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.

Index No. 01356/2022

RESPONDENT JUDGE MATTHEW J. COSTA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

Respondent Judge Matthew J. Costa respectfully submits this reply memorandum of law in further support of his motion to dismiss the District Attorney's article 78 petition.

ARGUMENT

I

The District Attorney's affirmation in opposition relies on distinguishable caselaw that, in any event, buttresses the conclusion that the petition should be dismissed

The District Attorney concedes in her opposition that the "entire basis" for her petition is that Judge Costa's discretionary prejudice determinations were wrong. Opposition at 2; *see id.* at 4-8. This is just a claim of pretrial error for which a writ of prohibition is not an available remedy. *See Matter of Johnson v. Price*, 28 A.D.3d 79, 81 (1st Dep't 2006) ("Even egregious errors in pretrial and trial rulings, such as the erroneous exclusion of important evidence, do not form a proper basis for an article 78 challenge, regardless of the fact that the People have no appellate recourse to correct the ruling").

Nevertheless, the District Attorney continues to dress up her inappropriate efforts to seek collateral review of an alleged pretrial error—Judge Costa's discretionary prejudice determinations—by mislabeling Judge Costa's conduct in each underlying case as an act "in excess of his statutory authority." Opposition at 2; *see id.* at 4-8. For the reasons discussed in the Spolzino affirmation and the memorandum of law in support, this Court should reject the District Attorney's attempted obfuscation and dismiss the petition because the District Attorney's challenge to Judge Costa's prejudice determinations—whether right or wrong—cannot serve as a basis for a writ of prohibition. Spolzino affirmation at 1-2; memorandum of law in support at 8-15; *see Matter of*

Rush v. Mordue, 68 N.Y.2d 348, 353 (1986) (prohibition does "not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power").

A. *Matter of Hoovler v. De Rosa* is inapposite.

The District Attorney's opposition is premised on the decision of the Appellate Division, Second Department, in *Matter of Hoovler v. De Rosa*, 143 A.D.3d 897 (2d Dep't 2016). *See* Opposition at 3. According to the District Attorney, the ultra vires nature of Judge Costa's conduct is "made plain" by that case. *Id.* She is wrong. *Matter of Hoovler* is readily distinguishable on its facts. Moreover, the overarching rule that can be gleaned from *Matter of Hoovler* undercuts the District Attorney's position.

In *Matter of Hoovler*, the prosecutor provided the defendant with laboratory reports containing the results of DNA tests. *See* 143 A.D.3d at 898. Several "initials" appeared on the reports. *Id.* The defendant requested that the prosecutor "disclose the names corresponding to [the] initials." *Id.* There was no authority under CPL article 240 to order disclosure of that information. *See id.* Nevertheless, over the prosecutor's objection, the County Court ordered the prosecutor to disclose the full names corresponding to the initials. *See id.* at 899.

The prosecutor commenced a proceeding pursuant to CPLR article 78 to prohibit the County Court from enforcing its disclosure order. *See id.* The Appellate Division granted the petition and issued a writ of prohibition prohibiting the County Court from enforcing its disclosure order, holding that the County Court "exceeded [its] authority by directing the People to make available to the defendant the full names corresponding to the initials that appear on the subject laboratory reports." *Id.* at 900, citing *Matter of Brown v. Grosso*, 285 A.D.2d 642, 644 (2d Dep't 2001), *lv. denied* 97 N.Y.2d 605 (2001). The Appellate Division's rationale was two-fold. It held

that "[n]othing in CPL 240.20 imposes an obligation on the People [1] to respond to the defendants' questions concerning notations that appear in discovery materials, or [2] to affirmatively create or compile material, or obtain it from sources beyond their control." *Id.*, citing *Matter of Phillips v. Ramsey*, 42 A.D.3d 456, 458 (2d Dep't 2007); *Matter of Sacket v. Bartlett*, 241 A.D.2d 97, 102 (3d Dep't 1998), *lv. denied* 92 N.Y.2d 806 (1998); *Matter of Catterson v. Rohl*, 202 A.D.2d 420, 422 (2d Dep't 1994), *lv. denied* 83 N.Y.2d 755 (1994).

In short, the issue in *Matter of Hoovler* was whether the County Court acted beyond its authority by ordering a prosecutor to disclose information that, as a matter of law, was not discoverable under any statutory provision within CPL article 240. *See id.* at 898-900. The Appellate Division answered that question in the affirmative, stating the rule succinctly: "[A] court exceeds its authority by ordering the People to make disclosure which they are not required to make pursuant to [CPL article 240]." *id.* at 899-900 (internal quotation marks omitted).

The cases cited as support in *Matter of Hoovler*, as well as the cases that have since cited *Matter of Hoovler* as support, have all applied that same rule to the same or similar facts and reached the same conclusion. *See Matter of Doorley v. Castro*, 160 A.D.3d 1381, 1382-1384 (4th Dep't 2018) (court exceeded its authority by ordering the prosecutor to disclose certain material because, the court "lacked any authority" under CPL article 240 to order the disclosure of that material); *Matter of Phillips*, 42 A.D.3d at 458-459 (court exceeded its authority by ordering a police officer to disclose certain material, because there was "no statutory right" under CPL article 240 for the disclosure of that material); *Matter of Brown*, 285 A.D.2d at 644 (court exceeded its authority by ordering the prosecutor to disclose certain material, because there was "no statutory right [under CPL article 240] entitling a defendant to disclosure of" that material); *Matter of Sacket*, 241 A.D.2d at 101-102 (court exceeded its authority by ordering the prosecutor to disclose

certain material, because the material that the court ordered to be disclosed was "far beyond that prescribed in CPL article 240"); *Matter of Catterson*, 202 A.D.2d at 422 (court exceeded its authority by ordering the prosecutor to disclose certain material, because "[n]othing contained in [CPL article 240] authorize[d] the [court's] directives"); *see also People v. Vega*, 57 Misc. 3d 1012, (Sup. Ct., Bronx County [Ralph A. Fabrizio, J.], 2017) (rejecting the defendant's argument that the court should order private individuals to open their home—the scene of the crime—to defense attorneys and investigators to photograph it, because there was "no authority in the CPL" for that relief).

But that rule does not apply here. The only thing that is "plain" is that *Matter of Hoovler* and the narrow rule it applied—a court exceeds its authority by ordering a prosecutor to make disclosure that is not authorized by any provision within CPL article 240—is inapplicable where, as here, Judge Costa did have statutory authority to impose sanctions and simply exercised that authority in a way that the District Attorney does not like. *Matter of Hoovler*, therefore, does not support the District Attorney's position.

In stark contrast to the factual scenarios presented in *Matter of Hoovler* and the related cases, this case does not implicate the now-repealed CPL article 240 or involve a court ordering a prosecutor to make disclosure. Instead, as discussed more fully in the memorandum of law in support, *see* memorandum of law in support at 8-15, this case involves Judge Costa exercising his statutorily authorized power pursuant to CPL article 245 gave Judge Costa the authority to issue sanctions for the District Attorney's discovery failings. *See* CPL 245.80(a) ("When material or information is discoverable under this article but is disclosed belatedly, the court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure."). Accordingly, the District Attorney's reliance on *Matter of Hoovler* is

misplaced.

If anything, the overarching rule that can be extracted from *Matter of Hoovler* actually belies the District Attorney's position. That general rule is, that a court acts in excess of its authority where there is no statutory basis for its conduct as a matter of law. *See Matter of Hoovler*, 143 A.D.3d at 898-900. But that clearly is not the case here. Again, as fully discussed in the memorandum in support, CPL article 245 expressly authorized Judge Costa to impose a discovery sanction upon his finding that Molina suffered "prejudice." *See* memorandum of law in support at 8-15. Judge Costa's finding of prejudice, a *discretionary determination*, cannot possibly be analogized to the conduct in *Matter of Hoovler* and the related cases, in which the courts ordered disclosure of material that was not discoverable *as a matter of law* under CPL article 240. *See Matter of Blumen v. McGann*, 18 A.D.3d 870, 870 (2d Dep't 2005) ("prohibition does not lie to review the exercise of discretion in criminal cases"); *Matter of Quackenbush v. Monroe*, 87 A.D.2d 720, 720 (3d Dep't 1982) (same), *lv. denied* 56 N.Y.2d 505 (1982). Indeed, given the purely discretionary nature of the prejudice determination underlying Judge Costa's statutorily authorized imposition of sanctions, it cannot be said that the District Attorney has a "clear right to relief" here; comparatively, where a court orders a prosecutor to disclose material that is not discoverable as a matter of law, as was the case in *Matter of Hoovler* and the related cases, the prosecutor has a "clear right to relief" in the form of not being ordered to disclose non-discoverable material. *Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988) ("prohibition is available only where there is a clear legal right").[1]

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[1] The District Attorney's attempt to analogize the facts of this case to those in *Matter of Holtzman* is unavailing. Opposition at 5-6. In *Matter of Holtzman*, the trial court completely "terminated" the prosecution "by entering a nonappealable trial order of dismissal on the merits." 71 N.Y.2d at 566, 575. By contrast, here, Judge Costa precluded the admission of certain evidence, leaving the prosecution intact.

B. The statute did not require Judge Costa to explain his prejudice determination.

Finally, contrary to the District Attorney's fleeting argument, *see* Opposition at 4, Judge Costa was not required to explain his prejudice determination any further than he did. The statute's plain language provides only that a finding of "prejudice" is a precondition to the imposition of discovery sanctions for belated discovery; there is no requirement that a court provide an in-depth explanation of its prejudice finding, much less explain it at all. CPL 245.80(1)(a). The legislature knows how to draft a CPL provision to impose a requirement upon a court to explain a decision. *See e.g.* CPL 530.13(4) ("Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection"); CPL 720.10(3) ("Where the court determines that the eligible youth is a youthful offender, the court shall make a statement on the record of the reasons for its determination"). The legislature's decision not to impose that requirement with respect to a court's prejudice determination and imposition of discovery sanctions is an indication that the exclusion was intentional. *See* McKinney's Cons Laws of N.Y., Book 1, Statutes § 74 ("the failure of the [l]egislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended"); *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 34 (2015) ("This statutory language makes clear that where the legislature intended to require [something], it knew how to do so, and any omission of such element is intentional").

In sum, the District Attorney does not actually allege that Judge Costa acted in excess of his authorized powers; instead, the District Attorney merely challenges Judge Costa's discretionary prejudice determination—a supposed pretrial error that is inadequate to warrant a writ of prohibition. *See Matter of Rush*, 68 N.Y.2d at 353.

II

The plain language of CPL article 245 provides that, although Judge Costa made a prejudice determination, that determination was not required to impose discovery sanctions for the District Attorney's discovery violations in Serrano's case

As discussed in the memorandum of law in support, the plain language of CPL article 245 authorized Judge Costa to impose sanctions for the District Attorney's discovery violations in Serrano's case, regardless of whether Serrano suffered prejudice. *See* memorandum of law in support at 10-11, 15-16. The District Attorney disagrees, arguing that prejudice was a precondition to the imposition of sanctions in Serrano's case. Opposition at 9-13. This Court should reject the District Attorney's argument because it is based on a fundamentally flawed reading of CPL article 245. Indeed, the District Attorney's position is plainly belied by the plain language of the CPL.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the [l]egislature." *Patrolmen's Bene. Assn. of City of N.Y. v. City of New York*, 41 N.Y.2d 205, 208 (1976). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998). In assessing a statute's plain language, the statue "must be construed as a whole," and its "various sections must be considered with reference to one another." *Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (2012). Indeed, "all parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and evert part and word thereof." *People v. Pabon*, 29 N.Y.3d 147, 152 (2016) (internal brackets and quotation marks omitted).

Judged by those standards, the plain language of CPL article 245 clearly authorized Judge

Costa to impose discovery sanctions in Serrano's case, irrespective of whether Serrano suffered prejudice. The District Attorney's discovery violations in Serrano's case were two-fold. First, Judge Costa determined that the District Attorney failed to disclose material that was required to be disclosed under CPL 245.20(1)(s). Second, Judge Costa determined that the District Attorney withheld material without following the requisite procedure set forth in CPL 245.10(1)(a)(iv)(A) for withholding material that the District Attorney believes is not discoverable—namely, notifying the defendant of its belief that the material is not discoverable and seeking leave of the court for a determination regarding the discoverability of the material.

The CPL provides that "[CPL] 245.10 and subdivision[] one of [CPL 245.20]"—the provisions that Judge Costa determined the District Attorney had violated—"*shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may result in application of any remedies or sanctions permitted for non-compliance with a court order under [CPL] 245.80.*" CPL 245.20(5) (emphasis added). According to CPL 245.80(2), entitled "Available remedies or sanctions," where there has been "a failure to comply with any discovery order," a court may "exclude evidence" or "preclude . . . a witness's testimony"—the sanction chosen by Judge Costa. That provision does not include the word "prejudice," much less make prejudice a precondition to the imposition of one of the available remedies or sanctions. Again, the legislature's silence in that regard is an indication that the exclusion was intentional. *See* McKinney's Cons Laws of N.Y., Book 1, Statutes § 74; *El-Dehdan*, 26 N.Y.3d at 34. The plain language of the CPL therefore makes clear that Judge Costa had the discretion to impose an appropriate sanction for the District Attorney's discovery violations in Serrano's case, regardless of whether Serrano suffered prejudice. *See Matter of Tall Trees Constr. Corp. v. Zoning Bd. Of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91 (2001) ("Where the language of a statute is clear

and unambiguous, courts must give effect to its plain meaning").

The only possible source for the District Attorney's assertion that a prejudice determination was a mandatory precondition to the imposition of sanctions in Serrano's case is CPL 245.80(1). But that provision has no application to Serrano's case. According to that provision, "When material or information is discoverable under this article *but is disclosed belatedly*, the court shall impose a remedy or sanction that is appropriate and proportionate to the *prejudice* suffered by the party entitled to disclosure." CPL 245.80(1) (emphasis added). The import of the provision's plain language is simple and straightforward: prejudice is a precondition to the imposition of sanctions only where the underlying discovery violation is premised on belated disclosure. As discussed, the District Attorney's discovery violations in Serrano's case were not premised on belated disclosure. Accordingly, the District Attorney's interpretation of CPL 245.80(1) and assertion that it is controlling must be rejected. *See Rodriguez v. City of New York*, 31 N.Y.3d 312, 318 (2018) (rejecting proposed statutory interpretation that was "at odds with the plain language of" the statute).[2]

In the end, this is a moot point. As discussed in the memorandum of law in support, even assuming, for the sake of argument, that a finding of prejudice to Serrano was a condition precedent to Judge Costa's imposition of discovery sanctions—which it was not for the reasons just discussed—Judge Costa nevertheless made a prejudice determination in Serrano's case. *See* memorandum of law in support at 15-16. Accordingly, for the reasons discussed above and in the

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[2] The District Attorney asserts that "there was no authorization for sanctions" because Judge Costa did not invoke the procedures set forth in CPL 245.35. Opposition affirmation at 11-12. But that provision does not impose any obligations on a court, much less impose mandatory obligations that a court must invoke in order to impose sanctions under CPL 245.80. Indeed, CPL 245.35 merely sets forth certain procedures that a court "may," in its "discretion," choose to employ to "facilitate" compliance with discovery or to "reduce or streamline litigation of any disputes about discovery."

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In the end, this is a moot point. As discussed in the memorandum of law in support, even assuming, for the sake of argument, that a finding of prejudice to Serrano was a condition precedent to Judge Costa's imposition of discovery sanctions—which it was not for the reasons just discussed—Judge Costa nevertheless made a prejudice determination in Serrano's case. *See* memorandum of law in support at 15-16. Accordingly, for the reasons discussed above and in the

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memorandum of law in support, the District Attorney is nevertheless not entitled to a writ of prohibition in Serrano's case. *See id.* at 8-16.

CONCLUSION

For all of these reasons, and for the reasons set forth in the Spolzino affirmation and the memorandum of law in support, Judge Costa respectfully requests that the Court dismiss the petition.

ABRAMS FENSTERMAN, LLP
Attorneys for Respondent Judge Matthew J. Costa

By: _____
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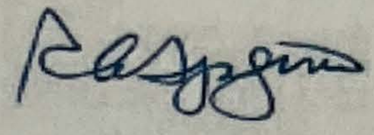
(914) 607-7010

Dated: White Plains, New York
July 26, 2022

CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Robert A. Spolzino, an attorney at law licensed to practice in the State of New York, certify that this document contains 3029 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.



Robert A. Spolzino

SC

7/27

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.

REPLY AFFIRMATION

Index No. 01356/2022

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ROBERT A. SPOLZINO, an attorney duly admitted to practice law in the State of New York, affirms the following to be true under the penalty of perjury:

1. I am a member of the firm of Abrams Fensterman, LLP, the attorneys for respondent Judge Matthew J. Costa. I submit this affirmation in reply to the opposition submitted by the District Attorney in response to Judge Costa's motion to dismiss ("opposition") and in further support of Judge Costa's motion to dismiss based upon my review of the petition filed by the District Attorney under CPLR article 78 and the documents submitted by the District Attorney in support of the petition.

2. The District Attorney concedes in her opposition that the "entire basis" for her petition is that Judge Costa's discretionary determinations that the defendants in both underlying cases were prejudiced was wrong. Opposition at 2, 4-8. The District Attorney's position, although framed as an argument that Judge Costa acted "in excess of his statutory authority," *id.*, is nothing more than an attempt to seek collateral review of an alleged pre-trial error. For the reasons set forth in my affirmation ("Spolzino affirmation") and the memorandum of law submitted in support of Judge Costa's motion to dismiss ("memorandum of law in support"), that is not a cognizable basis for a writ of prohibition. *See* Spolzino affirmation at 1-2; memorandum of law in support at 8-16.

The petition, therefore, should be dismissed without addressing the merits.

3. The District Attorney's opposition relies heavily on *Matter of Hoovler v. De Rosa*, 143 A.D.3d 897 (2d Dep't 2016). Opposition at 3. That reliance is misplaced because the issue before the Appellate Division in *Hoovler* was fundamentally different than the issue before the Court here.

4. The issue in *Matter of Hoovler* was whether the trial court had acted beyond its authority by ordering a prosecutor to disclose the full names of the individuals whose initials had appeared on certain laboratory reports. *See* 143 A.D.3d at 898-900. That information, as a matter of law, was not discoverable under any statutory provision within the now-repealed CPL article 240. *See* 143 A.D.3d at 898-900. The Appellate Division therefore granted the petition, holding that "a court exceeds its authority by ordering the People to make disclosure which they are not required to make pursuant to [CPL article 240]." *Id.* (internal quotation marks omitted).

5. This case is easily distinguishable from *Matter of Hoovler*. In stark contrast to the factual scenario there, this case does not involve a court ordering a prosecutor to make disclosure that is not authorized by statute as a matter of law. Instead, this case involves Judge Costa's exercise of his undisputed and statutorily-authorized discretionary power under CPL article 245 to issue sanctions for the District Attorney's failure to disclose. *See* CPL 245.80(a) ("When material or information is discoverable under this article but is disclosed belatedly, the court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure"). Accordingly, *Matter of Hoovler* is inapplicable here. Indeed, Judge Costa's finding of prejudice, a discretionary determination authorized by CPL article 245, cannot possibly be analogized to the conduct in *Matter of Hoovler*, in which the court ordered disclosure of material that was not discoverable as a matter of law under any provision of the now-repealed CPL article

240.

6. The District Attorney also argues that prejudice was a precondition to the imposition of sanctions in respondent Serrano's case. But that argument is belied by the plain language of CPL article 245. In Serrano's case, Judge Costa concluded that the District Attorney committed two discovery violations. First, Judge Costa determined that the District Attorney failed to disclose material that was required to be disclosed under CPL 245.20(1)(s). Second, Judge Costa determined that the District Attorney withheld material without following the requisite procedure set forth in CPL 245.10(1)(a)(iv)(A) for withholding material that the District Attorney believes is not discoverable. The CPL provides that "[CPL] 245.10 and subdivision[] one of [CPL 245.20]"—the provisions that Judge Costa determined the District Attorney had violated—"*shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may result in application of any remedies or sanctions permitted for non-compliance with a court order under [CPL] 245.80.*" CPL 245.20(5) (emphasis added). According to CPL 245.80(2), entitled "Available remedies or sanctions," where there has been "a failure to comply with any discovery order," a court may "exclude evidence" or "preclude . . . a witness's testimony"—the sanction chosen by Judge Costa. That provision does not include the word "prejudice," much less make prejudice a precondition to the imposition of one of the available remedies or sanctions. The plain language of the CPL therefore makes clear that Judge Costa had the discretion to impose an appropriate sanction for the District Attorney's discovery violations in Serrano's case, regardless of whether Serrano suffered prejudice. This is ultimately a moot point, though, because, even assuming, for the sake of argument, that a finding of prejudice to Serrano was a condition precedent to Judge Costa's imposition of discovery sanctions—which it was not—Judge Costa made a prejudice determination in Serrano's case, despite not having to, and as

discussed, the District Attorney's challenge to that determination cannot serve as a basis for a writ of prohibition.

7. A true and correct copy of the opposition is attached hereto as exhibit A.

8. A true and correct copy of the Spolzino affirmation is attached hereto as exhibit B.

9. A true and correct copy of the memorandum of law in support is attached hereto as exhibit C.

WHEREFORE, affirmant respectfully requests that Judge Costa's motion to dismiss the petition be granted in all respects.

Dated: White Plains, New York
July 26, 2022

Robert A. Spolzino

Exhibit A

Exhibit B

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

MIRIAM E. ROCAH, as District Attorney of Westchester County

Petitioner,

-against-

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

Respondents.

----------X

Index No.:
1356-2022

AFFIRMATION IN OPPOSITION TO RESPONDENT COSTA'S MOTION TO DISMISS

(Susan Cacace, J.)

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

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

1. I am an Assistant District Attorney of Westchester County and counsel

for the Petitioner, Westchester County District Attorney Miriam E. Rocah, and I make this affirmation in opposition to Respondent Costa's "Motion to Dismiss the Petition" in the above-captioned matter.

2. The relevant facts and procedural history are set forth in the Petitioner's initial filings, including her Verified Petition, Affirmation in Support, and Memorandum of Law. To the degree Respondent Costa contradicts the Petitioner's factual statement in his Statement of Facts, the Petitioner maintains the accuracy of the statements in her opening papers.

The entire premise of the Petition is that Respondent Costa acted far in excess of his statutory authority; there was no concession to the contrary.

3. Respondent Costa claims that the Petition should be dismissed because the Petitioner "concedes" Respondent Costa has jurisdiction over discovery disputes and "statutory authority to issue sanctions for discovery violations" (Resp. Costa's Mem. of Law at 1, 10, 12). But Respondent Costa's selective quotation of the Petioner's papers leaves out critical language stressing that he is only authorized to issue sanctions "where appropriate" (Pet. Mem. of Law at 2). The entire basis of the Petition is that sanctions are only allowed where the supposedly aggrieved party shows that it was prejudiced, and that here, where there was no prejudice, there was no authorization – particularly for the excessive sanctions imposed by Respondent Costa, that effectively dismissed serious driving-while-intoxicated charges (*see* Petitioner's Memorandum of Law at 2-3 ["Summary of

Argument"], 16-22, 28-29) (*see* CPL 245.80 [1][a]; *see, e.g.*, *People v Jateen*, 2022 NY Slip Op 50280[U] at *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2022]; *People v White*, 72 Misc3d 1002, 1007 [Sup Ct, Bx Cty 2021]; *People v Nelson*, 67 Misc3d 313, 316 [Cty Ct, Franklin Cty 2020]).

4. Although Respondent Costa may have general jurisdiction over discovery disputes, it does not mean he has unrestrained authority in handling them (*see* Petitioner's Memorandum of Law at 2). The distinction was made plain by the Appellate Division, Second Department in *Matter of Hoovler v De Rosa* (143 AD3d 897, 900 [2d Dept 2016]). In *Hoovler*, where the People sought a writ of prohibition in relation to a discovery order, the Appellate Division explained that while the Respondent judge "clearly has jurisdiction over the subject matter, as he has been assigned to preside over the defendant's criminal action," the "relevant inquiry" was "whether or not his actions exceeded his authorized powers" (*id.* at 900). Answering that question positively, the Court granted the requested writ of prohibition (*id.* at 900-01).

Respondent Costa acted far in excess of his statutory authority in Respondent Molina's case, and the Petitioner has a clear legal right to relief.

5. Respondent Costa uses his discovery motion "conclu[sion]" that Respondent Molina "was prejudiced" as a springboard to argue the Petitioner is simply "challeng[ing] the correctness of Judge Costa's prejudice determination." He asserts that whether his prejudice finding is "right or wrong," such a

disagreement "cannot serve as the basis for the remedy of prohibition" (Resp. Costa's Mem. of Law at 11-13).

6. But describing Respondent Costa's decision as including a "prejudice determination" is far too generous. He merely stated, in conclusory fashion and without explanation, that Respondent Molina had "shown under the totality of the circumstances that [he] was prejudiced" (1/4/2022 Decision and Order at 4 [Petitioner's Mem. of Law, Exhibit 4]). All the same, there was no prejudice. Explained in the Petitioner's opening papers (Petitioner's Mem. of Law at 19-23), the *Molina* matter involved potential cross-examination materials that were disclosed to Respondent Molina before the People even filed their discovery motion response, and long before any testimonial proceedings; Respondent Molina was not hampered in his use of those materials (*see People v Cortijo*, 70 NY2d 868, 869-70 [1987]; *People v Sanchez*, 144 AD3d 1179, 1180 [2d Dept 2016]; *People v Robertson*, 192 AD2d 682, 682 [2d Dept 1993]; *People v Burks*, 192 AD2d 542, 542 [2d Dept 1993]; *People v Florez*, 74 Misc3d 1222[A] at *13 [Sup Ct, Nassau Cty 2022]; *People v Cano*, 71 Misc3d 728, 739-40 [Sup Ct, Queens Cty 2020]; *People v Lustig*, 68 Misc3d 234, 248, n.6 [Sup Ct, Queens Cty 2020]).

7. Respondent Costa's argument is erroneous because it casts a blind eye to the *consequence* of the lack of prejudice. A judge only receives statutory authority to issue a discovery violation sanction under CPL 245.80 where prejudice exists –

as Respondent Costa recognizes (*see* Resp. Costa's Mem. of Law at 10-11 ["Judge Costa had the discretion to impose an appropriate sanction *for the prejudice suffered by Molina*"] [emphasis added]) (*see* CPL 245.80[1][a]; *see, e.g.*, *Jateen*, 2022 NY Slip Op 50280[U]; *White*, 72 Misc3d at 1007; *Nelson*, 67 Misc3d at 316). Without prejudice, there is no such authorization. The Petitioner is not merely disagreeing with a legal ruling, but showing a lack of authority.

8. Respondent Costa is therefore wrong that "[t]his is not a case involving a judge taking action beyond that which is authorized by statute" (Resp. Costa's Mem. of Law at 13); it is exactly that. Respondent Costa leapt far outside his authorized powers by issuing a preclusion order absent any prejudice, that barred the People from introducing any testimony of the lone on-scene State Trooper or any evidence he obtained – effectively terminating the prosecution. Comparatively discussed by the Court of Appeals in *Matter of Holtzman v Goldman* (71 NY2d 564 [1988]), while prohibition will not lie simply to correct trial errors, "abuses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself proper" (*id.* at 569). In *Holtzman*, where the lower court dismissed the charges against the defendant, the Court explained that that determination "if erroneous, was not merely a legal mistake, it related to the power of the court and affected the entire proceeding in the most conclusive manner; it terminated the case" (*id.* at 570). Respondent

Costa's unauthorized preclusion order was likewise not simply a legal error, but in effect ended the case against Respondent Molina.

9. And so, Respondent Costa deviates course to posit there is no clear legal right to relief, as Respondent Molina had claimed prejudice in the form of some general delay in pretrial hearings and motion practice (*see* Resp. Costa's Mem. of Law at 14). But discussed in the Petitioner's opening papers (*see* Petitioner's Memorandum of Law at 21-22), delay in disclosure does not alone constitute prejudice (*see People v Waksal*, 75 Misc3d 129[A] [App Term, 2d Dept, 9th & 10th Jud Dists 2022] [assuming discovery violation but finding no prejudice where materials had been belatedly disclosed]). CPL 245.80 already contemplates a situation in which items were "disclosed belatedly," yet still requires prejudice before a sanction can be imposed (*see* CPL 245.80[1][a]) – language that would be entirely superfluous, if delay alone were prejudicial. By equating the People's alleged discovery violation (late disclosure) with prejudice, Respondent Costa conflated the two concepts and wrote prejudice out of the controlling statutory framework.

10. Showing the irrationality of Respondent Costa's belief that a delay can itself constitute prejudice, a party receiving belatedly disclosed materials "shall" in all events, and even without showing prejudice, be afforded "reasonable time to prepare and respond to the new material" (CPL 245.80[1][a]). Even where

prejudice is demonstrated, a "continuance" is a potential *remedy* for belated disclosure (CPL 245.80[2]). In other words, "delay" in the form of adjourned proceedings is a possible *solution* for a discovery violation; it is not *per se* prejudice.

11. Contrary to Respondent Costa's delay-equals-prejudice theory and fallback assertion that the Petitioner cannot demonstrate a clear legal right to relief, the *Molina* matter concerned potential impeachment material – disciplinary records of the on-scene State Trooper. And the meaning of prejudice with regard to late receipt of such materials is longstanding and well known. It is firmly cemented that a defendant is not prejudiced by the tardy disclosure of such evidence if he obtains it in time to use it effectively – which Respondent Molina did here, as noted (*see Cortijo*, 70 NY2d at 869-70; *Sanchez*, 144 AD3d at 1180; *Robertson*, 192 AD2d at 682; *Burks*, 192 AD2d at 542; *Florez*, 74 Misc3d 1222[A]; *Cano*, 71 Misc3d at 739-40; *Lustig*, 68 Misc3d at 248, n.6). That Respondent Costa strayed from the well-rooted definition of prejudice in the context of potential impeachment material and formulated his own, entirely new concept of prejudice emphasizes that he acted in excess of his authorization.

12. Nor does Respondent Costa's citation to the lone, non-controlling case of *People v Rodriguez* (73 Misc3d 411 [Sup Ct, Queens Cty 2021]) adequately support his view that some obscure "delay" can provide the prejudice upon which

to rest a sanction (*see* Resp. Costa's Mem. of Law at 14). *Rodriguez* did not address impeachment material; and in that case, the People's late disclosure of a search warrant affidavit not only compounded trial postponements, but prevented the defense from moving to controvert the warrant during pre-trial omnibus motion practice – an obvious impact on the defendant's *use* of the materials. Even believing *Rodriguez* stands for the proposition that prejudice can be shown by some lengthy delay in trial proceedings incomparable to the disclosure delay herein, it is a non-controlling outlier in contrast to the above-cited, controlling authority defining prejudice in the context of belatedly disclosed impeachment material as a negative impact on one's use of that evidence.

13. Next, Respondent Costa tries to contort the Petitioner's argument into a simple disagreement with his exercise of discretion, stating that his "determination that preclusion was an appropriate sanction constituted a sound exercise of discretion, from which prohibition cannot lie" (Resp. Costa's Mem. of Law at 14). But the Petitioner's claim in this special proceeding is not that the imposed sanction was incompatible with the level of harm suffered by Respondent Molina – which it was, since no harm existed – or that Respondent Costa abused his discretion in selecting that particular sanction over something less severe. Again, because there was no conceivable prejudice, Respondent Costa exceeded his authority by issuing a sanction that effectively dismissed the case (*see* CPL

245.80[1][a]) (*see* Petitioner's Memorandum of Law at 2 ["Respondent Costa exceeded his statutory authority by precluding evidence in response to alleged discovery violations by the People, although Respondents Molina and Serrano were not prejudiced by the supposed violations"], 3, 16-22, 28-29).

Prejudice was required for the imposition of sanctions in Respondent Serrano's case – as Respondent Costa recognized below, despite his view at this time; Respondent Costa acted outside his authorized powers by imposing sanctions where there was no determination the at-issue materials were discoverable, let alone that the timing of their disclosure was prejudicial.

14. With regard to the *Serrano* matter, Respondent Costa argues he was permitted to sanction the People under CPL 245.80(2) "regardless of whether Serrano suffered prejudice," since they failed to produce certain requested materials without seeking a discoverability ruling from the court (Resp. Costa's Mem. of Law at 15).[1] However, CPL 245.20(5), which allows a party to move for a protective order in relation to non disclosure, does not authorize sanctions for a party's failure to do so (*see* CPL 245.20[5]). Nor, to whatever degree Respondent Costa believes differently (*see* Resp. Costa's Mem. of Law at 15-16), can CPL

[1] Respondent Costa states that the People failed to produce various manuals and the Datamaster operator's certificate "without following the procedural steps for withholding those materials and challenging their discoverability" (Resp. Costa's Mem. of Law at 15). For the sake of clarity, below, Respondent Serrano requested that the People produce certain manuals, and otherwise argued that the People had not met their automatic discovery obligations by not producing the correct evidence related to the Datamaster operator's certificate and gas chromatography records. Respondent Costa found that the People had not produced adequate materials in relation to the operator's certificate and gas chromatography records, and faulted the People for not disclosing the requested manuals without attempting to reach an accommodation with Respondent Serrano or consulting the court (Petitioner's Mem. of Law at 10-13).

245.80(2) be contorted into a standalone provision authorizing sanctions under such circumstances. CPL 245.80(1) is entitled "Need for remedy or sanction," and thus addresses the circumstances in which a sanction can be issued; CPL 245.80(2), by contrast, is entitled "Available remedies or sanctions," and thus sets forth a non-exhaustive list of potential remedies to utilize when there is a "Need" as set forth in CPL 245.80(1) (*see* CPL 245.80[1], [2]) (*see People v Diaz*, 62 AD3d 157, 164-65 [2d Dept 2009], *aff'd* 15 NY3d 40 [2010] [legislative intent can be gleaned from reading a statute as a whole, reading and construing its parts together and, where possible, harmonizing all parts]). CPL 245.80(2) does not itself authorize sanctions (*see People v Benitez*, 73 Misc3d 804, 807-08 [Sup Ct, NY Cty 2021] [explaining that the defendant's "complaint about the COC is nothing more than a garden-variety complaint that there has been a discovery violation," and that "*[t]he remedies* for discovery violations such as this are contained in CPL 245.80 (2)"] [emphasis added]; *People v Bruni*, 71 Misc3d 913, 920 [Cty Ct, Albany Cty 2021] [describing CPL 245.80[2] as providing "[s]everal permissible sanctions/remedies . . . for delayed, missing, or destroyed discovery material"]).

15. Still, standing alone, CPL 245.80(2) states that a court may "make such other order as it deems just under the circumstances" – incorporating into the statute the concept that any sanction should be proportional to the prejudice

suffered (CPL 245.80[2]) (*see Benitez*, 73 Misc3d at 808, n.2 ["The remedies and sanctions contained in section 245.80 are just that: remedies. They are intended to mitigate the prejudice that might ensue to one side due to the other side's discovery violation."]). Recent amendments to CPL 245.80(2) underscore that any sanction should be commensurate with the harm present – and therefore, that no sanction is warranted if no harm exists. Added to the provision, and effective May 9, 2022, was the instruction that a court may only order dismissal of charges "provided that, after considering all other remedies, dismissal is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure" (*id.*). Yet in the *Serrano* matter – just as in the *Molina* matter – Respondent Costa issued a preclusion order absent prejudice or authorization, that effectively terminated the prosecution of serious charges.

16. Respondent Costa further colors the *Serrano* matter as involving "an outright failure to disclose discoverable materials" (*see* Resp. Costa's Mem. of Law at 11), apparently trying to distinguish it from one involving late disclosure. But that assertion hits upon a fundamental reason he lacked authority to issue sanctions – namely, he left several critical threshold questions unresolved. Discussed in the Petitioner's opening papers (*see* Petitioner's Mem. of Law at 27), Respondent Costa did not, for instance, order disclosure of the materials and inspect them to gauge their relevance. He did not order the parties to confer, hold

a discovery compliance conference, or institute any other measure to facilitate the goals of discovery (*see* CPL 245.35[1], [2], [4]). Instead, he failed to settle preliminary issues including whether the materials even existed, were in the People's control, had been lost or destroyed, or, of course, contained any information that would render their non- or late disclosure prejudicial (*see People v Aquino*, 74 Misc3d 1147, 1154 [Sup Ct, NY Cty 2022] [noting in relation to CPL 245.80[1] that the "defendant has suffered no prejudice from any potential failure to disclose statements that he is ultimately unable to show were ever made"]). Absent such information, there was no authorization for sanctions. Respondent Costa could not even determine what statutory provision might allow him to issue such a remedy.

17. At any rate, the fabricated distinction between late and non-disclosed evidence makes little difference, since in all events prejudice is a prerequisite to sanctions. Recently explained by the Utica City Court in *People v Velardi* (2022 NY Slip Op 22198 [Utica City Ct 2022]), a defendant bears the "burden of demonstrating prejudice by the late *or non-disclosure*" of materials, and a court cannot "until that time, impose a sanction or remedy" (emphasis added) (*see also People v Perez*, 75 Misc3d 1205[A] at *5, n.5 [Crim Ct, Bx Cty 2022] ["The issue of prejudice should only be considered when determining whether the People should be sanctioned or a remedy imposed under CPL § 245.80 for late disclosure

or non-disclosure"] [emphasis added]; *People v Ramirez*, 2022 NY Slip Op 22194 at *2 [Crim Ct, Kings Cty 2022).

18. Contrary to Respondent Costa's bare assertion otherwise, it is understood that a sanction can only be issued under CPL 245.80 upon a showing of prejudice (*see, e.g., Jateen*, 2022 NY Slip Op 50280[U] at *2; *People v Pierna*, 74 Misc3d 1072, 1089-90 [Crim Ct, Bx Cty 2022]; *Perez*, 75 Misc3d 1205[A] at *5, n. 5; *White*, 72 Misc3d at 1007; *Nelson*, 67 Misc3d at 315). And here, where Respondent Serrano intended to use the training manuals, if at all, to cross-examine officer witness, and presumably intended to use any Datamaster operator certification and gas chromatography records to challenge the introduction or reliability of his breath test results, no prejudice could be shown at the time sanctions were imposed – prior to any pre-trial hearings or trial (*see* Petitioner's Mem. of Law at 23-24).

19. Boiled down, without prejudice, Respondent Costa had no authority to sanction the People. And his current, newly minted position to the contrary stands in direct contrast to the reasoning of his discovery decision – in which he recognized that prejudice was required. Respondent Costa explained that "[w]hen information that is discoverable is not disclosed and in violation of Article 245, CPL 245.80(1) provides that the Court may impose an appropriate remedy or sanction" (4/4/2022 Decision and Order at 4 [Petitioner's Memorandum of Law,

Exhibit 8]). He thereafter relayed that CPL 245.80(2) offers a list of possible remedies, noting that "[i]n pertinent part, CPL 245.80(2) provides that the Court may" preclude or strike testimony, or exclude evidence (*id.*). Pivotally, Respondent Costa then noted – incorrectly and in wholly conclusory fashion, as discussed in the Petitioner's opening papers (*see* Petitioner's Memorandum of Law at 22, 24-25, 27-28) – that "[d]efendant has shown under the totality of the circumstances that it was prejudiced" (4/4/2022 Decision and Order at 4).

* * *

20. Confronted with the People's reargument motion in the *Molina* matter, Respondent Costa had nearly two months to justify his discovery decision by articulating some type of prejudice, but issued no decision whatsoever; and even now, he merely accepts Respondent Molina's own "delay" theory of prejudice, contrary to controlling authority. And in the *Serrano* matter, instead of even attempting to describe the prejudice claimed in his decision, Respondent Costa now resorts to incorrectly arguing that prejudice was unnecessary. In both matters, Respondent Costa's authority to sanction the People for a discovery violation hinged on the existence of prejudice. Despite no prejudice, or authority, being present, he issued severe preclusion orders that essentially concluded the prosecution of serious driving-while-intoxicated charges.

WHEREFORE, for the reasons set forth above as well as in the Petitioner's Verified Petition and Memorandum of Law, the Petitioner respectfully requests that this Court deny Respondent Costa's motion to dismiss the Petition and grant the relief requested in the Petitioner's Order to Show Cause and Verified Petition.

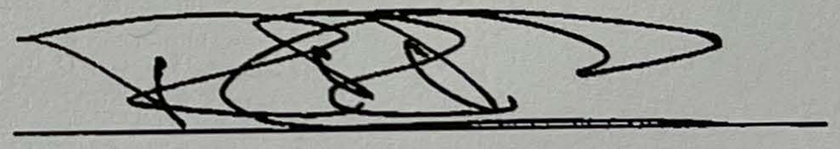
Dated: White Plains, New York
July 12, 2022

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

CERTIFICATION

BRIAN R. POULIOT, an attorney duly admitted to practice law before the courts of the State of New York, hereby certifies pursuant to 22 NYCRR §§ 202.8-b(a), (b) that the foregoing affirmation consists of 3,241 words, excluding any captions, table of contents, table of authorities, and signature block. The aforesaid word count was determined by using the word count of the word-processing system used to prepare the document.

Dated: White Plains, New York
July 12, 2022



BRIAN R. POULIOT

Exhibit B

Exhibit C

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.

AFFIRMATION

Index No. 01356/2022

ROBERT A. SPOLZINO, an attorney duly admitted to practice law in the State of New York, affirms the following to be true under the penalty of perjury:

1. I am a member of the firm of Abrams Fensterman, LLP, the attorneys for respondent Judge Matthew J. Costa. I submit this affirmation in support of Judge Costa's motion to dismiss based upon my review of the petition filed by the District Attorney under CPLR article 78 and the documents submitted by the District Attorney in support of the petition. True and correct copies of the petition and the supporting documents are attached as exhibit A.

2. This is a proceeding pursuant to CPLR article 78 in which the District Attorney seeks a writ of prohibition to enjoin Judge Costa from enforcing those portions of two discovery orders, one entered in the case of respondent Michael Molina and one entered in the case of respondent Gustavo Villamares Serrano, which precluded the District Attorney from offering certain evidence in those cases as a result of the District Attorney's failure to comply with the discovery obligations under CPL article 245.

3. For the reasons more fully set forth in the accompanying memorandum of law, the petition should be dismissed because it fails to state a valid basis for a writ of prohibition.

4. A writ of prohibition enjoining a court from taking a particular action lies only when

the court is acting or threatening to act either without jurisdiction or beyond its authorized powers.

In each case at issue here, Judge Costa had jurisdiction pursuant to CPL article 245 over the discovery dispute, as well as authority to issue discovery sanctions for the District Attorney's noncompliance with the discovery requirements. Judge Costa therefore acted in accord with his statutory authority by imposing sanctions for the discovery violations in each case.

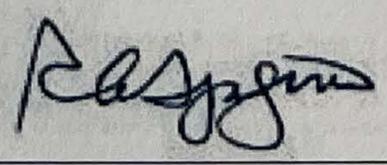
5. The District Attorney, in fact, concedes that Judge Costa had jurisdiction over the discovery disputes and was authorized by statute to impose sanctions for discovery violations in each case. Indeed, the plain language of CPL 245.80 makes clear that Judge Costa had the discretion to impose sanctions for discovery violations. The District Attorney nevertheless seeks a writ of prohibition enjoining Judge Costa from acting in accordance with his legal authority and enforcing the statutorily authorized sanctions.

6. The petition, in sum and substance, argues that a writ of prohibition lies here because Judge Costa's decision to impose discovery sanctions was wrong—not because Judge Costa acted in excess of his powers by imposing discovery sanctions. The District Attorney's position, although framed as an argument that Judge Costa acted beyond his authority, is nothing more than an attempt to seek collateral review of an alleged pre-trial error. This is not a cognizable basis for a writ of prohibition.

7. For all these reasons, as more fully set forth in the accompanying memorandum of law, the petition should be dismissed.

WHEREFORE, affirmant respectfully requests that respondent's motion to dismiss the petition be granted in all respects.

Dated: White Plains, New York
July 1, 2022



Robert A. Spolzino

Exhibit C

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.

Index No. 01356/2022

MEMORANDUM OF LAW OF RESPONDENT JUDGE MATTHEW J. COSTA IN SUPPORT OF HIS MOTION TO DISMISS THE PETITION

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PRELIMINARY STATEMENT

Respondent Judge Matthew J. Costa respectfully submits this memorandum of law in support of his motion to dismiss the petition.

SUMMARY OF ARGUMENT

This is a proceeding pursuant to CPLR article 78 in the nature of prohibition to enjoin Judge Costa from enforcing those portions of two orders, one entered in the case of respondent Michael Molina and one entered in the case of respondent Gustavo Villamares Serrano, which preclude the District Attorney from offering certain evidence in each of those cases as a result of the District Attorney's failure to comply with her discovery obligations under CPL article 245.

A writ of prohibition is an extraordinary remedy that is available only in rare cases. This is not one of them. Prohibition – enjoining a court from taking a particular action – is available only where the court is acting or threatening to act either without jurisdiction or in excess of its authorized powers. Prohibition does not lie simply to seek collateral review of claimed errors by the trial court. That, however, is exactly what the District Attorney seeks here.

In each case here, Judge Costa indisputably had jurisdiction over the discovery disputes and the statutory authority under CPL article 245 to sanction the District Attorney's Office for noncompliance with the statutory requirements. Exercising that authority here, Judge Costa issued a statutorily permitted sanction for the District Attorney's violations of the discovery requirements in each case. Judge Costa plainly acted within his statutory authority in doing so. Accordingly, prohibition does not lie.

The District Attorney does not dispute that Judge Costa had jurisdiction to pass on the discovery issues or that Judge Costa had the statutory authority to issue sanctions for discovery violations. In fact, the District Attorney concedes those indisputable facts. Instead, the sole basis

for the petition is that the District Attorney disagrees with Judge Costa's discretionary decision to impose a sanction. In other words, the District Attorney claims that she is entitled to a writ of prohibition because Judge Costa's decision to impose a sanction was wrong—not because Judge Costa acted beyond his statutory authority.

At bottom, the District Attorney is using this CPLR article 78 proceeding to seek collateral review of an alleged pretrial error. This is precisely the type of claim that cannot serve as the basis for a writ of prohibition. Because the District Attorney cannot demonstrate that Judge Costa acted beyond his authorized powers, and because the District Attorney cannot demonstrate a clear legal right to enjoin Judge Costa from enforcing his statutorily authorized discovery sanction, the District Attorney has failed to allege a cognizable claim for a writ of prohibition. Thus, this Court must dismiss the petition pursuant to CPLR 3211 (a) (7) and 7804 (f).

STATEMENT OF FACTS

A. Respondent Michael Molina's case.

On June 11, 2021, State Trooper Angelo Fortune pulled over respondent Michael Molina in New Rochelle for driving without his headlights on. After Molina failed three field sobriety tests, Trooper Fortune arrested him and transported him to the State Police Barracks, where he refused a chemical breath test.

On July 2, 2021, the trial court arraigned Molina on various charges, including driving while intoxicated. *See* Vehicle and Traffic Law § 1192 (3). Molina pleaded not guilty, and Judge Costa adjourned the case to July 27, 2021, for the District Attorney to comply with her statutory discovery obligations. Come that date, the District Attorney failed to file a certificate of compliance and declare her readiness for trial. Judge Costa adjourned the case to August 10, 2021.

On July 28, 2021, the District Attorney provided Molina with various discovery materials,

including a "Member Resume" for Trooper Fortune. The resume indicated, among other things, that Trooper Fortune had been the subject of two "founded" complaints resulting in disciplinary action against him: (1) a complaint stemming from a 2020 incident where Fortune unlawfully arrested someone for driving while intoxicated; and (2) a complaint stemming from a 2018 incident where Fortune improperly inventoried an impounded vehicle. The same day, the District Attorney filed a certificate of compliance and statement of readiness.

On August 10, 2021, Judge Costa adjourned the case to September 30, 2021 for pretrial hearings and for Molina to review the discovery provided by the District Attorney and to have the opportunity to file a motion objecting to the certificate of compliance.

By notice of objection and affirmation dated September 28, 2021, Molina moved for an order determining that the District Attorney's certificate of compliance and statement of readiness were invalid on ground that the District Attorney failed to comply with the mandatory discovery requirements. Specifically, Molina argued, in pertinent part, that the District Attorney failed to disclose the entirety of Trooper Fortune's disciplinary file, in violation of CPL 245.20 (1)(k)(iv), which requires the prosecution to turn over expeditiously all evidence that tends to impeach the credibility of a testifying prosecution witness.

On November 5, 2021, prior to filing its opposition to Molina's motion, the District Attorney provided Molina with some of the necessary discovery that it had failed to turn over three months earlier, when the certificate of compliance was filed. This discovery included: (1) documentation, including a "Letter of Censure," regarding the 2020 incident involving Fortune unlawfully arresting someone; and (2) documentation regarding the 2018 incident involving Fortune improperly inventorying an impounded vehicle.

On November 9, 2021, still prior to filing its opposition, the District Attorney filed a

supplemental certificate of compliance and statement of readiness. The next day, again prior to filings its opposition papers, the District Attorney turned over more of the mandatory discovery regarding Trooper Fortune's disciplinary record that was not disclosed at the time of filing the initial certificate of compliance. Specifically, the District Attorney supplied Molina with: (1) a 2018 complaint asserting that Trooper Fortune had conducted an inappropriate search of a female arrestee's person, in which he touched the arrestee's "vaginal region"; and (2) a 2015 complaint asserting that Fortune had behaved disrespectfully toward the victim of a car accident. The same day, the People filed another supplemental COC and statement of readiness.

After providing these four additional discovery packages containing impeachment material with respect to Trooper Fortune, by affirmation dated November 11, 2021, the District Attorney opposed Molina's motion. The District Attorney argued, in pertinent part, that the court should deny Molina's motion because the District Attorney exercised due diligence and made a good faith effort to comply with its discovery obligations prior to the filing of its original certificate of compliance. Moreover, the District Attorney argued that sanctions were inappropriate for the untimely disclosure of the impeachment material, because the disclosure of that material, although belated, occurred prior to any hearing or trial and therefore Molina could not have suffered any prejudice.

In a reply affirmation dated December 1, 2021, Molina reiterated the argument that the District Attorney's three-month-late disclosure of impeachment material constituted a violation of CPL 245.20 (1)(k)(iv). Molina further argued that his right to a speedy trial was prejudiced by the District Attorney's untimely disclosure because it delayed both the pretrial hearings and the filing of the instant motion.

In a written decision and order dated January 14, 2022, Judge Costa concluded that the

District Attorney was required by CPL 245.20(1)(k)(iv) to disclose to Molina all materials regarding Trooper Fortune's disciplinary record as soon as was practicable, and that the District Attorney's failure to disclose those materials until November 10, 2021, three months after the filing of the initial certificate of compliance, was a belated disclosure in violation of the automatic discovery requirements. For that violation, Judge Costa determined that a discovery sanction was appropriate because, based on the totality of the circumstances, Molina had demonstrated that he was prejudiced by the District Attorney's delayed disclosure. Pursuant to his discretionary authority to impose appropriate discovery sanctions under CPL 245.80, Judge Costa precluded the District Attorney from introducing the testimony of Trooper Fortune and any evidence procured by Trooper Fortune.[1]

B. Respondent Gustavo Villamares Serrano's case.

On October 1, 2021, respondent Gustavo Villamares Serrano was involved in a motor vehicle accident in New Rochelle. Police responded to the scene and subjected Serrano to three field sobriety tests, including the horizontal gaze nystagmus test ("HGN test"), all of which he failed. The police arrested Serrano. Serrano then submitted to a breath test, which a police officer administered using a "Datamaster" machine. The test revealed that Serrano's blood alcohol content was 0.16.

On November 22, 2021, the court arraigned Serrano on several violations of the Vehicle and Traffic Law, including driving while intoxicated and per se driving while intoxicated. *See* Vehicle and Traffic Law § 1192 (2)-(3). Serrano pleaded not guilty, and the court adjourned the matter for the District Attorney to comply with the mandatory discovery obligations.

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[1] By notice of motion and affirmation dated February 22, 2022, the District Attorney moved for leave to reargue Judge Costa's decision. Judge Costa has not yet decided the motion. The order to show cause in this proceeding has stayed all proceedings pending before Judge Costa regarding Molina's case, including the District Attorney's motion for leave to reargue.

Beginning on November 24, 2021, the District Attorney began serving Serrano with discovery packages. On December 6, 2021, Serrano served the District Attorney with a request for disclosure of the police training manuals for the administration of the HGN test and the use of the Datamaster machine, used by the respective officers who conduct those tests on him. According to Serrano, those materials were discoverable under CPL 245.20(1)(j), which requires the prosecution to disclose all information pertaining to any scientific tests relating to the criminal action.

On January 4, 2022, the District Attorney supplied Serrano with a discovery package. The package did not include the requested manuals regarding the HGN test and the Datamaster, but it purported to include the certification certificate for the officer who used the Datamaster to conduct the breath test on Serrano. The same day, the District Attorney filed a certificate of compliance and declared her readiness for trial. The court adjourned the matter to permit Serrano to make an application challenging the People's certificate of compliance.

By notice of motion and affirmation dated January 24, 2022, Serrano moved for an order determining that the District Attorney's certificate of compliance and statement of readiness were invalid on the ground that the District Attorney failed to comply with the mandatory discovery requirements. Specifically, Serrano argued, in pertinent part, that by failing to notify him in writing that she would be withholding the requested manuals regarding the Datamaster and the HGN test and by failing to apply for leave to the court for a determination on the discoverability of those materials, the District Attorney had violated CPL 245.10 (1) (a) (iv) (A) and 245.20 (2). Serrano also argued that the District Attorney's failure to disclose those manuals constituted a violation of CPL 245.20 (1) (j). Furthermore, Serrano argued that, although the District Attorney's discovery package stated that the Datamaster operator's operation certificate had been supplied, the

certificate was not provided, and the failure to provide that document constituted a violation of CPL 245.20 (1) (s), which requires the prosecution to disclose the operation certificate held by the operator of a machine used to conduct a breath test. According to Serrano, the District Attorney's failure to provide him with the referenced materials would deprive him of an adequate opportunity to effectively cross-examine—during pretrial hearings and trial—the officers who administered the tests.

By affirmation dated February 15, 2022, the District Attorney opposed Serrano's motion. The District Attorney argued that the court should deny Serrano's motion because, contrary to Serrano's contention, the Datamaster operator's operation certificate was provided, and because the requested manuals for the HGN test and the Datamaster were not discoverable under CPL 245.20. The District Attorney further argued that, because it exercised due diligence and made a good faith effort to comply with its discovery obligations prior to the filing of its original COC, it should not be sanctioned.

In a reply affirmation dated March 1, 2022, Serrano reiterated the same arguments in his main motion papers regarding the District Attorney's failure to comply with the mandatory discovery obligations.

In a written decision and order dated April 4, 2022, Judge Costa concluded that the disclosed item that the District Attorney claimed to be the Datamaster operator's operation certificate was not that document and that the District Attorney's failure to disclose the certificate constituted a violation of CPL 245.20 (1) (s). Next, Judge Costa addressed the District Attorney's failure to disclose the training manuals for the Datamaster and the HGN test, and the District Attorney's claim that those materials were not discoverable. Judge Costa explained that disputes regarding the discoverability of documents are governed by CPL 245.10 (1) (a) (iv) (A) and 245.20

(5) and that those provisions require the prosecution to notify the defendant of its belief that materials are not discoverable and seek leave of the court for a determination regarding the discoverability of those materials. Judge Costa concluded that the People's failure to pursue those procedural remedies amounted to a discovery violation. Based on that violation and the violation for failing to disclose the Datamaster operator's operating certificate, Judge Costa determined that a discovery sanction was appropriate because, based on the totality of the circumstances, Serrano had demonstrated that he was prejudiced by the District Attorney's misconduct. Pursuant to his discretionary authority to impose appropriate discovery sanctions under CPL 245.80, Judge Costa precluded the District Attorney from introducing any testimony regarding the chemical test and the HGN test.

C. The District Attorney's instant petition for a writ of prohibition.

By petition and order to show cause dated May 13, 2022, the District Attorney commenced the instant article 78 proceeding, seeking a writ of prohibition enjoining Judge Costa from enforcing the portion of the order in each case precluding the District Attorney from admitting certain evidence.

ARGUMENT

The petition must be dismissed because the District Attorney's claim for a writ of prohibition is not cognizable under CPLR article 78

This is a motion to dismiss the petition pursuant to CPLR 3211 (a) and 7804 (d). On such a motion, the reviewing court may consider only the allegations in the petition. *See Matter of Levy v. SUNY Stony Brook*, 185 A.D.3d 689, 690 (2d Dep't 2020). To survive the motion, the petition must set forth actual allegations which, if true, are sufficient to make out a claim for the relief sought. *See* CPLR 311 (a) (7); *Matter of Levy*, 185 A.D.3d at 690. Accordingly, the petition must

be dismissed if it "'fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn therefrom them do not allow for an enforceable right of recovery.'" *Matter of Levy*, 185 A.D.3d at 690, quoting *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017). Applying this standard here, the petition must be dismissed.

A writ of prohibition, enjoining a judge from taking a particular action, is an "extraordinary" remedy that is available only in "rare cases." *Matter of Lee v. McKinney*, 7 N.Y.3d 561, 565 (2006). Specifically, the writ is available only where two conditions are satisfied. *See Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988). First, the court must have acted "either without jurisdiction or in excess of its authorized powers." *Id.* Second, the party seeking the writ must have a "clear legal right" to that remedy. *Id.*; *see Matter of Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015) ("To demonstrate a clear legal right to the extraordinary writ of prohibition, a petitioner is required to show that the challenged action was in reality so serious an excess of power incontrovertibly justifying and requiring summary correction") (internal quotation marks omitted).

The "extraordinary remedy of prohibition is never available merely to correct or prevent trial errors of substantive law or procedure, however grievous." *Matter of La Rocca v. Lane*, 37 N.Y.2d 575, 579 (1975); *see Matter of Holtzman*, 71 N.Y.2d at 569 ("Prohibition will not lie, however, simply to correct trial errors"). Indeed, "errors of substantive law or procedure committed within a proceeding which is properly maintainable" do not give rise to entitlement to prohibition. *Matter of Rush v. Mordue*, 68 N.Y.2d 348, 353 (1986). Instead, prohibition is "available only when a court exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding." *Id.*; *see e.g. Matter of Steingut v. Gold*, 42 N.Y.2d 311, 315-318 (1977) (holding that prohibition lies to enjoin the prosecution of a crime that was

committed beyond the court's geographic jurisdiction). Succinctly put, prohibition does "not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." *Matter of Rush v Mordue*, 68 N.Y.2d at 353. Moreover, "prohibition does not lie to review the exercise of discretion in criminal cases." *Matter of Quackenbush v. Monroe*, 87 A.D.2d 720, 720 (3d Dep't 1982), *lv. denied* 56 N.Y.2d 505 (1982).

Judged by those standards, the allegations in the petition, even if true, do not establish the District Attorney's entitlement to a writ of prohibition. The petition does not allege that Judge Costa acted without jurisdiction. In fact, the District Attorney concedes that Judge Costa had "jurisdiction over discovery disputes in the matters at issue." Petitioner's Memo of Law at 2. Nor does the petition allege that Judge Costa exceeded his authority in concluding that the District Attorney had violated the statutory discovery requirements in both cases. Moreover, the District Attorney concedes that Judge Costa had the statutory authority to "issue a sanction for [that] noncompliance." *Id.*

The basis of the District Attorney's claim for a writ of prohibition is that Judge Costa exceeded his statutory authority in issuing the preclusion sanctions, because neither Molina nor Serrano demonstrated prejudice from the District Attorney's failure to comply with the statutory discovery requirements. Petition at 6-8, ¶¶ 14-16. This claim—which serves as the entire basis of the petition—must be rejected because it is based on a fundamental misunderstanding of the law.

The District Attorney fails to acknowledge a significant difference between the violations in Molina's case and Serrano's case. The discovery violation in Molina's case involved the belated disclosure of discoverable material. For this type of violation, a judge has discretion to impose a sanction upon a finding that the party to whom disclosure was entitled was prejudiced. *See* CPL

245.80(1)(a). As will be discussed more fully below, Judge Costa acted fully within his statutory authority when he made the requisite finding of prejudice and imposed a sanction. The District Attorney's challenge to the merits of Judge Costa's prejudice determination amounts to nothing more than an attempt to challenge a trial-level error, which is an insufficient basis for a writ of prohibition. The discovery violations in Serrano's case involved an outright failure to disclose discoverable material and to comply with the procedural steps to withhold requested materials. For these types of violations, a judge has discretion to impose a sanction without a finding of prejudice. *See* CPL 245.80(2). Thus, as will also be discussed more fully below, the District Attorney's claimed lack of prejudice is irrelevant and therefore inadequate to serve as the basis for a writ of prohibition in Serrano's case.

In short, the petition's allegation regarding a purported lack of prejudice is patently insufficient to demonstrate the District Attorney's entitlement to a writ of prohibition enjoining the enforcement of the preclusion order in either case.

A. The petition fails to allege that Judge Costa acted in excess of his authority by imposing a discovery sanction in Molina's case.

CPL 245.20(1)(k)(iv) requires the prosecution to disclose expeditiously to a defendant all evidence and information that tends to impeach the credibility of a testifying prosecution witness. In Molina's case, the District Attorney violated that requirement by disclosing impeachment material regarding Trooper Fortune months late. For that violation involving belated disclosure of discoverable material, Judge Costa had the discretion to impose an appropriate sanction for the prejudice suffered by Molina. *See* CPL 245.80(1)(a). Based on his review of the motion papers and his familiarity with the proceedings having presided over them, Judge Costa concluded that the totality of the circumstances demonstrated that Molina was prejudiced by the belated disclosure and that the appropriate sanction was precluding the District Attorney from admitting the

testimony of Trooper Fortune and any evidence procured by him. Judge Costa's imposition of the sanction therefore fell squarely within his statutorily authorized powers. *See id.* Indeed, the District Attorney concedes that Judge Costa had the statutory authority to "issue a sanction for noncompliance" with the discovery requirements. Petitioner's Mem of Law at 2.

Despite Judge Costa's statutorily-authorized conduct, the petition alleges that a writ of prohibition should be issued because Molina failed to "demonstrate[] the requisite prejudice." Petition at 6, ¶ 14. But this is not a cognizable ground upon which prohibition may lie. The true import of the District Attorney's allegation is not that Judge Costa acted in excess of his authorized powers, it is that Judge Costa wrongly concluded that Molina suffered prejudice. Although couched as a claim that Judge Costa exceeded his authority, the District Attorney simply challenges the correctness of Judge Costa's prejudice determination. That is really nothing more than an allegation of an "error[] of law," which is "not to be confused with a proper basis for using the extraordinary writ." *Matter of State of New York v. King*, 36 NY2d 59, 62 (1975).

Indeed, the propriety of Judge Costa's finding of prejudice—whether right or wrong—cannot serve as the basis for the remedy of prohibition. *See La Rocca v. Lane*, 37 N.Y.2d 575, 579 (1975) ("The extraordinary remedy of prohibition is never available merely to correct or prevent trial errors of substantive law or procedure, however grievous"). And, although the People may be without appellate recourse to raise this ostensible legal error, the People's lack of a remedy is insufficient to transmute a purported legal error in a pretrial discovery ruling into a claim that Judge Costa somehow acted in excess of his authorized powers. *See Matter of Johnson v. Price*, 28 A.D.3d 79, 81 (1st Dep't 2006) ("Even egregious errors in pretrial and trial rulings, such as the erroneous exclusion of important evidence, do not form a proper basis for an article 78 challenge, regardless of the fact that the People have no appellate recourse to correct the ruling"); *see also*

Matter of Holtzman, 71 N.Y.2d at 569-570 ("The appealability or nonappealability of an issue is not dispositive").

This Court should reject the District Attorney's inappropriate attempt to seek collateral review of Judge Costa's prejudice determination, an alleged trial error, by mischaracterizing it as an act beyond his power. *See Matter of Blumen v. McGann*, 18 A.D.3d 870, 870 (2d Dep't 2005) (warning that prohibition does "not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, . . . however cleverly the error may be characterized by counsel as an excess of jurisdiction or power") (internal quotation marks omitted). This is not a case involving a judge taking action beyond that which is authorized by a statute. *See e.g. Matter of Brown v. Schulman*, 245 A.D.2d 561, 562-563 (2d Dep't 1997) (granting petition for writ of prohibition to enjoin judge's sua sponte order severing defendants' trials, because separate trials may be ordered only upon motion of a party pursuant to CPL 200.40, and therefore the judge exceeded his authority in sua sponte severing the trials), *lv. denied* 91 N.Y.2d 814 (1998). Rather, this case involves Judge Costa acting in accord with the statute authorizing discovery sanctions, by making a finding of prejudice and then imposing a sanction, and the District Attorney now seeking to challenge the correctness of that determination.

This is precisely the type of case in which courts, including the Court of Appeals, have deemed a writ of prohibition to be unavailable. *See e.g. Matter of Oglesby v. McKinney*, 7 N.Y.3d 561, 565 (2006) (holding that prohibition did not lie to enjoin a judge from enforcing a decision to strike a jury panel, because the judge had the authority to strike the panel upon his finding that the jury was unlawfully selected, and the petitioner's challenge to the judge's determination of the lawfulness of the jury selection "gave no ground for issuing the extraordinary writ of prohibition"); *Matter of Lungen v. Kane*, 88 N.Y.2d 861, 862-863 (1996) (holding that prohibition did not lie to

enjoin a judge from enforcing an order requiring limited disclosure of grand jury minutes, because the trial court acted within its statutorily prescribed powers in directing disclosure of grand jury minutes, and the petitioner's argument against disclosure of the grand jury minutes did not amount to a claim of the judge acting in excess of his authority); *Matter of Heggen v. Sise*, 174 A.D.3d 1115, 1116 (3d Dep't 2019) (holding that prohibition did not lie to enjoin a judge from enforcing a decision to preclude certain witness testimony, because the judge was authorized to preclude certain testimony that was protected by the attorney-client privilege, and petitioner's claim that the judge erred in determining the scope of that privilege—a claim that "may" have been "correct"—amounted to an attempt to seek collateral review of a trial error). This Court should do the same and dismiss the petition.

In addition to the District Attorney's failure to demonstrate that Judge Costa acted in excess of his powers, the District Attorney has also failed to demonstrate a "clear legal right" to enjoin Judge Costa from enforcing the preclusion order. *Matter of Holtzman*, 71 N.Y.2d at 569. Molina argued before Judge Costa that he was prejudiced by the District Attorney's untimely disclosure because it delayed both the pretrial hearings and the filing of his motion challenging the certificate of compliance. Judge Costa determined, in accordance with his statutory powers, that this prejudice warranted a sanction of preclusion. *See People v. Rodriguez*, 73 Misc.3d 411, 420 (Sup. Ct., Queens County [Gene R. Lopez, J.], 2021) (holding that defendant experienced prejudice from People's belated discovery disclosure because "the practical effect of this late discovery is to delay the defendant's trial in a number of ways"). And Judge Costa's determination that preclusion was an appropriate sanction constituted a sound exercise of discretion, from which prohibition cannot lie. *See People v. Williams*, 176 A.D.3d 1122, 1123 (2d Dep't 2019) ("the trial court has discretion to impose a broad range of sanctions, including preclusion"), *lv. denied* 34 N.Y.3d 1134 (2020);

Matter of Blumen, 18 A.D.3d at 870 ("prohibition does not lie to review the exercise of discretion in criminal cases").

The petition plainly fails to allege either that Judge Costa acted in excess of his authorized powers by issuing a preclusion order or that the District Attorney had a clear legal right to enjoin Judge Costa from enforcing that order—both of which are necessary to establish entitlement to the extraordinary writ of prohibition. *See Matter of Holtzman*, 71 N.Y.2d at 569. Thus, because the District Attorney has failed to establish a cognizable basis for a writ of prohibition, the petition must be dismissed. *See* CPLR 3211(a) (7); 7804 (f).

B. The petition fails to allege that Judge Costa acted in excess of his authority by imposing a discovery sanction in Serrano's case.

CPL 245.20(1)(s) requires the prosecution to disclose the operation certificate held by the operator of a machine used to conduct a breath test. In situations where the prosecution believes that requested materials are not discoverable, the prosecution must notify the defendant of its belief that the materials are not discoverable and seek leave of the court for a determination regarding the discoverability of those materials. *See* CPL 245.10(1)(a)(4)(A); 245.20(5). In Serrano's case, the District Attorney violated the statute by failing to disclose the Datamaster operator's operating certificate and by failing to disclose the Datamaster and HGN test manuals without following the procedural steps for withholding those materials and challenging their discoverability. These violations are subject to the statutorily prescribed sanctions for non-compliance with a court order. *See* CPL 245.20(5). And, for those violations, Judge Costa had the discretion to impose an appropriate sanction, regardless of whether Serrano suffered prejudice. *See* CPL 240.80(2).

Accordingly, the petition's allegation that the District Attorney is entitled to a writ of prohibition because Serrano failed to demonstrate prejudice is irrelevant and cannot serve as a basis for that remedy because no finding of prejudice was necessary for Judge Costa to impose a

sanction. But even assuming, for the sake of argument, that a finding of prejudice to Serrano was a condition precedent to Judge Costa's imposition of discovery sanctions—which it was not—the petition still fails to adequately allege a legal basis for a writ of prohibition for the same reasons discussed above. The District Attorney has therefore failed to allege a valid basis for a writ of prohibition and the petition must be dismissed. *See* CPLR 3211 (a) (7); 7804 (f).

CONCLUSION

For all of these reasons, the petition should be dismissed.

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Attorneys for Respondent Judge Matthew J. Costa

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Dated: White Plains, New York
July 1, 2022

CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Robert A. Spolzino, an attorney at law licensed to practice in the State of New York, certify that this document contains 4,876 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

Robert A. Spolzino

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, JoAnn LePore, being duly sworn, depose and say that:

I am a legal 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 26, 2022, I served the within REPLY AFFIRMATION WITH EXHIBITS and RESPONDENT JUDGE MATTHEW J. COSTA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS 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.
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666 Old Country Road, Suite 700
Garden City, New York 11530

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666 Old Country Road, Suite 700
Garden City, New York 11530

JoAnn LePore

Sworn to before me this
26th day of July, 2022

Notary Public

Angela Terilli
Notary Public, State of New York
No. 01TE6370366
Qualified in Westchester County
Commission Expires January 29, 20