EXHIBIT 9

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EXHIBIT 6

OFFICE OF THE DISTRICT ATTORNEY
WESTCHESTER COUNTY

MIRIAM E. ROCAH
DISTRICT ATTORNEY

WESTCHESTER COUNTY COURTHOUSE
111 Dr. Martin Luther King, Jr. Blvd.
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NEW ROCHELLE CITY COURT
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February 15, 2022

Raneri, Light & O'Dell, PLLC,
150 Grand Street, Suite 502,
White Plains, New York 10601
Attn: Dennis W. Light, Esq,

Re: People v. GUSTAVO VILLAMARES SERRANO
New Rochelle City Docket # CR-5662-21

Dear Mr. Light:

Enclosed please find an *"AFFIRMATION IN OPPOSITION"* relating to the captioned case.

If you have any questions regarding this matter, please contact this office at (914) 813-5800.

Thank you for your consideration in this matter.

Sincerely,

MIRIAM E. ROCAH
District Attorney

Brittany Burk
Assistant District Attorney
New Rochelle Branch

BB/ jv
Encl

cc: New Rochelle City Court
Attn: Criminal Court Clerk

EXHIBIT 7 EXHIBIT 8 EXHIBIT 9 EXHIBIT 10 EXHIBIT 11

GREENBURGH BRANCH
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104 South Broadway
Yonkers, NY 10701
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CITY COURT OF THE STATE OF NEW YORK
CITY OF NEW ROCHELLE

THE PEOPLE OF THE STATE OF NEW YORK,

--against-

GUSTAVO VILLAMARES SERRANO,

Defendant.

AFFIRMATION IN OPPOSITION

Docket CR-5662-21

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

I, **BRITTANY J. BURK**, an attorney duly admitted to practice law in the Courts of the State of New York affirm the following under the penalties of perjury: I am an Assistant District Attorney of Westchester County and submit this affirmation in opposition to defendant's motion to invalidate the People's Certificate of Compliance. This affirmation is made upon information and belief, the source of which is the file of this matter maintained by the Office of the District Attorney.

STATEMENT OF FACTS

On October 1, 2021, defendant was arrested by members of the Westchester County Department of Public Safety and charged with Driving While Intoxicated; Per Se (Vehicle and Traffic Law §1192 [2]), Driving While Intoxicated (Vehicle and Traffic Law §1192 [3]), and Unlicensed Operation (Vehicle and Traffic Law §509 [1]).

On that date, the unlicensed defendant was involved in a motor vehicle accident. Responding police officers observed that defendant had trouble standing. They also observed that his speech was slurred, he smelled of alcohol, and had bloodshot, watery eyes. Defendant said that he had drank one beer a few hours earlier. Defendant took and failed three field

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sobriety tests. He agreed to an alco-sensor test, which showed a positive result for the presence of alcohol. Defendant was arrested. He subsequently consented to a breath test – the results showed .16 of one percentum by weight of alcohol in his blood.

On November 22, 2021, defendant appeared with counsel, Dennis Light, Esq., before the Honorable Jared Rice of New Rochelle City Court and was arraigned on the aforementioned charges. The matter was adjourned at the People's request for discovery to December 6, 2021. In the interim, discovery was provided to defendant via the portal, on November 24, 2021. This included information pursuant to CPL 245.20(1)(k) for police and civilian witnesses, the records of gas chromatography, and the current certification certificate for the operator of the breath test.

On December 6, 2021, defendant and his attorney appeared before the Court. The People stated on the record that discovery had been served on November 24, 2021, and the matter was adjourned to January 4, 2022 at the People's request for additional discovery and to file a Certificate of Compliance (COC).

On January 4, 2022, defendant and his attorney appeared before the Court. The People stated on the record that a Discovery Disclosure Index, a COC, and a Statement of Readiness had been filed with the Court and served on defense. Defendant argued that the People have not complied with their discovery obligations. A motion schedule was set and the case was adjourned to April 4, 2022 for decision. A few days later, the People provided defendant with updated (1)(k) forms for two police witnesses. There was no known (1)(k) information for any witness either before or after the People filed their COC. Subsequent to filing the COC, the People obtained an updated (1)(k) form from Officer Niall Nerney on February 9, 2022, and he indicated to the undersigned that he was advised not to answer question number 6 by his superiors.

On January 27, 2022, the People received defendant's instant motion to invalidate the COC or, in the alternative, for the preclusion of evidence.

WHEREFORE, for the reasons more fully set forth in the annexed Memorandum of Law, this Court should summarily deny defendant's motion in its entirety.

Affirmed to be True.

Dated: February 15, 2022
New Rochelle, NY

BRITTANY J. BURK
Assistant District Attorney

MEMORANDUM OF LAW

I. THE STANDARDIZED FIELD SOBRIETY TEST (SFST) TRAINING MANUAL AND THE DATAMASTER OPERATING MANUAL ARE NOT INCLUDED IN AUTOMATIC DISCOVERY BECAUSE THEY DO NOT RELATE TO THE SUBJECT MATTER OF THE INSTANT CASE.

Defendant challenges the validity of the People's certificate of compliance because of an alleged failure to provide him with a training manual and operating manual. Defendant's arguments are meritless, since the People do not have a duty to disclose these materials that are not related to this particular criminal proceeding.

Criminal Procedure Law article 245 provides a non-inclusive list of items required to be disclosed to the defendant (CPL 245.20[1]). This obligation includes "*all items and information that relate to the subject matter of the case* and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (*id.* [emphasis added]). Further, CPL 245.20(1)(s) provides that in any prosecution alleging a violation of the vehicle and traffic law, the People shall disclose:

> all records of calibration, certification, inspection, repair or maintenance of machines and instruments utilized to perform any scientific tests and experiments, including but not limited to any test of a person's breath, blood, urine or saliva, for the period of six months prior and six months after such test was conducted, including the records of gas chromatography related to the certification of all reference standards and the certification certificate, if any, held by the operator of the machine or instrument.

Defendant complains that he was not provided the SFST Training Manual and Datamaster Operating Manual . These materials are clearly not encompassed within CPL 245.20(1)(s). Arguing the subject matter for which defendant seeks production of these materials is "scientific in nature" (affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 21- ¶ 24), defendant

makes a tortured argument to attempt to make them fit into the parameters of CPL 245.20(1)(j).

Defendant acknowledges that CPL 245.20(1)(j) only requires the People to disclose:

> All reports, documents, records, data, calculations or writings . . . concerning . . . scientific tests . . . *relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing* (CPL 245.20[1][j]) [emphasis added]; *see* affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 20).

Training and operating manuals are not encompassed by the plain meaning of the statute (*see People v Lustig*, 68 Misc3d 234, 246 [Sup Ct, Queens County 2020]). Defendant nonetheless makes the strident declaration that because the breath test is a scientific test, the People are required, "*as a matter of law* [] to disclose the respective user/operating manual to the Defendant" (affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 24 [emphasis added]). Defendant does not cite any authority for this proposition that, "as a matter of law," the People, under CPL 245.20(1)(j), are required to provide manuals not created for this case, and not created by or at the direction of any witness the People intend to call (*see e.g. Lustig*, 68 Misc3d at 246; *People Ordonez*, 72 Misc3d 739 [County Ct, Orange County 2021]).

As to one of the administered field tests, which defendant failed (the Horizontal Gaze Nystagmus test), defendant argues the test is "scientific in nature," and it will be necessary for the People to lay a proper foundation for its admission at trial, defendant "should have the training manuals and/or books [the police witness] will rely on for the making of an opinion regarding the Defendant's BAC on October 1, 2021, at approximately 7:13pm" (*see* affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 21- ¶ 23). In addition to not being statutorily required, defendant's argument is based on several assumptions and anticipated events that have not, and may never occur – whether the People will seek to admit evidence of the test

by offering a foundation, and if done – whether there is a training manual that the witness will actually rely on to form an opinion on defendant's intoxication. Under defendant's reasoning, anything would be discoverable if there is a chance it may be helpful to defendant and he can envision a possible line of cross-examination. Defendant seeks to greatly expand the statutory language "relating to the criminal action or proceeding" (CPL 245.20[1][j]; *see also* CPL 245.20[1] ["that relate to the subject matter of the case"]) to anything that relates to the *charge*. Defendant is free to exercise any options available to him to obtain the sought materials, but the People have no disclosure obligation simply because defendant envisions a possible line of cross-examination through materials that may relate to a charge of intoxicated driving, but do not relate to this particular criminal action.

Defendant asserts in a blanket statement that these documents are necessary and relevant for effective cross-examination, but fails to describe specifically what kind of information they contain, if any, that relate to the subject matter of *this* case. "It is the moving party's responsibility to set forth a good faith basis for their requests in their motion. As the defendant has failed to articulate any basis for its belief that these items contain material relating to the subject matter of this case," his motion to invalidate the certificate of compliance on this basis should be denied (*People v Alvarez*, 71 Misc3d 1206[A] [Sup Ct, Queens County 2021]).

While defendant is correct that there is a presumption of disclosure, and statutory lists are not meant to be exhaustive and, indeed explicitly include the language "including but not limited to," he ignores that what is included in the list of discoverable materials in these categories are all materials and information related to the *particular criminal action at hand* (CPL 245.20 [1][j], [s]). Since the legislature enumerated items of the same character – *i.e.* all items that have an *actual nexus* to the criminal action at hand – defendant's assertion that materials not related to

this particular criminal proceeding are, "as a matter of law" (affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 24) to be included in this list ignores the rules of statutory construction and interpretation (McKinney's Cons Laws of NY, Book 1, Statutes § 254).

At this time and after extensive efforts, the People have already provided defendant with all existing material relevant to his case pursuant to CPL 245.20(1), including what is encompassed by subdivisions (j) and (s), and have thus satisfied our discovery obligation. As the defendant has failed to articulate any basis for his belief that the SFST Training Manual and Datamaster Operating Manual contain material relating to the subject matter of this case (as opposed to intoxicated driving cases generally), and were not made by, or at the direction of, a witness in this criminal action, his motion to invalidate the COC because of the alleged failure of the People to provide them should be denied.

II. THE PEOPLE HAVE COMPLIED WITH OUR DISCOVERY OBLIGATION TO PROVIDE DEFENDANT WITH DISCOVERABLE MATERIAL PURSUANT TO CPL 245.20(1)(k).

Defendant argues that the People's certificate of compliance is invalid because disclosure duties regarding impeachment information under CPL 245.20(1)(k) have not been satisfied. He argues the People's disclosure was incomplete. He also alleges that the disclosure contained stale information, and that gathering the information through witness self-disclosure did not satisfy our obligation. Defendant's claims are without merit and should be denied.

CPL 245.20(1)(k)(iv) provides that the defendant must be provided with all evidence and information, including that which is known to police or other law enforcement agencies acting on the governments behalf in the case, that tends to impeach the credibility of a testifying prosecution witness. The People are also under a continuing discovery obligation pursuant to CPL 245.60, which contemplates "disclosure of materials and evidence after the filing of the

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initial certificate of compliance and certificate of readiness. Therefore, delayed disclosure does not, alone, require the striking of a certificate of readiness, especially where the defense has not alleged any prejudice" (*People v Nelson*, 67 Misc3d 313 [County Ct, Franklin County 2020]).

Here, defendant was provided with information pursuant to CPL 245.20(1)(k)(iv) with respect to Officers Marco, Baker, and Nerney prior to the filing of our COC. Only one of these forms (for Officer Nerney) specifically requested only substantiated complaints. As part of our continuing discovery obligation, the People served on defendant updated information relating to Officers Marco and Baker, and served on defendant information relating to Officer Hearle, which was not previously available prior to the filing of our COC. The information provided by the aforementioned officers prior and subsequent to the filing of the COC was identical, which is evidenced by the People's disclosure documents, and thus the People relied in good faith on said information when filing our COC. Moreover, there was no discoverable (1)(k) information in either the forms disclosed prior to filing the COC, or after, thus, defendant cannot show any prejudice. Indeed, defendant has not alleged any. In addition, the People sought and obtained an updated (1)(k) form, which did not specify only substantiated complaints, from Officer Nerney on February 9, 2022, and Officer Nerney refused to answer question number 6. The information is not within the People's possession or control. The People, however, have exercised due diligence in requesting said material, if any exists, within our Discovery Demand Letter, which was sent to the department upon commencement of this case, and requested an updated (1)(k) form Officer Nerney twice via email. The People will continue to exercise due diligence in gathering any information that may exist.

Defendant further argues that our COC should be invalidated because we did not indicate on our COC the nonexistence of information that is required under CPL 245.20(1)(k)(iv) as it

relates to civil cases. Defendant then mentions several civil matters but concedes that he does not even know if the individuals named in those matters are the same individuals who are police witnesses here.[1] The "Nature of [the] Suit" of the 1995 federal action, filed in the Eastern District of New York, which names a "Kirk A. Baker" as one of the defendants, is a motor vehicle tort claim (defendant's exhibit 10). The nature of the state civil suits, filed in New York County Supreme Court, that name a "Niall Nerney" as a plaintiff both involve a claim of injury in 2015 by the plaintiff as an employee of the defendant construction company (*id.*). Defendant cannot show any relevance to the People's disclosure obligation under CPL 245.20(1)(k). Defendant's interpretation of the People's obligations knows no bounds. Under his reasoning, the People would have to search all databases, in every county, in every state, in every federal district, on all witnesses, before filing a certificate of compliance, in a search for any legal proceeding in which those witnesses may have been involved over the course of their lifetime (*see e.g. People v Garrett*, 23 NY3d 878, 890 [2014] [discussing the "unacceptable burden" of requiring prosecutors to search every federal and state court where their officers had a connection "just in case some impeaching evidence may show up"]). Therefore, defendant has not provided a good faith basis for raising this issue. Indeed, after conducting his search, and locating these cases, defendant does not show, or even allege, the existence of impeachment material, much less prejudice.

Lastly, defendant argues that the People failed to meet our discovery obligations pursuant to CPL 245.20(1)(k) by failing to provide any information regarding potential civilian witness Kelsey Picciano. While a witness questionnaire for Kelsey Picciano was not provided, on the

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[1] The named individual "Kirk A. Baker" from the civil matter referenced by the People is not PO Baker as it relates to the instant matter. The named individual "Niall Nerney" is the same individual as PO Nerney as it relates to the instant matter.

People's discovery addendum we indicated that we received no relevant information from any sources, and thus have exercised due diligence and have satisfied our discovery obligation (see attached Exhibit).

Considering the totality of the circumstances, the People's 1(k) inquiry about a broad area of potential impeachment material, including any "substantiated administrative, personnel or civilian complaints implicating the witness's honesty and integrity," was entirely reasonable and illustrative of the People's good faith efforts to comply with CPL article 245. Any claim that the People's certificate of compliance is invalid merely because one form, for one police witness, only sought the production of substantiated complaints implicating a police witness's honesty and integrity, or alternatively, make repetitive 1(k) inquiries during the course of this case, ignores the plain text of CPL 245.50, and the broader efforts of the People that have resulted in the production of voluminous discoverable material. Indeed, a finding that the People were required, as a matter of law, to seek unsubstantiated complaints of misconduct, or that the 1(k) material produced by the People was stale, is far from determinative of whether the People filed a valid certificate of compliance. The determinative issue under CPL 245.50(1) is not whether the People erred by not seeking either unsubstantiated complaints or more up-to-date inquiries, but whether, under the circumstances, the People's overall efforts to comply with CPL article 245 was reasonable and done in good faith, a far different and more flexible standard.

As noted, CPL 245.50(1) provides that "[n]o adverse consequences to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances; but, the court may grant a remedy or sanction for a discovery violation as provided in section 245.80 of this article." It bears repeating that, when read as whole, this provision confirms the Legislature's intent that a certificate of compliance not

be deemed invalid solely on the ground that the People did not produce every discoverable item or piece of information. Put another way, the terms of the statute evidence the Legislature's intent that, even a violation of CPL article 245, standing alone, will not render a certificate of compliance invalid. And, it must be emphasized that rather than requiring strict compliance, or even error-free compliance, the statute merely requires the filing of a certificate of compliance "in good faith and reasonable under the circumstances" (CPL 245.50[1]). In short, while discovery consistent with CPL article 245 surely evidences good faith and reasonable efforts, less than full compliance does not necessarily equate to less than good faith, reasonable efforts.

Judged by this standard, the absence of an inquiry seeking unsubstantiated complaints against the police cannot constitute a basis to invalidate the People's certificate of compliance, especially here where only one form, for one officer, specifically limited the inquiry to substantiated complaints. To start, CPL article 245 is wholly devoid of any express reference to the disclosure of complaints against police officers, whether substantiated or unsubstantiated. No claim can therefore be made that it is beyond dispute that the disclosure of unsubstantiated complaints of misconduct is mandated.

While the mandate of CPL 245.20(1)(k)(iv) for the disclose of "[a]ll evidence or information" that "tends to impeach the credibility of a testifying prosecution witness" is broad given its generalized terms, for the same reason, the scope of this provision is subject to interpretation. Importantly, no binding authority – from the Court of Appeals, Appellate Division, or Appellate Term – exists construing the terms of this still relatively new statutory provision, never mind specifically holding that unsubstantiated complaints of police misconduct must be sought and disclosed by the People. None.

True, courts of coordinate jurisdiction have issued decisions holding that the People are required to seek and produce unsubstantiated claims of misconduct reflecting negatively on a police witness's credibility (*see, e.g., People v Castellanos*, 72 Misc3d 371 [Sup Ct, Bronx County 2021]; *People v Randolph*, 69 Misc3d 770, 772 [Sup Ct Suffolk County 2020]). But, it is equally true that this interpretation of the law is not universal. Showing the extant conflict in the law, on June 14, 2021, a court expressly found that "an unsubstantiated complaint does not provide a good faith basis to inquire and, thus, does not constitute discoverable impeachment material" (*see People v Perez*, 73 Misc3d 171 [Sup Ct, Queens County, 2021]; *see also People v Davis*, 67 Misc3d 391, 401 [Crim Ct Bronx County 2020]).

Given the extant absence of controlling authority, conflict in those handful of decisions that have addressed the issue, and decisions holding that unsubstantiated complaints of police misconduct need not be disclosed, any determination that the People did not act in good faith or reasonably by not seeking unsubstantiated complaints from one witness runs afoul of CPL 245.50(1) in two respects. First, it fails to give the required consideration to "the circumstances" of the case by turning a blind eye to the unsettled state of the law. Second, although this Court is free to conclude that the statute requires the People to seek and disclose unsubstantiated complaints (and order the disclosure of that material), such a determination of error does not equate to a finding that the People did not act in good faith. In that instance, as the statute makes clear, defendant may be entitled to a remedy for the erroneous non-production of discoverable material, "a discovery violation" (CPL 245.50[1]; 245.80[1]). But, it is equally clear from the statute that no adverse consequence – such as the striking of a certificate of compliance and consequent rendering of a previous statement of readiness as illusory – may result to the prosecution under the present circumstance, where the People have clearly acted reasonably and

in good faith (CPL 245.50 [1]; *People v Bruni*, 71 Misc3d 913, 921 [County Ct, Albany County 2021]). This is especially true here where there is no non-production.

The fact that the Office of the Westchester County District Attorney has modified its 1(k) inquiry since the effective date of CPL article 245 and now generally seeks unsubstantiated complaints of misconduct implicating a police witness's credibility does not undermine the People's demonstration of good faith. As noted above, given the unsettled law, even in the absence of a *current* inquiry seeking unsubstantiated complaints, the People cannot be deemed not to have acted in good faith or reasonably. *A fortiori*, the People cannot be faulted for not previously making that inquiry.

In *People v Bruni* (71 Misc 3d 913), a challenge was similarly made to a certificate of compliance filed by the prosecution based upon, *inter alia*, the disclosure by email of additional discovery materials after the certificate had been filed (*id.* at 924). The court, however, rejected any notion that the additional disclosures proved that the prosecution had acted unreasonably or in bad faith (*id.*). The court offered the following reason:

> These emails have actually provided the court with further evidence that the People made significant efforts in continuing to provide discovery materials to the defendant and adhere to their 'continuing duty to disclose' under CPL 245.60. To hold these ongoing efforts against the People would be placing them in a catch-22: if they provide supplementary discovery material and status updates to defense counsel, then they will be accused of filing an invalid certificate of compliance; and if they do not, then they will be accused of attempting to conceal discovery material (*id.*).

Based upon the same reasoning, the general expansion of the 1(k) inquiry conducted by the Office of the District Attorney as circumstances changed should be considered illustrative of the People's good faith and reasonable efforts to comply with CPL article 245.

Just as the People should not be deemed to have acted unreasonably for not seeking unsubstantiated complaints of police misconduct, the People's certificate of compliance should not be deemed filed unreasonably or in less than good faith merely because, during the pendency of this case, the testifying police witnesses were not individually asked to complete yet another 1(k) questionnaire. To reiterate, before defendant was arrested in this case, the officers had completed 1(k) questionnaires. The questionnaire sought information that could be considered as "tending to impeach" the officer's credibility; except for the inquiry about any prior criminal conviction and pending criminal charges against the officer, none of the information sought by the People is expressly mandated by CPL article 245, including 245.20(1)(k) (*cf* CPL 245.20[1][p] [requiring disclosure of judgments of conviction]; 245.20 [1][q] [requiring disclosure of known pending criminal actions]). In recognition that the information could be potentially discoverable in other cases, after receiving the responses, the completed 1(k) forms were saved in a database maintained by the Office of the District Attorney, and following defendant's arrest, the 1(k) forms were retrieved from that database and provided to defendant.

Any claim that the People did not act in good faith or reasonably by not also asking the police officers to complete another 1(k) form immediately following defendant's arrest once again ignores "the circumstances"; and, unreasonably elevates what, at most could be considered a *potential* discovery violation, to a windfall for defendant. Consistent with the People's "continuing duty to disclose" (CPL 245.60), the 1(k) form also advises each officer, "If you become aware of any new information, please contact the ADA."[2] This request, however, was only one component of the People's continuing efforts to collect 1(k) information.

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[2] In the event an assistant district attorney is notified by a police officer of a change in circumstance or given updated 1(k) information, the assistant district attorney is generally directed to forward that information to the custodian of the 1(k) questionnaires so that the record relating to that officer may be updated and the new information made available for other assistant district attorneys to disclose.

Following defendant's arrest, a written request was also sent to the Westchester County Department of Public Safety ("the department"), specifically seeking discoverable material. The request alerts the department that the request is "time sensitive" and material should be produced in "an expeditious and organized manner." Further, and directly addressing concerns about the staleness of information collected, the request highlights that the duty to produce materials is ongoing, explaining:

> Throughout the investigation and prosecution of this case there will remain a continuing duty to expeditiously provide any and all additional records, files, items, information, and material as they are created, learned, discovered, located, or obtained by your agency or by any personnel member.

The request then goes on to detail the demanded discoverable material by tracking the language of CPL article 245, and again seeking the items of information specified in the 1(k) questionnaire.

Considered in combination with the collection and production of the prior completed 1(k) material, the People acted in good faith and reasonably to produce up-to-date material. Demonstrative of the People's efforts, the information was sought from two separate sources – the individual officer and the department. Both the individual and department requests not only specifically identified the relevant material, but also reminded the recipients of the continuing duty to produce material.

Any claim that this effort was deficient is based upon speculation and again conflates the concepts of "good faith" and "reasonable[ness]" with strict compliance. Given the breadth and nature of the information sought in the 1(k) questionnaire, the responsive information is admittedly subject to change. But it cannot be said that a police officer's conviction for a crime or prosecution for an offense is likely to occur with such frequency that repetitive inquiries are

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reasonably necessary to capture discoverable material. While new complaints of misconduct may be made, or investigations relating to past complaints completed, with greater frequency than criminal convictions or prosecutions, defendant has not offered any facts related to this case which would have triggered the prosecution to exercise greater diligence in seeking such information. Importantly, there is also no reason to doubt that the officer or the department, and to be sure both, would not on an ongoing basis follow up with the Office of the District Attorney, as directed in writing to do. After all, CPL 245.20(5) indicates that CPL 245.20(1) "shall have the force and effect of a court order," and CPL 245.20(1)(k) mandates disclosure of specified information, "including that which is known to police."

Finally, in seeking to invalidate the People's certificate of compliance and the People's statement of readiness, and thus obtain the drastic remedy of dismissal, defendant elevates the importance of the 1(k) information beyond what is reasonable under the circumstances. In stark contrast to the discovery provided to defendant directly relating to the instant case, the 1(k) information is generally collateral, impeachment information, a fact germane to this Court's consideration of what should be considered reasonable efforts by the People. For example, it would be wholly unreasonable to assess the People's efforts to preserve, obtain and produce a videotaped recording of a charged offense or confession, with the same degree of scrutiny as the theoretical tangential impeachment upon which defendant has fixated.

Along those same lines, and even more importantly, defendant's motion is defective because there is no demonstration that the supposedly undisclosed impeachment material exists. "The duty to disclose information in these circumstances, of course, cannot be greater than the power to acquire it" (*People v Santorelli*, 95 NY2d 412, 421 [2000]). To invalidate the certificate of compliance without a showing that undisclosed material exists, and in this case,

where in fact a showing has been made after diligent efforts that the material does not exist, would also contravene CPL 245.50(1), and the overall purpose of linking discovery and trial readiness.

Under this circumstance, dismissal based upon the non-production of non-existent material is illogical, and at odds with both CPL 245.50(1) and the current linkage between discovery and speedy trial. By its terms, CPL 245.50(1) mandates a certificate of compliance verifying the disclosure of "all known material and subject to discovery"; the existence of discoverable material is presumed. And, further showing that the existence of discoverable material is presumed, except for certain circumstances not relevant here, under CPL 245.50(3), "the prosecution shall not be deemed ready for trial" absent the filing of a proper certificate of compliance. Implicit to this provision, but without question, non-existent material could not hamper the People's ability to go to trial, or a defendant's ability to present a defense. Defendant's focus on inquiries without showing that any degree of inquiry could have produced discoverable material is, thus, obviously misdirected.

Once again confirming that discoverable material must have existed at some point, CPL 245.50(3) provides that the prosecution may be deemed ready for trial "where information that might be considered discoverable under this article cannot be disclosed because it has been lost, destroyed, or otherwise unavailable," despite "diligent and good faith efforts, reasonable under the circumstances." In that instance, a defendant may be entitled to a remedy or sanction pursuant to CPL 245.80(1)(b), but only upon a showing that the material "may have contained some information relevant to a contested issue." Here, defendant requests either the striking of the People's COC or, in the alternative, for preclusion of the testimony of *all* police and civilian witnesses, as well as the breath test results (affirmation of Dennis W. Light, Esq., dated January

25, 2022, ¶ 38). "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" (*People v Jenkins*, 98 NY2d 280, 284 [2002]). Defendant's requested preclusion of the testimony of *all* witness and the breath test results would of course completely gut the People's case and be tantamount to dismissal. Preclusion of evidence based upon the inadequacy of the People's inquiry about material that does not even exist, where defendant is not entitled to any lesser remedy or sanction under CPL article 245, would thus surely be an absurd and unjustified result.

Defendant's assertion that allowing for self-reporting is "an insufficient disclosure procedure and not good faith, diligent and reasonable inquiry into the existence of impeachment materials" (affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 38) is merely his opinion, and is not supported by the statute or caselaw. Any suggestion that the People – in asking police officers to self-report through the 1(k) questionnaires information tending to impeach their credibility – must, or even should, as a matter of course, also require those officers to either swear to any disclosure or make disclosures under penalty of perjury, finds no support in CPL article 245; runs afoul of long-settled fundamental principles of discovery; ignores extant safeguards for the open exchange of information; and, is improperly premised on the unfounded notion that police witnesses are potentially unreliable reporters, and, therefore, those additional protections are required to ensure that discoverable information has not been withheld.

To be sure, there is no express mandate in CPL article 245 that the People seek, or police officers make, disclosures of 1(k) material (or any other discoverable material) under oath. Nor is there any express mandate that the People seek, or police witnesses give, sworn assurance that such material does not exist. Indeed, there is no statutory mandate that the People even make written inquiry, as was done here through the use of the 1(k) questionnaire. Accordingly, the

People cannot be faulted for not providing 1(k) disclosures in the form of sworn statements by police witnesses attesting to the accuracy of the 1(k) disclosures or the non-existence of any relevant 1(k) information, or in any particular form. Any claim to the contrary contravenes settled law that "[w]here no statutory right of discovery is provided, no substantive right of discovery exists" (*Brown v Grosso*, 285 AD2d 642, 644 [2d Dept 2001]; *see generally People v Colavito*, 87 NY2d 423, 427 [1996]).

For the same reasons, the People cannot be deemed to have failed to act either with due diligence or reasonably by not seeking sworn assurances from testifying police officers regarding the accuracy of their 1(k) disclosures or non-disclosures, or by combing through records. By its plain terms, CPL 245.50(1) merely requires, as relevant here, that the People file with the court and serve upon a defendant a certificate of compliance that the People exercised "due diligence" and made "*reasonable* inquiries" to "ascertain the existence of material and information subject to discovery" (emphasis added); the statute does not require an inquiry in any particular form, including "sworn" inquiries, inquiries "under oath," written inquiries, or inquiries requiring the signature of the responding officer. Significantly, in other provisions of the CPL, the Legislature has required submissions to be sworn or subscribed (*see, e.g.*, CPL 110.15 [1] [requiring specified accusatory instruments to be "subscribed and verified by a person known as the 'complainant'"]; CPL 100.30 [setting forth how specified accusatory instruments may be "verified"]; CPL 100.35 [requiring prosecutor's information to be "subscribed by the district attorney by whom it is filed"]; CPL 710.60 [1] [requiring "sworn allegations of fact" in support of suppression motion]). Thus, the absence of a similar mandate in CPL article 245 that 1(k) inquiries be sworn or "verified" evidences the Legislature's intent that submission of sworn (verified) 1(k) inquiries is not mandated (*cf People v Excell*, 254 AD2d 369, 369-370 [2d Dept

1998] [comparing different Penal Law provisions to infer legislative intent]; *see also Town of Eastchester v NYS Board of Real Property Services*, 23 AD3d 484, 485 [2d Dept 2005] [*quoting* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240] ["Pursuant to the maxim of statutory construction *expressio unius est exclusio alterius*, 'where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded'"]). Notably, CPL 245.50 does not require that the certificate filed in court confirming the prosecution's discovery compliance be sworn (or subscribed); therefore, it would be incongruous to require that an underlying inquiry, relating to a discrete item of information, be sworn. The clear statutory language requires no such thing.

Nor can the suggested requirement that the People confirm the inquiries themselves, or seek sworn assurance from police officers in 1(k) inquiries be justified based on the supposition that police officers, as a result of their own self-interest, may deliberately withhold information impeaching their credibility. First, discovery in excess of what is mandated by statute cannot be ordered "based upon principles of due process" (*Brown v Grosso*, 285 AD2d at 644), and as demonstrated above, the statute does not require sworn responses to prosecution inquiries, or any other particular form of inquiry. Based upon the absence of any express authority for the Court to mandate a particular type of inquiry, the Court cannot indirectly mandate such an inquiry by finding that, in its absence, the People failed to act with due diligence. Second, there is no reason to broadly cast suspicion on the accuracy of police responses to 1(k) inquiries where the statute, as relevant here, compels compliance by, *inter alia*: CPL 245.20(5), which expressly provides that CPL 245.10 and 245.20, subdivisions 1 through 4, "shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may

result in application for any remedies or sanctions permitted for non-compliance with a court order" under CPL 245.80; and, CPL 245.55 (1), which mandates the "flow of information" "pertinent to the defendant and the offense or offenses charges," including 1(k) material between the prosecution and police. Third, and finally, the underpinning of faulting the People for not conducting the inquiry in any particular way – the sweeping suspicion that police witnesses may withhold information – lacks any specific, individualized factual basis. Although since the inception of CPL article 245 some police officers in Westchester County have refused to answer certain 1(k) questions, no bad faith can be divined from those refusals because: even now, the scope of the 1(k) disclosure mandate remains unsettled (*see, e.g., People v Perez*, 73 Misc3d 171 [finding that unsubstantiated complaints of misconduct do not tend to impeach a testifying officer's credibility, and, therefore, are not discoverable]); before its repeal, Civil Rights Law § 50-a could be construed as protecting certain disciplinary information as confidential; and, even after the repeal of Civil Rights Law § 50-a, police departments, outside the context of CPL article 245, have asserted independent legal grounds to keep unsubstantiated (and other) disciplinary claims confidential, and those objections were only finally rejected by the courts in 2021 (*see, e.g., Uniformed Fire Officers Association v Blasio*, 846 Fed Appx 25 [2d Cir, February 16, 2021]).[3]

Given the absence of any statutory mandate for how 1(k) inquiries are to be performed, and the extant mandates that CPL article 245.10 and 245.20 (1-4) shall be considered equivalent to a court order and that the People and police shall maintain a "flow of information," the People

[3] Although the plaintiffs in the *Uniformed Fire Officers* case were representatives of the City of New York, the Westchester Affiliated Police Association filed an *amicus* brief with the United States Court of Appeals for the Second Circuit in support of the plaintiff's action and prohibiting disclosure of, *inter alia*, unsubstantiated disciplinary complaints (2020 WL 6275133 [amicus brief]).

cannot be deemed to have acted with less than due diligence because of the manner in which they conducted their inquiry here.

III. THE PEOPLE HAVE COMPLIED WITH OUR DISCOVERY OBLIGATION TO PROVIDE DEFENDANT WITH DISCOVERABLE MATERIAL PURSUANT TO CPL 245.20(1)(s).

Defendant argues that the People failed to disclose PO Nerney's valid and current certification certificate as required by CPL 245.20(1)(s). However, that document was already served on defense on November 30, 2021 labeled "Nerney BAO.pdf" (see attached Exhibit). As noted on the certificate, PO Nerney's certification was issued on December 12, 2019 and expired on December 12, 2021. The date of the breath test for the instant matter was conducted by PO Nerney on October 1, 2021, at which time PO Nerney's certification was valid and current.

Defendant further argues that the People are not in compliance with our discovery obligations pursuant to CPL 245.20(1)(s) by our failure to provide "records of gas chromatography related to the certification of all reference standards" (affirmation of Dennis W. Light, Esq., dated January 25, 2022, ¶ 50; CPL 245.20[s]). Similarly, these records were also provided to defendant on November 30, 2021 labeled "SimSoIn21170.pdf" (see Exhibit). Thus, the People have complied with all of our discovery obligations under CPL 245.20(1)(s).

IV. THE PEOPLE HAVE EXERCISED DUE DILLIGENCE AND FILED THE CERTIFICATE OF COMPLIANCE IN GOOD FAITH.

Defendant's motion to invalidate the People's Certificate of Compliance (COC), and nullifying the People's stated readiness should be denied. Defendant moves for the aforementioned relief on the grounds that the People have not turned over sufficient information related to evidence and information to testifying prosecution witnesses pursuant to CPL 245.20(1)(k) that tends to impeach the credibility of testifying officers, as well as one civilian

witness, and material under CPL 245.20(1)(j), (s). Defendant argues the People failed to satisfy our discovery obligations and file our COC in good faith. However, the People exercised due diligence in all aspects of our investigation and in seeking relevant discovery. The People provided defendant with all relevant documentation, pursuant to our continuing discovery obligation. At that time, we acted in good faith by suppling all information which we believed was proper to disclose. As such, defendant's motion should be denied in its entirety.

CPL 245.50 provides that "no adverse consequence to the prosecution or the prosecutor shall result from the filling of a certificate of compliance in good faith and reasonable under the circumstances." In this regard, numerous courts have found that belated disclosures should not invalidate a certificate of compliance that was made in good faith after the exercise of due diligence where the delay resulted from, for example, minor oversights in the production of material, delayed discovery of the existence of certain items, or a good faith position that the material in question was not discoverable (*Alvarez*, 71 Misc3d 1206). The striking of a certificate of readiness is "a drastic remedy which should be used both sparingly and judiciously" (*Nelson*, 67 Misc.d 313).

> As the legislative history of article 245 indicates, and as the article's sanctions and remedies provisions suggest, the new discovery law, designed as it was to be remedial in nature, should not be construed as an inescapable trap for the diligent prosecutor who professionally, assiduously and in good faith attempts to comply with their new and extensive requirements under the discovery statute, but through no fault of his or her own, is unable to comply with every aspect of the automatic discovery rules specified in CPL 245.20 (*People v Erby*, 68 Misc3d 625, 633 [Sup Ct, Bronx County 2020]).

Assuming, *arguendo*, that any information not disclosed was discoverable and within the People's possession, custody, or control, striking the Certificate of Compliance is a drastic remedy. Where the People filed a Certificate of Compliance without turning over police 911

records, the Court found that the Certificate of Compliance was valid, even though it identified discovery material the prosecution was aware of, but did not yet possess. "That section requires that the Certificate of Compliance state that…the prosecutor has disclosed and made available all known material and information subject to discovery…If additional discovery is subsequently provided prior to trial pursuant to section 256.60…, a supplemental certificate shall be served" (*People v Pealo*, 71 Misc3d 337 [Justice Ct, Monroe County, 2021]). A certificate of compliance was also deemed valid, where the prosecutor's initial disclosures did not include maintenance records for breath testing machine and after exercising due diligence to obtain and furnish all discoverable items, the prosecutor appropriately discharged her continuing duty to disclose by obtaining the records and providing them to defense counsel as soon as she learned of their existence (*People v Davis*, 70 Misc3d 467 [October 9, 2020]).

While CPL Article 245 references the importance of exercising due diligence and good faith numerous times, it does not qualify these terms or their defining actions. As such, there is no statutorily-mandated bright line rule to resolve discovery disputes. Rather, the analysis of whether due diligence was exercised in providing discovery is holistic: resolution requires consideration of the totality of the circumstances (*see People v Williams*, County Court, Albany County, July 6, 2021, Ackerman, J., Index DA 260-20 [determination of discovery disputes must be made depending on the unique case at hand]; *see also Bruni*, 71 Misc 3d at 920 ["discovery disputes must be thoroughly examined to determine the appropriate outcome on a case-by-case basis"]). Relevant to the determination of whether the filing of a certificate of compliance was reasonable under the circumstances is "whether the People *reasonably and substantially adhered* to its discovery obligations and acted in good faith in doing so" (*Bruni*, 71 Misc 3d at 922 [emphasis added]). Put another way, resolution of discovery disputes requires the court to

determine "whether the People made honest efforts to comply with CPL 245.20(1) prior to the filing of a certificate of compliance and statement of readiness" (*Williams*, County Court, Albany County, July 6, 2021, Ackerman, J., Index DA 260-20). In examining whether the People made these honest efforts, "good faith, due diligence, and reasonableness under the circumstances are the touchstones by which a certificate of compliance must be evaluated" (*id.*, *citing People v Perez*, 73 Misc3d 171).

Perfect compliance — that is, disclosure of every possible discoverable item under CPL 245.20 (1) — is not required by statute before filing a certificate of compliance (*see* CPL 245.50[1]; *see Williams*, County Court, Albany County, July 6, 2021, Ackerman, J., Index DA 260-20 [court should not strictly consider whether every possible discovery item has been turned over at the filing of the certificate of compliance]; *see also Erby*, 68 Misc 3d at 632 [declining to require full compliance with automatic disclosure requirements to file certificate of compliance or depend on CPL 30.30 exclusions]). If the Legislature had intended to require complete disclosure before filing a certificate of compliance or declaring readiness for trial, this could have been easily mandated explicitly (*see People v Askin*, 68 Misc 3d 372, 378-379 [County Ct, Nassau County 2020] [rejecting claim that complete disclosure of discovery is required before filing certificate of compliance as "unreasonable" and "clearly not what the Legislature intended"]). However, with such intent, there would have been no need to discuss varying timeframes for discovery, continuing discovery, or supplemental certificates of compliance (*see id.*). Indeed, analysis of the other provisions of CPL 245 — specifically the discussions of "additional discovery" and "supplemental certificates of compliance" in CPL 245.50 (1); the "continuing duty to disclose" in CPL 245.60; and the "flow of information" in CPL 245.55 — reveals the Legislature's intent that discovery disclosure would be an ongoing process (*see* CPL

245.50 [1]; CPL 245.60, 245.50 [1]; *see also Askin*, 68 Misc 3d at 378-379 [finding these provisions, as well as the "prejudice" evaluation of CPL 245.80, as indicating legislative intent for ongoing discovery]; *People v Nelson*, 67 Misc 3d 313, 315 [County Court, Franklin County 2020] [concluding these provisions of the new law "contemplate disclosure of materials and evidence after the filing of the initial certificate of compliance and certificate of readiness"]).

That the statute provides for both continuing discovery and the possibility of sanctions (rather than dismissal of a certificate of compliance) for belated discovery causing prejudice indicates that the Legislature did not intend to require perfect discovery compliance for a certificate of compliance to be valid (*see Erby*, 68 Misc 3d at 631 [finding CPL 245's references to supplemental certificates and "the inclusion of remedies and sanctions for discovery violations of a material nature, inferentially, and powerfully, suggest that fidelity to an absolute, uncompromising and inflexible disclosure standard . . . is neither required nor desirable"]; *see also Askin*, 68 Misc 3d at 378-379 [finding these provisions, as well as the "prejudice" evaluation of CPL 245.80, as indicating legislative intent for ongoing discovery]).

An examination of the People's ongoing efforts to fulfill their discovery obligations shows that they exercised due diligence and filed a certificate of compliance in good faith that was reasonable under the circumstances. Defendant's motion to invalidate the People's certificate of compliance or for preclusion of evidence merely because one of the (1)(k) forms asked only about the existence of substantiated complaints, and because defendant unearthed a few civil cases that may or may not involve two of the People's police witnesses, but which certainly do not evidence non-production of discoverable information in all events, is meritless.

In light of the foregoing, the People have complied with our discovery obligations and have turned over all known material and information subject to discovery at this time. Defendant's motion should be denied.

WHEREFORE, the People respectfully request defendant's motion be denied in all respects except as heretofore stated.

Dated: February 15, 2022
New Rochelle, New York

Respectfully Submitted,

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By: ADA BRITTANY J. BURK

EXHIBIT 7 EXHIBIT 8 EXHIBIT 9

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AFFIDAVIT OF SERVICE
PEOPLE V GUSTAVO VILLAMARES SERRANO

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

BRITTANY BURK, being duly sworn, deposes and says that on **15TH DAY of FEBRUARY 2022**; (She) served **AFFIRMATION IN OPPOSITION** upon **Raneri, Light & O'Dell, PLLC, Attn: Dennis W. Lights, Esq,** by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed to the said attorney at, **150 Grand Street, Suite 502, White Plains, New York 10601** by depositing same in a Post Office Box regularly maintained by the United States Government, in the City of NEW ROCHELLE, NEW YORK.

Deponent further says that the said **ATTORNEY** is the attorney herein and the last address appearing from the last papers served on this office is SAME AS ABOVE.

Deponent is over the age of 18 years.

BRITTANY BURK
Assistant District Attorney
New Rochelle Branch

Sworn to before me this
15TH DAY of FEBRUARY 2022

JULISSA VEGA
NOTARY PUBLIC

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EXHIBIT 7 EXHIBIT 8 EXHIBIT 9 EXHIBIT 11