EXHIBIT 10

CITY COURT: 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.

----------x

AFFIRMATION IN OPPOSITION TO MOTION TO REARGUE

DOCKET 3495-21

I, STEVEN EPSTEIN, an attorney duly admitted to practice law in the Courts of this State, affirm under penalty of perjury that the following statements are true:

1. I am an attorney associated with Barket Epstein Kearon Aldea & LoTurco, LLP, counsel to the Defendant, MICHAEL MOLINA, and I am familiar with the facts of this case and with the proceedings that have been had in the matter to date. I make this Affirmation in opposition to the People's motion for leave to reargue Molina's motion to invalidate a certificate of compliance and impose discovery sanctions against the People pursuant to CPL §245.80.

2. The motion to reargue should be denied. The People fail to set forth any matters of fact or law which the Court overlooked or misapprehended in its January 14, 2022, Decision & Order ("Order") determining the prior motion.[1] Rather, the People simply disagree with the Court's choice of remedy for the People's prejudicial failure to timely disclose a key witness's obviously discoverable disciplinary record. Admittedly unable to seek appellate review of the Order, the People have moved for a remedy to which they clearly are not entitled. Accordingly, leave to reargue should be denied.

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[1] References below to "Motion" refer to Molina's original motion, dated Sept. 30, 2021. References to "Motion Opp." refer to the People's Affirmation, dated Nov. 11, 2021, in opposition to the Motion. References to "Motion Reply" refer to Molina's Reply Affirmation, dated Dec. 1, 2021, in further support of the Motion. The instant motion to reargue, dated Feb. 22, 2022, is hereinafter referred to as "Rearg. Motion."

Procedural History

3. The Defendant was arraigned on July 6, 2021, on the charge of violating Section 1192(3) of the Vehicle and Traffic Law. The Defendant entered a plea of not guilty and the matter was adjourned to July 27, 2021, for the People to comply with their discovery obligations.

4. On July 27, 2021, the People were not ready and had not yet filed a certificate of compliance ("COC") pursuant to C.P.L. §245.20 and C.P.L. §30.30(5). The People appeared for a conference and advised the court that they could not file a COC. The matter was adjourned to August 10, 2021. The Defendant did not consent to this adjournment.

5. On July 28, 2021, the People filed a certificate of readiness for trial along with a COC pursuant to C.P.L. §245.20 and C.P.L. §30.30(5). *See* Motion Ex. A. On August 10, 2021, the People consented to pretrial hearings and the matter was adjourned to September 30, 2021, for that purpose, as well as for Molina to review the discovery provided by the People.

6. On or about September 28, 2021, Molina filed a "Notice of Objection" to the People's July 28 COC, and moved to strike the COC on the ground that the People, prior to July 28, had failed to turn over discoverable documents containing evidence and information tending to impeach the credibility of the arresting officer, Trooper Angelo Fortune (Rearg. Mot. Ex. 1).

7. On September 30, 2021, the Court directed the People to file any opposition papers to the Motion by October 28, 2021. Thereafter, ADA Phillip Mellea sought undersigned counsel's consent to a two-week extension of the October 28 deadline. Counsel consented as a matter of professional courtesy on the condition that the People consent to half of that extension (*i.e.*, one week) being charged to the People for speedy trial purposes.

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8. Prior to filing opposition papers, on November 5, 2021, the People turned over additional documents relating to Trooper Fortune, including: (a) a July 2019 Letter of Censure, Notice of Suspension, and other documents related to Fortune's failure to properly inventory an impounded vehicle, resulting in the failure to discover narcotics therein; and (b) reports and other documents regarding the investigation of a claim that Fortune had unlawfully arrested a person.

9. Five days later, on November 10, 2021, the People turned over two additional packets of documents relating to: (a) a 2015 complaint that Fortune had behaved rudely towards the victim of a car accident and; (b) a 2018 complaint that Fortune had conducted an improper search during which he touched the arrestee's "vaginal region."

10. The People filed their opposition papers to the Motion on November 11, 2021 (Rearg. Mot. Ex. 2, "Motion Opp."). In relevant part, the prosecutor argued that he had exercised due diligence and made a good faith effort to comply with the People's discovery obligations prior to filing the July 28 COC.

11. While acknowledging that the above-referenced documents related to Trooper Fortune's credibility (*see* ¶¶ 8-9 above) had been disclosed "late," the prosecutor argued that Molina had not suffered prejudice by the late disclosure because there had been no adversarial proceedings.

12. On December 1, 2021, Molina filed a reply brief in further support of the Motion (Rearg. Mot. Ex. 3).

13. By Decision and Order dated January 14, 2022, the Court held that the material belatedly turned over regarding Trooper Fortune's disciplinary history was discoverable pursuant to CPL §245.20(1)(k)(iv) and, accordingly, the People's July 28, 2021 COC was invalid. (Rearg.

Mot. Ex. 4). The Court also concluded that, under the totality of the circumstances, Molina was prejudiced by the late disclosure of the impeachment material. As a result, pursuant to CPL §245.80 the Court imposed sanctions in the form of the preclusion of Trooper Fortune's testimony as well as "the use of any evidence procured by Trooper Fortune in this matter."[2]

14. The People's Motion to Reargue, dated February 22, 2022, argues that the Court's Order imposing discovery sanctions overlooked: (a) the lack of any prejudice to Molina from the People's admittedly late disclosures; and (b) the People's "good faith" compliance with their discovery obligations under CPL article 245 – both arguments that were previously raised by the People. In addition, the People suggest that reargument is appropriate because the Order precluding the testimony and other evidence from the People's chief witness is too drastic, and because the Court did not decide a purported motion to dismiss suggested by Molina's Notice of Objection. As explained below, none of these arguments is legally cognizable on reargument. Accordingly, the motion for reargument should be summarily denied.[3]

Discussion

15. A motion to reargue pursuant to CPLR 2221 is designed to afford the moving party the opportunity to establish that a court overlooked or misapprehended relevant facts, or misapplied

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[2] On February 25, 2022, Molina served a copy of the Order with written notice of entry, a copy of which is attached hereto as **Exhibit A**.

[3] Because the People's claims are not legally cognizable on reargument, the defense urges this Court to deny reargument—rather than again ruling on the merits and adhering to the initial decision. In this posture, the argument herein focuses on demonstrating why reargument should be denied, and only briefly discusses the merits of the substantive claims in this context. In the event that this Court nevertheless decides to grant reargument and then reconsider the People's substantive arguments, defendant requests an opportunity to provide supplemental briefing on the merits.

controlling principles of law. C.P.L.R. § 2221(d)(2). "It does not serve as a vehicle to permit the unsuccessful party . . . to argue again the very questions previously decided; nor does it permit one to advance different arguments than those made on the original application." *Rubin v. Dondysh*, 147 Misc.2d 221 (Civ. Ct. Queens Co. 1990); accord *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dept. 2005) (citations omitted) (motion for reargument "not available where the movant seeks only to argue 'a new theory of liability not previously advanced'"); *People v. Williams*, 73 Misc. 3d 1209(A) (Crim. Ct. N.Y. Co. Oct. 19, 2021).

16. Here, the People provide no basis for a grant of reargument. They claim that the Court overlooked two issues raised by Molina's motion to strike the July 28 COC, but they are wrong. *First,* the People mistakenly argue that the Court overlooked the issue of prejudice to Molina flowing from the People's illusory July 28 COC (Rearg. Mot., Milaccio Aff. at 9-10; Memorandum of Law ("MOL") at 1-3). But the People's current prejudice argument is the very same issue they raised in their opposition to the Motion. Specifically, the People argued in opposition that no discovery sanction was warranted because Molina had "not alleged any prejudice," and that, even if Molina was prejudiced, "the Court has other, less extreme, remedies available" than striking the COC (Motion Opp., Memo. Of Law Point III) (citing CPL §245.80).[4]

17. Not only did the People raise the prejudice issue upon the underlying motion, the Court faced the issue squarely when it: (a) explicitly acknowledged the People's contention that Molina had not been prejudiced (Order at 2); and (b) subsequently found that "under the totality of the

[4] This brief cites the Point associated with the relevant argument because the People did not number the pages of their memorandum of law in opposition to the Motion.

circumstances," and contrary to the People's arguments, Molina *had* been prejudiced by the belated disclosure (Order at 4).

18. While the Court need not—and should not—address again the merits of the issue, nevertheless the Court decided the prejudice issue correctly. The People's late disclosure caused an otherwise unnecessary adjournment of pretrial hearings, delaying the proceedings and causing Molina, who resides out of state, considerable additional delay and expense.

19. The People's contention that "mere delay" is insufficient as a matter of law to warrant sanction under CPL §245.80 (MOL at 4) is baseless. The People rely for support on cases defining prejudice narrowly as an effective inability to use belatedly disclosed material (MOL at 6-7). But these cases concern constitutional *Brady* and *Rosario* violations, *see Brady v. Maryland*, 373 U.S. 83 (1963); *People v Rosario*, 9 N.Y.2d 286 (1961) (MOL 6-8). These cases should not define the scope of prejudicial conduct for purposes of CPL §245.80, and the People provide no support for that proposition.

20. Indeed, all but one of the cases cited by the People were decided decades before the enactment of CPL article 245. Accordingly, those decisions could not have possibly considered the "presumption of openness" and "the dramatic change in the burden, timing, and scope of disclosure" required by the new discovery rules. *People v. Faison*, 73 Misc. 3d 900, 906 (Crim. Ct., Kings Co. Sept. 3, 2021) (citing *People v. Mauro*, 71 Misc. 3d 548, 552 (Westchester Co. Ct. 2021). Nor do those decisions account for the fact that, in enacting the new rules, the New York Legislature intended to "provide for broader and earlier disclosure than" the old discovery regime. *Id.* This intent is evident from the statutory text of the new rules. *See* CPL §245.20(7) ("There shall be a presumption in favor of disclosure when interpreting . . . section 245.20").

21. At least one New York judge has recognized that CPL 245.20 "is not merely a codification of the disclosure rules of [*Brady*] and or *Giglio v. United States*, 405 U.S. 150 (1972) as it mandates 'a presumption in favor of disclosure.'" *Hudson Police Loc. 3979 v. Bower*, 73 Misc. 3d 1063, 158 N.Y.S.3d 787 (Sup. Ct. Columbia Co. Nov. 24, 2021) (Zwack, J.) (citations omitted).

22. The People's reliance on *Matter of Johnson v Sackett*, 109 A.D.3d 427 (1st Dept. 2013) (MOL 11), is also inapposite. In that case, the First Department granted the People's CPLR article 78 petition seeking to prohibit a Bronx Supreme Court Justice from enforcing an order precluding a complainant from testifying at trial as a penalty for the witness' failure to consent to the release of his medical records. The First Department granted the People's petition because the trial court lacked any statutory authority to compel the discovery of the medical records at issue. *Id.* at 429.

23. Unlike *Sackett*, the People here were bound by statute, namely CPL §245.20 (1)(k)(iv), to disclose the impeachment material in Trooper Fortune's disciplinary records. They failed to do so before filing their July 28 COC. Accordingly, the Court possessed ample statutory authority under CPL §245.80 to issue its preclusion order. Thus, there is no basis for reargument on the issue of prejudice – which was already considered, and properly determined, by this Court.

24. *Second*, the People argue that the Court overlooked the prosecutor's "good faith" belief, at the time he filed the July 28 COC, that he was not required to disclose the records in the People's possession containing impeachment material as to Trooper Fortune (Milaccio Aff. at 10; MOL at 13). As with the prejudice issue, however, the People's current good faith argument is the very same issue they raised in their opposition to the Motion. Specifically, the People argued in

opposition that the People "acted in good faith" because the prosecutor disclosed "the information which we believed to be proper to disclose." (Motion Opp., Memo. Of Law Point II).

25. The Court did not overlook the issue of good faith, either. Rather, the Court explicitly acknowledged the People's contention that "they have exercised due diligence and that the [COC] was filed in good faith" (Order at 2). And the Court went on to decide the issue in Molina's favor. The Court's finding that the July 28 COC "was clearly not in accordance with" the People's discovery obligations (Order at 3) cannot be reconciled with a finding of good faith. Because CPLR §2221(d) does not provide the People with a chance to raise this same issue previously decided by the Court, *Rubin*, 147 Misc.2d at 223, reargument is unavailable.

26. While the Court should not address the merits of the good faith issue again, it bears noting that the People's continued protestations in the instant motion of their good faith are undermined by their own motion papers, which implicitly concede that some of the withheld documents in Trooper Fortune's disciplinary file are discoverable. After all, the People's argument in a footnote that they have not conceded the discoverability of "*all* of [the] materials" they belatedly disclosed (MOL at 12 n.1) (emphasis in original) contains the implicit admission that *some* of those documents are discoverable.

27. Similarly, the People's recognition that the prosecutor would have been "better suited" had he told the Court and Molina about the People's possession of Trooper Fortune's disciplinary file prior to filing the July 28 COC (MOL at 13) cannot be reconciled with their insistence on the prosecutor's good faith.

28. The People provide no support for their contention that discovery sanctions are unavailable under CPL §245.80 for a good faith failure to comply with the strict requirements of

CPL §245.20. In any event, however, the People did not have a good faith basis for withholding the impeachment material in Trooper Fortune's disciplinary file. Notwithstanding the cases cited by the People arriving at different conclusions as to exactly what is discoverable under CPL §245.20(1)(k)(iv), the clear judicial consensus to date is that documents related to substantiated or founded allegations of misconduct must be turned over.

29. Indeed, courts are increasingly finding that documents supporting *unsubstantiated* complaints must be disclosed. *See, e.g., Bower*, 158 N.Y.S.3d at 792 (finding no current consensus regarding discoverability of "unsubstantiated or unfounded" complaints). The *Bower* court went on to side with those courts finding that unsubstantiated are in fact discoverable, considering: (a) the "express language of CPL §245.20(1)(k)(iv);" (b) the legislative intent to provide "broad and all inclusive" discovery; and (c) the repeal of Civil Rights Law 50-a which had hitherto shielded such documents from disclosure.

30. In light of these factors, and because "it is not up to a District Attorney to decide if a particular item in a disciplinary record may be admissible or may impeach a witness," *Bower*, 158 N.Y.S.3d at 792, the People's claim of good faith here is tenuous at best.[5] *See also People v. Herrera*, 71 Misc. 3d 1205A (Dist. Ct. Nassau Co. April 5, 2021) (noting the "very clear mandates" of CPL §245.20 and §245.55 that the People provide "all material and information" described in those respective sections). Accordingly, reargument is improper on the issue of good faith.

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[5] Even if the impeachment material in the Trooper's file were not discoverable under CPL §245.20(1)(k)(iv)—and it was—the People were required to disclose it as *Rosario* material prior to the hearing scheduled for September 30, 2021. They did not do so, and to this date have not provided any basis for that failure.

31. The People's argument that preclusion is too harsh a discovery sanction under the circumstances is also not cognizable on reargument. Reargument does not provide a party with an opportunity to advance different arguments than those made on the original application. *Rubin*, 147 Misc.2d at 223. But that is precisely what the People attempt to do throughout their reargument motion. In their opposition to the Motion, the People cited CPL §245.80 by name and argued that discovery sanctions in general, and striking the COC in particular, were not warranted because of the People's good faith efforts prior to filing the July 28 COC (Motion Opp., Memo. Of Law Point II). The People further cited a decision of Franklin County Court, *People v. Nelson*, 67 Misc. 3d 313 (Franklin Cty. Ct. Feb. 20, 2020), which discussed a trial court's discretion under CPL §245.80 to impose discovery sanctions.

32. In making those arguments, the People could have raised the arguments they raise in the instant motion that preclusion, like striking the COC, was too "severe" a sanction and "unauthorized" by CPL §245.80 (*e.g.*, Rearg. Motion, MOL at 1, 8, 11). After all, CPL §245.80 explicitly names preclusion among its non-exhaustive list of potential violations. The People chose not to raise these arguments in the first instance; accordingly, they may not do so for the first time in an application for reargument.

33. Similarly, when Molina specifically asked the Court to impose sanctions pursuant to CPL §245.80 in his reply brief (Motion Reply ¶20), the People could have—but did not—move to strike that application for failure to raise it in the initial motion, or seek permission to file a sur-reply in order to respond. Thus, the Court may not and should not consider that argument for the first time now (Rearg Mot., Aff. at 8). Accordingly, the Court should not address the merits of the People's complaints regarding the propriety of the sanction imposed by this Court's Order.

34. In any event, the Court was well within its discretion to issue its preclusion order. The withheld documents in Trooper Fortune's disciplinary file related to substantiated complaints were clearly discoverable, and were admittedly in the People's possession (Rearg Mot., Aff. at 10). Indeed, the People conceded that their disclosure of those documents in November 2021—more than 3 months after the filing of the COC—was late (Motion Opp., MOL Point II (referring to "belated disclosures"); Point III (arguing that Molina had not explained why the "late disclosure of credibility information" warranted discovery sanctions). Accordingly, preclusion was an authorized—and appropriate—remedy. *See e.g.*, *People v. Rodriguez*, 73 Misc. 3d 411, 421 (Sup. Ct., Queens Cty. Sept. 7, 2021) (search warrant materials precluded "for the People's failure to disclose [them] in a timely fashion).

35. Lastly, the People argue that the Court's Order left unresolved that portion of the Notice of Objection seeking dismissal (Milaccio Aff. At 10; MOL 13-16). However, the Court did not overlook or misapprehend Molina's actual motion. The only relief requested by counsel in the Motion was a finding that "the People have not met their obligations pursuant to CPL §245.20 and pursuant to CPL §30.30(5)" (Motion ¶2), and "an Order rejecting" the People's July 28 COC (*id.* ¶19), as the People themselves acknowledge (Rearg. Motion Aff. at 4 n.1). This was *precisely* the relief that the Court ordered. To the extent the "Notice of Objection" sought dismissal pursuant to CPL §30.30(1)(b) and §170.30(e), the Court properly declined to address that relief since it was not raised anywhere in counsel's affirmation. While Molina has not yet sought dismissal under CPL §30.30, he reserves the right to do so in the future.

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Conclusion

36. Accordingly, for the foregoing reasons the People's motion for reargument should be denied in its entirety.

Dated: Garden City, New York 11530
March 11, 2022

Respectfully submitted by:

Steven Epstein, Esq.
Barket Epstein Kearon Aldea &LoTurco, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530
(516) 745-1500

EXHIBIT A

EXHIBIT A

CITY COURT: NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK
----------X
THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

NOTICE OF ENTRY

Docket No.: 3495-21

MICHAEL MOLINA,

Defendant.
----------X

SIR:

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order signed by Honorable Matthew J. Costa and entered in the office of the clerk of the within named court on or about the 14th day of January, 2022.

DATED: February 25, 2022
Garden City, New York

Respectfully submitted,

Steven B. Epstein, Esq.
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Barket Epstein Kearon Aldea & LoTurco, LLP
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TO: ADA Philip Mellea
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Clerk's Office
New Rochelle City Court
475 North Avenue,
New Rochelle, NY 10801

CITY COURT OF THE CITY OF NEW ROCHELLE
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MICHAEL MOLINA,
Defendant.

Docket # CR-3495-21

DECISION AND ORDER

PHILIP J. MELLEA, A.D.A.
Office of the District Attorney
Westchester County
New Rochelle Branch
475 North Avenue
New Rochelle, NY 10801

STEVEN EPSTEIN, ESQ.
Barket Epstein Kearon Aldea
& LoTurco, LLP
666 Old Country Road, Suite 700
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Attorney for Defendant

Costa, J.:

The following papers were read on this motion:

Notice of Motion to Dismiss with Affirmation in Support and Exhibits A-B	1-2, 3-4
Affirmation in Opposition and Memorandum of Law with Exhibits A-F	5-6, 7-12
Reply Affirmation with Exhibit A	13, 14

In this criminal matter, the defendant Michael Molina is charged with violating: VTL 1192.3 Driving While Intoxicated; VTL 375(2)(a) No Headlights/Inclement; VTL 1128(a) Moved From Lane Unsafely; VTL 1163(a) Improper or Unsafe Turn Without Signal and VTL 1194(1)(b) Refusal To Take Breath Test. The defendant was arraigned on these charges on July 2, 2021. The defendant entered a plea of not guilty to all charges. The case was adjourned to July 27, 2021, for the People to provide discovery. The People provided some discovery to defendant's counsel via the Westchester District Attorney's Office discovery portal on July 8, 2021. On July 27, 2021, the case was adjourned to August 10, 2021, at the People's request to file a certificate of compliance.

On July 28, 2021, the People filed their certificate of compliance via the Westchester District Attorney's Office discovery portal and announced their readiness for trial.

On August 10, 2021, the People advised the Court, the defendant and the defendant's counsel on the record that the certificate of compliance was filed via their office's discovery portal and declared their readiness for trial. In response, defense counsel requested pre-trial hearings and stated that if an objection to certificate of compliance was found a motion would be filed on September 30, 2021, the date set for hearings.

On September 28, 2021, the defendant filed the instant motion seeking an order dismissing the accusatory instruments pursuant to CPL 30.30(1)(b) and 170.30(e) and the Sixth and Fourteenth Amendments of the United States Constitution. The defendant argues that the People were not ready for trial when they filed the certificate of compliance as they did not complete their discovery obligations under CPL 245.20. Specifically, the defendant asserts that it is undisputed that the People did not produce the disciplinary file of the arresting state trooper Angelo Trooper Fortune, which is required under CPL 245.20(1)(k)(iv), until November 10, 2021, as the trooper is a key prosecution witness. In the alternative, the defendant seeks an order from the Court invalidating the People's certificate of compliance and imposing sanctions against the People under CPL 245.80, for the People's discovery violations as the People have failed to offer an explanation for said violations in this case.

The People oppose the instant motion arguing that it is well within its time limits under CPL 30.30 and that only 26 days are chargeable to the People. The People also assert that they have exercised due diligence and that the certificate of compliance was filed in good faith. Moreover, the People argue that the defense has not been prejudiced by the delay in providing discoverable state police records as there have yet to have any adversarial proceeding in the case.

Although the papers submitted on this motion are filled with learned and interesting discussions of the interplay between CPL 30.30 and 245, especially with the newly developing

case law surrounding CPL 245, the Court, however, finds that it needs to look no further than the clear and unambiguous language of CPL 245 to address the defense's challenge to the People's certificate of compliance; the statutory interpretation is dispositive. Initial discovery is governed by CPL 245.20. The People's obligations are clearly stated in CPL 245.20(1):

> the prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, 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.

Moreover, CPL 245.20(1)(k) provides that

> All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: ... (iv) impeach the credibility of a testifying prosecution witness; ... Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

In the instant case, at issue is when Trooper Fortune's disciplinary records should have been produced. As the summary of his disciplinary file indicates, the investigation on the most recent complaint against Trooper Fortune, on a case which also involved a refusal, was completed on or about December 16, 2020, and resulted in a finding of poor judgment, and for which the trooper was censured on January 7, 2021. Clearly, this information that was in possession of the state police when the defendant was arraigned on July 2, 2021; and therefore, pursuant to CPL 245.20(1)(k)(iv) the People were required to disclose this information as soon as practicable after the defendant's arraignment. Instead, disclosure of this information did not occur until November 10, 2021. Thus, the Court finds that the filing of the certificate of compliance on July 28, 2021, was clearly not in accordance with the CPL 245.20(1)(k)(iv).

When information that is discoverable is disclosed belatedly and in violation of Article 240, CPL 245.80(1) provides that the Court may impose an appropriate remedy or sanction for discovery violation(s) if the party entitled to discovery shows it was prejudiced. In pertinent part, CPL 245.80(2), provides that the Court may "preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence . . . ."

In this matter, defendant's counsel has shown under the totality of the circumstances that it was prejudiced when the People filed its certificate of compliance on July 28, 2021, when it did not provide pertinent information that tended to impeach the credibility of the prosecution's witness, Trooper Fortune. Accordingly, as the Court has found the People in violation of its discovery obligations, the Court pursuant to CPL 245.80 sanctions the People by the precluding the testimony of Trooper Fortune and by precluding the use of any evidence procured by Trooper Fortune in this matter.

The parties are directed to appear January 25, 2022, at 9:30 a.m., for further proceedings.

The foregoing constitutes the decision and order of the court.

Dated: January 14, 2022
New Rochelle, New York

MATTHEW J. COSTA, JUDGE

CITY COURT: NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK
----------X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Docket No.: CR-3495-21

MICHAEL MOLINA,

Defendant.
----------X

AFFIRMATION IN OPPOSITION TO MOTION TO REARGUE

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EXHIBIT 11

CITY COURT: CITY OF NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK
----------X
THE PEOPLE OF THE STATE OF NEW YORK

REPLY AFFIRMATION

-against-

Return Date: April 22, 2022

MICHAEL MOLINA,

Defendant.

(Matthew J. Costa, J.)

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 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

[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.

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
----------X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

MICHAEL MOLINA,

Defendant.

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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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

MIRIAM E. ROCAH, as District Attorney of Westchester County,

Petitioner,

- against –

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

Respondent.

AFFIDAVIT OF SERVICE

Index No.: 01356/2022

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

I, Laura Iorio, being duly sworn, depose and say that:

I am an administrative assistant at the firm of Abrams Fensterman, LLP, located at 81 Main Street, White Plains, New York 10601; I am over the age of 18 years; I am not a party to this action; and

That on July 1, 2022, I served the within NOTICE OF MOTION WITH AFFIRMATION AND EXHIBITS and MEMORANDUM OF LAW OF RESPONDENT JUDGE MATTHEW J. COSTA IN SUPPORT OF HIS MOTION TO DISMISS THE PETITION by depositing a true copy thereof enclosed in a first class, post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York to the following persons at the last known addresses set forth:

Westchester County District Attorney's Office
Attn: ADA Brian R. Pouliot
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York 10601

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

Matthew Keller, Esq.
Donna Aldea, Esq.
Barket Epstein Kearon Aldea & LoTurco, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530

SUPREME COURT OF THE STATE OF NEW YORK
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Barket Epstein Kearon Aldea & LoTurco, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530

Laura Iorio

Sworn to before me this
1st day of July 2022

Notary Public

Angela Terilli
Notary Public, State of New York
No. 01TE6370366
Qualified in Westchester County
Commission Expires January 29, 2026