EXHIBIT 9

EXHIBIT 10

EXHIBIT 11

CITY COURT: CITY OF NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

MICHAEL MOLINA,

Defendant.

New Rochelle City Court Docket No. CR-3495-21

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☐ ORIGINAL

NOTICE OF MOTION TO REARGUE PURSUANT TO CPLR 2221(d)

Return Date: April 22, 2022

(Matthew J. Costa, J.)

PLEASE TAKE NOTICE, that upon the annexed affirmation of WILLIAM C. MILACCIO, the undersigned will move this Court at a part thereof to be held in the courthouse located at 475 North Avenue, New Rochelle, New York on the 22nd day of April, 2022, at 9:30 o'clock in the forenoon thereof or as soon thereafter as counsel may be heard, for an order permitting reargument of this Court's order, dated January 14, 2022, and for such other and further relief as to this Court may deem just and proper.

Dated: White Plains, New York
February 22, 2022

Yours, etc.

MIRIAM E. ROCAH
District Attorney of Westchester County
Westchester County Courthouse
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, New York 10601
(914) 995-3496

EXHIBIT 10

EXHIBIT 11

BY: WILLIAM C. MILACCIO
Assistant District Attorney

To: STEVEN EPSTEIN, Esq.
Counsel for Defendant
Barket Epstein Kearon Aldea & LoTurco, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530

CITY COURT: CITY OF NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

MICHAEL MOLINA,

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NOTICE OF MOTION TO REARGUE PURSUANT TO CPLR 2221(d)

Return Date: April 22, 2022

(Matthew J. Costa, J.)

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

WILLIAM C. MILACCIO, an attorney duly admitted to practice in the courts of the State of New York, affirms the following under the penalty of perjury: that he is an Assistant District Attorney of Westchester County and submits this affirmation in support of the People's motion to reargue this Court's order striking the People's certificate of compliance, and precluding the testimony of New York State Police Trooper Angelo Fortune and "the use of any evidence procured by Trooper Fortune." 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, and information provided by Assistant District Attorneys Philip J. Mellea and Frank Luis.

The following facts are relevant to the determination of the instant motion:

On June 11, 2021, at approximately 11:28 P.M., in the City of New Rochelle, New York State Trooper Angelo Fortune, alone and conducting a stationary radar screening of southbound traffic on Interstate 95, observed defendant driving without the headlights of his car illuminated. Fortune stopped the car, and after approaching the driver's window, spoke with defendant. Fortune noticed an odor of alcoholic beverage on defendant's breath and that his eyes were glassy. At Fortune's direction, defendant then submitted to three field sobriety tests. He failed each test. Fortune also asked defendant to take a portable breath test, but he refused.

Fortune arrested defendant and brought him to the State Police Barracks in New Rochelle. There, another New York State Trooper, Meghan McMahon, twice read "DWI Refusal" warnings to defendant and asked him to take a chemical breath test. In both instances, defendant refused.

Defendant was charged in this Court by uniform traffic tickets with, among other violations of the Vehicle and Traffic Law, driving while intoxicated (VTL § 1192 [3]) (New Rochelle City Court Docket Number CR-3495-21).

On July 2, 2021, defendant, represented by Steven Epstein, Esq., appeared in this Court and was arraigned. He pleaded not guilty.

Six days later, on July 8, 2021, the People provided defense counsel via the Westchester County District Attorney's Office Discovery Portal (hereinafter, "the Portal") with items of discovery. The items included information directly related to defendant's arrest such as: police reports; property and evidence forms; report of refusal; refusal warning; and, DWI Investigative Notes.

Eight days later, on July 16, 2021, the People provided additional discovery to defendant via the Portal.

On July 28, 2021, the People disclosed yet more items, and served upon defense counsel a certificate of compliance. This most recent discovery disclosure included a summary or "Resume" of Fortune's disciplinary history. The Resume indicated that Fortune had been the subject of two complaints deemed to be "founded: in 2018, a large quantity of drugs were found in a car that Fortune had previously impounded; and, in 2020, Fortune had "unlawfully" taken a person into custody following a prior arrest of that individual so that he could fingerprint that person. The Resume also indicated that Fortune had been the subject of two complaints deemed to be "unsubstantiated": in 2015, a person claimed Fortune "treated her rudely" and issued her tickets because she requested a complete accident report; and, in 2017, an arrestee claimed that Fortune had "inappropriately touched [her] in the genital area" and "forcibly entered" her car after it had become disabled on the highway, leading to his recovery of marihuana and a gun.

On August 10, 2021, in a virtual proceeding before this Court, the People stated that a certificate of compliance had been served upon defendant via the Portal on July 28, 2021 and announced ready for trial. The People also consented to pretrial hearings. Defense counsel stated that he had not received the certificate and asked for another copy, before then requesting that the Court set a motion schedule. Although asked by the Court, defense counsel declined to raise any specific objection to the adequacy of the materials disclosed by the People; rather, he stated: "Not at this time, Judge. Any objections I'll file within the motion." The case was adjourned to September 30, 2021.

On September 30, 2021, defense counsel filed a motion, dated September 28, 2021, seeking to strike the People's certificate of compliance (Exhibit 1, attached). Defense counsel's complaint focused on the People's failure to provide sufficient information, "actual documentation," relating to Fortune's disciplinary history (Epstein Affirmation at ¶17 [Fortune's disciplinary Resume was attached to defendant's motion as Exhibit B]).[1]

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[1] Defendant's "Notice of Objection" indicated that defendant sought dismissal of the charges pursuant to CPL 30.30 and 170.30; however, consistent with his prior statement to the Court indicating that he would challenge the People's certificate of compliance, defense counsel's affirmation merely requested "an Order rejecting [the People's] certificate of compliance and statement of readiness" (Epstein Affirmation at p. 6). Any attempt to dismiss the charges at this early juncture was manifestly deficient because the motion was filed on the 90th day after the commencement of the action and the time period from August 10, 2021, when defendant asked for time to file his motion, to September 30, 2021, was clearly excludable time.

On September 30, 2021, the People again answered ready before this Court. Defense counsel contested the People's statement of readiness. Having received defendant's motion challenging the People's certificate of compliance, the Court set the following motion schedule: the People were to respond to defendant's motion by October 28, 2021; any reply by defendant would be filed by November 4, 2021; and, the Court would render a decision on November 19, 2021.

On October 28, 2021, the People requested an extension of time to file their response, by November 11, 2021. Defense counsel consented. The Court revised the motion schedule for the People to file their response by November 12, 2021; and, defendant's reply by November 19, 2021.

Before submitting a response to defendant's motion, the People disclosed. via the Portal, materials relating to the previously disclosed complaints in Fortune's disciplinary history, as reflected in the previously disclosed Resume, first on November 5, 2021, and, again, on November 9, 2021.

On November 5, 2021, the People disclosed three additional items relating to the previously disclosed "founded" complaints. First, the People disclosed a July 18, 2019, "Letter of Censure" and "Notice of Suspension" indicating that due to Fortune's failure to "conduct a proper inventory search" of an impounded vehicle, a large of amount of drugs was not immediately discovered, and his "inaction constitute[d] a neglect of duty and brought discredit upon the Division" (Portal

File: DCN2018-0456[1]). Second, the People disclosed documents related to Fortune's impoundment of the aforementioned vehicle and the State Police investigation of his conduct (Portal File: DCN2018-0456). Third, the People provided the underlying reports and documentation of the State Police Investigation of Fortune unlawfully taking a person into custody; this documentation revealed, inter alia, that other allegations relating to the same events had been made against Fortune deemed by the State Police to be unsubstantiated (e.g., he acted unprofessionally by "making inappropriate comments" to the arrestee about "his sexual orientation"), or unfounded (e.g., he deprived the arrestee of medical treatment) (Portal File: DCN2018-0071).

On November 9, 2021, the People also served upon defense counsel, and filed with this Court, a Supplemental Certificate of Compliance reflecting these most recent disclosures and a statement of readiness.

On November 10, 2021, the People disclosed two additional packets of material relating to the allegations summarized in Trooper Fortune's previously disclosed Resume, allegations deemed unsubstantiated. First, the People disclosed documents relating to the 2018 complaint, summarized in the Resume, that Fortune had conducted an improper search and touched the arrestee's "vaginal region" (Portal File: DCN2018-0023). Second, the People disclosed documents related to

the 2015 complaint, summarized in the Resume, that Fortune had treated a person involved in car accident "rudely" (Portal File: DCN2018-0100).

On November 10, 2021, the People also served upon defense and filed with this Court, a Supplemental Certificate of Compliance reflecting these most recent disclosures, and a statement of readiness.

Two days later, the People filed an affirmation of Assistant District Attorney Philip J. Mellea, memorandum of law, and accompanying exhibits (Exhibit 2, attached), opposing defendant's motion. As relevant to Fortune's disciplinary record, the People explained that defendant originally had been solely provided Fortune's resume, as that was "the information which [the People] believed to be proper to disclose," and, in all events, and reflecting the People's good faith, the People had since "disclosed to the defendant all substantiated and unsubstantiated files which were mentioned in the Resume" (Mellea Memorandum of Law, Point II). The People argued, inter alia, that the original certificate of compliance should not be stricken because, inter alia, defendant had not demonstrated, and, indeed he could not do so, any prejudice because Fortune had not yet testified (*id.*, Point III).

In response, defense counsel filed a reply affirmation, dated December 1, 2021 (Exhibit 3, attached). Defense counsel contended that the People's certificate of compliance was improper because the People had not fully complied with their discovery obligations (Epstein Reply Affirmation at ¶¶ 10-12). Defense counsel

also harped on the fact that the People had requested an adjournment to file papers opposing his motion, offered to accept a week of that time as chargeable to the People, and then changed position in their papers in reliance upon the certificate of compliance (*id.* at ¶ 19).

Fixating on the People's argument that all of the time for motion practice should be excluded, at the tail end of his reply affirmation, and for the first time, defense counsel sought a purported sanction, what he dubbed an "alternative remedy" (Epstein Reply at ¶ 20). Defendant requested that, if this Court "is inclined to exclude the time for motion practice pursuant to CPL 30.30(4)(a)," the Court should "charge the People with the time occasioned by their failure to produce discovery which caused the delayed hearing and the filing of this motion" (*id.*). Defense counsel claimed this remedy is "especially warranted" because the People had not offered a "good faith basis for failing to produce discovery to produce discovery" and their "deceptive statements" relating to the extension of time to file papers in opposition (*id.*). Notably, although in possession of the documentation underlying the earlier disclosed disciplinary Resume, defense counsel made no attempt to demonstrate that the documents tended to impeach Fortune, or how defendant was prejudiced by the timing of the additional disclosures.

By decision and order, dated January 14, 2022, the Court found that, because Fortune's records were in the possession of the State Police, the records should have been disclosed by the People (Decision at p. 3; attached as Exhibit 4). Thus, the Court concluded, the certificate of compliance filed by the People on July 28, 2021, was not valid (*id.*). Although the Court considered defendant's motion as one seeking dismissal of the charges (*id.* at p. 2), as the People had (Mellea Affirmation at p. 1), the Court did not dispose of the motion, as required by CPL 170.45 and 210.45.

Rather, the Court imposed a sanction upon the People pursuant to CPL 245.80 (Decision at p. 4), but not the sanction or remedy requested by defense counsel. The Court found that defense counsel had "shown under the totality of the circumstances" that defendant was prejudiced on July 28, 2021, when the People did not provide all impeachment information relating to Fortune (*id.*). Concluding, the Court found that "as the Court has found the People in violation of its discovery obligations, the Court pursuant to CPL 245.80 sanctions the People by precluding the testimony of Trooper Fortune and by precluding the use of any evidence procured by Trooper Fortune in this matter" (*id.*).

The People respectfully submit that, in imposing this drastic sanction, tantamount to a dismissal of the charges, and leaving the People no recourse to appeal, the Court overlooked that defendant had not demonstrated the appropriate

EXHIBIT 11

prejudice, as required by CPL 245.80 and controlling decisional law, that is, deprivation of its use; and, contravened the principle that preclusion "should 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, 283 [2002]).

Further, the Court overlooked that the People had acted in good faith, as demonstrated by their overall compliance. And to the extent defendant's motion could be considered a motion to dismiss, as opposed to merely an objection to the People's original certificate of compliance, as expressly stated by defendant, the People submit that the motion must be properly resolved, as required by CPL 170.45 and 210.45. Here, the People do not contest the Court's conclusion that the at-issue disciplinary records were in the possession of the prosecution, albeit for a different reason. The records, although not in the file of the local court prosecutors handling defendant's case, were in the possession of the Office of the District Attorney; their possession, therefore, is imputed to the local court prosecutors, as a matter of law. Still, all of the underlying documents of the disclosed disciplinary resume for the trooper were not immediately disclosed due to a good faith belief disclosure was not required, consistent with numerous decisions of courts of coordinate jurisdiction; and at no time were the documents withheld to gain any undue advantage over defendant. Even assuming, for argument purposes only, that

the original certificate of compliance was not valid, any dismissal motion must be denied because defendant filed his motion on the 90th day from the commencement of the action and, excluding time for motion practice, less than 90 days of speedy trial can be charged to the People.

WHEREFORE, for the reasons set forth in the annexed memorandum of law, it is requested that this Court grant the People's motion to reargue, and, upon such reargument, vacate its prior decision and order, reinstate the People's certificate of compliance, and deny the motion to the extent it could be considered a motion to dismiss.

Affirmed to be true.

Dated: White Plains, New York
February 22, 2022

/s/ William C. Milaccio
WILLIAM C. MILACCIO
Assistant District Attorney

MEMORANDUM OF LAW

THE PEOPLE'S MOTION TO REARGUE SHOULD BE GRANTED BECAUSE THE COURT OVERLOOKED DEFENDANT'S FAILURE TO DEMONSTRATE ANY COGNIZABLE PREJUDICE BY THE TIMING OF THE PEOPLE'S DISCLOSURE OF IMPEACHMENT MATERIAL, AND THE OVERALL GOOD FAITH COMPLIANCE BY THE PEOPLE.

Despite defendant's complete failure to make any "showing" of prejudice by the People's delayed disclosure of underlying disciplinary records, as he must under CPL 245.80 (1) (a), this Court precluded any testimony from Trooper Fortune and any evidence derived from him. The preclusion order, a severe sanction in any case is, therefore, wholly unauthorized. Indeed, the severity of the preclusion order is particularly acute because it effectively dismisses the People's case in a manner depriving the People of any right to appeal. In imposing this unauthorized sanction, the Court ignored the deficiency of defendant's pleadings, the nature of the items disclosed, and extant law governing the imposition of sanctions for discovery violations. Considering the issue within the confines of statutory and decisional guideposts, defendant cannot show that he was prejudiced by the delayed disclosure of the disciplinary records because no testimony has been taken in this case, and, therefore, defendant still has ample opportunity to meaningfully use the disclosed materials in either plea negotiations or cross-examination of Fortune.

Without question, the Court has jurisdiction over whether the People have complied with CPL article 245, and the secondary issue of whether any noncompliance by the People warrants a sanction under CPL 245.80 (*compare Matter of Hoovler v De Rosa*, 143 AD3d 897, 900 [2d Dept 2016]). As well, the principle is settled that the determination of the "appropriate sanction to be imposed" for a discovery violation, ordinarily rests "within the sound discretion of trial court" (*People v Jenkins*, 98 NY2d 280, 284 [2002]). The court's authority and discretion to sanction the People, however, also has well-settled limits.

Under CPL 245.80 (1) (a), "[w]hen material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy or sanction *if the party entitled to disclosure shows that it was prejudiced*" (emphasis added). True, the Court recognized this provision governed its decision of whether a sanction was appropriate (Decision and Order at p. 4). But, the Court overlooked that defendant made no showing of prejudice as contemplated by CPL 245.80 and decisional law relating to late disclosures, never mind a showing authorizing the severe remedy of preclusion.

Notably, in his original motion papers, defendant's attorney did not seek any sanction. He did not cite CPL 245.80, or even attempt to demonstrate

prejudice. The word "prejudice" does not appear in defense counsel's original affirmation.

More significantly, defense counsel completely failed to make any showing of prejudice in his reply affirmation notwithstanding that, by then, he had the documentation underlying Fortune's previously disclosed disciplinary resume. The People disclosed the underlying documentation on November 5, 2021 and November 10, 2021, respectively. Defense counsel did not submit his reply until December 1, 2021, about three weeks later. Thus, counsel had ample opportunity to review the documents, consider whether the materials tended to impeach Fortune, and if defendant had been prejudiced, plead and demonstrate prejudice in his reply.

Not surprisingly, defendant's attorney made no such showing given the nature of the disclosed materials, and the procedural posture of this case. Tellingly, he made no reference to the substance of the disclosed material. Nor was any portion of the material submitted to the Court for its in-camera review.

Instead, counsel fixated on the delay of disclosure, the People's request for an extension of time to respond to his motion, and their subsequent argument that the motion time should be excludable. Defense counsel now argued that defendant's "rights to a speedy trial had been prejudiced" (Epstein Reply at ¶ 18).

Counsel went on to allege that the People had not offered a good faith basis for failing to timely produce the discovery (*id.*). Defense counsel concluded that the People should be sanctioned by "charg[ing] them with all time until they filed" the November 9, 2021 certificate of compliance and dismissal of the charges (*id.* at ¶ 22).

The Court, in finding that defendant had "shown" that he was prejudiced (Decision at p. 4), overlooked that the so-called prejudice claimed by counsel – a mere delay in the proceeding – is not the prejudice contemplated by CPL 245.80 or decisional law governing the imposition of sanctions. By its terms, CPL 245.80 focuses on whether the discovery violation impaired a defendant's ability to use the items or information, or contributed to the outcome of a proceeding, not whether a mere delay resulted from the nondisclosure. For example, CPL 245.80 (1) (a) mandates that, in all circumstances, "the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material," showing the party's ability to use the material is paramount. Likewise, CPL 245.80 (1) (b), governing sanctions for lost or destroyed material, highlights the central issue of use, by stating: "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*" (emphasis added). Notable, as

well, CPL 245.80 (3) similarly cautions that non-disclosure of a statement by a prosecution witness shall not be grounds for ordering a new hearing or trial, "in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding," or in other words, absent a showing its non-use impacted the outcome. Finally, the same provision confirms the centrality of a defendant's ability to use the material by indicating, "nothing in this section shall affect or limit any right the defendant may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial" (CPL 245.80 [3]).

While CPL 245.80 (2) sets forth the sanctions available to a court, charging the People with speedy-trial time due to consideration of mere delay in producing discovery is not one of the itemized or listed sanctions. The same provision does allow a court to impose a sanction by "such other order as it deems just under the circumstances" (CPL 245.80 [2]; *see People v Otero*, 70 Misc3d 526, 531-32 [City Court Albany 2020]), but this last clause (focusing on "as it deems just under the circumstances"), highlights the legislative intent the nature of the sanction, when imposed, proportionally fits the demonstrated prejudice. As titled, "Available remedies or sanctions," the clause does not speak to the type of prejudice which must be shown. And, all of the section's provisions must be read together.

Considered in sum, the defendant's ability to use the discovery is the lodestar to whether prejudice has been shown, and a sanction is, therefore, appropriate.

This emphasis on whether a discovery violation either prevented a defendant from meaningfully using the discovery, or impacted the proceeding unfavorably to the defendant is also consistent with decisional law. In applying former CPL 240.70 (entitled, "Discovery; sanctions; fees."), the Court of Appeals instructed that in crafting an "appropriate" sanction for a discovery violation, "the degree of prosecutorial fault may be considered, but the overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society" (*People v Kelly*, 62 NY2d 516, 521 [1984]). And in the context of untimely produced impeachment material, the Court of Appeals has assessed prejudice to a defendant by gauging whether the defendant had been "given a meaningful opportunity to use" the withheld evidence "to cross-examine the People's witnesses or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]). The Appellate Division, Second Department has likewise considered whether a defendant suffered prejudiced by the late disclosure of impeachment material by focusing on the defendant's opportunity to use that material in cross-examination (*see, e.g., People v Sanchez*, 144 AD3d 1179, 1180 [2d Dept 2016] [finding that the defendant could not have been prejudiced by delayed disclosure of

certain items because those items were "provided to the defendant before cross-examination of the relevant witness"]; *People v Robertson*, 192 AD2d 682 [2d Dept 1993] [finding the defendant had not shown any prejudice by late disclosure of *Rosario* material because his "defense counsel was given a one-day continuance and the People's witness was made available for the defense counsel to conduct further cross-examination" with that material]; *People v Burks*, 192 AD2d 542 [2d Dept 1993] [finding that the defendant was not prejudiced by late disclosure because defense counsel was provided materials "in time for effective use"]).

Alternatively, the Court of Appeals has considered whether a defendant detrimentally relied upon the non-disclosure and was denied the opportunity to use the materials (*see, e.g.*, *People v Goins*, 73 NY2d 989, 991 [1989]).

Any claim that the prejudice suffered by defendant was the delay in the prosecution, therefore, flies in the face of CPL 245.80 and these controlling decisions. Indeed, defendant's "delay constitutes prejudice" theory is illogical because by that metric, any time the People did not timely produce discovery material, a defendant would necessarily have been prejudiced. Put another way, defendant improperly equates a discovery violation with a demonstration of prejudice.

This Court not only overlooked these general principles, but also the specific limitations on its authority to preclude evidence, a sanction that even defense counsel did not request. The Court of Appeals made clear in *Jenkins*, *supra*, that, "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" (98 NY2d at 284). Assuming the People's delayed disclosure constituted a discovery violation, a conclusion at odds with decisions of several courts, as noted below, this Court clearly erred by not considering that far lesser sanctions than preclusion, such as an adjournment, was sufficient to alleviate any conceivable prejudice suffered by defendant.

Dispositively, pretrial hearings never commenced in this case, and, thus, Trooper Fortune has never been called to testify. Therefore, defense counsel was never deprived of the opportunity to use the materials in cross-examination of Fortune, or as evidence in this proceeding. Accordingly, he cannot show prejudice by the timing of the People's disclosure (*see Sanchez*, 144 AD3d at 1180; *People v Thomas*, 12 AD3d 383, 384 [2d Dept 2004]; *Robertson*, 192 AD2d at 682; *Burks*, 192 AD2d at 542).

Significantly, and not to be forgotten, from the early stages of this prosecution, defendant already had the summary of Fortune's disciplinary history

and he did not press for greater disclosure. Indeed, when asked on August 10, 2021, by this Court if he wished to state his objections to the People's certificate of compliance, defense counsel declined the opportunity and chose to raise his claim by motion. While objections to a certificate of compliance have to be raised by motion (CPL 245.50 [4]), the parties are also encouraged by the statute to resolve discovery disputes (*see* CPL 245.35 [1]; *People v Bonifacio*, 179 AD3d 977, 979 [2d Dept 2020] [CPL article 245 "recognizes the importance of parties and the court taking available measures to attempt to resolve discovery disputes and reach reasonable accommodation."]). More importantly, for the present and separate of issue of whether a sanction is appropriate, when a defendant is on notice of the existence of material, the Court of Appeals has indicated that a defendant's inaction is a factor militating against the imposition of a sanction (*Jenkins*, 98 NY2d at 284 ["Even though the defense attorney knew from the voluntary disclosure form that a ballistics report existed and he asked for it, he did not renew his request."]).

Although the fact that defendant was never deprived of the opportunity to use the disclosed materials should put the issue of possible prejudice to rest, defendant's purported showing of prejudice was also deficient given the nature of the materials. None of the materials negate defendant's guilt; the materials are

unrelated to defendant's arrest. Nor do the allegations relate to past conduct of Fortune similar to his conduct at issue in this case, his assessment of whether defendant was intoxicated, including his administration of field sobriety tests. Further, two of the allegations were found to be unsubstantiated; a determination that some courts have held renders such information not subject to discovery (*see, e.g., People v Perez*, 73 Misc3d 171 (Sup Ct Queens Cty 2020) ("An unsubstantiated complaint does not provide a good faith basis to inquire and, thus, does not constitute discoverable material. A determination that there is insufficient evidence to establish that something happened does not support a reasonable basis to believe that it did."). Setting this legal point aside, one of those unsubstantiated allegations, that Fortune was rude to a person, is also hardly impeaching of his credibility.

To be sure, the Court's preclusion order also undermines the "truth-seeking function" of the criminal action against defendant (*Jenkins*, 98 NY2d at 284), no less in a case where defendant is charged with "a very serious crime" (*People v Washington*, 23 NY3d 228, 231 [2014] [quoting *County of Nassau v Canavan*, 1 NY3d 134, 140 (2003)]). Rather than alleviating any demonstrated prejudice to defendant, the order unfairly punishes the People, who also cannot appeal from the order (CPL 450.20; *Mattter of Clark v Newbauer*, 148 AD3d 260, 265 [1st Dept

2017]; *Matter of Johnson v Sackett*, 109 AD3d 427, 431 [1st Dept 2013]). Even a "significant misjudgment by the prosecution," which is not present here, does not necessarily entitle a defendant to such a "windfall," as defendant received in this case (*People v Williams*, 7 NY3d 15, 20 [2006]).

Considering the totality of these circumstances, the preclusion order was neither "just" nor proper (CPL 245.80 [2]); indeed, it was wholly authorized (*compare Matter of Johnson v Sackett*, 109 AD3d at 430 [finding that court improperly precluded evidence before trial had commenced]). The Court overlooked the doubly severe impact of its preclusion order; it "effectively terminated the ability of the People to prosecute" the case (*compare Matter of Clark v Newbauer*, 148 AD3d at 265). Defendant's guilt cannot be established without Fortune's testimony. Fortune observed defendant operating a motor vehicle and arrested him based upon his observations of defendant's signs of intoxication and the failed field sobriety tests. The evidence of defendant's refusal would also be arguably precluded by this Court's order, as evidence derived from Fortune. Accordingly, the Court should vacate its prior preclusion order and decline to impose any sanction on the People.[1]

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[1] The fact that defendant was never deprived of the opportunity to use the materials is, as demonstrated, determinative, but it is noteworthy that this Court imposed a sanction tantamount to dismissal without defendant ever: submitting what had been later disclosed; specifically

This Court should also reject the sanction floated by defendant of charging the People all the time through the filing of the supplemental certificate of compliance on November 9, 2021. In making that request, defendant ignores that he has not been prejudiced, as contemplated by CPL 245.80, as proven above. Defendant also ignores that, even when he first raised that issue, in reply, an extensive period of time had not elapsed since the commencement of this action. CPL 30.30 also makes no allowance for the charging of time to the People based upon a showing of prejudice; the potential prejudice to defendant by the delay in prosecution is relevant to a constitutional speedy trial claim (*People v Taranovich*, 37 NY2d 442, 446-47 [1975]), one not raised by defendant.

Contrary to defendant's contention, the People have acted in good faith, a fact overlooked by this Court in finding that the People's certificate of compliance was invalid. Early in the prosecution, the People disclosed materials directly relating to defendant's arrest, and turned over the summary of Fortune's disciplinary history. In addition to cases holding that there is no obligation to

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showing that items were discoverable; and showing that the timing of the disclosure prejudiced him (*compare Matter of Doorley v Castro*, 160 AD3d 1381 [4th Dept 2018]). By no means should the People's disclosure of the materials and filing of supplemental certificates of compliance be considered a concession by the People that *all* of those materials are discoverable. While some documents could theoretically be used by defense counsel in cross-examination, such as those instances of founded allegations of misconduct, many documents have no value, as impeaching information or as tools for cross-examination.

disclose any information related to unsubstantiated complaints, as noted above, there are also decisions from courts of coordinate jurisdiction indicating that the People do not have an obligation to disclose underlying disciplinary records (*see, e.g., People v Akhlaq*, 71 Misc3d 823, 826 [Sup Ct, Kings Cty 2021]; *People v Mauro*, 71 Misc3d 548 [County Ct, Westchester Cty 2021]; *People v Gonzalez*, 68 Misc3d 1213 [A] [Sup Ct Kings Cty, 2020]; *People v Knight*, 69 Misc3d 546 [Sup Ct Kings Cty 2020]). Of course, it was the People who turned over the underlying records in the end, and the People did not gain any advantage over defendant by the timing of the disclosure. While the People, in possession of the items, would have been better suited by notifying defense counsel and the Court of their possession and the position that the materials were not discoverable (CPL 245.10 [1] [a]), the People's failure to utilize this procedure should not vitiate their overall, good faith compliance.

In all events, the question of whether the People's original certificate of compliance was valid has been rendered moot by the People's subsequent disclosure of the materials that were the basis of defendant's objection, another fact overlooked by this Court. To the extent defendant's motion objecting to the certificate of compliance could be considered a motion to dismiss, this Court overlooked that the motion must be disposed of, as required by CPL 210.45 and

170.45: in this case, denied without a hearing. Preliminarily, any speedy trial motion by defendant was facially deficient because he filed his motion, at best, on the 90th day after the commencement of the action, and surely, the time between August 10, 2021, well before the expiration of the 90-day period, and when he ultimately filed his motion, on September 30, 2021, is excludable time under CPL 30.30 (4) (a) (*People v Shannon*, 143 AD2d 572, 572-73 [1st Dept 1988] [time when speedy trial motion was under consideration is excludable time]; *see also Matter of Farbman v Brann*, 197 AD3d 1054 [1st Dept 2021] [time when party was contemplating the filing of motion which was not "hypothetical" but ultimately filed was properly excluded]).

Nor should this Court adopt defendant's novel interpretation of *People v McKenna* (76 NY2d 59 [1990]), a case addressing a wholly factually dissimilar circumstance, to charge the People the time attributed to his motion practice. As demonstrated, charging the People time, in the absence of demonstrated prejudice because of the deprivation of use, would be an unauthorized sanction under CPL 245.80. In seeking dismissal, defendant attempts to indirectly obtain a windfall by what he cannot directly obtain by the imposition of a discovery sanction. As demonstrated above, the People have acted in good faith.

Further, adopting defendant's position that CPL 30.30 (4) (a) should not exclude the time for motion practice in this case would lead to a result that is inconsistent with extant law. Defendant considered the People's additional disclosures as vindication of his objection to the original certificate of compliance (Epstein Reply at ¶ 12). Time dedicated to the determination of a defendant's motion is excludable, however, regardless of whether the relief sought by the defendant is granted (*People v Littlejohn*, 184 AD2d 790 [2d Dept 1992] [motion practice is excludable, even when the motion time was spent in consideration of a "successful" defense claim]). Defendant's attempt to charge the People with motion time flies in the face of this controlling precedent. At bottom, the delay in the case was the result of defendant filing his objection motion, and, therefore, the speedy trial time occasioned by that motion practice must be excluded pursuant to CPL 30.30 (4) (a) (*see People v Lumpkin*, 71 Misc3d 1213 [A] [Sup Ct Kings Cty, 2021] ["Although defendant argues that he should not be charged with a motion necessitated by the People's conduct (here, the filing of a COC that, upon challenge, was ruled to be invalid), that argument ignores the simple reality of the CPL: Motions are the means by which disputes and alleged legal errors are brought to the attention of the court for a judicial determination, and the time that is required to decide these motions — which necessarily includes time for the

adversary to respond and the court to consider the submissions - is excluded from the speedy-trial clock."]; *Otero*, 70 Misc3d at 531 [finding that "[n]one of the extensive 2019 reforms modified the definition of excludable time as it relates to discovery compliance."]).

Excluding time for defendant's filing of his motion and the determination of that motion, less than 90 days of speedy trial have expired, and, therefore, any speedy trial motion must be denied. For argument purposes, even charging the People one-week of time during that motion practice when the People sought an extension (*see* Exhibit A to Epstein Reply Affirmation), the remaining time is excludable time attributable to motion practice because the People sought a reasonable extension of time to respond to defendant's motion (*People v Anderson*, 216 AD2d 309 [2d Dept 1995). Any speedy trial motion must be denied.

CONCLUSION

The People's motion for reargument should be granted and, upon reargument, this Court should vacate its prior decision and order, reinstate the People's certificate of compliance, and to the extent defendant's original motion could be considered one seeking dismissal, deny the motion without a hearing.

Respectfully Submitted,

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EXHIBIT 11