ARTIFICIAL INTELLIGENCE ADMISSIBILITY CASELAW:

People v. Wakefield, 175 A.D.3d 158, 107 N.Y.S.3d 487 (N.Y. App. 3d Dept. August 15, 2019)

> Defendant was subsequently charged in a multicount indictment in connection with the victim's death. Law enforcement collected a buccal swab from defendant to compare his DNA to that found at the crime scene. The data was eventually sent to Cybergenetics, a private company that used a software program called TrueAllele Casework System, for further testing.1 The DNA analysis by TrueAllele revealed, to a high degree of probability, that defendant's DNA was found on the amplifier cord, on parts of the victim's T-shirt and on the victim's forearm. . . At the *Frye* hearing, Supreme Court heard the testimony of Mark Perlin, the founder, chief scientist and chief executive officer of Cybergenetics, among others. Following the Frye hearing, the court rendered a decision concluding that TrueAllele was generally accepted within the relevant scientific community . . . Perlin also testified that TrueAllele is designed to have a certain degree of artificial intelligence to make additional inferences as more information becomes available. Perlin explained that, after objectively generating all genotype possibilities, TrueAllele answers the question of "how much more the suspect matches the evidence [than] a random person would," and the answer takes the form of a likelihood ratio. . . Supreme Court found that "there [was] a plethora of evidence in favor of [TrueAllele], and there [was] no significant evidence to the contrary" (47 Misc 3d at 859). In view of the evidence adduced at the Frye hearing, we find that the court's ruling was proper (see People v Hamilton, 255 AD2d 693, 694 [1998], lv denied 92 NY2d 1032 [1998]; see generally People v Wesley, 83 NY2d 417, 426-427 [1994]).”

State v. Morrill, A-1-CA-36490, 2019 WL 3765586 (N.M. App. July 24, 2019)

> Defendant asks this Court to "find that the attestations made by a computer program constitute 'statements,' whether attributable to an artificial intelligence software or the software developer who implicitly offers the program's conclusions as their own." (Emphasis omitted.) Based

on that contention, Defendant further argues that the automated conclusions from Roundup and Forensic Toolkit constitute inadmissible hearsay statements that are not admissible under the business record exception.4 In so arguing, Defendant acknowledges that such a holding would diverge from the plain language of our hearsay rule's relevant definitions that reference statements of a "person." . . . Based on the following, we conclude the district court correctly determined that the computer generated evidence produced by Roundup and Forensic Toolkit was not hearsay. Agent Peña testified that his computer runs Roundup twenty-four hours a day, seven days a week and automatically attempts to make connections with and downloads from IP addresses that are suspected to be sharing child pornography. As it does so, Roundup logs every action it takes. Detective Hartsock testified that Forensic Toolkit organizes information stored on seized electronic devices into various categories including graphics, videos, word documents, and internet history. Because the software programs make the relevant assertions, without any intervention or modification by a person using the software, we conclude that the assertions are not statements by a person governed by our hearsay rules.

United States v. Shipp, 392 F.Supp.3d 300 (E.D.N.Y. July 15, 2019)

The court has serious concerns regarding the breadth of Facebook warrants like the one at issue here. The Second Circuit has observed that "[a] general search of electronic data is an especially potent threat to privacy because hard drives and e-mail accounts may be 'akin to a residence in terms of the scope and quantity of private information [they] may contain.' " Ulbricht, 858 F.3d at 99 (quoting Galpin, 720 F.3d at 445); see also Galpin, 720 F.3d at 447 (explaining that "[t]his threat demands a heightened sensitivity to the particularity requirement in the context of digital searches"). This threat is further elevated in a search of Facebook data because, perhaps more than any other location—including a residence, a computer hard drive, or a car—Facebook provides a single window through which almost every detail of a person's life is visible. Indeed, Facebook is designed to replicate, record, and facilitate personal, familial, social, professional, and financial activity and networks. Users not only voluntarily entrust information concerning just about every aspect of their lives to the service,

but Facebook also proactively collects and aggregates information about its users and non-users in ways that we are only just beginning to understand. . . Natasha Singer, What You Don't Know About How Facebook Uses Your Data, N.Y. TIMES, Apr. 11, 2018, https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html (explaining that Facebook tracks users and non-users, collects biometric facial data, and "can learn almost anything about you by using artificial intelligence to analyze your behavior"). (See also Aff. ¶ 27 (explaining that "Facebook also provides its users with access to thousands of other applications ('apps') on the Facebook platform")). Particularly troubling, information stored in non-Facebook applications may come to constitute part of a user's "Facebook account"—and thus be subject to broad searches—by virtue of corporate decisions, such as mergers and integrations, without the act or awareness of any particular user. . . Compared to other digital searches, therefore, Facebook searches both (1) present a greater "risk that every warrant for electronic information will become, in effect, a general warrant," Ulbricht, 858 F.3d at 99, and (2) are more easily limited to avoid such constitutional concerns. In light of these considerations, courts can and should take particular care to ensure that the scope of searches involving Facebook are "defined by the object of the search and the places in which there is probable cause to believe that it may be found."

State v. Saylor, 2018-CA-14, 2019 WL 1313375 (Ohio App. March 22, 2019)

[concurring opinion] Although it found Saylor to be indigent and did not impose the mandatory fine, the court imposed a $ 500 fine and assessed attorney fees and costs; the court also specifically disapproved a Risk Reduction sentence or placement in the Intensive Program Prison (IPP). {¶ 50} I have previously voiced my concerns about the almost unfettered discretion available to a sentencing court when the current case law apparently does not permit a review for abuse of discretion. State v. Roberts, 2d Dist. Clark No. 2017-CA-98, 2018-Ohio-4885, ¶ 42-45, (Froelich, J., dissenting). However, in this case, the trial court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12, the individual sentences were within the statutory ranges, and the court's consecutive sentencing

findings, including the course-of-conduct finding under R.C. 2929.14(C)(4)(b), were supported by the record.

{¶ 51} As for the trial court's consideration of ORAS, the "algorithmization" of sentencing is perhaps a good-faith attempt to remove unbridled discretion – and its inherent biases – from sentencing. Compare State v. Lawson, 2018-Ohio-1532, 111 N.E.3d 98, ¶ 20-21 (2d Dist.) (Froelich, J., concurring). However, "recidivism risk modeling still involves human choices about what characteristics and factors should be assessed, what hierarchy governs their application, and what relative weight should be ascribed to each." Hillman, The Use of Artificial Intelligence in Gauging the Risk of Recidivism, 58 The Judges Journal 40 (2019).

*9 {¶ 52} The court's statement that the "moderate" score was "awfully high," given the lack of criminal history, could imply that the court believed there must be other factors reflected in the score that increased Saylor's probable recidivism. There is nothing on this record to refute or confirm the relevance of Saylor's ORAS score or any ORAS score. Certainly, the law of averages is not the law. The trial court's comment further suggested that its own assessment of Saylor's risk of recidivism differed from the ORAS score. The decision of the trial court is not clearly and convincingly unsupported by the record, regardless of any weight potentially given to the ORAS score by the trial court.