SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MIRIAM E. ROCAH, as District Attorney of Westchester County

Petitioner,

-against-

MATTHEW J. COSTA, Judge of the New Rochelle City Court, MICHAEL MOLINA, Defendant, and GUSTAVO VILLAMARES SERRANO, Defendant

Respondents.

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Index No.:

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE

(_____, J.)

STATE OF NEW YORK)
ss.:
COUNTY OF WESTCHESTER)

BRIAN R. POULIOT, an attorney duly admitted to practice law before the Courts of the State of New York, makes the following affirmation under the penalty of perjury:

1. I am an Assistant District Attorney of Westchester County and counsel for the Petitioner, Miriam E. Rocah, Esq., and I make this affirmation in support of the preceding Order to Show Cause and Petitioner's application for a stay of proceedings pursuant to CPLR § 7805, in both *People v Molina*, New Rochelle

City Court Docket Number CR-3495-21 and *People v Serrano*, New Rochelle City Court Docket Number CR-5661-21, pending the determination of this Article 78 proceeding.

2. The facts and procedural history relevant to the matter are set forth in greater detail in the accompanying CPLR Article 78 Verified Petition and attached Memorandum of Law.

3. Succinctly, in *People v Molina*, New Rochelle City Court Docket Number CR-3495-21 – which involves a charge of driving while intoxicated – Respondent Molina claimed that the People had violated their discovery obligations by not disclosing certain potential impeachment materials related to matters within a disclosed disciplinary resume of the lone on-scene State Trooper. The People provided Respondent Molina with the complained-about materials prior to their motion opposition. Still, in a January 14, 2022 Decision and Order, Respondent Costa sanctioned the People by precluding any testimony of the trooper and any evidence he obtained. However, since no testimonial proceedings had taken place, Respondent Molina had not been prejudiced despite any belated disclosure. Respondent Costa was therefore without statutory authority to issue a sanction (*see* CPL 245.80[1][a]), never mind a preclusion order tantamount to dismissal of a charge.

4. Comparably, in *People v Serrano*, New Rochelle City Court Docket

Number CR-5661-21 – which likewise involves driving while intoxicated charges – Respondent Serrano faulted the People for not conferring with him or consulting Respondent Costa with respect to the discoverability of certain manuals, and for not disclosing sufficient information as to a Datamaster breath test operator's certification, or gas chromatography records. In a Decision and Order Dated April 4, 2022, Respondent Costa sanctioned the People by precluding any testimony concerning Respondent Serrano's Datamaster breath test and field sobriety tests. Again however, since no testimonial proceedings had taken place, and since the at-issue materials would be utilized by Respondent Serrano, if at all, to cross-examine the People's witnesses and challenge their introduction of evidence, Respondent Serrano could not have suffered any prejudice. Respondent Costa thus lacked statutory authority to sanction the People for any delayed disclosure, or for their alleged failure to confer with Respondent Serrano or consult the court (*see* CPL 245.80[1][a]).

5. The Petitioner's application is being brought by Order to Show Cause in part because the statute of limitations as to the cause of action with respect to Respondent Molina is set to expire on May 16, 2022.

6. The People filed a February 22, 2022 reargument motion with respect to

the January 14, 2022 Decision and Order in *People v Molina*, but while the decision date for that motion was set as April 22, 2022, no decision has yet been issued.

7. The Petitioner has also proceeded by Order to Show Cause because she will be irreparably harmed if the proceedings under both Docket Numbers are not stayed pursuant to CPLR § 7805, pending the determination of this CPLR Article 78 proceeding (*see, e.g.*, *Matter of Hoovler v De Rosa*, 143 AD3d 897, 898 [2d Dept 2016] [in which proceedings were stayed pending determination of Article 78 Petition concerning discovery order]). Respondent Costa's orders preclude the People from introducing pivotal evidence of Respondent Molina and Respondent Serrano's guilt – that showing intoxication. Should the matters continue and proceed to trial while this Court considers the Petitioner's papers, the People will be forced to litigate within the confines of the unauthorized determinations they seek to prohibit, and that bar their most probative, if not only, evidence. Even though the People's reargument motion in *People v Molina* is currently pending, Respondent Costa's discovery decision in *People v Serrano*, issued after the People filed that reargument motion, suggests that Respondent Costa will remain steadfast in his preclusion order despite the lack of prejudice to Respondent Molina.

8. A stay will also stop the running of the CPL 30.30 speedy trial clocks in

the matters at issue, and will eliminate any need to determine whether time spent in the litigation of this Petition is excludable.

9. Petitioner will likely succeed in her request for a writ of prohibition in each matter. As explained, and as set forth in greater detail in the accompanying CPLR Article 78 Petition, verified by the undersigned, Respondent Costa lacked statutory authority to formulate sanctions for the alleged discovery violations, because no possible prejudice to Respondent Molina or Respondent Serrano existed (*see* CPL 245.80[1][a]). And Respondent Costa doubly erred in *People v Serrano*, for issuing a sanction in part based on the People's alleged failure to confer with the opposing party or seek a discovery ruling from the court – despite there being no statutory authority for sanctioning a party under such circumstances. Nor will Respondents Molina and Serrano suffer any harm from the requested stay under CPLR § 7805. They are both currently at liberty to the People's knowledge, and they will not be materially affected by a brief continuation of the underlying proceedings – whereas the Petitioner's cases will otherwise be gutted.

10. No previous application for the relief requested herein has been made.

11. On May 10, 2022, pursuant to 22 NYCRR § 202.8-e, the affirmant notified: Judge Matthew J. Costa (via email to mjcosta@nycourts.gov); Steven Epstein, Esq., attorney for Respondent Michael Molina (via email to Sepstein@barketepstein.com); Dennis W. Light, Esq., attorney for Respondent

Gustavo Villamares Serrano (via email to dwlight@rlslawoffice.com); and Assistant Attorney General Gary S. Brown of the New York State Attorney General's Office (via email to Gary.Brown@ag.ny.gov), that the People would be presenting a Judge of the Westchester County Supreme Court with a proposed Order to Show Cause at or around 9:00 A.M. on Friday, May, 13, 2022, in which the People would be requesting a stay of proceedings in both *People v Molina*, New Rochelle City Court Docket Number CR-3495-21 and *People v Serrano*, New Rochelle City Court Docket Number CR-5661-21, pursuant to CPLR § 7805. The four notified parties were provided with copies of all papers related to the People's request for a stay.

WHEREFORE, Petitioner respectfully requests that this Court:

12. Sign the preceding Order to Show Cause, and;

13. As to both New Rochelle City Court Docket Number CR-3495-21 and New Rochelle City Court Docket Number CR-5661-21, issue a stay of proceedings pursuant to CPLR § 7805, pending determination of the Petitioner's CPLR Article 78 Petition.

Affirmed To Be True.
Dated: White Plains, New York
May 11, 2022

BRIAN R. POULIOT
Assistant District Attorney
bpouliot@westchesterda.net

EXHIBIT 1 EXHIBIT 2

CERTIFICATION

BRIAN R. POULIOT, an attorney duly admitted to practice law before the courts of the State of New York, hereby certifies pursuant to 22 NYCRR §§ 202.8-b(a), (b) that the foregoing affirmation consists of 1115 words, excluding any captions, table of contents, table of authorities, and signature block. The aforesaid word count was determined by using the word count of the word-processing system used to prepare the document.

Dated: White Plains, New York
May 11, 2022

BRIAN R. POULIOT

EXHIBIT 1 EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

MIRIAM E. ROCAH, as District Attorney of Westchester County

Index No.: 1356-22

Petitioner,

VERIFIED PETITION

-against-

MATTHEW J. COSTA, Judge of the New Rochelle City Court, MICHAEL MOLINA, Defendant, and GUSTAVO VILLAMARES SERRANO, Defendant

(_____, J.)

Respondents.

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Petitioner Miriam E. Rocah, as District Attorney of Westchester County, ("Petitioner"), with respect to her verified petition pursuant to CPLR § 7803(2), alleges:

THE PARTIES

1. Petitioner Miriam E. Rocah, Esq., is District Attorney of Westchester County, State of New York, with offices at 111 Dr. Martin Luther King Jr., Boulevard, County of Westchester, White Plains, New York 10601.

2. Respondent Judge Matthew J. Costa ("Respondent Costa"), is a City

Court Judge of the New Rochelle City Court, Westchester County, located at 475 North Avenue, New Rochelle, New York 10801. In that position, he presided over portions of the matters of *People v Michael Molina* (New Rochelle City Court Docket Number CR-3495-21) and *People v Gustavo Villamares Serrano* (New Rochelle City Court Docket Number CR-5661-21).

3. Respondent Michael Molina ("Respondent Molina"), party to this proceeding pursuant to CPLR § 7804(i), is the defendant in the matter of *People v Michael Molina*, New Rochelle City Court Docket Number CR-3495-21.

4. Respondent Gustavo Villamares Serrano ("Respondent Serrano"), party to this proceeding pursuant to CPLR § 7804(i), is the defendant in the matter of *People v Gustavo Villamares Serrano*, New Rochelle City Court Docket Number CR-5661-21.

JURISDICTION AND VENUE

5. Petitioner's claims are cognizable under CPLR Article 78, because Respondent Costa exceeded his statutorily authorized powers (*see* CPL 245.80[1][a]) by imposing sanctions for alleged discovery violations in both *People v Michael Molina*, New Rochelle City Court Docket Number CR-3495-21 and *People v Gustavo Villamares Serrano*, New Rochelle City Court Docket Number CR-5661-21 (*see* CPLR § 7803[2]), where Respondents Molina and Serrano suffered no conceivable prejudice as a result of the supposed violations.

6. Respondent Costa's orders in relation to the alleged discovery violations are not appealable by the Petitioner (*see* CPL 450.20).

7. This Court has jurisdiction to entertain the proceeding, and venue is appropriate, pursuant to CPLR § 7804(b) and CPLR § 506(b), as this is a special proceeding against a City Court Judge of Westchester County, and Respondent Costa made the unauthorized determinations within the Second Judicial Department.

BACKGROUND OF EVENTS

8. On June 11, 2021, after Respondent Molina was pulled over by a state trooper and failed three field sobriety tests, he was charged under New Rochelle City Court Docket Number CR-3495-21 with, *inter alia*, driving while intoxicated (VTL § 1192[3]).

9. Discovery was provided by the People, including a "resume" or summary of the trooper's disciplinary history at the State Police, following which Respondent Molina filed a September 28, 2021 motion to strike the People's Certificate of Compliance and deem their statement of readiness illusory. Respondent Molina argued that the People had failed in their discovery obligations under CPL 245.20, by not providing the underlying documents concerning the lone on-scene trooper's disciplinary history. The documents were thereafter provided to Respondent Molina, before the People filed their motion opposition. Still, in a

written decision and order dated January 14, 2022, Respondent Costa found that the People had violated CPL 245.20 by not disclosing the materials as soon as possible – despite Respondent Costa not describing the content of any of the materials, or how they were in any way impactful. Ostensibly relying on CPL 245.80, Respondent Costa concluded that Respondent Molina had "shown under the totality of the circumstances that it was prejudiced" when the People "did not provide pertinent information that tended to impeach the credibility of the prosecution's witness." In part, Respondent Costa sanctioned the People by "precluding the testimony of" the trooper, and "precluding the use of any evidence procured by" him.

10. The People filed a February 22, 2022 reargument motion from Respondent Costa's decision. Respondent Molina filed a March 11, 2022 opposition, after which the People filed a March 18, 2022 reply. The People's reargument motion is currently pending before Respondent Costa.[1]

11. On October 1, 2021, officers responded to a motor vehicle accident involving Respondent Serrano, who proceeded to fail three field sobriety tests and later took a breath test showing that his blood alcohol content was 0.16%.

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[1] Although the reargument motion is pending, the four-month statute of limitations for the Petitioner to bring an Article 78 petition from Respondent Costa's January 14, 2022 Decision and Order has not been tolled by that application (*see* CPLR § 217[1]; *Matter of Silvestri v Hubert*, 106 AD3d 924, 926 [2d Dept 2013]). The decision date for the reargument motion was set as April 22, 2022, but to date, Respondent Costa has not issued a decision.

Respondent Serrano was charged under New Rochelle City Court Docket Number CR-5661-21 with driving while intoxicated *per se* (VTL § 1192[2]), driving while intoxicated (VTL § 1192[3]), and unlicensed operation of motor vehicle (VTL § 509[1]).

12. After the prosecution provided Respondent Serrano discovery, Respondent Serrano filed a January 24, 2022 motion alleging the People had committed various violations, including: not disclosing requested manuals concerning the "Datamaster" breath test machine and administration of horizontal gaze nystagmus ["HGN"] field sobriety tests, without applying to the court for a ruling regarding discoverability; and not providing proper documentation concerning the Datamaster operator's certification and gas chromatography records. In a written decision dated April 4, 2022, Respondent Costa faulted the People for denying Respondent Serrano's discovery request concerning the manuals without first conferring with Respondent Serrano or consulting the court, and for not providing a proper Datamaster operator's certificate or gas chromatography records. Citing CPL 245.80, Respondent Costa found that Respondent Serrano had "shown under the totality of the circumstances that it was prejudiced" – without inquiring as to the availability of the complained-about materials, let alone examining those materials to gauge their relevance and any prejudice to the defense. As relevant here, Respondent Costa "preclud[ed] any

testimony regarding the Datamaster chemical test and the Standard Field Sobriety Test."

13. On April 29, 2022, the People provided Respondent Serrano With Standard Field Sobriety Test and DWI Detection training manuals, as well as a Breath Analysis Operator Course manual.[2]

LEGAL CLAIMS

14. In both matters, Respondent Costa exceeded his statutory authority by precluding the aforementioned evidence – thus substantially injuring the Petitioner. Under CPL 245.80(1)(a), a court is only authorized to impose a remedy or sanction for belatedly disclosed materials – beyond offering the aggrieved party a reasonable time to prepare – where the receiving party shows it was prejudiced (CPL 245.80[1][a]). But here, neither Respondent Molina nor Respondent Serrano demonstrated the requisite prejudice, nor could any prejudice have existed.

15. As to Docket Number CR-3495-21: Respondent Molina complained about the belated disclosure of potential impeachment materials concerning the on-scene trooper. However, as no testimonial proceedings had yet taken place, and because Respondent Molina received the complained-about materials even before the People filed their motion response, Respondent Molina missed no opportunity

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[2] The People are currently reviewing the validity of Respondent Serrano's claim that additional materials in relation to the Datamaster operator's certification and gas chromatography records should have been provided.

to cross-examine the trooper with the provided disciplinary record. He will have a full and fair opportunity to utilize the materials at any upcoming testimonial proceeding (*see People v Florez*, 74 Misc3d 1222[A] at *13 [Sup Ct, Nassau Cty 2022]; *People v Cano*, 71 Misc3d 728, 739-40 [Sup Ct, Queens Cty 2020]; *People v Lustig*, 68 Misc3d 234, 248, n.6 [Sup Ct, Queens Cty 2020]; *see also People v Cortijo*, 70 NY2d 868, 869-70 [1987] [assessing prejudice in the context of untimely produced material, prior to the enactment of CPL 245.80]; *People v Sanchez*, 144 AD3d 1179, 1180 [2d Dept 2016] [same]; *People v Robertson*, 192 AD2d 682, 682 [2d Dept 1993] [same]; *People v Burks*, 192 AD2d 542, 542 [2d Dept 1993] [same]). To whatever extent Respondent Molina suggested that prejudice arose in the form of some minor delay in the proceedings, that assertion, essentially equating belated disclosure with prejudice, contravenes the plain terms of the statute and settled meaning of "prejudice" in this context (*see* CPL 245.80[1][a]; *People v Kraten*, 73 Misc3d 1229[A] at *3 [Webster Just Ct, Monroe Cty 2021]; *see also, e.g.*, *Cortijo*, 70 NY2d at 869-70). As no prejudice existed, Respondent Costa had no statutory authorization to impose the sanction of evidence preclusion (*see* CPL 245.80[1][a]).

16. As to Docket Number CR-5661-21: Respondent Serrano similarly complained about the non-disclosure of potential impeachment materials, as well as materials related to the possible admissibility of trial evidence. Again however,

no testimonial or evidentiary proceedings had yet taken place. Respondent Serrano suffered no prejudice from not having the materials at that early stage, since a full opportunity to use the materials as desired remained, and still remains, available (*see Florez*, 74 Misc3d 1222[A] at *13; *Cano*, 71 Misc3d at 739-40; *Lustig*, 68 Misc3d at 248, n.6; *see also Cortijo*, 70 NY2d at 869-70; *Sanchez*, 144 AD3d at 1180; *Robertson*, 192 AD2d at 682; *Burks*, 192 AD2d at 542). Once more, because there was no prejudice, Respondent Costa had no statutory authority to impose the remedy of evidence preclusion (*see* CPL 245.80[1][a]).

17. So too, although Respondent Costa hinged the sanction in *People v Serrano* in part on the People's failure to confer with Respondent Serrano or consult the court as to the discoverability of the at-issue manuals, CPL 245.80 provides no authority for a court to issue a remedy for such conduct (*see* CPL 245.80[1][a]).

18. Petitioner is greatly harmed by the portions of Respondent Costa's January 14, 2022 and April 4, 2022 decisions precluding the People's use of evidence. In both matters, and without statutory authority, Respondent Costa barred the People from using critical proof – that showing intoxication. In all cases, preclusion is a severe sanction (*see People v Jenkins*, 98 NY2d 280, 284 [2002]). Due to the nature of the precluded evidence here, that severity is magnified. In effect, Respondent Costa terminated the prosecution of certain

charges (*see Matter of Clark v Newbauer*, 148 AD3d 260, 265 [1st Dept 2017]). "District Attorneys have plenary prosecutorial power in the counties where they are elected" (*People v Romero*, 91 NY2d 750, 754 [1998]), and with only limited exceptions (inapplicable here), "it shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed" (NY County Law § 700[1]). Thus, by his unauthorized preclusion orders, Respondent Costa has barred the Petitioner from fulfilling her prosecutorial role.

RELIEF SOUGHT

WHEREFORE, Petitioner respectfully requests that this Court:

19. As to New Rochelle City Court Docket Number CR-3495-21:

issue a writ of prohibition, prohibiting Respondent Costa from enforcing that portion of his January 14, 2022 Decision and Order "precluding the testimony of" the on-scene trooper, and "precluding the use of any evidence procured by" him.

20. As to New Rochelle City Court Docket Number CR-5661-21:

issue a writ of prohibition, prohibiting Respondent Costa from enforcing that portion of his April 4, 2022 Decision and Order "precluding any testimony regarding the Datamaster chemical test and the Standard Field Sobriety Test."

VERIFICATION

BRIAN R. POULIOT, an attorney duly admitted to practice law before the courts of the State of New York, hereby verifies that I am an Assistant District Attorney of Westchester County, and in that role represent the Petitioner herein, and that I have read the foregoing verified petition and know the contents thereof to be true based on the file of this matter maintained by the Office of the District Attorney, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters I believe them to be true.

Sworn to me Before This
10 Day of May, 2022

DEBORAH A. TRIMARCHI
NOTARY PUBLIC-STATE OF NEW YORK
No. 01TR4998995
Qualified in Bronx County
My Commission Expires July 13, 2022

BRIAN R. POULIOT
Assistant District Attorney
bpouliot@westchesterda.net

EXHIBIT 1 | EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

MIRIAM E. ROCAH, as District Attorney of Westchester County

Petitioner,

-against-

MATTHEW J. COSTA, Judge of the New Rochelle City Court, MICHAEL MOLINA, Defendant, and GUSTAVO VILLAMARES SERRANO, Defendant

Respondents.

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Index No.:

AFFIRMATION

(_____, J.)

PHILIP MELLEA, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following under penalty of perjury:

1. I am an Assistant District Attorney of Westchester County, and Branch Chief of the Office's New Rochelle Branch. As such, I am familiar with the proceedings discussed herein, based on my personal knowledge and the files maintained by the Office of the District Attorney.

2. Respondent Costa is a Judge of the New Rochelle City Court, Westchester County. In that role, he presides over proceedings involving individuals charged with, *inter alia*, driving while intoxicated. Respondent Costa

EXHIBIT 1 EXHIBIT 2

is one of only three New Rochelle City Court judges before whom the District Attorney's Office appears in New Rochelle.

3. The District Attorney's Office has an average of approximately 250 cases per week before the New Rochelle City Court.

4. In the matter of *People v Molina*, New Rochelle City Court Docket Number CR-3495-21 – in which Respondent Molina is in part charged with driving while intoxicated (VTL § 1192[3]) – Respondent Costa, in a decision and order dated January 14, 2022, precluded the People from introducing any testimony of the on-scene state trooper, or any evidence obtained by the trooper. At the time of Respondent Costa's decision, no testimonial proceedings had yet occurred in the case. Respondent Molina is currently at liberty during the pendency of the matter.

5. In the matter of *People v Serrano*, New Rochelle City Court Docket Number CR-5661-21 – in which Respondent Serrano is in part charged with driving while intoxicated (VTL §§ 1192[2], [3]) – Respondent Costa, in a decision and order dated April 4, 2022, precluded the People from introducing any testimony regarding a Datamaster breath test or field sobriety test. At the time of Respondent Costa's decision, no testimonial proceedings had yet occurred in the case. Respondent Serrano is currently at liberty during the pendency of the matter.

6. In each matter, Respondent Costa precluded the most critical evidence

showing the defendant was driving while intoxicated – effectively barring the People from proving their case in *People v Molina* and the VTL § 1192(2) charge in *People v Serrano*, while critically compromising the latter case as a whole. Under New Rochelle City Court Docket Number CR-3495-21, the state trooper's observations of Respondent Molina's operation of the motor vehicle and condition, as well as the circumstances of the trooper's investigation including Respondent Molina's refusal of a breath test, are the primary evidence that Respondent Molina was driving in an intoxicated condition under VTL § 1192(3) – a charge that stands independent from a defendant's blood alcohol content. Under New Rochelle City Court Docket Number CR-5661-21, the Datamaster test is the key evidence demonstrating that Respondent Serrano's blood alcohol content at the time of his motor vehicle operation was 0.08% or more (*see* VTL § 1192[2]). And the results of Respondent Serrano's field sobriety test are crucial to demonstrating that regardless of his blood alcohol content, he was driving in an intoxicated condition (*see* VTL § 1192[3]).

7. Respondent Costa's January 14, 2022 decision and order in *People v Molina*, New Rochelle City Court Docket Number CR-3495-21, and his April 4, 2022 decision and order in *People v Serrano*, New Rochelle City Court Docket Number CR-5661-21, fundamentally compromised the People's cases.

8. Given the average number of cases the District Attorney's

Office has pending in the New Rochelle City Court, Respondent Costa's repeated resort to preclusion of the People's central evidence not only impairs the Petitioner's ability to prosecute the charges in the matters at hand, but speaks to the District Attorney's future ability to enforce the law in the City of New Rochelle.

9. Should the matters proceed with Respondent Costa's orders in place, the People's cases will be vitally impacted. And because any decision on this Article 78 petition could potentially come too late, the only way to ensure that the requested relief for prohibition could have an actual effect is to stay the proceedings in both *People v Molina*, New Rochelle City Court Docket Number CR-3495-21, and *People v Serrano*, New Rochelle City Court Docket Number CR-5661-21, pending determination of the Article 78 petition.

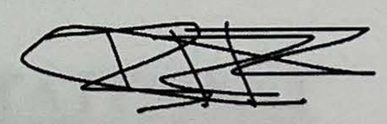
Dated: New Rochelle, New York
May 11, 2022

Philip Mellea
Assistant District Attorney

CERTIFICATION

BRIAN R. POULIOT, an attorney duly admitted to practice law before the courts of the State of New York, hereby certifies pursuant to 22 NYCRR §§ 202.8-b(a), (b) that the foregoing affirmation consists of 691 words, excluding any captions, table of contents, table of authorities, and signature block. The aforesaid word count was determined by using the word count of the word-processing system used to prepare the document.

Dated: White Plains, New York
May 11, 2022



BRIAN R. POULIOT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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MIRIAM E. ROCAH, as District Attorney of Westchester County

Index No.:

Petitioner,

-against-

MEMORANDUM OF LAW

MATTHEW J. COSTA, Judge of the New Rochelle City Court, MICHAEL MOLINA, Defendant, and GUSTAVO VILLAMARES SERRANO, Defendant

(_____, J.)

Respondents.
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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the verified petition filed on behalf of petitioner Miriam E. Rocah, District Attorney of Westchester County. Petitioner requests a writ of prohibition against respondent Matthew J. Costa, Judge of the New Rochelle City Court ("Respondent Costa") pursuant to CPLR Article 78. Specifically, Respondent Costa should be prohibited from: precluding any testimony of the on-scene trooper and any evidence procured by that trooper in *People v Molina*, New Rochelle City Court Docket Number CR-3495-21; and precluding any testimony regarding Datamaster and field sobriety tests in *People v Serrano*, New Rochelle City Court Docket Number CR-5661-21.

SUMMARY OF ARGUMENT

Respondent Costa generally has jurisdiction over discovery disputes in the matters at issue; and he can, where appropriate, issue a sanction for noncompliance (*see Matter of Hoovler v De Rosa*, 143 AD3d 897, 900 [2d Dept 2016]). But a court's jurisdiction does not mean it has unbridled authority in handling such matters (*see id.*; *Matter of Proskin v County Ct of Albany Cty*, 30 NY2d 15, 19-21 [1972]; *Matter of Lee v County Ct of Erie Cty*, 27 NY2d 432, 436-37 [1971]). Of particular relevance herein, for instance, there are boundaries to a court's authority to issue remedies or sanctions for discovery violations – set forth in CPL 245.80. Under CPL 245.80(1)(a), a court can only impose such a remedy or sanction where the aggrieved party shows that it was prejudiced (CPL 245.80[1][a]).

Respondent Costa exceeded his statutory authority by precluding evidence in response to alleged discovery violations by the People, although Respondents Molina and Serrano were not prejudiced by the supposed violations (*see* CPL 245.80[1][a]). Respondents Molina and Serrano complained about materials related to potential impeachment of the People's witnesses and the People's introduction of evidence at trial; but, no testimonial proceedings have occurred in either case. Respondents Molina and Serrano have not been harmed (*see People v Florez*, 74 Misc3d 1222[A] at *13 [Sup Ct, Nassau Cty 2022]; *People v Cano*, 71 Misc3d 728, 739-40 [Sup Ct, Queens Cty 2020]; *People v Lustig*, 68 Misc3d 234,

248, n.6 [Sup Ct, Queens Cty 2020]; *People v Morocho-Morocho*, 71 Misc3d 1221[A] at *5 [Just Ct, Town of Ossining, Westchester Cty 2021]; *see also People v Cortijo*, 70 NY2d 868, 869-70 [1987]; *People v Sanchez*, 144 AD3d 1179, 1180 [2d Dept 2016]; *People v Robertson*, 192 AD2d 682, 682 [2d Dept 1993]; *People v Burks*, 192 AD2d 542, 542 [2d Dept 1993]).

Nevertheless, Respondent Costa assumed prejudice – without viewing the belatedly disclosed materials in *People v Molina*, and without ordering disclosure of, or seeing, the at-issue evidence in *People v Serrano*. Respondent Costa seemingly equates disclosure not made within the timelines of CPL Article 245, on its own, as grounds to sanction the People – to the point of terminating a prosecution. That abuse of power flies in the face of CPL 245.80, as well as longstanding, binding case law interpreting prejudice in the context of belatedly disclosed material before the enactment of CPL 245.80. Also in *People v Serrano*, Respondent Costa's preclusion order was partially based on the People not conferring with Respondent Serrano or consulting the court on the discoverability of certain materials, although, again, there is no statutory authority to issue a sanction on that ground (*see* CPL 245.80[1][a]).

Because Respondent Costa lacked statutory authority to issue sanctions under these circumstances, his decision was not mere legal error, but instead an improper arrogation of power terminating a prosecution without authority, for

which the remedy of prohibition lies (*see Matter of Brown v Blumenfeld*, 103 AD3d 45, 54 [2d Dept 2012]). The precluded proof constituted the most probative evidence that Respondents Molina and Serrano were driving while intoxicated. Thus, Respondent Costa's decisions essentially terminated the prosecution of the driving while intoxicated charge in *People v Molina* and the VTL § 1192(2) charge in *People v Serrano*, while fundamentally eroding the remainder of the People's case in the latter matter – all contrary to the controlling statute and case law (*see Matter of Clark v Newbauer*, 148 AD3d 260, 265 [1st Dept 2017]; *Matter of Brown v Schulman*, 244 AD2d 406 [2d Dept 1997]; *Matter of Mollen v Mathews*, 269 AD2d 42, 47 [3d Dept 2000]; *see also Matter of Holtzman v Goldman*, 71 NY2d 564, 575 [1988]).

For those reasons, Petitioner seeks a writ of prohibition pursuant to CPLR Article 78, prohibiting Respondent Costa from enforcing his preclusion orders.

STATEMENT OF FACTS

The case under New Rochelle City Court Docket Number CR-3495-21.

At about 11:28 P.M. on June 11, 2021, Respondent Michael Molina was pulled over by a lone State Trooper in New Rochelle, for driving without headlights. The trooper noticed that Respondent Molina smelled of alcohol and had glassy eyes, and Respondent Molina proceeded to fail three field sobriety tests. After being arrested and taken to the State Police Barracks, Respondent Molina

refused a chemical breath test (People's 2/22/2022 Mtn. for Reargument [Exhibit 9, without exhibits]).[3] On July 2, 2021, Respondent Molina was arraigned in the New Rochelle City Court on various charges including driving while intoxicated (VTL § 1192[3]) (People's 11/11/2021 Aff. in Opp. at 1 [Exhibit 2]). Thereafter, the People provided various discovery materials to Respondent Molina, including, on July 28, 2021, a "resume" of the on-scene trooper's disciplinary history – indicating that the trooper had been the subject of two "founded" complaints from 2018 and 2020, and two "unsubstantiated" complaints from 2015 and 2017 (People's 2/22/2022 Mtn. for Reargument at 3). The same day, the People filed a certificate of compliance ("COC") (People's 11/11/2021 Mtn. Aff. in Opp. at 2). In a proceeding on August 10, 2021, the People indicated that they had served Respondent Molina with their COC, and declared readiness for trial (*id.*). Counsel for Respondent Molina indicated he had no discovery objections at that time, and would raise any such objections in a motion (*id.*).

In a motion dated September 28, 2021, Respondent Molina asked that the court strike the People's COC and find their statement of readiness illusory (Def.

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[3] The exhibits attached to the People's reargument motion constituted underlying motion practice in the case. As that motion practice is included alongside this Memorandum of Law as additional exhibits, its inclusion in the reproduction of the People's reargument motion would be redundant, and it has been excluded from that exhibit.

Molina 9/28/2021 Motion Aff. [Exhibit 1]).[4] Noting the trooper's disciplinary history resume, Respondent Molina complained that the People had not provided sufficient information and "actual documentation" as to the events captured therein, violating CPL 245.20(1)(k) (*id.* at 4-6). Respondent Molina did not allege any prejudice, nor did he request any remedy under CPL 245.80.

On November 5, 2021, before responding to Respondent Molina's motion, the People provided additional materials related to the founded complaints within the disciplinary resume (People's 2/22/2022 Mtn. for Reargument at 5-6; People's 11/11/2021 Mtn. Aff. in Opp. at 3). On November 9, 2021, the People filed a supplemental COC and a new statement of readiness (People's 11/11/2021 Mtn. Aff. in Opp. at 3). On November 10, 2021, the People provided Respondent Molina with materials related to the unsubstantiated allegations within the disciplinary history, and they filed another supplemental COC and statement of readiness (People's 2/22/2022 Mtn. for Reargument at 6-7; People's 11/11/2021 Mtn. Aff. in Opp. at 3).

In papers dated November 11, 2021, the People opposed Respondent Molina's motion. Relevant to Respondent Molina's claim concerning CPL

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[4] Defendant's "Notice of Objection" indicated that he sought dismissal of the charges pursuant to CPL 30.30 and CPL 170.30 (*see* Def. Molina 9/28/2021 Not. of Objection [Exhibit 1]), but his motion affirmation simply requested an order striking the COC and the People's statement of readiness.

245.20(1)(k), the People stated that they had believed the originally provided disciplinary resume was sufficient; and, reflecting on their good faith, the People explained that they had since "disclosed to the defendant all substantiated and unsubstantiated files which were mentioned in the Resume" (People's 11/11/2021 Mem. of Law at 5). The People contended that the original COC should not be stricken, because they had acted in good faith (*id*. at 5-6). They added that striking the COC was unjustified because Respondent Molina had "not shown or even alleged any prejudice," nor could he; the complained-about materials concerned the trooper's credibility, rather than the facts of the crime, but the trooper had not yet testified at any adversarial proceeding. And citing CPL 245.80, the People explained that even if Respondent Molina could demonstrate prejudice from the timing of disclosure, less drastic remedies were available – such as giving the defense additional time to respond to the evidence (*id*. at 8-9).

Respondent Molina filed a December 1, 2021 reply affirmation in which, *inter alia*, he reiterated that the People had violated CPL 245.20(1)(k) by not disclosing the totality of the documents related to the trooper's disciplinary history until November 10, 2021, which he believed invalidated the People's COC and statement of readiness (Def. Molina 12/1/2021 Reply Aff. at 2-3 [Exhibit 3]). Offhandedly and obscurely, Respondent Molina asserted that his "rights to a speedy trial [were] prejudiced" (*id*. at 4). Respondent Molina added that if the

time spent in motion practice was not officially charged to the People pursuant to CPL 30.30, the court should impose an "alternative remedy." Citing CPL 245.80, he proposed that the court sanction the People by still charging them with speedy trial time occasioned by their belated disclosure, which prompted the motion practice and a "delayed hearing" (*id.* at 6). Notably, Respondent Molina neither submitted the disciplinary history documents to Respondent Costa, nor attempted to distinguish those documents from the previously disclosed resume.

In a written decision and order dated January 14, 2022, Respondent Costa referenced the "newly developing case law surrounding CPL 245," but dismissed the People's legal arguments and citations without meaningfully addressing them – by finding he needed to "look no further than the clear and unambiguous language of CPL 245 to address the defense's challenge" (1/14/2022 Decision and Order at 2-3 [Exhibit 4]). Respondent Costa found that the People should have disclosed the entirety of the disciplinary records as soon as practicable after arraignment, and thus invalidated their COC (*id.* at 3). He went on to fashion a remedy under CPL 245.80 for the belated disclosure, separate from that requested in Respondent Molina's reply papers (*id.* at 4). Overlooking that the chosen remedy should reflect the level of prejudice demonstrated, Respondent Costa noted only that the statute allowed him to "'preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence'" (*id.*, *quoting* CPL 245.80[2]).

And bypassing Respondent Molina's utter failure to demonstrate any prejudice (*see* CPL 245.80[1][a]), Respondent Costa found in conclusory fashion that Respondent Molina had "shown under the totality of the circumstances that it was prejudiced" when the People "did not provide pertinent information that tended to impeach the credibility of the prosecution's witness" (1/14/2022 Decision and Order at 4). Respondent Costa did not endeavor to explain how Respondent Molina had been prejudiced by the timing of disclosure, but still imposed the dramatic sanction of "precluding the testimony of" the trooper and "precluding the use of any evidence procured by" him (*id.*) – in effect, eliminating the People's case as to the driving while intoxicated charge.

The People filed a February 22, 2022 motion for reargument that was vigorously opposed by Respondent Molina, who in part claimed that the People's arguments were not cognizable upon reargument. The application, although originally scheduled for decision on April 22, 2022, is currently pending before Respondent Costa (People's 2/22/2022 Mtn. for Reargument [Exhibit 9]; Def. Molina 3/11/2022 Aff. in Opp. [Exhibit 10]; People's 3/18/2022 Reply Aff. [Exhibit 11]).

The case under New Rochelle City Court Docket Number CR-5661-21.

On October 1, 2021, police officers responded to a motor vehicle accident involving Respondent Gustavo Villamares Serrano. Officers noted that

Respondent Serrano smelled of alcohol, had trouble standing, was slurring his speech, and had bloodshot, watery eyes. He failed three field sobriety tests, and a subsequent breath test revealed that his blood alcohol content was 0.16%. On November 22, 2021, Respondent Serrano appeared with counsel in the City Court of New Rochelle, where he was arraigned under charges of driving while intoxicated *per se* (VTL §1192[2]), driving while intoxicated (VTL §1192[3]), and unlicensed operation of motor vehicle (VTL §509[1]) (People's 2/15/2022 Aff. in Opp. at 1-2 [Exhibit 6]).

The parties proceeded through discovery, after which the People filed their COC and declared readiness for trial. Thereafter, Respondent Serrano filed a January 24, 2022 motion alleging various discovery violations and asking the court to strike the People's COC or, in the alternative, to preclude the testimony of all law enforcement and civilian witnesses, and any evidence concerning his breath test results (Def. Serrano 1/24/2022 Not. of Mtn.; Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 4, 54-62 [Exhibit 5]). Respondent Serrano explained that he had served the People with a written request under CPL 245.20(1)(j) for any officer manuals concerning the administration of horizontal gaze nystagmus ["HGN"] tests, and any user manuals for the "Datamaster" machine that had been used to administer his breath test. He argued that the People had erred by not producing those materials without notifying him in writing and applying to the court for a

determination on discoverability (Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 9-10, 12-14, 20-28). Respondent Serrano stated that any training manuals concerning HGN tests could be used to challenge the People's foundational showing for trial testimony concerning such tests, and that training and Datamaster manuals could be used during cross-examination of the People's witnesses at pre-trial hearings and trial (*id.* at ¶¶ 23, 26). Further, Respondent Serrano contended that the People had violated CPL 245.20(1)(s) by not providing the certification certificate, "if any," of the Datamaster operator, as well as gas chromatography records (*id.* at ¶¶ 48-53).[5]

The People responded in papers dated February 15, 2022, arguing that any training manuals containing HGN procedures, as well as any Datamaster manual, did not fall within their discovery obligations under CPL 245.20(1) since they did not "relate to the subject matter of the case" in particular, and did not fall within CPL 245.20(1)(j) since they had not been created for the case at the request of law enforcement (People's 2/15/2022 Mem. of Law at 4-7 [Exhibit 6]). The People added: while Respondent Serrano hypothesized that the materials might be useful for "effective cross-examination," he failed to describe what probative information they might contain; Respondent Serrano's position was "based on several

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[5] Not relevant herein, Respondent Serrano also alleged that the People had violated their discovery obligations under CPL 245.20(1)(k) and CPL 245.20(1)(p) (Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 29-47 [Exhibit 5]).

assumptions and anticipated events" that "may never occur," such as whether any witness would rely on such a manual in forming a trial opinion as to Respondent Serrano's intoxication; and Respondent Serrano was himself free to obtain the materials (*id*. at 5-6). With respect to Respondent Serrano's complaints under CPL 245.20(1)(s), the People stated that they had already disclosed the Datamaster operator's certification, as well as the gas chromatography records (*id*. at 22).[6] The People maintained that they had acted in good faith, and that striking the COC was unjustified (*id*. at 22-26).

Respondent Serrano filed a March 1, 2022 reply affirmation, in part relying on an attached sample certification and gas chromatography records, to support his argument that the materials provided by the People were insufficient under CPL 245.20(1)(s) (Def. Serrano Reply Aff. at ¶¶ 5-21 [Exhibit 7]). He made no attempt to amplify his complaint concerning the non-production of manuals.

In a written decision dated April 4, 2022, Respondent Costa acknowledged the "newly developing case law surrounding CPL 245" – without further elaboration – but again concluded that he had to "look no further than the clear and unambiguous language of CPL 245 to address the defense's challenge" (4/4/2022 Decision and Order at 2 [Exhibit 8]). In relevant part, Respondent Costa found

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[6] The People referenced certain exhibits described as the certification and gas chromatography records (People's Mem. of Law at 22), but inadvertently neglected to attach the exhibits to their motion response.

that the disclosed materials related to the Datamaster operator's certification and gas chromatography records fell short of what CPL 245.20(1)(s) required (*id.* at 3). Further, Respondent Costa faulted the People for not disclosing any officer training and Datamaster manuals, without attempting to reach an accommodation with Respondent Serrano, discussing the matter with the court pursuant to CPL 245.35, or presenting good cause as to why the materials were not discoverable, pursuant to CPL 245.10(a)(iv), CPL 245.20(5), and CPL 245.70 (*id.* at 4).

Respondent Costa stated that CPL 245.80 allowed him to "impose an appropriate remedy or sanction for discovery violations," and noted only that CPL 245.80(2) permitted him to "'preclude or strike a witness's testimony or a portion of a witness's testimony, [or] admit or exclude evidence'" (*id.*, *quoting* CPL 245.80[2]). Although Respondent Serrano alleged no prejudice stemming from the People's supposed discovery violations, Respondent Costa concluded that "Defendant has shown under the totality of the circumstances that it was prejudiced when the People filed its certificate of compliance . . . when the People did not provide automatic discovery required by CPL 245.20(1)(s) and when they failed to request leave of the Court for a determination on whether the discovery requested by the Defendant was in fact discoverable" (*id.* at 4). Without explaining how Respondent Serrano was prejudiced, or to what degree, Respondent Costa sanctioned the People by "precluding any testimony regarding

the Datamaster chemical test and the Standard Field Sobriety Test," as well as striking their COC (*id*. at 5).

After Respondent Costa's decision, on April 29, 2022, the People provided to Respondent Serrano, the Standard Field Sobriety Test and DWI Detection training manuals, as well as a Breath Analysis Operator Course manual (Rocah Verified Petition at ¶ 13).

THE RELEVANT LEGAL STANDARDS

The writ of prohibition, originally a common-law remedy, is now codified in CPLR Article 78 (*Matter of Brown v Blumenfeld*, 103 AD3d 45, 54 [2d Dept 2012]; *see* CPLR § 7801). It is available to prevent a judicial or quasi-judicial body or officer from proceeding without, or in excess of, its jurisdiction (*Murray v Town of N Castle*, 203 AD3d 150, 157 [2d Dept 2022]; *see also Matter of Haggerty v Himelin*, 89 NY2d 431, 435 [1997]). And "'[b]ecause of its extraordinary nature, prohibition is only available" where "there is a clear legal right'" (*Merolla v Garguilo*, 160 AD3d 649, 650 [2d Dept 2018], *quoting Matter of Holtzman v Goldman*, 71 NY2d 564, 569 [1988]). Accordingly, a petitioner seeking a writ of prohibition must demonstrate that: "(1) a body or officer is acting in a judicial or quasi-judicial capacity, (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction and (3) petitioner has a clear

legal right to the relief requested" (*Matter of Rachelle v Rice*, 112 AD3d 942 [2d Dept 2013] [internal marks omitted]).

A writ of prohibition "ordinarily" does not issue where "ordinary proceedings" are sufficient to address the petitioner's grievance – such as a motion, appeal, or other routine application (*Murray*, 203 AD3d at 158 [internal marks omitted]). Even where prohibition is available as a remedy, it is not mandatory, but can be issued in the sound discretion of the court – considering factors such as the gravity of harm caused, the availability or unavailability of an adequate remedy, and the effectiveness of prohibition if such an alternate remedy does not exist (*Matter of Soares v Herrick*, 20 NY3d 139, 145 [2012]). A court considering a petition for a writ of prohibition should thus engage in a two-step process: first determining whether the issue presented is one for which the remedy of prohibition lies, and second considering whether to exercise its discretion to grant the remedy (*Brown*, 103 AD3d at 55).

ARGUMENT

IN BOTH MATTERS, RESPONDENT COSTA EXCEEDED HIS STATUTORY AUTHORITY BY IMPOSING SANCTIONS FOR ALLEGED DISCOVERY VIOLATIONS WHERE NO PREJUDICE EXISTED, THEREBY GUTTING THE PEOPLE'S CASES.

In each matter, Respondent Costa did not merely err in precluding the introduction of critical evidence of guilt. Rather, he exceeded the authority, granted by statute, allowing him to fashion a remedy for discovery violations where the aggrieved party shows prejudice – since no prejudice was, or could be, present.

On that score, where the People fail to abide by their discovery obligations under CPL 245.20, and where discoverable materials are belatedly provided, the receiving party is entitled to a reasonable time to prepare and respond to the materials (CPL 245.80 [1][a]; *see People v Bruni*, 71 Misc3d 913, 920 [Cty Ct, Albany Cty 2021]). Otherwise, only where the party "shows that it was prejudiced," shall the court fashion an additional, appropriate remedy or sanction (CPL 245.80 [1][a]; *see, e.g.*, *People v Jateen*, 2022 NY Slip Op 50280[U] at *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2022]; *People v White*, 72 Misc3d 1002, 1007 [Sup Ct, Bx Cty 2021]; *People v Nelson*, 67 Misc3d 313, 316 [Cty Ct, Franklin Cty 2020]).[7]

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[7] Where, as opposed to late disclosure, materials cannot be disclosed because they have been lost or destroyed, the court shall impose a remedy or sanction if the aggrieved party shows the

In other words, a court is only vested with statutory authority under CPL 245.80 to sanction the People for a discovery violation upon an adequate showing of prejudice; and prejudice is not to be presumed from untimely discovery. By way of example, where impeachment material is disclosed belatedly, but still in time to be used for cross-examination, there is no prejudice – and no remedy is justified (*see People v Florez*, 74 Misc3d 1222[A] at *13 [Sup Ct, Nassau Cty 2022]; *see also People v Cano*, 71 Misc3d 728, 739-40 [Sup Ct, Queens Cty 2020] [where the case was not yet scheduled for hearings or trial and the defendant "has not been thwarted in his ability to use" belatedly disclosed evidence related to breathalyzer test]; *People v Lustig*, 68 Misc3d 234, 248, n.6 [Sup Ct, Queens Cty 2020]).

Of course, the Legislature recently amended CPL 245.80(1)(a), effective May 9, 2022 (*see* L.2022, c.56, pt.UU, Subpart D, §§ 2, 6 [2022]). As amended, the provision reads that when discoverable information is disclosed belatedly, a court "shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure" (*id.*). The statute, as amended, therefore confirms that any remedy or sanction should be commensurate to the harm suffered – a legal truism that was already implicit in the existing

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evidence may have contained information relevant to a contested issue; the remedy should be proportionate to the potential benefit the information would have provided (CPL 245.80[1][b]).

statutes, as well as stated in case law, but had not yet been made explicit in CPL 245.80(1)(a) (*see* CPL 245.80[2] [aside from the illustrative list of remedies, a court can "make such other order as it deems just under the circumstances"]; *Bruni*, 71 Misc3d at 920 ["each discovery dispute must be determined after considering the totality of the circumstances"]; McKinney's Cons. Laws of NY, Book 1, *Statutes*, Ch. 6 ["Construction and Interpretation"] § 191, Comment ["The Legislature will be assumed to have known of . . . judicial decisions in enacting amendatory legislation"]).[8]

The statute pivotally retained the requirement of prejudice, before a court can issue a sanction or remedy. Underscoring that point, since any remedy must be proportionate to the prejudice, where there is no prejudice, there can be no remedy. Thus, with respect to the current petition, whether applying the prior or soon-to-be version of CPL 245.80(1)(a), the analysis remains the same. In either form, the statute requires prejudice before a court is empowered to impose a remedy or sanction for a discovery violation (apart from affording the aggrieved party time to prepare). And here, discussed throughout, no prejudice existed.

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[8] That the Legislature's goal in amending CPL 245.80(1)(a) was to stress that any remedy or sanction must be proportionate to the prejudice suffered is highlighted by its concurrent amendment of CPL 245.80(2), adding that a court should only resort to dismissal as a remedy "provided that, after considering all other remedies, dismissal is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure" (*see* L.2022, c.56, pt.UU, Subpart D, § 2 [2022]).

In that regard, the prejudice contemplated by CPL 245.80 concerns whether a discovery violation impairs a defendant's ability to *use* the discoverable material, not whether a simple delay occurred (*see* CPL 245.80[1][a] [in all circumstances the aggrieved party "shall be given reasonable time to prepare and respond to the new material"]; CPL 245.80[1][b] ["The appropriate remedy or sanction is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure"]; CPL 245.80[3] [non-disclosure of a testifying prosecution witness's statement shall not constitute grounds for a new hearing or trial absent a showing that there is a reasonable possibility the non-disclosure materially contributed to the result of the trial or proceeding]). Put differently, if a defendant's usage of evidence has not been thwarted, he has not been prejudiced (*see Florez*, 74 Misc3d 1222[A] at *13; *Cano*, 71 Misc3d at 739-40; *Lustig*, 68 Misc3d at 248, n.6). Certainly, "[t]here is no presumption that the failure to provide any item of discoverable material is in and of itself prejudicial to the case of the party entitled to said disclosure" (*People v Kraten*, 73 Misc3d 1229[A] at *3 [Webster Just Ct, Monroe Cty 2021]).

Instructively, even prior to the enactment of the current discovery laws, an assessment of whether or not a defendant was prejudiced by late disclosure of potential impeachment material hinged on his opportunity to utilize it (*see People v Cortijo*, 70 NY2d 868, 869-70 [1987]; *People v Sanchez*, 144 AD3d 1179, 1180

[2d Dept 2016]; *People v Robertson*, 192 AD2d 682 [2d Dept 1993]; *People v Burks*, 192 AD2d 542 [2d Dept 1993]). The Legislature is presumed to have been aware of such decisions in enacting CPL 245.80. And thus, by expressly incorporating into CPL 245.80(1)(a) a requirement of prejudice that had already been judicially defined, the Legislature incorporated the essence of that prior, binding case law.

Yet here, in both matters, Respondents Molina and Serrano failed to demonstrate any prejudice in their motion papers, and beyond those failures, no prejudice existed. Respondent Costa was, therefore, devoid of any statutory authority under CPL 245.80 to impose a remedy or sanction beyond affording Respondents Molina and Serrano a reasonable time to prepare (*see* CPL 245.80[1][a]).

In his initial motion under Docket Number CR-3495-21, Respondent Molina alleged no prejudice from the People's supposed violation of CPL 245.20(1)(k), nor did he ask for any sanction under CPL 245.80 (*see generally*, Def. Molina 9/28/2021 Mtn. Aff. [Exhibit 1]). While defending the propriety of the COC, the People even pointed out in their responsive motion that "THE DEFENSE HAS NOT ALLEGED ANY PREJUDICE" (*see* People's 11/11/2021 Mem. of Law at Point III [Exhibit 2]). Yet Respondent Molina remained largely silent on the matter in his reply papers. To be sure, Respondent Molina offhandedly stated in

the midst of that reply that his "rights to a speedy trial [were] prejudiced," and for the first time requested as an alternate remedy that the court impose a sanction under CPL 245.80 in the form of crediting certain speedy trial time to the People, because the belated discovery "caused the delayed hearing and the filing of this motion" (Def. Molina 12/1/2021 Reply Aff. at 4, 6 [Exhibit 3]).

However, to the degree those statements could be construed as forwarding an actual claim of prejudice, they failed to sustain Respondent Molina's showing. Undoubtedly realizing that no prejudice could be demonstrated, Respondent Molina attempted to recycle belated disclosure into such prejudice. In the context of a discovery violation, however, prejudice relates to the harm caused by delayed disclosure, rather than the delay alone. Otherwise, portions of CPL 245.80(1)(a) would be rendered meaningless, as there would be no need for a defendant to show prejudice when materials are "disclosed belatedly" (*see* CPL 245.80[1][a]; McKinney's Cons. Laws of NY, Book 1, *Statutes*, Ch. 6 ["Construction and Interpretation"] § 98, Comment ["Whenever practicable, the court must give effect to all the language employed"]). Discussed above, non-disclosure is not itself presumed to be prejudicial (*Kraten*, 73 Misc3d 1229[A] at *3), and the prejudice contemplated by CPL 245.80 focuses on the possible impairment of the aggrieved party's *use* of evidence (*see* CPL 245.80[1][a], [1][b], [3]; *Florez*, 74 Misc3d 1222[A] at *13; *Cano*, 71 Misc3d at 739-40; *Lustig*, 68 Misc3d at 248, n.6; *see*

also Cortijo, 70 NY2d at 869-70; *Sanchez*, 144 AD3d at 1180; *Robertson*, 192 AD2d at 682; *Burks*, 192 AD2d at 542). In short, any brief disclosure delay in *People v Molina* did not constitute prejudice authorizing a sanction.

Under Docket Number CR-5661-21, Respondent Serrano alleged no prejudice whatsoever with respect to the training manuals and Datamaster manual he faulted the People for not disclosing (*see* Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 20-28 [Exhibit 5]), nor did he claim any prejudice from the claimed insufficient disclosure of the Datamaster operator certification and gas chromatography records (*see* Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 48-53). For that reason alone, Respondent Costa should have denied any remedy (*see* CPL 245.80 [1][a]) – especially the drastic remedy of evidence preclusion (*see Jateen*, 2022 NY Slip Op 50280[U] at *2; *White*, 72 Misc3d at 1007 ["no punitive 245.80 remedy is available for a very simple reason: there is no allegation of prejudice"]).

Indeed, in both cases, and even bypassing that Respondents Serrano and Molina failed to demonstrate any prejudice in their papers, no prejudice existed. Respondent Costa's statutory authority to impose a sanction was never triggered (*see* CPL 245.80[1][a]). Respondent Costa leapt past this impediment, and to make things worse, imposed a severe sanction akin to dismissal.

The People provided the complained-about materials to Respondent Molina by the time they filed their motion opposition, in which they pivotally highlighted

that "the case has yet to have any adversarial proceedings" (*see* People's 11/11/2021 Mtn Aff. at 3; Mem. of Law at 8 [Exhibit 2]). Respondent Molina was not stymied in any way, but was free to employ the materials for impeachment purposes when the trooper ultimately testified, and if they in fact contained admissible information. He suffered no prejudice (*see Florez*, 74 Misc3d 1222[A] at *13; *Cano*, 71 Misc3d at 739-40; *Morocho-Morocho*, 71 Misc3d 1221[A] at *5; *see also Cortijo*, 70 NY2d at 869-70; *Sanchez*, 144 AD3d at 1180; *Robertson*, 192 AD2d at 682; *Burks*, 192 AD2d at 542).

As to Docket Number CR-5661-21, Respondent Costa remained true to form. Respondent Serrano explained in his motion that he wished to utilize any Datamaster or field sobriety test training manuals to "conduct an effective cross-examination" of officer witnesses at "trial or pre-trial hearings," including contesting the People's foundational showing if they sought to introduce an officer's opinion, based on a horizontal gaze nystagmus test, that Respondent Serrano had been intoxicated (Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 22-26 [Exhibit 5]). But those intended uses were forward-looking and concerned future events, betraying any suggestion of prejudice. The parties had not proceeded to trial, or to pre-trial hearings (Mellea Aff. at ¶¶ 5-6). Prejudice could not be presumed at that time, since Respondent Serrano still had an ample opportunity to use any Datamaster or training manuals for his intended purpose, once produced

(*see Florez*, 74 Misc3d 1222[A] at *13; *Cano*, 71 Misc3d at 739-40; *Morocho-Morocho*, 71 Misc3d 1221[A]; *see also Cortijo*, 70 NY2d at 869-70; *Sanchez*, 144 AD3d at 1180; *Robertson*, 192 AD2d at 682; *Burks*, 192 AD2d at 542). By the same token, although Respondent Serrano did not explain how or when he sought to utilize the complained-about Datamaster operator certification or gas chromatography reports (Def. Serrano 1/24/2022 Mtn. Aff. at ¶¶ 48-53 [Exhibit 5]), he presumably sought to use them, if at all, to challenge the introduction or reliability of his breath test results. Again, no prejudice could be drawn at that early juncture since, upon disclosure, Respondent Serrano could have used the items as desired.

It is therefore no surprise that Respondent Costa bypassed any meaningful prejudice analysis in his succinct opinions. Under Docket Number CR-3495-21, Respondent Costa instead found that Respondent Molina had "shown under the totality of the circumstances that [he] was prejudiced when the People" filed their COC without providing "pertinent information that tended to impeach the credibility of the prosecution's witness" (1/14/2022 Decision and Order at 4 [Exhibit 4]) – despite Respondent Molina having received the materials before Respondent Costa's decision, and before any testimonial proceeding. Under Docket Number CR-5661-21, Respondent Costa likewise concluded – despite Respondent Serrano's failure to allege any prejudice, and without explanation as to

how non-disclosure had harmed Respondent Serrano's case at that early stage – that Respondent Serrano had "shown" he was prejudiced "when the People did not provide automatic discovery" and "failed to request leave of the Court" for a determination regarding certain items' discoverability (4/4/2022 Decision and Order 4 [Exhibit 8]). In both matters, Respondent Costa presumed prejudice, contrary to both the Criminal Procedure Law and caselaw (*see* CPL 245.80[1][a]; *Florez*, 74 Misc3d 1222[A] at *13; *Cano*, 71 Misc3d at 739-40; *Lustig*, 68 Misc3d at 248, n.6; *Kraten*, 73 Misc3d 1229[A] at *3).

So too under Docket Number CR-5661-21, Respondent Costa in part rested the sanctions on the People's alleged failure to converse with Respondent Serrano about, or consult the court on, the discoverability of the complained-about manuals (*see* 4/4/2022 Decision and Order at 4). But CPL 245.80(1), which authorizes sanctions for discovery violations under certain circumstances, does not permit sanctions for bypassing such discussions (*see* CPL 245.80[1]). Nor did Respondent Costa gain such authorization under the remaining provisions he cited in shotgun fashion (*see* 4/4/2022 Decision and Order at 4). CPL 245.35 references a court's ability to issue an order for the parties to confer, or to order a discovery conference – but does not provide for sanctions when a party does not *sua sponte* proceed to confer with the opposition or request such a conference (*see* CPL 245.35). Likewise, CPL 245.70 allows a court to issue a protective order upon a

showing of good cause, but does not include any punishment for a party not seeking such an order (*see* CPL 245.70). And while CPL 245.10 allows a party to withhold information pending a determination under CPL 245.70, that provision concerns the non-disclosure of "portions" of materials claimed to be non-discoverable – contemplating that some parts of the materials are discoverable and disclosed, as opposed to materials (such as the manuals herein) that are not in the possession of the People, and the People believe are on the whole not subject to automatic discovery (*see* CPL 245.10[1]; *see also* 245.20[5]).

That the sanctions were excessive and unauthorized is doubly obvious in light of Respondent Costa's failure to address the contents of any of the complained-about materials. Importantly under Docket Number CR-3495-21, and despite the People providing the possible impeachment documents to Respondent Molina prior to their motion opposition, Respondent Molina did not offer those materials to Respondent Costa. And Respondent Costa gave no indication that he had otherwise considered those items, or their relevance. To whatever degree Respondent Costa relied on the initially disclosed disciplinary "resume" in making his unadorned prejudice finding, that resume pivotally concerned only two "founded" complaints at most containing general impeachment information. They involved drugs being found in a car the trooper had impounded in 2018, and the trooper "unlawfully" taking an individual into custody for fingerprinting after the

prior arrest of that individual (People's 2/22/2022 Not. of Mtn. for Reargument at 3). The matters had nothing to do with the facts of the case, and would not have vitally undercut the proof of those facts. Respondent Costa's apparent imposition of sanctions based upon materials timely disclosed to Respondent Molina, but without a showing that the materials subsequently disclosed were somehow different and more beneficial to Respondent Molina, confirms Respondent Costa's improper presumption of prejudice.

Under Docket Number CR-5661-21, Respondent Costa likewise did not order disclosure of the at-issue manuals, certification, or gas chromatography records, then inspect those materials to gauge their relevance and any prejudice to Respondent Serrano. Instead, without ever seeing the materials, and despite the parties not yet proceeding to the events at which they *might* be pertinent, Respondent Costa severely sanctioned the People with prospective preclusion. Respondent Costa did not, and could not, have actually considered whether Respondent Serrano had been impacted – yet still concluded, largely in the dark as to what the evidence contained, that Respondent Serrano had been prejudiced (*see Johnson v Sackett*, 109 AD3d 427, 430 [1st Dept 2013]; *see also Matter of Gribetz v Edelstein*, 121 AD2d 666, 668 [2d Dept 1986]).

All told, there was no prejudice, but Respondent Costa employed a faulty "grading papers" approach wherein non- or late disclosure equals preclusion of all related evidence.

As no prejudice could have existed in either matter, Respondent Costa exceeded the authority conveyed by statute, which only allowed him to sanction the People in the face of such prejudice (*see* CPL 245.80[1][a]; *Holtzman*, 71 NY2d at 570-71). His decision was "not mere legal error, but, rather, an improper arrogation of power," and as such, "the remedy of prohibition lies" (*Brown*, 103 AD3d at 64). While the "distinction between legal errors and actions in excess of power is not always easily made," abuses of power "may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself" (*Holtzman*, 71 NY2d at 569). And here, Respondent Costa's conduct "was not merely a legal mistake." It related to the power of the court, and he effectively terminated the People's ability to maintain certain charges, by excising fundamental evidence against the defendants (*see id*. at 570, 575; *see Matter of Clark v Newbauer*, 148 AD3d 260, 265 [1st Dept 2017] ["although the ruling did not actually terminate the case, it effectively terminated the ability of the People to prosecute the highest count in the indictment"]). Undoubtedly, a writ of prohibition is available where a court exceeds its authority in relation to the preclusion of evidence and issues an order that is tantamount to dismissal (*see*

Clark, 148 AD3d at 264-65; *see also Matter of Brown v Schulman*, 244 AD2d 406 [2d Dept 1997]; *Matter of Cosgrove v Ward*, 48 AD3d 1150, 1151-52 [4th Dept 2008]; *cf Matter of Heggen v Sise*, 174 AD3d 1115 [3d Dept 2019] [where the respondent judge's preclusion order was clearly not tantamount to dismissal, as the People proceeded to trial and gained conviction]; *Matter of Hynes v Holdman*, 44 AD3d 940, 941 [where, under facts not expressed in the opinion, the Petitioner "failed to demonstrate a clear legal right to the relief sought"]).

Beyond prohibition being available, the Court should exercise its sound discretion to issue such a remedy (*see Soares*, 20 NY3d at 145 [stating factors to consider when exercising discretion]). The Petitioner lacks any other viable recourse. "No appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" (*People v Hernandez*, 98 NY2d 8, 10 [2002]), and the Petitioner is without statutory authority to appeal Respondent Costa's decisions (*see* CPL 450.20; *see Brown*, 103 AD3d at 65). In fact, the right to appeal from a discovery dispute sanction was expanded under the recently added CPL 450.20(12), but only where a court dismisses a charge or charges (*see* L.2022, c.56, pt.UU, Subpart D, §§ 3, 6 [2022]). Respondent Costa's preclusion orders, while not outright dismissals falling within that newly enacted provision, are equivalent to dismissal of the People's cases – underscoring the excessiveness of

his actions and the propriety of the requested writ (*see Matter of Mollen v Mathews*, 269 AD2d 42, 47 [3d Dept 2000]; *see also Clark*, 148 AD3d 260, 265).

While the People attempted a motion for reargument under Docket Number CR-3495-21, that pending motion is being heard by Respondent Costa; and Respondent Molina has vigorously opposed the People's papers, in part claiming that their arguments are not properly raised in a reargument motion (People's 2/22/2022 Mtn. for Reargument [Exhibit 9]; Def. Molina 3/11/2022 Aff. in Opp. [Exhibit 10]; People's 3/18/2022 Reply Aff. [Exhibit 11]). And the harmful impact from Respondent Costa's decisions is large (*see People v Jenkins*, 98 NY2d 280, 284 [2002] ["Preclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction"]). Driving while intoxicated "is a very serious crime" (*People v Washington*, 23 NY3d 228, 231 [2014] [internal marks omitted]). And Respondent Molina is one of only three judges before whom the Petitioner appears in the New Rochelle City Court – a court that considers a substantial number of criminal cases (*see* Mellea Aff. at ¶¶ 3-4). His consistent preclusion of large swaths of critical evidence in response to defendants' discovery criticisms, without due consideration or any showing of prejudice, has for all intents and purposes eliminated the prosecution of serious charges against Respondents Molina and Serrano (*see* Mellea Aff. at ¶¶ 7-8). Since preclusion seems to be Respondent

Costa's typical recourse, his repeated conduct speaks on a larger scale to the Petitioner's potential ability to enforce the law in the City of New Rochelle (*see* Mellea Aff. at ¶ 9; *Romero*, 91 NY2d at 754). And it impacts her prerogative in determining, subject to the rules of evidence, what evidence should be presented (*see Gribetz*, 121 AD2d at 668).

Dated: White Plains, New York
May 11, 2022

Respectfully,

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EXHIBIT 1 EXHIBIT 2 EXHIBIT 3 EXHIBIT 4

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court grant the relief requested in the Petitioner's Order to Show Cause and Verified Petition.

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May 11, 2022

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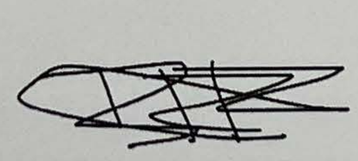
CERTIFICATION

BRIAN R. POULIOT, an attorney duly admitted to practice law before the courts of the State of New York, hereby certifies pursuant to 22 NYCRR §§ 202.8-b(a), (b) that the foregoing memorandum of law consists of 6,972 words, excluding any captions, table of contents, table of authorities, and signature block. The aforesaid word count was determined by using the word count of the word-processing system used to prepare the document.

Dated: White Plains, New York
May 11, 2022



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