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.

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REPLY AFFIRMATION

Return Date: April 22, 2022

(Matthew J. Costa, J.)

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

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 reply to the affirmation filed by counsel for defendant in opposition to 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 respectfully incorporates by reference the allegations set forth in the affirmation of the undersigned, dated February 22, 2022.

On March 11, 2022, the parties appeared virtually before this Court, and the Court granted defendant a one-day extension, on consent of the People, to file his response to the instant motion. That day, counsel for defendant served the People with a copy of his response (hereinafter, "Epstein Answer").

By that answer, the People's contention that the Court must determine any motion to dismiss by defendant is moot. In support of his original motion, defense counsel expressly requested that the Court "dismiss these charges pursuant to CPL §30.30" (Epstein Reply at ¶ 22). Nevertheless, counsel now affirms that the "only relief" requested by him was striking the People's certificate of compliance (Epstein Answer at ¶ 35). Defense counsel, thus, has clarified that there was never a dismissal motion on speedy trial grounds pending before this Court, and, accordingly, the People's request for the Court to dispose of such motion is academic.

Contrary to defense counsel's contention, the People have otherwise properly sought reargument. True, in opposing defendant's motion, the People argued "there is no way that the defendant has been prejudiced" (by the timing of their disclosures) because "the case has yet to have any adversarial proceedings" (Memorandum of Law Accompanying Mellea Affirmation, Point III). Ignored by

defense counsel, however, the People only raised this argument in relation to the relief sought by him – the striking of the certificate of compliance (*id.*). Defense counsel had not requested a sanction pursuant to CPL 245.80; as noted, counsel concedes the "only relief" sought by him was striking the People's certificate of compliance (Epstein Answer at ¶ 35). Defense counsel's suggestion that the People should have addressed the appropriateness of all sanctions available to the Court (Epstein Answer at ¶ 32), including preclusion, improperly shifts the burden to the People on that score. The burden rests with defendant to establish that a sanction is warranted (CPL 245.80 [1] [a]). Significantly, defense counsel only raised the issue of alleged prejudice for the time, and in conjunction with a proposed sanction, in reply (Epstein Reply at ¶ 20). Defendant's current claim that the People previously addressed these issues in opposing his motion is, therefore, not supported by the record.

Even in defense counsel's reply, however, defense counsel did not seek the drastic remedy of preclusion. In fact, that such a drastic remedy as preclusion of testimony from the prosecution's primary and vital witness (Trooper Fortune) was under consideration by the Court was only first revealed to the People by this Court's decision and order. As indicated in *People v Otero* (70 Misc3d 526 [Albany City Ct 2020]), a case cited by defense counsel (Epstein Reply at ¶ 18), where the defendant has not moved for sanctions, "it would be unfair to impose

them without affording the People proper notice and an opportunity to be heard" (*id.* at 532). The People, therefore, should not now be denied the opportunity to reargue the Court's decision and order on the ground that the Court overlooked the law controlling the determination of an "appropriate" sanction, and, thereby, "mistakenly arrived at its earlier decision," when the People were never given a fair opportunity to address that specific issue in the first instance (*Loland v City of New York*, 212 AD2d 674 [2d Dept 1995]; *see Canann v Costco Wholesale Membership, Inc.*, 49 AD3d 583, 584 [2d Dept 2008]; *Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]). Indeed, reargument is particularly warranted because the Court's preclusion order is tantamount to dismissal, and, as acknowledged by defense counsel, the People have no right to appeal (Epstein Answer at ¶ 2).

In arguing that this Court did not overlook the law, defense counsel suggests the Court give no weight to decisions pre-dating the enactment of CPL article 245 (Epstein Answer at ¶ 20). Counsel makes the obvious point that those decisions could not have considered CPL article 245, enacted in the future (Epstein Answer at ¶ 20). In so doing, defense counsel ignores the more relevant controlling point of law: the Legislature, in enacting CPL 245.80, is presumed to have been aware of those decisions (*Odunbaku v Odunbaku*, 28 NY3d 223, 229 [2016]).

With that in mind, the manifest lineage between those decisions and CPL 245.80 proves those decisions control. CPL 245.80 (1) (a) provides: "When 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). The terms "appropriate" and "prejudiced" in the context of discovery violations are not new. Former CPL 240.70, the predecessor to CPL 245.80, likewise authorized courts to impose an "appropriate" sanction for discovery violations. The Court of Appeals interpreted the meaning of "appropriate" and "prejudice" in light of a defendant's opportunity to use the discoverable material, and, made clear that prelusion was not "appropriate" when a lesser sanction could cure any demonstrated prejudice to a defendant (*see, e.g., People v Jenkins*, 98 NY2d 280, 284 [2002]; *People v Kelly*, 62 NY2d 516, 520-22 [1984]; *see also* People's Memorandum of Law in Support of Reargument at pp. 6-8).

Pivotally, the Legislature, presumed to be aware of these decisions, did not change the meaning of "appropriate" or "prejudiced" when enacting CPL 245.80. To the contrary, as argued more fully in the People's Memorandum of Law in Support of Reargument, CPL 245.80 makes clear that a defendant's ability to use discoverable information still drives consideration of whether a defendant was prejudiced by a discovery violation (Memorandum at pp. 4-5). Critically, "if

courts have settled the meaning of an existing provision the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning" (*Lightfoot v Cendant Mortg. Corp.*, 137 S Ct 553, 563 [2017]; *see also* McKinney's Cons. Laws of NY, Book 1, Statutes § 75 ["Where a word has received a judicial construction it will almost invariably be given the same meaning where it is again used by the Legislature in connection with the same subject."]). Defense counsel's attempt to sway this Court to turn a blind eye to prior decisions of the Court of Appeals and Appellate Division flies in the face of these settled principles.

Defense counsel's argument that decisional law relating to the appropriate sanction for *Brady* and *Rosario* violations is inapposite (Epstein Answer at ¶ 19), is equally off the mark.[1] A prosecutor's *Brady* obligations were previously codified in CPL 240.20 (1) (h) (requiring disclosure of "[a]nything required to be disclosed prior to trial, to the defendant by the prosecutor, pursuant to the constitution of the state or of the United States"]). Thus, those cases assessing the appropriateness of a *Brady* violation, under a similar sanction provision (as demonstrated above), should have been considered by this Court in determining any sanction in this case.

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[1] Defense counsel's argument on this front is also curious because he invokes the *Rosario* doctrine (Epstein Answer at ¶ 30, n 5), albeit improperly for the first time as part of this reargument motion.

In addition, the at-issue items relating to Trooper Fortune are claimed by defendant (and conceded, in part, by the People) to be discoverable under CPL 245.20 (1) (k). There is little doubt that the origin of this provision rests with *Brady* and its progeny (William C. Donnino, Practice Commentary, McKinney's Cons. Law of NY, CPL 245.10 [pointing out that CPL 245.20 (1) (k) is "drawn from" *Brady v Maryland*, before utilizing pre-CPL article 245 cases to explain the meaning and scope of the provision]).[2] Defense counsel's attempt to marginalize those cases addressing sanctions for *Brady* violations, is also at odds with his motion challenging the People's certificate of compliance, which relied upon *People v Herrera* (71 Misc3d 1205 [A] [Nassau Cty Dist Ct 2021]) and *People v Cooper* (71 Misc3d 559 [County Ct, Eerie County 2021] (Epstein Affirmation at ¶¶13-15). In *Herrera*, the court cited *Brady v Maryland* (373 US 83 [1963]) and *Giglio v United States* (405 US 150 [1972]) immediately following its quotation of CPL 245.20 (1) (k) (71 Misc3d 1205 [A], at *4), clearly indicating the continued relevance of those decisions in interpreting CPL 245.20 (1) (k); and in *Cooper*, the court went so far as to hold that "CPL 245.20(1)(k)(iv) specifically delineates and

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[2] Showing the continued relevance of pre-CPL article 245 decisions, the Practice Commentary also cites such decisions to explain the meaning of 245.80 (William C. Donnino, Practice Commentaries, McKinney's Cons. Law of NY, CPL 245.10 [citing *Jenkins* and other decisions] and CPL 245.80 [annotations]).

codifies the People's obligation as it relates to categories of information commonly known as *Brady/Giglio* material" (71 Misc3d at 566).

As recently as February 2, 2022, the Appellate Term for the Ninth and Tenth Judicial Districts issued a decision and order in *People v Zachary P. Ambrosini* (2022 NY Slip Op 22054), confirming the continued nexus between a prosecutor's *Brady* and statutory disclosure obligations, and that a defendant's opportunity to use materials continues to control determinations of prejudice. In *Ambrosini*, the defendant contended that the charges against him should have been dismissed on the ground that he had "belatedly received *Brady* material" because, in violation of the deadline in CPL 245.10 (1) (a) (iii), he received the discovery on the day of trial (*id.*). The Appellate Term rejected the defendant's claim, finding "any *Brady* issues were resolved, as the District Court provided defendant with an appropriate remedy, pursuant to CPL 245.80 (1), by offering to delay the trial so that counsel could review the materials and talk to defendant" (*id.*). The *Ambrosino* decision thus makes clear that this Court's preclusion order, tantamount to dismissal notwithstanding that defendant received the materials long before any hearing or trial, was an unauthorized exercise of judicial power (*Matter of Clark v Newbauer*, 148 AD3d 260 [1st Dept 2017]).

Despite the well-established decisions defining prejudice based upon a defendant's opportunity to use the discoverable material, defendant persists in

incorrectly contending that a violation alone justifies a sanction (Epstein Answer at ¶ 23), or that a mere delay in disclosure constitutes prejudice (Epstein Answer at ¶ 34).[3] Defendant's reliance upon the decision in *People v Rodriguez* (73 Misc3d 411 [Sup Ct, Queen Cty 2021]), is misplaced. The *Rodriguez* court cited the delay in proceedings as cognizable prejudice warranting preclusion, but did so, not surprisingly, without citation to any decision supportive of that point. That decision's reasoning runs contrary to the decisions of higher appellate courts, decisions cited by the People. Notably, the *Rodriguez* court also found the delay prejudiced the defendant only after recognizing that the delayed disclosure prevented the defendant from using the belatedly disclosed materials in motion practice (71 Misc3d at 420). Defendant has not been deprived of the use of any materials.

In addition to being legally infirm, defendant's claim of prejudice by delay plainly rings hollow in light of his current request to submit additional submissions in opposition to the instant reargument motion (Epstein Answer at ¶ 14, n 3). Defendant took more than a month to file his original motion; did not object to the motion schedule set by the court; consented, albeit conditionally, to the extension of time requested by the People to respond to his motion; and, filed a reply. Now,

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[3] Defendant improperly attempts to bolster his prejudice claim by asserting, for the first time, that the delay in the proceedings caused defendant "who resides out of state, considerable additional delay and expense" (Epstein Answer at ¶ 18).

although given ample opportunity to answer the People's reargument motion, and contesting its propriety on both procedural and substantive grounds, counsel would further delay the disposition of this motion, and, therefore, his case, by asking to submit additional papers. Counsel is also undoubtedly aware that such a submission would entail further delay because, in fairness, the People should get an opportunity to file a reply. Defense counsel's request should, therefore, be denied.

Defense counsel's request to file yet more submissions is even more dubious when considered in light of his service of this Court's decision and order upon the People with notice of entry (Epstein Answer, Exhibit A). Defense counsel recognizes that the People have no right to appeal (Epstein Answer at ¶ 2), and there was no need to trigger the deadline for the People's time to seek reargument (CPLR 2221 [d] [3]) because the motion had been filed and served three days before his filed notice. There is but one reason for counsel to have filed the notice: ensuring the commencement of the four-month statute of limitations for the People to challenge this Court's unauthorized order pursuant to CPLR article 78 (CPLR 217). Given the ample submission before the Court, defendant's request, therefore, appears to be a dilatory tactic designed to press the People into deciding whether to seek CPLR article 78 relief before the disposition of this motion.

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In sum, this Court should grant reargument because the People were never granted a full and fair opportunity to address whether preclusion was appropriate, and upon reargument, vacate its preclusion order because defendant has not demonstrated any prejudice and far less severe sanctions could be imposed.

WHEREFORE, 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.

Affirmed to be true.

Dated: White Plains, New York
March 18, 2022

/s/ William C. Milaccio
WILLIAM C. MILACCIO
Assistant District Attorney
wmilaccio@westchesterda.net

AFFIRMATION OF SERVICE

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

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

WILLIAM C. MILACCIO, an attorney duly admitted to practice law before the Courts of the State of New York, makes the following affirmation under the penalties of perjury: that he is an Assistant District Attorney of Westchester County and affirms that on March 18, 2022, he served a true copy of the Reply Affirmation in the above-captioned matter upon defendant's counsel, Steven Epstein, Esq., via email to sepstein@barketepstein.com, and Matthew Keller, Esq., via email to mkeller@barketepstein.com, after receiving consent from Mr. Keller to service by email.

Affirmed To Be True.

/s/ William C. Milaccio
William C. Milaccio
wmilaccio@westchesterda.net

Dated: White Plains, New York
March 18, 2022