

IN THE
SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NO. 29 WDM 2016

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

V.

JAKE KNIGHT,
Petitioner.

BRIEF IN RESPONSE TO PETITION FOR REVIEW

Appeal from the Order dated February 29, 2016 refusing to certify for appeal the trial court's discovery Order dated February 29, 2016 at No. CC 20140006386 in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division

STEPHEN A. ZAPPALA, JR.
District Attorney

MICHAEL W. STREILY
Deputy District Attorney

AMY E. CONSTANTINE*
Assistant District Attorney
PA I.D. NO. 63385

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219-2489
(412) 350-4377

**Counsel of Record*

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COUNTER STATEMENT OF JURISDICTION

Presently under review is the Petitioner's Petition for Review, an appeal from the Order denying his Application for Amendment to Include Certification of the Interlocutory Discovery Order Issued on February 29, 2016. 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 step to obtaining appellate review is set forth in the Comment to Pa. R.A.P. 1311(d). 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."

Pursuant to Pa. R.A.P. 1501 (a)(4), 42 Pa. C.S.A., which provides that an appeal from an order refusing to certify an order for immediate appeal is within the scope of that chapter, the Petitioner's instant Petition for Review challenging the Honorable Jeffrey A. Manning's denial of certification is properly before this Court.

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 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).

COUNTER-STATEMENT OF THE QUESTION INVOLVED

- I. WHETHER THIS COURT SHOULD DENY THE PETITIONER'S PETITION FOR REVIEW BECAUSE THE UNDERLYING INTERLOCUTORY ORDER PETITIONER SEEKS 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 Petitioner in the above-captioned case is charged with one count of criminal homicide and related charges in connection with the killing of Lee Williams on April 10, 2014. A firearm that is believed to have been used in the crime by Petitioner was recovered from the scene. 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 the Petitioner.

On November 16, 2015, counsel for Petitioner, J. Richard Narvin, Esquire and Lisa C. Leake, Esquire, filed a Motion to Compel Discovery seeking the source code of the TrueAllele program. On February 18, 2016, Counsel for Petitioner filed a Motion to Incorporate Proceedings into the Record and Request for Certification. The Motion requested that the record of discovery hearings on October 9, 2015 and November 19, 2015 in the Allegheny County case of *Commonwealth v. Michael Robinson*, CP-02-CR-0007777-2013 be incorporated into the record of Petitioner’s case. The Motion further requested that the Honorable Jeffrey A. Manning enter a separate Order certifying the interlocutory appeal of the predicted denial of the Motion to Compel Discovery to the

Superior Court. A hearing was held before Judge Manning on February 22, 2016. On February 29, 2016, Judge Manning issued an Order denying the Petitioner's Motion to Compel Discovery of the TrueAllele source code. Also on February 29, 2016, Judge Manning issued an Order granting Petitioner's Motion to incorporate the record of the discovery hearings described above in the Allegheny County case of *Commonwealth v. Michael Robinson*, CP-02-CR-0007777-2013 into the record of Petitioner's case.

Where, as here, a litigant seeks immediate appellate review of an otherwise interlocutory order in the Superior Court, 42 Pa. C.S. § 702(b) provides that if the trial court believes the interlocutory 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." On February 29, 2016, Judge Manning issued an Order denying Petitioner's request for appellate certification. On March 30, 2016, counsel for Petitioner filed a Petition for Review, seeking this Court's review of the Order denying certification. According to the instant Petition for Review filed by counsel for Petitioner, Judge Manning did not write a Rule 1925(a) opinion in this matter, instead adopting or relying upon the Rule 1925(a) opinion filed by the Honorable Jill E. Rangos in *Commonwealth v. Robinson* on February 4, 2016. (See Petition for Review at p. 4, citing to Appendix D.) The Commonwealth's responsive Brief follows.

FACTUAL HISTORY

The facts underlying the charges in this case were set forth in the Police Criminal Complaint filed on April 11, 2014, as follows:

Your affiant is a detective with the Allegheny County Police Department, currently assigned to the Homicide Unit.

Your affiant has been a police officer with the Allegheny County Police Department since 2001, and was first assigned to General Investigations in 2003, and then reassigned to the Homicide Section in 2009. Since becoming a detective, your affiant has conducted numerous criminal investigations. All of the information contained in this affidavit was learned directly by your affiant or other investigators and or police officers involved in this investigation.

On Thursday, April 10, 2014 at 9:03 pm Rankin Police requested the investigative assistance of the Allegheny County Police Homicide Section. The request was in reference to a male identified as Lee Williams who was shot at 17H in Hawkins Village. Officers Gunter and Ernst of the Rankin Police Department responded to the scene. Priority 1 EMS responded to the scene to treat the victim for a single gunshot wound to the left chest area. Paramedic Suzanne Salisbury pronounced the victim deceased at 9:01am.

Your affiant, Detectives Perry, Costa, and Kaspryszyn responded to initiate an investigation. A request was made for the MCU-Mobile Crime Unit of Allegheny County Crime Lab. As per the request, Scientist Jason Clark responded to document and process the scene by photographs, measurements, and collecting items of evidentiary value. During scene processing one spent cartridge casing head stamped "FC .357 SIG" was collected.

During the course of the investigation, two witnesses provided information that will be contained in this affidavit. Detectives of the Allegheny County Homicide Section have specifically ascertained the victim/witnesses identities. Your affiant has verified the witnesses' identities through positive proof of identification such as PA Driver's License. Those witnesses are indicated below and are either "eye-witnesses" to events that transpired and/or have personal knowledge regarding the criminal incident or information that they have relayed and provided to detectives of the Homicide Section and police as more fully detailed below. To provide for the safety of those witnesses and to preserve the integrity of future investigation their identities are being withheld for the purpose of this affidavit.

The first known victim/witness will be referred to as Victim/Witness#1 for the purpose of this affidavit. Victim/Witness#1 stated that he was at the victim's residence

inside the living room, sitting on the couch next to the victim. He stated that there were two other victims/witnesses inside the living room with them, including (Victim/Witness#2). He stated that he was sitting closest to the stairs when he looked up and saw two individuals with black colored semi-automatic handguns. He stated that one of the individuals said "Lay Down", and the victim lifted up the glass table, and the individual who said "Lay Down" fired one gunshot towards them and striking the victim.

Victim/Witness#1 described the first actor as being approximately 5'10" in height, slim build, wearing a black colored mask, black colored hooded sweatshirt, possessing a black colored semi-automatic handgun. Victim/Witness#1 stated that he recognized the voice from the first actor who told them to "Lay Down". Victim/Witness#1 described the voice as being very distinctive, and that he has spoken to this individual in the past. Victim/Witness#1 stated that he knows the mother of the first actor, the individual who stated, "Lay Down" and stated that her name is "Ms. Roxie" who also lives in Hawkins Village.

Victim/Witness#1 described the second actor as being possibly 5'8-5'10", slim build, black colored mask, black colored pants and black colored hooded sweatshirt, possessing a black colored semi-automatic handgun. Victim/Witness#1 stated that the second actor did not say anything.

During the course of the investigation, a suspect was developed as being Jake Knight, DOB: 10-11-94. Your affiant developed a photo array that consisted of eight single image photographs that included a photograph of Jake Knight. Photographs of seven other black males with similar characteristics of Jake Knight, were also included in the photo array. The photographs used, were from the Commonwealth Photo Imaging Network (CPIN). Detective Perry presented the eight single image photographs to Victim/Witness#1 in random order. Victim/Witness#1 reviewed the eight single image photographs, and selected the single image photograph of Jake Knight, and indicated that that was the individual who is "Ms. Roxie's son" and the same individual who shot the victim.

The second known victim/witness will be referred as Victim/Witness#2 for the purpose of this affidavit. Victim/Witness#2 is a friend of the victim, and is the

leaseholder of apartment 17 H Hawkins Village. Victim/Witness#2 stated that he/she has known the victim for approximately the last 7 or 8 years. The victim was also known as "Stretch". When asked about the events surrounding the death of the victim, Victim/Witness#2 stated that he/she was in his/her apartment with the victim and two other victims/witnesses, including Victim/Witness#1 at the time of the shooting. Victim/Witness#2 stated that they were socializing and drinking alcoholic beverages. Victim/Witness#2 stated that he/she sat in the living room across from the stairs, which descended downward.

Victim/Witness#2 stated that he/she, the victim, Witness#1 and the two other victims/witnesses were inside the living room of the apartment he/she noticed two black males at the top of his/her stairs. Victim/Witness#2 stated that there were two additional black males on the stairs just below the top of the stairs. The two males who were at the top of the stairs held handguns, which were pointed at Victim/Witness#2 and the other victim/witness inside the living room. Upon seeing the firearms, Victim/Witness#2 ran towards the kitchen the victim/witness ran towards the bedroom. Victim/Witness#2 stated that Victim/Witness#1 and the victim had been seated on the couch, and that he/she recalled running past the victim. Victim/Witness# 2 heard one shot when he/she was inside the kitchen. Victim/Witness# 2 continued to the adjacent laundry room where he/she hid in a closet. When Victim/Witness#2 heard footsteps going down the stairs he/she came out from hiding. Victim/Witness#2 observed the victim in the kitchen area, and he was in the process of falling on the kitchen floor. Victim/Witness#2 observed a large quantity of blood emanating from the victim's body. Victim/Witness#2 stated that he/she could not tell where the victim was injured.

Victim/Witness#2 stated that "Roxanne's son" was one of the black males who entered his/her residence. Victim/Witness#2 stated that "Roxanne" lives in Hawkins Village. Again, during the course of the investigation a suspect was developed as being Jake Knight. Again, your affiant developed a photo array that consisted of eight single image photographs that included a photograph of Jake Knight. Photographs of seven other black males with similar characteristics to each other and Jake Knight, were also included in the photo array. The photographs used, were from the Commonwealth Photo Imaging Network (CPIN). Detective Perry presented the eight single image

photographs to Victim/Witness#2 in random order. After viewing the photo array in its entirety, Victim/Witness#2 chose the single image photograph of Jake Knight. Witness#2 affixed his/her name, signature, time, date on the photograph. Victim/Witness#2 also, printed "Roxanne's son" and "Had a gun in my apartment" on the photograph.

During the course of the investigation, police officers began a search of the area and observed two black colored handguns lying in the rear of Building #35 underneath concrete steps. Allegheny County Housing Authority Officer Hornyak is the officer who observed the handguns. The handguns are described as being Glock Model#31, .357 cal. containing serial#MPV214, and a Keltec P11 9mm Luger containing serial#133016. The Glock Model#31 contained an FC .357 SIG live round of ammunition inside the chamber, which is the same type of spent cartridge casing that was found at the crime scene. Note: This is the same building where Jake Knight resides. In addition, Chief Vogel of the Allegheny County Police Housing Authority Police had specifically searched this same area yesterday afternoon on April 10, 2014 between 1:30pm and 1:45pm, due to drug activity, and did not observe any handguns underneath the concrete steps of rear of Building #35.

Chief Vogel and Detectives of the Homicide Section along with other assisting agencies made contact with Jake Clark at 35B Hawkins Village. Sergeant Mogus of the Allegheny County Housing Authority Police stated that they first knocked on 35B's door several times and announced that they were police. He stated that an individual later identified as Jake Knight "cracked open" the door, and then immediately attempted to close the door on the officers. Jake Knight was taken into custody without further incident. Chief Vogel stated that Jake Knight made a spontaneous utterance that he had been sleeping. Chief Vogel stated that Jake Knight had been the only individual inside the apartment at the time of contact and that it appeared that someone had just taken a shower. He stated that the bathroom windows appeared "steamy", water beads were observed in the shower. Chief Vogel stated that Jake Knight was wearing black colored pants, and a short sleeve t-shirt. The officers then secured the residence awaiting a search warrant be issued for the premises.

A Search Warrant was later drafted, and approved for the search of 358 Hawkins Village, Jake Knight's residence.

During the search, black colored jeans and a black colored mask was recovered inside the apartment.

Based on the aforementioned facts and circumstances your affiant believes probable cause exists and request the listed charges be filed against Jake Knight.

In addition, insofar as Petitioner has successfully moved to incorporate the discovery hearings in the Allegheny County case of *Commonwealth v. Michael Robinson*, CP-02-CR-0007777-2013 into the record of his case, the Commonwealth proffers the following summary of the testimony at the *Robinson* discovery proceedings.

At the discovery hearing on October 9, 2015, Dr. Ranajit Chakraborty testified for the defense. Dr. Chakraborty has a Ph.D. in biostatistics and population genetics, and he is currently a professor of molecular and medical genetics and is the director of the Center for Computation Economics at the Institute of Applied Genetics at the University of North Texas. Discovery Hearing Transcript, 10/9/2015 (“DHT1”), at 31, 21. Dr. Chakraborty stated that he has testified as an expert witness in DNA identification more than two hundred times. *Id.* at 29.

Dr. Chakraborty was a member of the New York DNA Subcommittee from 1995 through 2011, when he resigned. *Id.* at 61-63. Dr. Chakraborty voted to approve TrueAllele for case work in New York state labs. *Id.* at 68. He testified that in voting for approval of TrueAllele, he did not need to examine the source code for TrueAllele. *Id.* at 71. Dr. Chakraborty testified he did not have his own propriety software. He testified that all of the software he had ever written was free to everyone. *Id.* at 71-72.

Dr. Chakraborty testified he created MPKin FS software. *Id.* at 73-74. He stated he would give the software to anyone who asked. *Id.* at 75. Dr. Chakraborty acknowledged however, that in a prior proceeding he testified that MPKin FS is not free

and is licensed for a fee to the state of New York. *Id.* at 86-87. Dr. Chakraborty acknowledged he testified in a New York state proceeding that the source code of MPKin FS was published as supplemental data in the scientific journal “Investigative Genetics”. *Id.* at 88-89. Dr. Chakraborty testified he believed most of the source code was contained in the text of the article itself. *Id.* at 90. However, neither the article, admitted as Commonwealth Exhibit 1, nor the six page supplemental appendix to the article, admitted as Commonwealth Exhibit 2, contained the source code. *Id.* at 92. Concerning this discrepancy, Dr. Chakraborty maintained that the source code was not published but that instructions in the article could be translated into a computer language. *Id.* at 95.

Dr. Chakraborty testified he would be willing and able to evaluate the validity of the TrueAllele methodology without the source code. He stated he could use his own data on the TrueAllele system. He acknowledged that Dr. Mark Perlin makes TrueAllele available to anyone for this purpose. *Id.* at 122-123, 131, 132, 136-137.

Dr. Chakraborty testified that the TrueAllele Casework System was validated in an independent study in the September 2015 issue of the “Journal of Forensic Science”. *Id.* at 145. Dr. Chakraborty acknowledged it is not unusual for the owner of software being validated to offer assistance to those validating the software. *Id.* at 146. Dr. Chakraborty acknowledged that seven studies validating the True Allele system, from December 2009 through September 2015, were completed without examination of the TrueAllele Casework System source code. *Id.* at 149. Dr. Chakraborty did not express his concern or criticism of any of these validation studies of TrueAllele. *Id.* at 153.

Dr. Chakraborty testified he was involved in a case, specifically David Balding's Likelihood Ratio Program, where source code was produced and was found to contain errors. *Id.* at 154-155, 167. Dr. Chakraborty testified that the second vote of the New York DNA Subcommittee to approve TrueAllele involved a DNA mixture but that mixture was not as complex as in the *Robinson* case, nor did it involve low quantities of DNA. *Id.* at 176. Had the mixture under review been as complex, Dr. Chakraborty would not have voted for the approval of TrueAllele. *Id.* Dr. Chakraborty characterized the mixture in the *Robinson* case as "complex" because there were three contributors. *Id.* at 179. Dr. Chakraborty testified it was his understanding that there was a low level of DNA present for testing. *Id.* He characterized low levels as one hundred picograms or less. *Id.* at 181. Dr. Chakraborty testified that if he knew TrueAllele was going to be used for complex DNA mixtures he would not have voted for its approval. *Id.* at 191. At the time he approved TrueAllele, he did not object based on what he knew then. *Id.* at 192.

At the second discovery hearing on November 19, 2015, Attorney John McIlvaine, a partner in the Webb Law Firm, testified for the defense as an expert in the area of patent law and intellectual property. Discovery Hearing Transcript, 11/19/2015 ("DHTII"), 11/19/2015 at 7. Attorney McIlvaine testified that a remedy for a party's unwillingness to produce source code is the court's issuance of a Protective Order, and that a protective order could be crafted to protect the source code at issue. DHTII at 12-13, 20-21.

Dr. Perlin has testified as an expert witness in over 20 trials. Courts accepting TrueAllele evidence include state courts in California, Louisiana, New York, Ohio,

Pennsylvania and Virginia, federal courts of the Eastern District of Virginia and the United States Marine Corps, and internationally, in Northern Ireland and Australia. Cybergenetics thoroughly tests its software before it is released. Over twenty internal validation studies have been conducted to establish the reliability of the TrueAllele method and software. See Declaration of Dr. Mark Perlin, filed as Exhibit 1 to Commonwealth's Supplemental Answer to Motion for Discovery, 4/14/2015.

Over a dozen crime laboratories have purchased the TrueAllele system for their own use (DHTII at 122), and 4 labs currently use the system (*Id.* at 123). According to the federal government, all crime labs in the United States, in the next 5 to 10 years, will be using a probabilistic genotyping program. *Id.* TrueAllele has been used in approximately five hundred criminal cases, including for the identification of human remains in the World Trade Center bombing. DHTII at 45. Over thirty studies determining the reliability of TrueAllele have been conducted, seven of those having been published in peer-reviewed scientific journals, for both laboratory-generated and DNA samples from real court cases. *Id.* at 50. In the peer-review process, scientists describe their research methods, results and conclusions in a scientific paper, and submit these findings to a journal for publication. That journal's editor has at least two independent and anonymous scientists in the field read the paper, assess its merits, and advise the editor concerning the suitability of the manuscript for publication. At that point, the paper is accepted, rejected, or sent back to the authors for revision and more review. *Id.* at 58. The peer review process does not require examination of the source code to assess the validity or reliability of the TrueAllele program. *Id.* at 60.

SUMMARY OF THE ARGUMENT

The Commonwealth respectfully submits that the Petition for Review filed by Petitioner Knight should 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 Petitioner seeks 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 denying Petitioner's Motion for Appellate Certification issued on February 29, 2016 should be upheld.

ARGUMENT

- I. THIS COURT SHOULD DENY THE PETITIONER'S PETITION FOR REVIEW BECAUSE THE UNDERLYING INTERLOCUTORY ORDER PETITIONER SEEKS 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)², 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

² **(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).

reason the case is so egregious as to require immediate correction of the trial court's ruling. See *Commonwealth v. McMurren*, 945 A.2d 194, 195-96 (Pa. Super. 2008) (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). Instantly, Petitioner has complied with the requirement that he file a Petition for Review.

The Commonwealth respectfully submits that the Order denying Petitioner’s

Motion to Compel 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 PETITIONER SEEKS 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", Petitioner alleges that the testimony of Dr. Chakraborty in the *Robinson* discovery proceedings establishes this fact. (See Petition for Review ("PR") at 11, citing Appendix C.) Appendix C is a copy of Judge Manning's Order dated February 29, 2016, directing that the *Robinson* record be incorporated as part of the record in the present case. The Petition for Review cites to no specific portion of Dr. Chakraborty's testimony in support of this claim. However, contrary to Petitioner's bald assertion, the Commonwealth notes that Dr. Chakraborty testified he would be willing and able to evaluate the validity of the TrueAllele methodology without the source code. He stated he could use his own data on the

TrueAllele system. He acknowledged that Dr. Mark Perlin makes TrueAllele available to anyone for this purpose. (DHT1 at 122-123, 131, 132, 136-137.)

Next, Petitioner suggests 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. 11.) The Commonwealth respectfully disagrees. In *Chubbs*, the State of California opposed production of the TrueAllele source code. Although the trial court did initially grant the defendant Chubb's request for production of the TrueAllele source code, 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.)

"[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.

See PR at Exhibit E, *People v. Superior Court (Chubbs)* (Cal. Ct. App. January 9, 2015) at pp. 20-21 (emphasis supplied).³

While Petitioner also claims that the issue of the discoverability of the TrueAllele source code is in flux nationwide (see PR at 12), the Commonwealth submits that across the country, jurists do not have a substantial ground for difference of opinion concerning the government's obligation to produce the TrueAllele source code. See e.g., Opinion and Order denying access to Cybergenetics TrueAllele Casework source code in *State v. John Wakefield*, Supreme Court of State of New York for Schenectady County, New York, 3/13/2015 (attached as Exhibit 3 to Commonwealth Response to *Robinson* Petition for Review) and Opinion and Order denying Motion to Compel TrueAllele source code in *State v. Maurice Shaw*, Court of Common Pleas of Cuyahoga County, Ohio, 10/9/2014 at p. 26 (“the TrueAllele methodology and the State's witness are reliable without the use of the source code.”) (*Id.* at Exhibit 4). See

³ Via email, on March 18, 2016 undersigned counsel learned from Dr. Perlin that Martell Chubs entered a guilty plea on March 18, 2016.

also *People v. Belle*, 47 Misc.3d 1218(A), 2015 WL 2131497 (Sup. Ct. Bronx Co. April 29, 2015) [involving another program, and concluding that its source code was irrelevant].) Additionally, TrueAllele is not the only DNA analysis tool that contains proprietary information. GeneScan and GenoTyper from Applied Biosystems contain proprietary information. See *State v. Foreman*, 288 Conn. 684, 726, 954 A.2d 135, 162 (2008). Profiler Plus and Cofiler kits manufactured by Perkins-Elmer also contain proprietary primers that are not publicly available. See *People v. Hill*, 89 Cal. App. 4th 48, 107 Cal. Rptr. 2d 110 (2001); *State v. Traylor*, 656 N.W.2d 885 (Minn. 2003). There is no indication that proprietary information makes these genotyping tools untrustworthy or inadmissible in criminal cases. The Commonwealth submits these rulings are sound and provide valid guidance in this matter concerning the claim that the reliability and accuracy of TrueAllele cannot be tested without its source code.

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 Petitioner’s 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.

Petitioner next claims that forensic science is “rapidly being called into question”, which apparently should automatically disqualify any reliance on the TrueAllele program. (PR at 12, citing Appendix F.) The Commonwealth notes that

Appendix F is a collection of print articles disparaging hair analysis, fire science, bite mark evidence, and “old technology and software” related to FBI DNA testing. The validity of these types of evidence has no bearing on the matter at issue. 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) that warrants certification of the court’s Order denying discovery dated February 29, 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, Petitioner makes the unsubstantiated claim that “this appeal will result in the ultimate termination of this matter.” (PR at p. 12.) 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 Petitioner's 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 Petitioner concerning Petitioner's 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.

Petitioner does not separately address this factor in his Petition for Review. However, in the section of the Petition for Review entitled Statement of Objections to Order (PR at p. 5), Petitioner claims that the failure of the Commonwealth to produce the source code violates Petitioner’s confrontation and due process rights, and that the *Robinson* court failed to address these claims. (PR at pp. 5 – 10.)

Petitioner argues that the TrueAllele source code is testimonial, and it must be

produced to protect his right to confrontation. (See PR at 6, citing *Commonwealth v. Yohe*, 621 Pa. 527, 79 A.3d 520 (2013).) However, as the Pennsylvania Supreme Court made clear in *Yohe*, the confrontation clause does not bar admission of an expert's testimony concerning an independent opinion based on work performed by technicians under his review. In *Yohe*, Dr. Blum certified blood alcohol content test results and prepared and signed a report, but did not observe or conduct the actual testing on the defendant's blood sample. The Supreme Court determined that it was the expert's independent opinion itself that was testimonial evidence against the defendant, and the confrontation clause was satisfied where, as in *Yohe*, the defendant had the opportunity to cross-examine the expert. The *Yohe* Court affirmed the Superior Court's ruling that the toxicologist was the analyst the defendant was entitled to confront, as opposed to the technicians who performed the testing.

Moreover, concerning Petitioner's claim that the Supreme Court in *Yohe* viewed the plurality decision in *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 2221 (2012)⁴ (plurality) "with caution", the Commonwealth points out that the *Yohe* Court stated as follows:

Although the Commonwealth and its *amicus* rely on *Williams* as supporting their arguments, we view *Williams* with caution. When a fragmented Court decides a case and no

⁴ In *Williams*, the Illinois State Police lab sent swabs taken from a rape victim to Cellmark, a private lab, and Cellmark developed a DNA profile from semen recovered from the swabs. An Illinois state laboratory forensic technician testified that she compared the DNA profile generated by Cellmark from the vaginal swabs to the defendant's DNA profile in the state DNA database and determined that they matched. The Cellmark report itself, however, was not admitted into evidence.

single legal rationale explaining the results garners a majority, then “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” [. . .]

The narrowest grounds for the Court's affirmance of the lower court in *Williams*, a disposition on which the lead opinion and Justice Thomas were in agreement, is their conclusion that the Cellmark report was not testimonial.

Yohe, supra, 79 A.3d at 536 (internal citation omitted). Although the *Williams* decision may have been received with caution, it cannot be disputed that a majority of the United Supreme Court agreed that a DNA report is not testimonial. This is due to the unique nature of DNA testing, as the *Yohe* Court also acknowledged, holding:

an analyst creating a DNA profile may know that the result will affect a criminal case, but does not know the circumstances or the person accused, and is therefore unlike the “accusing” witness-analysts in *Melendez-Diaz* and *Bullcoming*.” [...] In this regard, the [Opinion] explained that the DNA profile, like statements of many laboratory analysts, do not easily fit within the linguistic scope of the term “testimonial statement,” and noted that **in every post-Crawford case in which the Court found a Confrontation Clause violation, the statement at issue had the primary purpose of accusing a targeted individual; unlike the DNA report, which sought not to accuse the defendant in particular “but instead to generate objectively a profile of a then-unknown suspect’s DNA from the semen he left in committing the crime.”** *Id.* at 2251. Under the circumstances of *Williams*, according to the OAJC, **“there was no ‘prospect of fabrication’ and no incentive to produce anything other than a scientifically sound and reliable profile.”** *Williams*, 132 S.Ct at 2244 (citing *Bryant*, 131 S.Ct. at 1157).

Yohe, supra, 79 A.3d at 535-536 (emphasis supplied). See also *Commonwealth v. Dyarman*, 621 Pa. 88, 73 A.3d 565, 574 (2013) (“[C]alibration and accuracy certificates [for breathalyzer machines] were not prepared for the primary purpose of providing evidence in a criminal case, let alone for the primary purpose of accusing

appellant.”; certificates” admission into evidence did not violate defendant's Confrontation Clause rights).

The Commonwealth contends that in this respect, *Yohe* and *Williams* are on point and dispositive herein, and make clear Petitioner's right to confrontation has not been compromised. As Dr. Perlin testified at the second Discovery Hearing in the *Robinson* case, the source code cannot harbor a bias toward any individual:

[T]here is no bias in the software because it doesn't know what answer anybody is looking for. It will give the same answer regardless of who wants an answer and what that answer in terms of a comparison might be. We often disappoint people in that they don't get the answer they would like to get because there is no statistical support that a person is present or not present in the data. The whole point of the software is to give accurate answers, not answers that please anyone. In that sense it's not biased.

Q. You just referenced that validation studies stand for the idea that there's no bias within the source code instructions?

A. There's no bias in the source code instructions independently of a validation study because there's no answer or person that's put in there. The validation studies lend scientific support to that statement.

DHTII at 85-86.

Next, Petitioner claims the *Robinson* trial court's opinion, as relied upon by Judge Manning in the case at bar, “incorrectly discussed this matter as a *Frye* issue”. (PR at 7.) However, the record reveals that the *Robinson* trial court had good reason for referencing *Foley*, and did not discount any constitutional claim.

The *Robinson* trial court was merely responding to Petitioner Robinson's arguments, which included entwined arguments that the reliability of TrueAllele cannot be tested without the source code, and that the source code is necessary for the

exercise of Petitioner’s right to confrontation. For example, Petitioner Robinson argued he “**cannot cross-examine a computer.**” (Robinson PR at 4 (emphasis in original)). Moreover, at the second pretrial hearing held on this matter, counsel for Petitioner Robinson explicitly addressed technical, scientific aspects of the TrueAllele program in the cross-examination of Dr. Perlin. (DHTII at 127 – 134.) At that point, Judge Rangos stated:

We may be getting beyond the source code issue here.

Id. at 134. Defense counsel responded:

I think that’s why we need a source code. This is incredibly complex. Nobody could possibly understand it. We could get the source code, and he could review it.

Id. at 134-135. The following exchange occurred:

THE COURT: I believe the source code issue is separate from the underlying *Frye* issue. The source code issue has to do with whether or not the TrueAllele software can be validated by scientific method rather than by access to the source code itself or the TrueAllele software.

DEFENSE COUNSEL: But the program has changed continuously and constantly over time. So every time a case comes up, if the Commonwealth wants to say *Foley, Foley, Foley* –

THE COURT: [...]What I’m trying to ask you is, are we not getting more into the DNA match that underlies the *Foley/Frye* test than we are whether or not the source code is necessary to validate it?

DEFENSE COUNSEL: It’s not to validate. It’s to determine how reliable is this. [...]

THE COURT: [...] I’m not clear I understand why we need to go into this whole loci information at this point.

Id. at 134 – 136. Defense counsel then terminated this line of questioning.

Subsequently, during closing argument, defense counsel stated:

[T]here are really two different needs for the source code. One is to determine the admissibility of the testimony. That would be the *Frye* issue.

And the second one is a kind of pure Sixth Amendment issue. And as I indicated before, the *Frye* issue goes to the scientific validity, to use the Court's phrase. Which is, is this a valid science? Should we even allow a fact finder, a jury, to even listen to this? Because as we know from recent events, jurors –

First of all, the studies have been done, jurors just focus in on expert testimony like this, and pretty much just adopt it *carte blanche* unless there is an ability to find that smoking gun [...].

So it's generally accepted. Many people were convicted based on science that that that time seemed reliable and have since been debunked. And that's one of the things we submitted to the court.

Whether it be arson testimony in the '70s and '80s, totally debunked now.

Whether it be hair analysis that was deemed to be reliable, there were some statistical probabilities attached to it, almost completely debunked now.

And DNA probability statistical analysis that the FBI used for years, which they have now admitted that they overstated match statistics, and they have apologized and admitted error.

So the first issue is, is this necessary for us to even present a *Frye* challenge so that the Court can determine should we even allow the jury to hear this? And I submit to you that because jurors attach such great importance to this type of evidence that there should be a full *Frye* hearing in this case.

Whether other lawyers in other cases in other jurisdictions or anywhere outside this courtroom fought, presented witnesses, put a presentation forth, that's of no moment really of this Court. I mean, this Court has to decide this based on the record that has been created before it. And I know Your Honor knows that.

But just saying, for instance, the *Wakefield* case,

there was no record created in that case for the source code. It was solely a *Frye* issue. And just saying that -- Did they ask for the source code? Yes. Well, if you ask for something but you don't explain why you need it or make argument that has legal meaning and sense, well, of course you're not going to get it. And in this case, Your Honor, the evidence, I submit, couldn't be clearer that certainly on the second issue --

And I don't concede the first at all. I think as to the scientific validity, the source code is necessary. Dr. Chakraborty said so.

On the second issue of Sixth Amendment right to confront witnesses against you at trial, how could the defendant not be entitled to the source code and everything about TrueAllele so that we can test the reliability?

They want us -- they want the jury to make their determination as to the reliability of TrueAllele based on out-of-court experiments that they're calling peer-review validation studies. That only goes to whether it's admissible. We don't have to be stuck with the blanket statements that haven't been supported at all in this courtroom by Dr. Perlin that, "Don't worry, it's been validated." And he puts in this declaration that it's validated and reliable.

Reliable is not up to him. Reliable is not up to the people who did the studies with him[.]

Id. at 154 – 157. Clearly, during discovery, Petitioner Robinson placed the *Foley* decision at issue, and the *Robinson* trial court cannot be faulted for addressing that claim.

Further, as to Petitioner's *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 Petitioner has failed to establish the source code at issue in this case is either helpful or outcome determinative. And, as Petitioner is aware, the TrueAllele source code he seeks 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. Petitioner has access to those factors in the case at bar.

Finally, Petitioner claims in his Statement of Objections to Order that the *Robinson* trial court erred in determining that disclosure of the source code would harm Dr. Perlin's business. (PR at p. 9). Contrary to Petitioner's claim, the *Robinson* record contains support for the assertion that disclosure of the source code will harm Dr. Perlin's business. See Declaration of Mark W. Perlin, April 2015, at pp. 6 – 7, para. 47-60 (emphasis supplied):

47. People can easily copy a computer program if they have its source code.

48. Source code contains the software design, engineering know-how, and algorithmic implementation of the entire computer program.

49. Cybergenetics has invested millions of dollars over two decades to develop its TrueAllele system, the company's flagship product. Although the technology is patented, the source code itself is not disclosed by any patent and cannot be derived from any publicly disclosed source.

50. Cybergenetics considers the TrueAllele source code to be a trade secret. Cybergenetics does not disclose the source code to anyone outside the company. In fact, the source code has never been disclosed. The source code is not distributed to employees of Cybergenetics, and copies

are not provided to individuals, businesses or government agencies that use or license the software.

51. The fact that the source code is kept secret provides Cybergenetics with a significant advantage over others who do not have access to the source code and do not have the programming know-how or are not willing to make the investment necessary to develop comparable software.

52. Cybergenetics operates in a highly competitive commercial environment.

53. In recent years, at least five other groups have developed similar software.

54. There is keen interest from competitors to find out how to replicate TrueAllele. The TrueAllele software represents a technological breakthrough that has not been successfully replicated by any other company as of this date.

55. Disclosure of the TrueAllele source code trade secret would cause irreparable harm to the company, enabling competitors to easily copy the company's proprietary products and services.

56. Ownership of the TrueAllele program and source code provides Cybergenetics with an advantage over its competitors who do not know the proprietary code and could not legally duplicate it.

57. Cybergenetics takes reasonable measures to protect the secrecy of the source code. For example, all information relating to the source code is housed on secure computers.

58. TrueAllele's source code derives value from remaining secret, and has never been disclosed to the public.

59. In contrast to so-called "open source" programs, for-profit companies do not make their source codes available to the public.

60. Commercial software programs are extensively validated while in development and before release and commercialization. By their nature, open source programs typically are not validated prior to release, because the process of perfecting software is costly. Open source forensic DNA analysis software programs tend to be relatively short programs consisting of several hundreds of lines of code that realistically can be reviewed by a human being.

(Emphasis supplied). Dr. Perlin's Declaration was filed as Exhibit 1 to the Commonwealth's Supplemental Answer to Motion for Discovery, filed April 14, 2015. It was also admitted at the October 15, 2015 *Robinson* Pre-trial Motions Hearing by defense counsel as Exhibit G (DHTI at p. 57 ("it is part of the record. But there is a copy and it is marked as G, and I would like to offer it at this time."))

The Statements in paragraphs 47 through 60 of Dr. Perlin's Declaration, set forth fully above, make clear that great harm would be occasioned by having to produce the source code. These statements, which are a part of the record, were not challenged during the defense examination of Dr. Perlin. Finally, during his direct examination by the Commonwealth, Dr. Perlin was asked:

Could you give us an idea of the economic harm that would befall you if your source code fell in to the hands of a competitor?

A: It could potentially eliminate Cybergenetics as a business.

(DHTII at 49). What is more, *Robinson* defense counsel explicitly acknowledged Dr. Perlin had previously asserted this fact. (*Id.* at pp. 18-19). Further, Robinson's patent law expert, John W. McIlvaine, Esquire, acknowledged on direct examination that he had read Dr. Perlin's Declaration concerning the harmful effects of disclosing the source code trade secret (*Id.* at 20), and Attorney McIlvaine was questioned specifically about certain statements in Dr. Perlin's Declaration. (*Id.* at 20, 35, 40).

Clearly, the Commonwealth did proffer evidence concerning the severe damaging effect that disclosure of the source code would have on Dr. Perlin's business, and Petitioner Robinson failed to establish the necessity for revelation of the source code. As this Court recognizes, more than a bald assertion of usefulness is required to

mandate that a trade secret be revealed. See *Crum v. Bridgestone/Firestone N. Am. Tire, LLC*, 907 A.2d 578, 588 (Pa. Super. 2006) (insufficient to claim that trade secret might be useful; record confirmed petitioner did not offer evidence to establish necessity for disclosure that outweighed harm to trade secret holder and trade secret holder presented evidence formulas sought were not relevant or necessary to the adjudication of claims at issue; trial court orders directing production of evidence reversed). The Commonwealth respectfully submits this Court should reject the assertion that the Commonwealth failed to provide sufficient evidence of the dire consequences of disclosure of the TrueAllele source code, and that the *Robinson* court erred in relying upon that evidence.

Consistent with the authority cited above, Judge Manning correctly denied the Petitioner's 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 the Order denying Petitioner's Application for Amendment to Include Certification of the Interlocutory Discovery Order Issued on February 29, 2016 should be upheld.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the trial court's Order denying Petitioner's Motion for Appellate Certification on February 29, 2016 should be affirmed.

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 Petitioner in the manner indicated below which service satisfies the requirements of Pa. R. A. P. 121:

Service by First Class Mail addressed as follows:

J. Richard Narvin, Esq.
Lisa C. Leake, Esq.
Allegheny County Office of Conflict Counsel
429 Forbes Avenue
Suite 1405
Pittsburgh, PA 15219
(412) 350-4850

Dated: April __12__, 2016

/s/ Amy E. Constantine

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

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219