicle or on their persons and both responded "no".

I checked Arganda and White's information through Index and learned that White had an active arrest warrant out of Beaver County at OTN T404460-0 for Person Not to Possess Use Etc. Firearms, Firearms Not to Be Carried W/0 License, and Receiving Stolen Property. Officer Nowak and I placed White into custody at that time (handcuffs double locked and checked for tightness). White was searched incident to arrest and placed into the rear of our Police Vehicle.

I advised Arganda that White had active warrants and again asked her where her drivers license was. Arganda stated that it was the trunk and stated that she would get it. I again asked Arganda if there were any weapons in the vehicle that she was aware of and she stated "no". I asked Arganda if I could do a quick search of the vehicle and she stated that would be fine. I asked Arganda to exit the vehicle and at which time I conducted a search of the interior of the vehicle and located/recovered a silver/black Smith and Wesson SW40VE pistol, serial #DVN8542 from inside the center consol arm rest. I asked Arganda if the firearm belonged to her and she denied ownership. I asked Arganda if she possessed a valid license to carry a firearm and she responded "no". I place Arganda into custody at that time (handcuffs double locked and checked for tightness). Arganda was searched incident to arrest and I located/recovered a clear knotted baggy containing marijuana from inside her purse. Arganda was placed into the rear of Officer Nowak's Police Vehicle.

I advised White of the firearm that was recovered from the center arm rest and he immediately denied ownership of the firearm.

Note: The firearm was located in arms reach of Arganda and White and both could easily access the weapon.

Officer Seserko arrived on scene and handled the tow of the gray Pontiac G6 PA registration to the City Pound (McGann and Chester).

Officer Deloplaine and I transported White to the ACJ without incident.

Officer Nowak transported Arganda to the ACJ without incident.

All Police vehicles were checked for contraband before/after all transports.

Officer Seserko checked JNET and discovered that White was found guilty of Robbery 3701 at OTN G015166-4.

I checked the silver/black Smith and Wesson .40 caliber SW40VE serial #DVN8542 through Index and it was not reported stolen at this time.

SUMMARY OF THE ARGUMENT

The Commonwealth respectfully submits that the Petition for Review filed by Petitioners Arganda and White should be quashed because it was not timely filed.

In the alternative, it must be denied. Instantly, the Order denying appellate certification of the Order denying the motion to compel discovery of the TrueAllele source code was proper. The underlying interlocutory order Petitioners seek to appeal does not involve a controlling question of law as to which there is a substantial ground for difference of opinion, immediate appeal from the order will not materially advance the ultimate termination of this matter, and the trial court's denial of certification was not egregious. Accordingly, the Commonwealth respectfully submits that the trial court's Order issued on June 9, 2016 that denied Petitioners' Motion to Certify the discovery issue for interlocutory appeal should be upheld.

ARGUMENT

I. THIS COURT SHOULD QUASH THE PETITIONERS' PETITION FOR REVIEW BECAUSE IT WAS NOT TIMELY FILED.

Under Pennsylvania law, an appeal may be taken from: (a) a final order or an order certified by the trial court as a final order; (b) an interlocutory order as of right; (c) an interlocutory order by permission; or (d) a collateral order. A final order is any order that disposes of all claims and all parties, is expressly defined as a final order by statute, or is entered as a final order pursuant to the trial court's determination. Pa. R.A.P. 341(b)(1)-(3), 42 Pa. C.S.A. The question of the appealability of an order goes directly to the jurisdiction of the Court asked to review the order. *In re N.B.*, 817 A.2d 530, 533 (Pa. Super. 2003) (citation omitted).

Petitioner filed a petition for permission to appeal, in the form of a Petition for Review, in this Court's Prothonotary. This filing is required pursuant to Pa. R.A.P. 1311(b), which in relevant part provides:

> (b) Petition for permission to appeal. Permission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. § 702(b) may be sought by filing a petition for permission to appeal with the prothonotary of the appellate court within 30 days after entry of such order in the lower court or other government unit with proof of service on all other parties to the matter in the lower court or other government unit and on the government unit or clerk of the lower court, who shall file the petition of record in such lower court. An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) shall be filed with the lower court or other government unit within 30 days after the entry of such interlocutory order and permission to appeal may be sought within 30 days after entry of the order as amended. [. . .].

Pa. R.A.P. 1311, 42 Pa. C. S. A. However, the Petition for Review was not filed within 30 days of June 9, 2016, the date of the trial court's Order denying the application to

certify the interlocutory appeal of the denial of the Motion to Compel Discovery to the Superior Court. Insofar as the trial court's Order was docketed and served on counsel on June 9, 2016, the deadline for filing an appeal from the Order expired on July 11, 2016. The time stamped Petition for Review and Certificate of Service attached to the Petition indicate it was filed on July 12, 2016 in Superior Court.

As set forth more fully above and in the Counter Statement of Jurisdiction, *supra*, the instant Petition for Review was not timely filed. The Commonwealth respectfully submits Petitioners failed to follow the required process for interlocutory appeals, which is jurisdictional in nature and cannot be overlooked. *Commonwealth v. Fleming,* 794 A.2d 385, 387 (Pa. Super. 2002) ("When an interlocutory order is not immediately appealable by right, discretionary review may only be sought by the filing of a petition for an interlocutory appeal by permission pursuant to Pa.R.A.P. 1311 and 42 Pa.C.S.A. § 702(b)."); *Brister, supra; Estate of Considine, supra*. See also Pa. R.A.P 105(b) (an appellate court "may not enlarge the time for filing […] a petition for review.") Therefore, the Commonwealth respectfully submits this Court is without jurisdiction to entertain the merits of the instant Petition, and there is consequently a basis for this Court to quash the Petition for Review.

II. IN THE ALTERNATIVE, THIS COURT SHOULD DENY THE PETITIONERS' PETITION FOR REVIEW BECAUSE THE UNDERLYING INTERLOCUTORY ORDER PETITIONERS SEEK TO APPEAL DOES NOT INVOLVE A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION, IMMEDIATE APPEAL FROM THE ORDER WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS MATTER, AND THE TRIAL COURT'S REFUSAL TO AMEND WAS NOT EGREGIOUS.

As referenced in the Counter Statement of Jurisdiction, *supra*, if the trial court denies a request for amendment to include the language of 42 Pa. C. S. section 702(b)[4], the second step to obtaining appellate review is set forth in the Comment to Pa. R.A.P. 1311(d). The Comment states that if the trial court "refuses to amend its order to include the prescribed statement [of section 702(b)], a petition for review under Chapter 15 of the unappealable order of denial is the proper mode of determining whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." Thus, after being denied certification, the litigant's second step would be to petition this Court under Chapter Fifteen and establish the reason the case is so egregious as to require immediate correction of the trial court's

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[4] **(b) Interlocutory appeals by permission.--**When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa. C. S. § 702 (b).

ruling. See *McMurren*, *supra*, 945 A.2d at 195-96 (detailing procedure). In *Commonwealth v. Dennis*, 580 Pa. 95, 859 A.2d 1270, 1275 (2004), the Supreme Court explained:

> "where the trial court refuses to certify an interlocutory order [for appeal], the accepted procedure for requesting appellate review of an uncertified, interlocutory order is by the filing of a Petition for Review, directed to the appellate court which would have jurisdiction if a final order were entered in the matter." […] "The purpose of a Petition for Review in such cases is to test the discretion of the trial court in refusing to certify its order for purposes of appeal." […]

(other citation omitted). In *Hoover v. Welsh*, 419 Pa. Super. 102, 615 A.2d 45, 46 (1992), this Court ruled that where the trial court refuses to amend its order so as to characterize it as appealable:

> [A] party filing a petition for review from an order denying certification should incorporate into the petition for review all of the components which are required to be included within a petition for permission to appeal. *See* Pa.R.A.P. 1312. In such a case, the best practice is to prepare a document which conforms in every respect to the requirements of a petition for permission to appeal, but label the document a 'Petition For Review (from the order of the Court of Common Pleas of _____ County refusing to amend its order pursuant to Pa.R.A.P. 1311(b) [sic]'. In presenting the 'statement of reasons,' emphasis should be placed on why the trial court ... erred in failing to amend its order *viz.,* that the underlying interlocutory order the petitioner seeks to appeal involves a 'controlling question of law as to which there is a substantial ground for difference of opinion' and 'immediate appeal from the order may materially advance the ultimate termination of this matter.' The petition also should stress that the refusal to amend was 'egregious.'

(other citation omitted).

The Commonwealth respectfully submits that the Order denying Petitioners' Motion for discovery of the TrueAllele source code from which the instant Petition for Review is taken was proper. Accordingly, there is no basis for this Court to disturb it.

This Court will review the trial court's Order denying discovery for an abuse of discretion. "Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." *Commonwealth v. Robinson*, 122 A.3d 367, 373 (Pa. Super. 2015) (other citation omitted). The question whether an order is "final" and thus immediately appealable to the Superior Court is a question of law, concerning which this Court's standard of review is *de novo,* and its scope of review is plenary. *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 846, 652 n. 1 (2006).

A. THE UNDERLYING INTERLOCUTORY ORDER PETITIONERS SEEK TO APPEAL DOES NOT INVOLVE A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

Concerning the requirement that there be a "controlling question of law as to which there is a substantial ground for difference of opinion", Petitioners suggest that the California *Martell Chubbs* case created a substantial ground for difference of opinion concerning the accuracy of the TrueAllele program (see PR at p. 5, and PR Exhibit B.) The Commonwealth respectfully disagrees. In *Chubbs*, the State of California opposed production of the TrueAllele source code.

Ultimately, the Order directing production of the source code was reversed by the California Superior Court on January 9, 2015, in an unpublished Opinion. The Superior Court held Dr. Perlin was not required to produce the source code and that it was not material to the case merely based on bald defense assertions that the source code was required to evaluate the reliability of TrueAllele:

> Although [*Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super.

> 2012), an] out-of-state case does not carry precedential weight, we agree with its conclusion that access to TrueAllele's source code is not necessary to judge the software's reliability. Similar to Chubbs' case, Perlin's estimate of the probability of a DNA match to the defendant in *Foley* was much higher (1 in 189 billion) than the estimates of the other scientific experts (1 in 13,000 and 1 in 23 million). (See *id.* at p. 887.) As pertinent here, the Pennsylvania court rejected the defendant's argument that Perlin's testimony should have been excluded, reasoning that "scientists can validate the reliability of a computerized process even if the 'source code' underlying that process is not available to the public. TrueAllele is proprietary software; it would not be possible to market TrueAllele if it were available for free. [Citation.]" (*Id.* at p. 889.) The court further reasoned that TrueAllele "has been tested and validated in peer-reviewed studies," citing several papers that "were published in peer-reviewed journals" and thus "reviewed by other scholars in the field." (*Id.* at pp. 889–890.)
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> "[I]t is not enough that a trade secret might be useful to real parties." (*Bridgestone, supra,* 7 Cal.App.4th at p. 1395.) Instead, "the party seeking discovery must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit." (*Id.* at p. 1393.) Chubbs has received extensive information regarding TrueAllele's methodology and underlying assumptions, but he has not demonstrated how TrueAllele's source code is necessary to his ability to test the reliability of its results. We therefore conclude that Chubbs has not made a prima facie showing of the particularized need for TrueAllele's source code.

People v. Superior Court (Chubbs), No. B258569, 2015 WL 139069, at *8–9 (Cal. Ct. App. Jan. 9, 2015) (emphasis supplied).[5]

[5] Via email, on March 18, 2016 undersigned counsel learned from Dr. Perlin that Martell Chubs entered a guilty plea on March 18, 2016.

More importantly, in *Chubbs*, Judge Manning was merely ordering Dr. Perlin to comply with a subpoena duces tecum issued in California, by traveling there with documents, and he did not rule on the discoverability of the TrueAllele source code. Judge Manning determined that Dr. Perlin was a material witness in *Chubbs*, but he never stated that the source code was "material" as Petitioners now claim. Judge Manning's Opinion and Order did not order production of the source code, but instructed that what would be done with that information was a matter for the California trial court. Taken in context, Judge Manning's Opinion and Order did not deem the source code to be material in the sense that it is critical to Chubbs' (or Petitioners') case. Equally important, Judge Manning's instant Memorandum Opinion and Order make plain that he does not believe it is discoverable or material to Petitioners' case, just as two other Allegheny County Court of Common Pleas jurists have already concluded. Accordingly, no substantial ground for difference of opinion can be found.

From a review of the above, the Commonwealth respectfully submits that the *Chubbs* case does not demonstrate a substantial ground for difference of opinion concerning the government's obligation to produce the TrueAllele source code, as is required.

Separate from litigation concerning probabilistic genotyping software, there has been extensive litigation in other states regarding disclosure of source codes for DUI breath-testing equipment. Generally, courts have determined that disclosure is not necessary in order to test the machines' accuracy. Several courts have denied requests for the breath test source code simply because it was not in the state's possession. See *State v. Tindell*, 2010 WL 2516875, at *16 (Tenn. Crim. App. June

22, 2010) (“We see no error in the trial court's conclusion that the source code was not discoverable under this Rule. First, Appellant has failed to demonstrate that the State had possession, custody, or control over the source code.”); *State v. Bernini*, 220 Ariz. 536, 207 P.3d 789, 791 (Ct. App. 2009) (“Reasonable evidence supported the respondent judge's findings that the state has no independent obligation […] to produce CMI's source code for the Intoxilyzer 8000, because, based upon the record […], the state has neither possession of the source code nor control over CMI.); *People v. Robinson,* 860 N.Y.S.2d 159, 167, 53 A.D.3d 63, 73-74 (2008) (“the People were not required to make available the Intoxilyzer's source code because the People never possessed it, actually or constructively. […] The Intoxilyzer source code was not the property of the State, since it was owned and copyrighted by its manufacturer, CMI, Inc., a Kentucky corporation, and is a trade secret of CMI, Inc. (citing *Moe v. State,* 944 So.2d 1096 (Fla. Dist. Ct. App. 2006); *People v. Cialino,* 14 Misc.3d 999, 831 N.Y.S.2d 680, 681-682 (N.Y.Crim.Ct.2007) [it was “undisputed” that the People did not actually or constructively possess the source code])”); *City of Fargo v. Levine*, 747 N.W.2d 130, 134 (N.D. 2008) (same).

In a case where a court has ordered disclosure of breath test source code, the facts are markedly different from those in Petitioners’ case. See *In re Comm'r of Pub. Safety* 735 N.W.2d 706, 712 (Minn. 2007) *(“Underdahl I”).* In *Underdahl I*, the Supreme Court of Minnesota found that state had possession or control of the source code because the Commissioner of Public Safety had an agreement with the breath test machine’s manufacturer that gave the Commissioner access to the source code. This ruling was upheld in *State v. Underdahl,* 767 N.W.2d 677 (Minn. 2009) *(“Underdahl II”).*

However, in *Underdahl II*, the court reversed the order mandating disclosure as to one of the defendants because he had made no specific showing of relevance. *Id*. at 685.

DNA identification evidence is commonly accepted as reliable in the vast majority of courts across the United States, and is generally admissible to assist in determining the identity of criminal offenders. *See* Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R.4th 313 at § 4 (1991) (collecting cases from federal district courts in New Hampshire and Vermont, the 6th, 8th, 9th and 10th Circuits, and state courts of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming (41 states)).

Based on a review of the above authority, there appears not to be a "substantial ground for difference of opinion" as envisioned in section 702(b), among either Allegheny County judges or those from other jurisdictions, that warrants certification of the court's Order denying discovery dated April 13, 2016 as appealable in this case.

B. IMMEDIATE APPEAL FROM THE UNDERLYING INTERLOCUTORY ORDER WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS MATTER.

As to the second factor to be established to secure an interlocutory appeal by permission, Petitioners cursorily make an unsubstantiated claim that "Appellate resolution of this issue at this juncture will materially advance resolution of this issue to prevent the Petitioners from being denied a fair trial." (PR at p. 6.) The Commonwealth

respectfully submits an immediate appeal would not advance the termination of this case. A determination that the source code is discoverable is merely an initial step in the progress of Petitioners' trial. The parties likely will proceed to select a jury, and it and the trial court will likely hear evidence from the Commonwealth and the Petitioners concerning Petitioners' guilt or innocence. Accordingly, an immediate appellate decision on this matter will not save time. As this Court recognizes,

> [t]he purpose of the interlocutory procedure rule to secure immediate appellate review is not designed to encourage or authorize the wholesale appeal of difficult issues when appellate review would be better served by having all issues that are raised in a trial initially reviewed by the trial court and then subject to one review if necessary.

Kensey v. Kensey, 877 A.2d 1284, 1289 (Pa. Super. 2005) (other citation omitted).

Judge Manning's Order neither ends the litigation nor disposes of the entire case, and for this reason it typically would not be subject to this Honorable Court's review. See *Doughery v. Heller*, 97 A.3d 1257, 1261 (Pa. Super. 2014) ("[g]enerally, discovery orders are deemed interlocutory and not immediately appealable because they do not dispose of the litigation.") (*En banc*) (other citation omitted); *Commonwealth v. Scarborough*, 619 Pa. 353, 64 A.3d 602, 608 (2013) (characterizing a final order as "one which ends the litigation or disposes of the entire case"); *Diamond v. Diamond*, 715 A.2d 1190, 1193 (Pa. Super. 1998) (noting that orders imposing discovery sanctions are not appealable until entry of final judgment "even where the party refusing to provide discovery is held in civil contempt in an effort to coerce compliance with a discovery order"); contrast *Rhodes v. USAA Cas. Ins. Co*., 21 A.3d 1253, 1258 (Pa. Super. 2011) (discovery orders that *require the disclosure* of privileged or confidential material may be immediately appealable as collateral orders because "the disclosure of

documents cannot be undone.") (Emphasis supplied).

Additionally, this Court has recognized that a discovery order encompassing material that is intertwined with the facts necessary to support the action is not separable from the action. *See Van der Laan v. Nazareth Hosp.,* 703 A.2d 540, 541 (Pa. Super. 1997). In *Van der Laan,* this Court explained that "this definition of separability in the discovery context is necessary to prevent our appellate courts from becoming 'second-stage motion courts' and to forestall the interruption and delay of litigation by 'piecemeal review of trial court decisions.'" *Id*. at 542 (citations omitted). Presently, the TrueAllele source code provides a basis for the opinion of the Commonwealth's expert in this matter. This testimony will be included as part of the Commonwealth's burden of proof of beyond a reasonable doubt at trial, and thus it cannot be deemed separately appealable. Additionally, if the instant Petition for Review were granted, the likely outcome would be an appeal of that decision, thus further delaying trial. On the whole, an immediate appeal would not advance the termination of this case. The Commonwealth respectfully submits that the discovery process should be permitted to develop and conclude without this Court's intervention.

C. THE TRIAL COURT'S REFUSAL TO AMEND WAS NOT EGREGIOUS.

Petitioners claim that the trial court's refusal to certify this matter as appealable is egregious error because it allegedly conflicts with the *Chubbs* case. (PR at p. 7). As set forth more fully above however, Judge Manning only ordered Dr. Perlin to comply with a subpoena duces tecum issued in California, by traveling there with documents, and he did not rule on the discoverability of the TrueAllele source code. Judge Manning determined that Dr. Perlin was a material witness in *Chubbs*, but he never determined

that the source code was "material". Judge Manning's Opinion and Order merely instructed that what would be done with the documents possessed by Dr. Perlin was a matter for the California trial court. Taken in context, Judge Manning's Opinion and Order did not deem the source code to be material in the sense that it is critical to Chubbs' (or Petitioners') case. As set forth above, Judge Manning's instant Memorandum Opinion and Order clearly indicate he does not believe the source code is discoverable or material to Petitioners' case, just as two other Allegheny County Court of Common Pleas jurists have already concluded (See **Exhibit AA**). Likewise, the California Court in *Chubbs* ultimately held Dr. Perlin was not required to produce the source code and that it was not material to the case merely based on bald defense assertions that the source code was required to evaluate the reliability of TrueAllele.

To the extent the Petition for Review alleges TrueAllele's reliability cannot be evaluated without its source code (see PR at p. 6), thus mandating reversal of Judge Manning's Order denying discovery, this Honorable Court has suggested otherwise. In *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012) (*en banc*), the Superior Court addressed whether Dr. Perlin's testimony based on TrueAllele testing in a homicide case was admissible pursuant to *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). As the *Foley* Court noted:

> The *Frye* test is a two-step process. […] First, the party opposing the evidence must show that the scientific evidence is "novel" by demonstrating "that there is a legitimate dispute regarding the reliability of the expert's conclusions." [I]f the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that "the expert's methodology has general acceptance in the relevant scientific community" despite the legitimate dispute.

Foley, 38 A.3d at 888 (internal quotation marks omitted). The Foley trial court did find that Dr. Perlin's methodology was generally accepted. However, the trial court had not determined whether Dr. Perlin's testimony was "novel scientific evidence". The *Foley* Court nevertheless pointed out the trial court had "[found] Dr. Perlin's methodology [to be] a refined application of the "product rule," a method for calculating probabilities that is used in forensic DNA analysis." *Id*. The *Foley* Court noted the Pennsylvania Supreme Court found scientific evidence based on the product rule to be admissible. *Id*., citing *Commonwealth v. Blasioli,* 552 Pa. 149, 713 A.2d 1117, 1118 (1998).

Further, as to Petitioners' cursory *Brady* claim (PR at p. 8), to be material, as the United States Supreme Court has instructed, "there [must be] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). In *Commonwealth v. Tharp*, 627 Pa. 673, 101 A.3d 736 (2014), the Pennsylvania Supreme Court held that in order to establish a *Brady* violation, a defendant must demonstrate that withheld impeachment evidence is "determinative of the defendant's guilt or innocence." *Tharp*, 101 A.3d at 747 (other citation omitted). The *Tharp* Court further instructed:

> [F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. […] In determining if a reasonable probability of a different outcome has been demonstrated, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in

> its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Tharp, *supra*, 101 A.3d at 748 (internal citation omitted).

"The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist the preparation of [his] defense, but to assure that the defendant will not be denied access to exculpatory evidence **only** known to the Government." *Commonwealth v. Lambert*, 765 A.2d 306, 325 (Pa. Super. 2000) (emphasis in original). Moreover, *Brady* does not mandate that the prosecution disclose to a defendant all of the evidence in its possession, but only favorable evidence that, if suppressed, would deprive the defendant of a fair trial. *Commonwealth v. Cam Ly*, 602 Pa. 268, 980 A.2d 61 (2009). In *Lambert*, the Supreme Court held that *Brady* does not grant a criminal defendant unfettered access to the Commonwealth's files. *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848 (2005). "*Brady* does not require the disclosure of information 'that is not exculpatory but might merely form the groundwork for possible arguments or defenses,' nor does *Brady* require the prosecution to disclose 'every fruitless lead' considered during a criminal investigation. […] The duty to disclose is limited to information in the possession of the government bringing the prosecution[.]" *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 608 (2013).

On *Brady*/Sixth Amendment grounds, other jurisdictions have rejected requests for source code. *State v. Tindell*, *supra,* 2010 WL 2516875, at *14 (noting that Confrontation Clause guarantees the right to confront those who bear testimony against a defendant, and concluding that breath testing machine was not a witness pursuant to the Confrontation Clause.); *State v. Marino*, 229 N.C. App. 130, 137, 747 S.E.2d 633,

638 (2013) (rejecting *Brady* argument that defendant entitled to source code; "defendant failed to establish Intoximeter source code was 'favorable' to his case or 'material either to guilt or to punishment.' Instead, defendant [sought] to examine the source code in hopes that it will be exculpatory in nature or will lead to exculpatory material.").

Still other jurisdictions have required a showing of materiality, which requires some suggestion that an error exists in the code before ordering its disclosure. See *Commonwealth v. House*, 295 S.W.3d 825, 829 (Ky. 2009) ("in this case, the party demanding production can point to nothing more than hope or conjecture that the subpoenaed material will provide admissible evidence. House, as noted above, sought CMI's Intoxilyzer code hoping that his expert might discover flaws in it, but he presented no evidence whatsoever suggesting that the code was flawed. His subpoena was nothing but a classic fishing expedition, which RCr 7.02(3) does not allow."); *Bernini*, *supra*, 218 P.3d at 1069 (vacating order mandating disclosure of code "merely in hope that something will turn up").

In order to obtain relief under *Brady*, the evidence sought must be outcome determinative, and not merely helpful. The Commonwealth submits Petitioners have failed to establish the source code at issue in this case is either helpful or outcome determinative. And, as Petitioners are aware, the TrueAllele source code they seek to obtain through discovery is not in the Commonwealth's possession. Therefore, the failure to produce the source code was not in violation of *Brady v. Maryland*. Moreover, the cases summarized above make clear that it is common for cases to proceed without the parties having access to proprietary source code. All that is required is access to the program's methodology, and validation studies verifying its results. Petitioners have

access to those factors in the case at bar.

Consistent with the authority cited above, Judge Manning correctly denied the Petitioners' Motion for appellate certification in this case, and this ruling was not an egregious error or an abuse of discretion. Based on all of the above authority and analysis, the Commonwealth respectfully submits that if the instant Petition for Review is not quashed, the June 9, 2016 Order denying Petitioners' Application for Amendment to Include Certification of the Interlocutory Discovery Order should be upheld.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the instant Petition for Review be quashed, and in the alternative, the trial court's Order, issued June 9, 2016, denying Petitioners' Application for Amendment to Include Certification of the Interlocutory Discovery Order should be upheld.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY

MICHAEL W. STREILY
DEPUTY DISTRICT ATTORNEY

AMY E. CONSTANTINE
ASSISTANT DISTRICT ATTORNEY
PA I.D. NO. 63385

Attorneys for Appellee

PROOF OF SERVICE

I hereby certify that I am this day serving two (2) copies of the within Brief for Respondent upon Counsel for Petitioners in the manner indicated below which service satisfies the requirements of Pa. R. A. P. 121:

Service by First Class Mail addressed as follows:

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Dated: August __1__, 2016

/s/ Amy E. Constantine

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Office of the District Attorney
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IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317748

CHELSEA LYNN ARGANDA

Defendant.

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317753

CHESTER WHITE, JR.,

Defendant.

MEMORANDUM OPINION AND ORDER OF COURT

Honorable Jeffrey A. Manning, P.J.

For the Defendant Arganda:
Noah Geary, Esquire

For the Defendant White:
Kenneth J. Haber, Esquire

For the Commonwealth:
Brian Catanzarite, Esq.

EXHIBIT AA

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317748

CHELSEA LYNN ARGANDA

Defendant.

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317753

CHESTER WHITE, JR.,

Defendant.

MEMORANDUM OPINION AND ORDER OF COURT

Manning, J.

Before the Court are several Motions filed on behalf of the defendants, Chelsea Arganda and Chester White, Jr.; Motions to Reconsider the Court's April 13, 2016 Order quashing the Subpoena issued to Dr. Mark Perlin and Cybergenetics; Motions for Discovery and a request, made on the record at the May 2, 2016 hearing on the aforementioned Motions, asking that this Court certify the issue decided by the April 13, 2016 order for interlocutory appeal. For the reasons that follow, all three Motions will be denied.

The Motion to Reconsider and the Motion for Discovery attempt to re-litigate the issue decided by this Court in its April 13 order. The

defendants offered nothing new in its pleadings that would cause this Court to reconsider its ruling or permit the discovery requested.

Turning to the request that this Court certify the matter for interlocutory appeal, the Court would note that our colleague, the Honorable Jill A. Rangos, addressed an identical request in Commonwealth of Pennsylvania v. Michael Robinson at CC 201307777. There defense counsel, who also represents the defendant White in this matter, filed a Motion asking Judge Rangos to amend her order denying the defendant's request for production of the source codes in discovery to include a statement that would permit an interlocutory appeal.

In a Memorandum Opinion denying that request, filed on February 4, 2016, Judge Rangos rejected the defendant's argument that this Court's Memorandum Opinion in In Re: Application for Out of State Subpoena, (MD No. 2861-2014, Slip Opinion, June 16, 2014, supports the claim that there is a substantial grounds for difference of opinion as to the issue presented. Judge Rangos was correct. This Court did not rule in that matter on whether the source codes for the TrueAllele system were discoverable.

The ***sole*** issue presented to the Court was the application of 42 Pa. C.S.A. § 5963 to the subpoena issued to Dr. Perlin from the Superior Court of California in the case of The People of California v. Martell Chubbs. Section 5963 provides:

> **(a) General rule.--**If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this Commonwealth certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced, or is about to commence, that a person being within this Commonwealth is a material witness in such prosecution or grand jury investigation and his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.
>
> **(b) Hearing.--**If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state and that the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence and of any other state through which the witness may be required to pass by ordinary course of travel will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons with a copy of the certificate attached directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

42 Pa. C.S.A.§ 5963. Thus, this Court's determination of "materiality" in that matter was in the context of the enforcement of the subpoena pursuant to section 5963. The Court did not address, as it was not an issue presented, whether the evidence was "material" as that term is applied in the context of Pennsylvania Rule of Criminal Procedure 573

governing pretrial discovery and inspection or for any other purpose.

The Court simply found, based upon the certification from the California Court whose subpoena this Court was being asked to enforce, that Dr. Perlin was a material witness and that the items he was being directed to produce pursuant to that subpoena were material. That determination was based on the representation of California Superior Court Judge Richard R. Romero as to the materiality of Dr. Perlin and the information sought pursuant to the subpoena. This Court specifically noted:

> "... Judge Romero, who is in a much better position than this Court to make that determination, found that he is a material witness in the Certificate he issued pursuant to the Uniform Act. Section 5963 (b) of Pennsylvania's version of the Uniform Act, provides that "...the certificate shall be *Prima Facie* evidence of all of the facts stated therein." 42 Pa. C.S.A. § 5963 (b). Nothing that was presented to this Court during the June 9 hearing called into question the accuracy of Judge Romero's materiality determination."

In Re: Application for Out of State Subpoena, Supra. at pp. 3-4

This Court also points out that the defendant in the Robinson matter filed a Petition for Review with the Pennsylvania Superior Court requesting that it agree to hear the interlocutory appeal. The Super Court rejected that request. (See *Commonwealth v. Robinson, 25 WDM 2015, April 21, 2016 Per Curiam Order).* In light of the determination by Judge Rangos that the question of the discoverability of the TrueAllele source codes did not involve a controlling question of

law for which there is substantial grounds for a difference of opinion, a determination upheld by the Superior Court, this Court will deny the same request made here.

Testimony based upon the TrueAllele system developed by Dr. Perlin has been admitted in New York (State v. Wakefield, 9 N.Y.S. 3d 540 (2015 N.Y. Slip. Op. 25037), and in Virginia (Ramsey v. Commonwealth, 757 S.E. 2d 576 (Court of Appeals 2014)). In the California case that gave rise to this Court's decision in the California case, the California Court of Appeal, Second District, Division 4, held that the defendant in that case had " ... not demonstrated how TrueAllele Source Code is necessary to its ability to test for reliability of its results. We therefore conclude that Chubbs has not made a prime facie showing of the particularized deed for the TrueAllele's Source Code." 2015 W.L. 139069, at 6. Although that California Supreme Court's decision cannot be cited as precedent, it is certainly instructive regarding the defendant's claims in that the California Court of Appeals determined, as has Judge Rangos here, that the TrueAllele's Source Codes were not material and therefore not discoverable. The Pennsylvania Superior Court, in Commonwealth v. Foley, 38 A.2d 882 (Pa. Super. 2012), rejected a claim raised by the appellant therein that TrueAllele evidence should be excluded because "...no outside scientist can replicate of validate Dr. Perlin's methodology because his

computer software is proprietary." 38 A.2d at 888-889. Writing for a unanimous panel, Judge Panella wrote:

> Foley's third reason for exclusion is misleading because scientists can validate the reliability of a computerized process even if the "source code" underlying that process is not available to the public. TrueAllele is proprietary software; it would not be possible to market TrueAllele if it were available for free. *See* N.T., Hearing, February 18, 2009, at 54. Nevertheless, TrueAllele has been tested and validated in peer-reviewed studies.

Id. at 889.

Three members of the Court of Common Pleas of Allegheny County have now had the opportunity to address the issue raised herein. This Court, Judge Rangos and The Honorable Edward J. Borkowski in Commonwealth v. Wade, CC201404799, reached the same conclusions, that that the TrueAllele source codes are not discoverable as they are not material. Appellate Courts in three other jurisdictions have reached the same result. Accordingly, the request that this Court certify this issue for interlocutory appeal will be denied.

Date: June 8, 2016

BY THE COURT:

_____, P.J.

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v.

CC No.: 201317748

CHELSEA LYNN ARGANDA

Defendant.

ORDER OF COURT

AND NOW, this 8th day of JUNE, 2016, for the reasons set forth in the attached Memorandum Opinion, it is ORDERED as follows:

1. Defendants' Motion to Reconsider the Court's April 13, 2016 Order is DENIED;

2. The defendants' Motion for Discovery filed on May 2, 2016 is DENIED; and

3. The defendants' request that this Court certify this issue for interlocutory appeal is DENIED.

BY THE COURT:

, P.J.

Copies To:

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	
	)	**CC 2013-17748**
CHELSEA ARGANDA,	)	
	)	
Defendant.	)	
	)	
	)	
COMMONWEALTH OF PENNSYLVANIA	)	
	)	
	)	
vs.	)	
	)	
CHESTER WHITE,	)	**CC 2013 - 17753**
	)	
Defendant.	)	

MOTION TO COMPEL DISCOVERY.

AND NOW COME the Defendants, Chelsea Arganda and Chester White, by their lawyers, Noah Geary and Kenneth Haber, who respectfully submit as follows:

1. The Defendants are charged with violations of Title 18 Pa.C.S.A. Section 6106, carrying a firearm without a license, and related charges.

2. The charges result from a traffic stop in the City of Pittsburgh.

3. A 40 caliber Smith and Wesson pistol was seized from the center console of the vehicle.

4. From the Commonwealth's discovery production, it appears that no fingerprint testing was performed on the gun.

5. Instead, the Commonwealth instructed the Allegheny County Medical Examiner's Office to conduct DNA testing on the gun.

EXHIBIT BB

6. The Medical Examiner's findings were that no conclusion could be drawn because the DNA mixture profile on the gun included DNA from 4 or more contributors.

7. The Commonwealth then retained Dr. Mark Perlin/Cybergenetics to conduct DNA testing on the gun.

8. Dr. Perlin has invented his own software program, which he calls the "True Allele Casework System", which he purports can deconvolute complex DNA mixtures.

9. Importantly, Dr. Perlin created the source code to the Software Program. The source code constitutes the instructions Dr. Perlin gives the computer; Perlin instructs the computer what to do with the data received from the Medical Examiner's Office.

10. The source code to Dr. Perlin's software program consists of over 170,000 lines of instructions.

11. Although the Commonwealth has produced a report of Dr. Perlin, the report contains no information whatsoever indicating what Dr. Perlin, in the source code, instructed the computer to do with the crime lab data.

12. There is also no basis provided whatsoever in his report upon which Dr. Perlin's findings/conclusions rely upon nor any identifiable methodology.

13. The Commonwealth has produced an additional document in discovery called the "Case Packet". This document also fails, however, to establish what Dr. Perlin instructed the computer to do with the crime lab data. Inter alia, it fails to (i) identify what assumptions the computer was asked to make in the complex mixture DNA analysis, (ii) identify the rationale behind the making of each of these assumptions, (iii) identify the variables which the computer is instructed to consider (Perlin contends there are over 100 variables considered in a complex mixture

analysis) (iv) identify what weight each is given to each variable, and why; and (v) fails to identify the results of the intermediate steps in the DNA analysis.

14. The Defendants are thus prejudiced in that they are incapable of (i) identifying Dr. Perlin's methodology and (ii) assessing the reliability and validity of his methodology and his findings and conclusions.

15. The Defendants have the right under the 6th Amendment to the U.S. Constitution as well as the Pennsylvania Constitution to learn, assess and challenge Dr. Perlin at trial about his methodology and the basis for his findings and conclusions. This information is included in the source code to the software program and is material and discoverable. Unless and until the source code is produced along with all input data utilized and all output data generated in the complex mixture analysis, the Defendants will be deprived of a fair trial.

16. Accordingly, the Defendants request this Honorable Court to Order Dr. Perlin/Cybergenetics to produce the source code to the True Allele Casework System , including all input data utilized and all output data generated, to defense counsel, forthwith.

17. Dr. Perlin has obtained numerous patents on his software system; his proprietary interest in the True Allele Software program is therefore protected.

18. Additionally, pursuant to **Pennsylvania Rule of Criminal Procedure 573(F), Protective Orders**, the Defendants and their counsel are willing to enter into a Protective Order so as to further ensure that any proprietary interest of Dr. Perlin/Cybergenetics is protected.

WHEREFORE, the Defendants respectfully request this Honorable Court to Order the Commonwealth to produce the source code to Dr. Mark Perlin's True Allele Casework System as well as all input data utilized and all output data generated, to defense counsel, forthwith.

Respectfully submitted,

Noah Geary, Esquire
Attorney for Chelsea Arganda
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Mitchell Building
304 Ross Street
Pittsburgh, PA 15219
412-232-7000

Kenneth Haber, Esquire
Attorney for Chester White
Suite 400
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Pittsburgh, PA 15219
412-338-9990

CERTIFICATE OF SERVICE:

I, Noah Geary, Esquire hereby verify that I served the foregoing **Motion to Compel** upon the following counsel of record this date on behalf of both Defendants, via electronic mail and first class mail:

Allison Beagle, Esquire
Assistant District Attorney
Office of the Allegheny County District Attorney

October 14, 2015

Noah Geary, Esquire

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	
	)	
CHELSEA ARGANDA,	)	CC 2013-17748
	)	
Defendant.	)	
	)	
COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	
	)	
CHESTER WHITE,	)	CC 2013 - 17753
	)	
Defendant.	)	

ORDER OF COURT:

AND NOW, this _____ day of October, 2015, upon consideration of the Defendants' Motion to Compel, it is hereby **ORDERED** that the Motion is **GRANTED**. Cybergenetics/Dr. Perlin shall produce to defense counsel, forthwith, the source code to the True Allele Casework System, as well as all input data and all output data utilized/involved in the DNA analysis conducted on the complex DNA mixtures involved in this case.

BY THE COURT:

_____, J.
Jeffrey A. Manning

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317748

CHELSEA ARGANDA,

Defendant.

ORDER OF COURT

AND NOW this 13th day of April, 2016, the Motion of the Commonwealth to Quash the subpoena issued in this matter to Dr. Mark Perlin and Cybergenetics, is GRANTED and that Subpoena is QUASHED.

BY THE COURT:

P.J.

FILED
16 APR 19 AM 9:09
DEPT OF COURT RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY PA

EXHIBIT CC

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317748

CHESTER WHITE,

Defendant.

ORDER OF COURT

AND NOW this 13th day of April, 2016, the Motion of the Commonwealth to Quash the subpoena issued in this matter to Dr. Mark Perlin and Cybergenetics, is GRANTED and that Subpoena is QUASHED.

BY THE COURT:

_____ P.J.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

CHELSEA LYNN ARGANDA
CHESTER CORNELIUS WHITE, JR.

CRIMINAL DIVISION

CC No. 2013-17748 (Arganda)
CC No. 2013-17753 (White)

PROCEEDING:
Argument

BEFORE: The Honorable
Jeffrey A. Manning

DATE:
May 2, 2016

Reported and transcribed by:
Mary Beth Perko, RMR
Official Court Reporter

COUNSEL OF RECORD:

For the Commonwealth:
Brian Catanzarite, ADA
Alison Bragle, ADA

For Defendant Arganda:
Noah Geary, Esq.

For Defendant White:
Kenneth Haber, Esq.

EXHIBIT DD

P-R-O-C-E-E-D-I-N-G-S

- - -

THE MINUTE CLERK: Your Honor, we're here on Chester White and Chelsea Arganda.

THE COURT: Mr. Haber, you asked for the hearing?

MR. HABER: Your Honor, we did ask for the hearing. The first thing I would like to bring to the Court's attention, I think we did it orally on the record at the last time we were on the record in this matter. The Court had indicated that -- certainly correct me if I'm mistaken -- that the request for the source code, we had served a subpoena on Cybergenetics, and I believe at the time we also asked for it in discovery.

The reason for that was in the case that was dealing with the same issue before Judge Rangos, Judge Rangos said she was not going to rule on the subpoena, on whether it should be complied with or quashed, but, rather, she was going to deal with it as a matter of discovery, which is arguably a different matter, different standard.

So we did file -- I thought we actually

had already filed, but if not, just out of an abundance of caution we filed a motion to compel discovery of that same source code today because I know that was the only issue Judge Rangos ruled on.

And to my understanding --

THE COURT: So you're asking me to rule differently than she did?

MR. HABER: Well, I'm just bringing to the Court's attention that because the Court said Your Honor was going to follow the ruling in that case, the only way to do so would be if we filed the same motion. That's really all I'm doing right now.

THE COURT: All right.

MR. HABER: I would love to ask what Your Honor just raised, but I'm not going to waste anyone's time.

THE COURT: Well, I mean, it's been to the Superior Court now.

MR. HABER: Well, in that light, Judge --

THE COURT: Technically, I suppose, a judge could have another hearing on the same issue and rule differently, but it's

inconsistent with what's supposed to go on in this world. Once a judge rules, a judge of concurrent jurisdiction shouldn't be overruling that judge. That's basically what you're asking me to do. I understand that.

MR. HABER: I think it's a little more complex in this case, especially in light of Your Honor's ruling.

THE COURT: It all boils down to the same thing, whether you get Dr. Perlin's source code. That's all it boils down to.

MR. HABER: It boils down to --

THE COURT: Superior Court has said no.

MR. HABER: That's not what the Superior Court said, Your Honor. They didn't say that. The Superior Court did not agree to even consider the issue as an interlocutory appeal.

THE COURT: There you go. That sounds like a no to me.

MR. HABER: I don't think they got to the merits of the case.

THE COURT: They didn't say they got to the merits of the case. They said no. They said, No, we're not going to hear it.

MR. HABER: Right. So if the Court is following --

THE COURT: I'm going to follow Judge Rangos's lead. At some point in time it's going to become -- I don't know what you did upstairs. You're not upstairs in Judge Borkowski. That's ongoing now.

MR. HABER: Well, Judge Borkowski's issue was, again, just the subpoena, not discovery. They filed a motion to ask the Superior Court to consider it interlocutory. They withdrew the --

THE COURT: Who's "they"?

MR. HABER: The public defenders representing Mr. Wade. They withdrew -- I mean, Judge Borkowski initially ruled Judge Rangos ruled this way, and Judge Rangos cited Judge Borkowski as her support. To be quite honest, Judge, that was not logic that made any sense to me, that one judge was citing the other judge as their support and vice versa. Somebody has to rule on the issue first.

But be that as it may, I'm simply asking the Court -- Here's what I'm asking

the Court to do, two things. One, assuming it's denied, our motion to compel discovery of the source code -- and I presume the Court is going to do that.

THE COURT: I am. I do so at this point in time on the record. I'm denying the motion.

MR. HABER: Okay. I'm asking the Court, at an earlier time, I believe April 13, the Court entered an order on the companion issue of whether Cybergenetics is required to abide by the subpoena that was served on it to provide the source code in this case to the defense, and Your Honor did quash, at the request of the Commonwealth, Your Honor signed an order quashing the subpoena, and I believe that was actually dated April 19 or it was filed on April 19.

So I'm asking the Court to do one of two things or consider doing one of two things. One, in light of the rationale of the Court in the Chubbs matter the year prior, we're asking the Court to reconsider its ruling on the subpoena, which is different than the discovery issue, wherein

the Court did state that there's nothing in the law of the Commonwealth or in the Commonwealth versus Foley decision that would not make this discoverable and subject to cross-examination at trial.

Of course that is our firm position. We believe that it is absolutely proper cross-examination and, therefore, would have to be disclosed in order to engage in that full and fair cross-examination.

In the alternative, we're asking the Court to amend its order that it just entered, I guess on the discovery motion, to allow the defendants to petition the Superior Court given that we believe we have met the standard of --

THE COURT: You expect the Superior Court to act differently on your petition?

MR. HABER: Well, the standard for the Superior Court to hear an interlocutory appeal by the defense is substantially higher if the trial judge denies the request to amend its order. When the trial judge, who's in a position to see the issue much better than the Superior Court, certifies it and

basically states, and I'm using plain English here but basically states, Hey, I obviously am ruling this way because I think it's the correct legal ruling but I acknowledge that I don't know everything in the world and it's possible reasonable minds could differ on this issue and that there is grounds for reasonable minds to debate this and have a different conclusion, then the Superior Court -- not only is our standard for Superior Court to hear the case lower, but I think it makes it more likely they would hear the issue.

And the reason we're asking the Court to do that is, I guess, two or threefold. One is, yeah, I think Your Honor made findings in the Chubbs matter that support what I'm asking the Court to do.

Secondly, we believe that this is an issue of utmost public importance. In fact, not that the newspapers are always right, but they do speak towards important issues of the day, and the Pittsburgh Post-Gazette editorialized --

THE COURT: I read their editorial.

MR. HABER: I'm not asking the Court to agree with it, obviously.

THE COURT: Somebody down there on the editorial boards thinks they ought to be on the Supreme Court.

MR. HABER: We're not asking anyone to rule as a final judgment here. We're just asking, this is an issue that is pending not only, as the Court knows, in an unrelated case but a related issue, which is the Commonwealth of Pennsylvania versus Michael Robinson. That is a capital case. It's also in front of this Court with two other citizens, Chelsea Arganda and Chester White.

And I believe, and I don't want to make an error here, but I believe Your Honor even has this issue with another set of litigants, and I believe it exists elsewhere not only in this Courthouse but the Commonwealth.

THE COURT: I'm sure it exists elsewhere in the Commonwealth. I'm just not sure of where.

MR. HABER: What makes perfect sense, Judge, is because this is an important issue, a matter of public importance, a matter of

vital importance to the litigants, of course, and because it's going to be an issue repeatedly brought in front of the higher courts in the Commonwealth, it makes perfect sense for it to be heard and resolved once and for all.

All we're asking the Court to do is to just certify or to amend its order and say basically this isn't an unreasonable issue for the higher court to decide so that it's uniformly applied.

THE COURT: Mr. Catanzarite.

MR. CATANZARITE: Your Honor, Judge Rangos ruled on that issue already as well. She applied to certify this case for interlocutory appeal. She found that the discoverability of the source code of Cybergenetics TrueAllele casework system involves -- she's not of the opinion that this involves a controlling issue of law to which a substantial ground for a difference of opinion exists.

And the defense hasn't made any argument as to why it wouldn't. They haven't changed their argument as to Rules of

Discovery, the fact that Judge Rangos found discoverability of the source code is neither material, reasonable, or in the interests of justice.

The subpoena itself that the Court has already quashed amounts to a mere fishing expedition as they can't say what in the source code would be helpful to their case.

Whether they're arguing discovery or arguing for the subpoena, they keep asking for the validity and to test the validity and the reliability of the TrueAllele casework system, and all of that evidence has been presented to Judge Rangos previously and their requests have been denied. I ask the Court to do the same here.

MR. HABER: Judge, if I could, may I have one response to that?

THE COURT: Yes.

MR. HABER: Material, reasonable, and in the interests of justice. Two things. One, Your Honor found it to be material. The same exact item, the source code, Your Honor found it to be material, so there is clearly -- Whether another judge found it to

be not material is that judge's prerogative.

But not only did Your Honor find it material, it is so obviously material that every attorney and every civilian who's not an attorney who talks about this issue can't believe -- can't believe -- that the conclusion is reached that it's not material. It is material. It is.

So it is absolutely in the interests of justice that a defendant be given the right to fully and fairly cross-examine every witness against him. The basis for the opinions of an expert are within the source code.

There was a hearing on the matter. An expert testified to that very fact. But even if there was no expert, why would a criminal defendant not be entitled to know what a computer is being told to do? We cannot cross-examine the computer.

MR. CATANZARITE: And, Your Honor, if I may, Mr. Haber's reliance on this Court's decision in the Chubbs matter, no matter how often he misstates the finding, it's never going to make it actually what he wants it to

be. This Court ruled that Dr. Perlin had to comply with the court order to appear in California court on the Chubbs matter. That court, the Superior Court of California, ultimately determined that the TrueAllele source code did not have to be turned over.

I don't care who else, civilians or other attorneys -- The fact is this was presented to Judge Rangos, the fact that the source code itself, lines of computer code, are not material because all of Dr. Perlin's work can be validated in other ways.

To that extent, Your Honor, we have accumulated a series of declarations from other scientists who have used this program and have validated the program without asking for the source code. And, again, this was put out with their expert before Judge Rangos, the fact that the source code itself, which is what they're asking for, the lines of computer code, are not material to the case.

They are able to cross-examine Dr. Perlin on his methodology on the reliability and the validity of his results

by merely testing the program. That was made clear to Judge Rangos, and that's why she ruled the way she did.

MR. HABER: Judge, first of all, the California case, the trial judge there did order the production of the source code after Your Honor told Dr. Perlin to get out there with it. There were interlocutory appeals that then began to shape what California law was on this issue.

That's all we're asking this Court to do. We're beyond the Court ruling, I presume, on our request. We're just asking the Court to amend its order to allow us to be in the same position as California is. Let's have a ruling that will apply uniformly throughout the Commonwealth.

And not only that, it's the right, reasonable thing to do because these are serious matters. Mr. White faces ten years in prison.

THE COURT: I understand they're serious matters.

MR. HABER: If I may, Judge, I know there's no jury in the box, so I would ask

the Court's indulgence if Mr. Geary could also speak to the matter.

THE COURT: I suppose. Go ahead.

MR. GEARY: Thank you, Judge. Good morning.

THE COURT: It's afternoon now.

MR. GEARY: On behalf of Ms. Arganda, just briefly, two points. When Mr. Catanzarite referenced the quashing of the subpoena, he referenced a fishing expedition. On the case cited by the Commonwealth, Cook, it was seeking in that case blood alcohol concentration tests.

The reason the subpoena was quashed was because it was deemed that the BAC tests are basic and routine. Here the TrueAllele software program with 170,000 lines of source code instructions is anything but basic or routine.

The bottom line is this: In your Chubbs opinion -- which we're not misstating it. We all know what it says -- you ruled unequivocally the source code is material and discoverable. So we don't understand how it would be material and discoverable to Martell

Chubbs but not to Chester White or Chelsea Arganda.

So we did ask Judge Rangos to follow your lead as a court of concurrent jurisdiction, and she did not. So we're asking you to just follow what you ruled in Chubbs. Respectfully, your ruling in Chubbs and quashing the subpoena in this case, it's inconsistent. It's directly inconsistent.

THE COURT: I'm not sure it is. Anything else from the Commonwealth?

MR. CATANZARITE: No, Your Honor.

THE COURT: Give me an order. Commonwealth give me an order.

MR. CATANZARITE: All right. Thank you, Your Honor.

THE COURT: That's all.

- - -

(Whereupon, the proceedings were concluded.)

- - -

COMMONWEALTH OF PENNSYLVANIA)
)
COUNTY OF ALLEGHENY)

CERTIFICATE OF REPORTER

I, Mary Beth Perko, RMR, do hereby certify that the evidence and proceedings are contained fully and accurately in the machine shorthand notes taken by me at the hearing of the within cause, and that the same were transcribed under my supervision and direction, and that this is a correct transcript of the same.

_____

Official Court Reporter
Court of Common Pleas

The foregoing record of the proceedings upon the hearing of the above cause is hereby approved and directed to be filed.

_____

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
Respondent,	)	
	)	**No. 17748 of 2013**
VS.	)	
	)	
CHELSEA ARGANDA,	)	
	)	
Defendant.	)	

COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
Respondent,	)	
	)	**No. 17753 of 2013**
VS.	)	
	)	
CHESTER WHITE,	)	
	)	
Defendant.	)	

DEFENDANTS' APPLICATION PURSUANT TO TITLE 42 Pa. C.S.A. Section 702(b), INTERLOCUTORY ORDERS, FOR AMENDMENT TO INCLUDE CERTIFICATION OF THE INTERLOCUTORY DISCOVERY ORDER ISSUED ON April 13, 2016 GRANTING THE COMMONWEALTH'S MOTION TO QUASH SUBPOENA DUCES TECUM SEEKING SOURCE CODE TO TRUE ALLELE CASEWORK SOFTWARE PROGRAM OF CYBERGENETICS.

AND NOW COME the Defendants, by their lawyers, Noah Geary and Kenneth Haber, pursuant to **Title 42 Pa. C.S.A. Section 702(b), Interlocutory Orders**, and in conjunction with **Pennsylvania Rule of Appellate Procedure 1311(b), Interlocutory Appeals by Permission,** and respectfully submit as follows:

EXHIBIT EE

1. The Defendants are charged with felony counts of Title 18, Pa. C.S.A. Section 6106, carrying firearms without a license.

2. The case involves a complex DNA mixture discovered on the firearm. Due to the complexity of the mixture, the Allegheny County Crime Lab could come to no conclusions about the identity of any of the contributors to the mixture.

4. The Commonwealth retained Cybergenetics to attempt to deconvolute the DNA mixture on the gun using Cybergenetics' "True Allele Casework System" software program.

5. A report of Cybergenetics was furnished to the defense.

6. The report sets forth the conclusion of a computer that the Defendants are contributors to the DNA mixture.

7. The report contains no information whatsoever setting forth the basis of the findings of the computer, or the process by which the computer arrived at its finding.

8. The report merely includes one conclusory sentence: "True Allele...objectively inferred evidence genotypes [the identity of the contributors] solely from [the Crime Lab] data".

9. A document called a "Case Packet" was furnished to the defense as well along with other promotional materials regarding the True Allele Software Program.

10. None of these materials contain the basis for how the computer arrived at its findings either.

11. As this Court is now aware through filings, the "True Allele Casework System" is a software program which runs pursuant to 170,000 lines of instructions, called "source code". These instructions were entered by human beings.

12. The Defendants, in an effort to obtain the computer instructions so that they can assess and challenge what the computer was told to do with the Crime Lab data, sought the source code of True Allele via Subpoena Duces Tecum.

13. The Commonwealth filed a Motion to Quash.

14. This Court recently granted the Motion to Quash. *(See Orders, attached hereto).*

15. The Defendants hereby request this Court to Amend its Orders of April 13, 2016 and to Certify its Interlocutory Orders for appeal to the Superior Court.

16. First, the issue involves a controlling issue of law, that is, the discoverability of the source code so that the Defendants are not deprived of their constitutional right under both Federal and State Constitutions to a fair trial and to be able to effectively confront and cross-examine Dr. Perlin at trial.

17. Second, a substantial ground for difference of opinion exists as to the discoverability of the source code/instructions to the software program.

18. Specifically, this very Court, in the matter of the State of California vs. Martell Chubbs, GRANTED Mr. Chubbs' Order enforcing his Subpoena Duces Tecum seeking production of the source code to true Allele.

19. In ringing terms, this Court ruled that the computer instructions/source code were material and discoverable and essential to Chubbs's constitutional right to effectively confront and cross-examine Cybergenetics at trial:

a. "It is beyond cavil…that the evidence that is sought to be produced [the source code] is material". *(Opinion, page 3).*

b. "The evidence that places the defendant at the scene of a crime is without question "material". The means by which Dr. Perlin arrived at his opinions is likewise material. The argument that Dr. Perlin is not a material witness and or that the evidence sought to be produced is not material is specious". *(Opinion at 4).*

c. "More importantly, it is apparent...that this evidence is sought to allow the defendant in that case to effectively cross-examine Dr. Perlin. Just because evidence is [inadmissible] does not mean that it cannot be subject to cross-examination". *(Opinion at 5).*

d. "Nothing in Commonwealth vs. Foley would prevent cross-examination of an expert based upon the source code or pseudo source codes, even in the Commonwealth of Pennsylvania". *(Opinion at 6).*

e. "The commercial value of [the source code] is something that can readily be protected by Judge Romero." *(Opinion at 6).*

(See Opinion and Order, attached).

20. Accordingly, a substantial ground for difference of opinion exists as to the discoverability of the source code because this Court ruled in the Chubbs matter that the 170,000 lines of computer instructions are disco able.

21. Dr. Perlin's credibility at trial will be the paramount issue.

22. A party to any proceeding is always entitled to know how the other party's expert, in this case, a computer, arrived at its conclusions.

23. The Defendants cannot cross-examine a computer.

24. Dr. Perlin admitted during testimony yesterday in the matter of the Commonwealth of Pennsylvania vs. Alan Wade that it is possible that errors exist in the computer instructions to True Allele.

25. Appellate resolution of this issue at this juncture will materially advance resolution of this issue to prevent the Defendants from being denied a fair trial.

26. Accordingly, the Defendants have met the criteria of **Title 42 Pa. C.S.A. Section 702(b)** to warrant this Court to Amend its interlocutory Order so that they may Petition the Superior Court for Permission to Appeal on this critical issue which affects their constitutional rights to a fair trial and to confront and cross-examine the Commonwealth's expert witness.

WHEREFORE, in the interests of justice, in light of all of the above, and to afford the Defendants the opportunity and their right under the 6th Amendment to the U.S. Constitution and the Pennsylvania Constitution to effectively confront and cross-examine Dr. Perlin at trial regarding the basis of his computer's opinions, the Defendants respectfully request this Honorable Court to Amend its Orders dated April 13, 2016 to include language from Title 42 Pa. C.S.A. Section 702(b), that a substantial ground for difference of opinion exists as to the discoverability of the computer's source code.

May 13, 2016

Respectfully submitted,

Noah Geary, Esquire
Attorney for Defendant Arganda
304 Ross Street, Suite 600
Pittsburgh, PA 15219
(412) 232-7000

Ken Haber, Esquire
Attorney for Defendant White
304 Ross Street, Suite 400
Pittsburgh, PA 15219
(412) 338-9990

CERTIFICATE OF SERVICE:

I, Kenneth Haber, Esquire, and Noah Geary, Esquire hereby certify that on this day we served the foregoing **APPLICATION FOR AMENDMENT OF INTERLOCUTORY ORDER** upon the following persons, via hand delivery:

Allison Bragle, Esquire
Assistant District Attorney
Allegheny County Courthouse
436 Grant St #303
Pittsburgh, PA 15219

Honorable Jeffrey Manning
Judges Chambers

Respectfully submitted,

May 13, 2016

Ken Haber, Esquire
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
Respondent,	)	
	)	**No. 17748 of 2013**
VS.	)	
	)	
CHELSEA ARGANDA,	)	
	)	
Defendant.	)	

COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
Respondent,	)	
	)	**No. 17753 of 2013**
VS.	)	
	)	
CHESTER WHITE,	)	
	)	
Defendant.	)	

ORDER OF COURT:

AND NOW, this _____ day of May, 2016, upon consideration of the Defendants' Application for Amendment pursuant to **Title 42 Pa. C.S.A. Section 702(b), Interlocutory Orders**, and in conjunction with **Pennsylvania Rule of Appellate Procedure 1311(b), Interlocutory Appeals by Permission**, for certification of the interlocutory discovery Orders which were issued in this case on April 13, 2016, it is hereby **ORDERED** that the application for amendment is **GRANTED,** and that the April 13, 2016 Orders of Court issued in this matter are hereby amended to read as follows:

And now, this 13th day of April, 2016, the Commonwealth's Motion to Quash the Defendants' Subpoena Duces Tecum seeking the source code to the True Allele Casework Software Program is hereby GRANTED. However, this Court is of the opinion that this Court's Order involves a controlling issue of law, that is, the discoverability of the source code to Cybergenetics's True Allele Casework System, as to which there exists a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination/resolution of the matter/issue.

Proceedings in this case shall hereby be **STAYED** pending further Order of Court.

BY THE COURT:

_____, J.
Honorable Jeffrey Manning

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v.

CC No.: 201317748

CHELSEA ARGANDA,

Defendant.

ORDER OF COURT

AND NOW this 13th day of April, 2016, the Motion of the Commonwealth to Quash the subpoena issued in this matter to Dr. Mark Perlin and Cybergenetics, is GRANTED and that Subpoena is QUASHED.

BY THE COURT:

P.J.

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 201317748

CHESTER WHITE,

Defendant.

ORDER OF COURT

AND NOW this 13th day of April, 2016, the Motion of the Commonwealth to Quash the subpoena issued in this matter to Dr. Mark Perlin and Cybergenetics, is GRANTED and that Subpoena is QUASHED.

BY THE COURT:

P.J.

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE APPLICATION FOR OUT OF STATE SUBPOENA BY MARTELL CHUBBS

CRIMINAL DIVISION

MD No. 2861-2014

MEMORANDUM OPINION AND ORDER OF COURT

Honorable Jeffrey A. Manning, P.J.
Court of Common Pleas
Room 325 Courthouse
436 Grant Street
Pittsburgh, PA 15219

Counsel of Record for the Parties:

For Dr. Mark W. Perlin, M.D.:

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Cohen & Grigsby, P.C.
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Pittsburgh, PA 15222-3152

For Martell Chubbs:

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IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE APPLICATION FOR OUT OF STATE SUBPOENA BY MARTELL CHUBBS

MD No. 2861-2014

MEMORANDUM OPINION AND ORDER OF COURT

Before the Court is the Application for Issuance of Out of State Subpoena filed on behalf of Martell Chubbs, a criminal defendant charged with Homicide in the State of California. The Application is filed pursuant to the Uniform Act to Secure the Attendance of Out of State Witnesses codified in Pennsylvania at 42 Pa.C.S.A. § 5963. Attached to the Application is a copy of the Application presented to the Superior Court of the State of California at Case No. NA 093179. Also attached is the Certificate for Out of State Subpoena executed by Judge Romero. In that Certificate, Judge Romero made the following relevant findings:

1. There is a pending criminal proceeding in Los Angeles County Superior Court involving the defendant, Martell Nathaniel Chubbs;

2. That Mark Perlin of Cybergenetics, is a material witness for the prosecution; and

3. and has in his possession under his control certain data identified as computer source codes and pseudo source codes for his computer software entitled TrueAllele which are material to the prosecution;

Based on those findings, Judge Romero ordered that Dr. Perlin's appear in his Courtroom on June 24, 2014 to give evidence. Judge Romero also directed, however, that Dr. Perlin could avoid having to appear on that date if he provided copies of all the materials identified in the subpoena to the Court Clerk, along with a Declaration of Records Custodian. Judge Romero's Certificate further provided that Dr. Perlin's reasonable travel expenses would be reimbursed.

Dr. Perlin filed a response with this Court opposing the Application, claiming, *inter alia:* that he is not a material witness; that the Uniform Act does not apply to a subpoena *duces tecum*; that the materials Dr. Perlin is directed to produce, "source codes and psuedo-source codes", are not material; that the production of these materials is not necessary to establish the admissibility of Dr. Perlin's testimony; and that complying with the subpoena would pose a hardship to Dr. Perlin and the owner the computer program at issue, Cybergenetics, because it would require disclosure of trade secrets.

It is beyond cavil that Dr. Perlin is a material witness and that the evidence that is sought to be produced is material. Judge Romero, who is in a much better position than this Court to make that determination, found that he is a material witness in the Certificate he issued pursuant to the Uniform Act. Section 5963 (b) of Pennsylvania's version of the Uniform Act, provides that "...the

certificate shall be *Prima Facie* evidence of all of the facts stated therein." 42 Pa. C.S.A. § 5963 (b). Nothing that was presented to this Court during the June 9 hearing called into question the accuracy of Judge Romero's materiality determination.

Dr. Perlin is the expert that the prosecution will present to establish that biological material found at the scene of this 37 year old murder came from the defendant. The evidence that places the defendant at the scene of a crime is without question "material". The means by which Dr. Perlin arrived at his opinions is likewise material. The argument that Dr. Perlin is not a material witness and or that the evidence sought to be produced is not material is specious.

The argument that the Uniform Act does not apply to subpoena's *duces tecum* is likewise wholly without merit. The Act refers to "subpoenas" in general; it does not differentiate between those issued to compel the attendance of a witness and those issued to compel the production of physical evidence along with the attendance of the witness. Most states that have addressed whether the Uniform Act can be used to compel the production of physical evidence have concluded that it can. *See cases cited at 4 ALR 4th 836.* Those states that have questioned the application of the Uniform Act to physical evidence have done so, generally, in cases involving attempts to secure physical evidence from a suspect or to secure physical evidence

alone without a subpoena of the person as well. *Id.* The only Pennsylvania Court to address this issue based its concern over the scope of the Act on the direction of the subpoena at a suspect in a criminal case. Marcus v. Diulus, 363 A.2d 1205 (Pa. Super. 1976). This Court is satisfied that the Uniform Act permits subpoena's *duces tecum*.

The next objection proffered by Dr. Perlin is not relevant to the application of the Uniform Act. The admissibility of the evidence obtained pursuant to the subpoena is a matter left to the discretion of the Court that has issued the subpoena. Whether the evidence of the source codes or psuedo codes would be admissible is a question that will be addressed by a California judge applying California law. There is nothing in the Uniform Act that requires that this Court make a determination as to the admissibility of the evidence sought. More importantly, it is apparent from the Application filed in California that this evidence is sought to allow the defendant in that case to effectively cross-examine Dr. Perlin. Just because evidence is admissible, does not mean that it cannot be subject to cross examination.

The Court would also note that counsel for Dr. Perlin misstates the holding in Commonwealth v. Foley, 47 A.3d 882 (Pa. Super.2012). All that Foley held was that the testimony of Dr. Perlin was admissible

pursuant to the Frye standards. The issue before that Court was the admissibility of the testimony, not its credibility. Nothing in Foley would prevent cross examination of an expert based upon the source codes or pseudo source codes, even in the Commonwealth of Pennsylvania. Whether that is permitted in California is a question for Judge Romero.

Finally, Dr. Perlin contends that complying with the subpoena would cause undue hardship to him and the source codes' owner, Cybergenetics, because it would require disclosure of a trade secret protected by this state's laws. Nothing in the subpoena requires the disclosure of trade secrets. Dr. Perlin is required to travel to California and to bring with him those documents. What, if anything, is done with that information is a matter to be determined by Judge Romero. The commercial value of that information is something that can readily be protected by Judge Romero.

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE APPLICATION FOR OUT OF STATE SUBPOENA BY MARTELL CHUBBS

MD No. 2861-2014

ORDER OF COURT

AND NOW, this 16th day of June, 2014, For the reasons set forth in the Memorandum Opinion, the Application for Issuance of Out of State Subpoena Pursuant to the Uniform Act to Secure the Attendance of Out of State Witnesses In a Criminal Proceedings is HEREBY GRANTED. The witness, Mark W. Perlin, M.D., Ph. D., shall comply with the subpoena issued by the Superior Court of California at Case No. NA093179.

BY THE COURT:

Date: 6-16-14

_____, P.J.