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,

Respondents.

Index No. 01356/2022

RESPONDENT JUDGE MATTHEW J. COSTA'S MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION AND IN SUPPORT OF HIS VERIFIED ANSWER TO THE VERIFIED PETITION

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PRELIMINARY STATEMENT

Respondent Judge Matthew J. Costa ("Judge Costa") respectfully submits this memorandum of law in opposition to the verified petition ("the petition") of petitioner Miriam E. Rocah, as District Attorney of Westchester County ("the District Attorney"), and in support of his verified answer to the petition.

SUMMARY OF ARGUMENT

This is a proceeding pursuant to CPLR article 78 in the nature of prohibition, in which the District Attorney seeks to enjoin Judge Costa from enforcing those portions of two orders, one entered in the case of respondent Michael Molina ("Molina") and one entered in the case of respondent Gustavo Villamares Serrano ("Serrano"), which preclude the District Attorney from offering certain evidence because of the District Attorney's failure to comply with her mandatory 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 legal or procedural errors by the trial court. That, however, is exactly what the District Attorney seeks here.

Judge Costa indisputably has jurisdiction over discovery disputes under CPL article 245 and the statutory authority to sanction the District Attorney's Office upon concluding that the District Attorney failed to comply with the statutory discovery requirements resulting in prejudice to the defendant. Exercising that authority in each case at issue here, Judge Costa concluded that the District Attorney's discovery violations prejudiced the defendant, and, on that basis, imposed a statutorily permitted sanction for the District Attorney's discovery noncompliance. Judge Costa

therefore plainly acted within his jurisdiction and in a manner consistent with his statutory authority. Accordingly, prohibition does not lie.

The District Attorney does not dispute that Judge Costa, in each case, had jurisdiction to pass on the discovery issues, had the statutory authority to issue sanctions for discovery violations that prejudiced the defendant, and expressly determined that the defendant was prejudiced by her discovery violations. In fact, the District Attorney concedes those indisputable facts. Nor does the District Attorney argue in this proceeding that Judge Costa was wrong in finding that she had failed to satisfy her discovery obligations under CPL article 245. Instead, the sole basis for the petition is that the District Attorney disagrees with Judge Costa's conclusion that the defendant suffered prejudice in each case. In other words, the District Attorney claims that she is entitled to a writ of prohibition because Judge Costa's prejudice determinations underlying his decision to impose a sanction in each case was wrong—not because Judge Costa acted beyond his statutory authority.

At bottom, the District Attorney is impermissibly using this CPLR article 78 proceeding to seek collateral review of an alleged pretrial error in each case. This is precisely the type of claim that cannot serve as the basis for a writ of prohibition. Thus, this Court should therefore deny the petition for that reason alone. But even if the Court could grant the petition, there is no basis for doing so, since the District Attorney has failed to demonstrate that Judge Costa erred in imposing the sanction of preclusion for her failure to comply with her discovery obligations.

STATEMENT OF FACTS

The Court is respectfully referred to the verified answer of Judge Costa for a recitation of the relevant facts. *See* Verified Answer, ¶¶ 22-43.

ARGUMENT

I

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

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).

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, as discussed, 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*, 68 N.Y.2d at 353.

In the end, even if a court has acted without jurisdiction or in excess of its authority, "[p]rohibition is not mandatory." *Matter of La Rocca*, 37 N.Y.2d at 579. Rather, the issuance of a writ of prohibition is a matter committed to the "sound discretion of the court." *Id.*; *see Matter of Rush*, 68 N.Y.2d at 354 ("Even in those rare circumstances where an arrogation of power would justify burdening the judicial process with collateral intervention and summary correction, the writ of prohibition nonetheless does not issue as of right, but only in the sound discretion of the court").

Judged by those standards, this Court should deny the petition. The District Attorney cannot establish the two preconditions for the issuance of a writ of prohibition; indeed, Judge Costa did not act without jurisdiction or in excess of his statutorily authorized powers, and the District Attorney does not have a clear legal right to the relief sought. Instead, the petition is based entirely on a claim of legal error, which, as a matter of law, is not a valid basis for a writ of prohibition.

A. Judge Costa acted within his jurisdictional and statutory authority by issuing a discovery sanction based on his conclusion that the District Attorney's discovery violations prejudiced the defendant in each case, and the petition's challenge to Judge Costa's prejudice determinations amounts to nothing more than a claim of pretrial error, which is not a cognizable basis for a writ of prohibition.

As noted, prohibition lies only where the court acted either without jurisdiction or in excess of its authorized powers; prohibition does not lie, however, to correct a court's substantive or procedural error committed within a proceeding which is properly maintainable. *See Matter of Hotlzman*, 71 N.Y.2d at 569; *Matter of Rush*, 68 N.Y.2d at 353; *Matter of La Rocca*, 37 N.Y.2d at 579. The petition embodies the latter scenario.

Judge Costa had jurisdiction over the discovery disputes in the matter at issue under CPL article 245. Specifically, Judge Costa is vested with the statutory authority to sanction the District Attorney for failing to comply with the mandatory discovery obligations if the defendant entitled to disclosure shows that he or she suffered "prejudice." CPL 245.80(1)(a). That section provides as follows:

> 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(2) goes on to define the permissible sanctions the court may impose upon finding prejudice:

> For failure to comply with any discovery order imposed or issued pursuant to this article, the court may . . . preclude or strike a witness's testimony or a portion of a witness's testimony . . . .

In each case here, the defendant moved for discovery sanctions on the ground that he was prejudiced by the District Attorney's failure to comply with the statutorily mandated discovery requirements. Respondent Molina alleged that the District Attorney's discovery violations—failing to disclose all materials regarding the disciplinary record of the arresting officer, including documentation relating to a complaint for unlawfully arresting someone for driving while intoxicated, the same crime for which he arrested Molina—"prejudiced" his "rights to a speedy trial" and "created an impediment to the case advancing to trial absent the filing of this motion itself." Petition, Exhibit 3, ¶ 17. Respondent Serrano alleged that the District Attorney's discovery violations—failing to turn over the police training manuals relating to the field sobriety test and chemical test, used by the respective officers who conducted those tests—prevented him from being able to effectively cross-examine at trial or pre-trial hearings the police officers who conducted the tests on him. Petition, Exhibit 5, ¶¶ 23, 26.

Judge Costa agreed and found that, "under the totality of the circumstances," each defendant had "shown" that he was "prejudiced" by the District Attorney's discovery violations. Petition, Exhibit 4 at 4; Petition, Exhibit 8 at 4. Thus, Judge Costa plainly acted within the statutory power granted to him by CPL article 245 in imposing a discovery sanction of preclusion in each case. *See* CPL 245.80(1)(a), (2). And while the District Attorney can disagree with Judge Costa's determination that the defendants were prejudiced, she cannot argue, in light of Judge Costa's

statutory authority and his decisions, that he was not entitled to make, or did not make, that determination.

The petition does not establish, or even materially allege, otherwise. Indeed, the petition concedes that, in each case, Judge Costa had jurisdiction over the discovery disputes, Judge Costa had the statutory authority to sanction the District Attorney for noncompliance with mandatory discovery upon determining that the defendants had shown prejudice, and Judge Costa issued sanctions pursuant to that statutory authority based on his express determinations that the District Attorney violated the mandatory discovery requirements and that the defendant demonstrated resulting prejudice. *See* Petition, ¶¶ 9, 12; District Attorney's Memo of Law at 2, 24-25. Those concessions, in and of themselves, establish that Judge Costa acted within his powers and that prohibition, therefore, does not lie here. *See Matter of Holtzman*, 71 N.Y.2d at 569; *see generally e.g. Churuti v. Devane*, 29 A.D.3d 1139, 1142 (3d Dep't 2006) ("it cannot be said that either the County Judge or the District Attorney acted or threatened to act in excess of his authorized powers and, accordingly, prohibition does not lie against those respondents").

Faced with the unassailable conclusion that Judge Costa acted within his jurisdictional and statutory authority, the District Attorney resorts to obfuscation. Despite acknowledging Judge Costa's statutory authority and effectively admitting that his conduct fell well within its scope, *see* Petition, ¶¶ 9, 12; District Attorney's Memo of Law at 2, 24-25, the District Attorney maintains, as the sole basis for the petition, that she is entitled to a writ of prohibition because neither Molina nor Serrano "demonstrated the requisite prejudice." Petition, ¶ 14; *see id.*, ¶¶ 15-16; District Attorney's Memo of Law at 2-3, 16, 18, 20-25, 27-28.[1] This is nothing more than an allegation of

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[1] The District Attorney fleetingly asserts that it was inappropriate for Judge Costa to "hinge[]" the sanction imposed in Serrano's case "in part" on her failure to comply with the

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, although couched as a claim that Judge Costa "exceeded his statutory authority," Petition, ¶ 14; *see* District Attorney's Memo of Law at 2-3, 16, 28, the real import of the District Attorney's prejudice-based argument is that Judge Costa wrongly concluded that prejudice was shown by the defendant in each case—i.e., that Judge Costa committed a pretrial error. And, of course, the propriety of Judge Costa's prejudice determinations—whether right or wrong—cannot justify the remedy of prohibition. *See Matter of La Rocca*, 37 N.Y.2d at 579 ("The extraordinary remedy of prohibition is never available merely to correct or prevent trial errors of substantive law or procedure, however grievous"); *Kramer v. Rosenberger*, 107 A.D.2d 748, 749 (2d Dep't 1985) ("The remedy of prohibition does not lie as a means of seeking collateral review of an error of law, no matter how egregious, in a pending criminal matter").

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procedural requirements set forth in in CPL 245.10(1)(a)(iv)(A) for withholding material that the she believed was not discoverable. *See* Petition ¶ 17; District Attorney's Memo of Law at 3, 25-26. This argument is academic at best, however, because Judge Costa clearly had the authority to impose sanctions for the District Attorney's other discovery violations in Serrano's case. Moreover, this argument is belied by the plain language of CPL article 45. *See Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998) ("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"). 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, *see* Exhibit 8 at 4—"*shall have the force and effect of a court order*, and failure to provide discovery pursuant to such section or subdivision *may result in application of any remedies or sanctions* permitted for non-compliance with a court order under [CPL] 245.80." CPL 245.20(5) (emphasis added). Thus, the plain language of the statutory scheme set forth in CPLR article 245 allows a court to impose a sanction for failure to comply with CPL 245.10(1). *See Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (2012) ("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").

At bottom, the cases at issue do not involve a judge taking action beyond that which is authorized by statute—the type of "rare" case in which the remedy of prohibition is warranted. *Matter of Lee*, 7 N.Y.3d at 565; *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, the cases at issue involve Judge Costa acting in accord with the statute authorizing sanctions for discovery violations, *see* CPL 245.80(1)(a), by making a finding of prejudice and then imposing a sanction, and the District Attorney now seeking to collaterally challenge the correctness of those prejudice determinations by impermissibly and unconvincingly attempting to transmute an ordinary claim of purported legal error into an "extraordinary" claim of a court acting beyond its powers. *Holtzman*, 71 N.Y.2d at 569. The petition is thus an inappropriate attempt to seek collateral review of Judge Costa's prejudice determinations and claimed pretrial errors, by mischaracterizing them as ultra vires conduct. *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).

In fact, 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 deny the petition.

B. The discretionary nature of Judge Costa's decision to impose discovery sanctions dictates that the District Attorney does not have a clear legal right to the relief sought.

In addition to establishing that the court acted either without jurisdiction or in excess of its powers, a party seeking a writ of prohibition must also establish a "clear legal right" to that remedy. *Matter of Holtzman*, 71 N.Y.2d at 569. "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." *Matter of Soares*, 25 N.Y.3d at 1013 (internal quotation marks omitted). The District Attorney cannot satisfy that requirement.

1. The District Attorney cannot have a clear legal right to relief with respect to the discretionary decision to impose sanctions.

It is well settled that the determination to impose sanctions for discovery violations is a

matter entrusted to the sound discretion of the trial court. *See People v. Jenkins*, 98 N.Y.2d 280, 284 (2002). That discretionary determination, of course, includes the issue of whether the requisite prejudice has been shown. *See id.*; *People v. Collins*, 106 A.D.3d 1544, 1546 (4th Dep't 2013). In making that prejudice determination, courts must assess the totality of the specific circumstances in the case at issue. *See People v. Rodriguez*, 73 Misc. 3d 411, 420 (Sup. Ct., Queens County [Gene R. Lopez, J.], 2021) ("Under the circumstances, this court must conclude that the defendant experience prejudice as a result of the People's delay"). For example, a court may conclude that, under the circumstances of the case, there is an inherent prejudice from the delay in the trial caused by the prosecution's discovery violations. *See e.g. id.* (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"). Comparatively, a court may conclude that no prejudice is established absent a showing that the People's delayed disclosure somehow impaired the defendant's ability to use the belatedly disclosed materials. *See e.g. People v. Florez*, 74 Misc. 3d 1222(A), 2022 N.Y. Slip Op. 50202(U), *13 (Sup. Ct., Nassau County [Teresa K. Corrigan, J.], Mar. 10, 2022) (holding that the defendant was not prejudiced from the People's delayed disclosure because the defendant still had "time to 'use'" the belatedly disclosed materials).

Whichever decision a court may reach on the particular facts of the case, the issue of whether prejudice has been established to justify the imposition of sanctions is a discretionary determination upon which even the most learned jurists may differ. *See Bua v. Purcell & Ingrao, P.C.*, 99 A.D.3d 843, 846 (2d Dep't 2012) ("The conduct of legal matters routinely involve questions of judgment and discretion as to which even the most distinguished members of the profession may differ") (internal brackets and quotation marks omitted), *lv. denied* 20 N.Y.3d 857

(2013); *Matter of Gaignat*, 181 A.D. 193, 197 (2d Dep't 1917) ("a judicial determination" that "involves the exercise of discretion" is a "determination upon which reasonable men may differ"), *aff'd* 223 N.Y. 561 (1918).

Thus, in light of the wholly discretionary nature of a trial court's decision to impose discovery sanctions, which rationally may lead to differing interpretations of what does and does not amount to prejudice under particular circumstances, it cannot possibly be said that the District Attorney has a "clear legal right" to the writ of prohibition sought here. *Matter of Holtzman*, 71 N.Y.2d at 569; *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"); *Matter of Quackenbush v. Monroe*, 87 A.D.2d 720, 720 (3d Dep't 1982) (same), *lv. denied* 56 N.Y.2d 505 (1982). In other words, given that Judge Costa's prejudice determinations were committed to his discretion and based on his assessment of the specific circumstances of each case, there is no reasonable basis to conclude that he committed "a gross abuse of power" that, "on its face and in effect," is "so serious an excess of power incontrovertibly justifying and requiring summary correction." *Matter of La Rocca*, 37 N.Y.2d at 580.

The District Attorney ostensibly claims that she has a clear legal right to the remedy of prohibition because, according to her, courts do not have the power to impose discovery sanctions unless the court finds a specific level, degree, or type of prejudice, which Judge Costa did not do in either case here. *See* Petition, ¶¶ 14-15; District Attorney's Memo of Law at 2, 17-22. This argument has no basis in law. The statute authorizing judges, including Judge Costa, to impose sanctions for discovery violations provides that a showing of "prejudice" is required, without defining prejudice or qualifying the term in any way. *See* CPL 245.80(1)(a). The legislature's

*decision not to define the term "prejudice" in the statute, or to otherwise elaborate or explain in the statute on what must be shown in order for "prejudice" to be established, leads only to the conclusion that courts have broad discretion to determine what does and does not amount to prejudice under the particular circumstances of each case, belying any claim that the District Attorney has a "clear legal right" to a writ of prohibition. *See* McKinney's Cons Laws of N.Y., Book 1, Statutes § 232, Comment ("It is a general rule in the interpretation of statutes that the legislative intent is primarily to be determined from the language used in an act, considering the language in its most natural and obvious sense"); *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").

2. Judge Costa did not abuse, or even improvidently exercise, his discretion in imposing sanctions.

Even if Judge Costa's prejudice determination was incorrect in each case, that legal error, no matter how egregious, does not entitle the District Attorney to the remedy of prohibition. *See Matter of Holtzman*, 71 N.Y.2d at 569; *Matter of Rush*, 68 N.Y.2d at 353; *Matter of La Rocca*, 37 N.Y.2d at 579; *Matter of Johnson*, 28 A.D.3d at 81; *Kramer*, 107 A.D.2d at 749. But even if it did, Judge Costa's prejudice determination in each case constituted a provident exercise of discretion because there is a substantial basis in the record for Judge Costa's decisions. *See generally Jenkins*, 98 N.Y.2d at 284.

Although not articulated in detail by Judge Costa, counsel for both Molina and Serrano argued hat their clients had been prejudiced by the District Attorney's failure to satisfy her discovery obligations. Molina's counsel argued that "Defendant's rights to a speedy trial [were] prejudiced by the People's knowing and deliberate failure to do that which they must do by law, particularly when the People engage in dilatory conduct which created an impediment to the case

advancing to trial absent the filing of this motion itself." Petition, Exhibit 3, ¶ 17. Serrano's counsel argued that the requested disclosure was "necessary, material and relevant to Defendant [to] have an adequate opportunity to conduct an effective cross-examination" of the arresting officers. Petition, Exhibit 5, ¶ 26,

Beyond these arguments, the prejudice sustained by the defendant in each case was apparent for other reasons. In Molina's case, the District Attorney's discovery failing related to the nondisclosure of certain materials regarding the disciplinary record of the officer who arrested Molina, including documentation relating to a complaint for unlawfully arresting someone for driving while intoxicated, which is the same crime for which Molina was arrested. The information contained in that documentation could have been used as support for a motion to dismiss the accusatory instrument in the interest of justice. *See* CPL 170.30(g); 170.40. In Serrano's case, the District Attorney's discovery failing related to the nondisclosure of the police training manuals for the administration of the HGN test and the operation of the Datamaster machine, used by the respective officers who conducted those tests on Serrano. The information contained in those documents could have been used to support a motion to dismiss the accusatory instrument on facial insufficiency grounds by attacking the allegations underlying the accusatory instrument. *See* CPL 170.30(a); 170.35.

The District Attorney's untimely disclosure, however, prevented the defendant in each case from using that information to make a motion to dismiss pursuant to CPL 170.30. Such a motion must be made within 45 days after arraignment. *See* CPL 170.40; 255.20(1). Under the circumstances of this case, then, the District Attorney's failure to turn over the at-issue material within 45 days of each defendant's arraignment prejudiced the defendant in each case because they could not use that information as support for a potential motion to dismiss. *See generally*

Rodriguez, 73 Misc. 3d at 420.

C. Neither the harm sustained by the District Attorney from the discovery sanction nor the District Attorney's lack of appellate recourse provide a basis to review an alleged pretrial error by a collateral proceeding sounding in prohibition.

In a proceeding for a writ of prohibition, the severity of the harm caused to that party by the challenged conduct and whether that party may raise their grievance on appeal becomes a consideration in determining whether to grant relief only after the two jurisdictional predicates for that relief—lack of jurisdiction and a clear legal right to the relief sought—are established. *See Matter of Holtzman*, 71 N.Y.2d at 569; *Matter of La Rocca*, 37 N.Y.2d at 579. Where, as here, the party seeking a writ of prohibition fails to establish the two prerequisites to demonstrate that prohibition may lie, the additional factors regarding the harm caused to that party and that party's lack of appellate recourse cannot establish entitlement to a writ of prohibition. *See Matter of State of New York v. King*, 36 N.Y.2d 59, 63 (1975); *Matter of Morgenthau v. Marks*, 177 A.D.2d 131, 133-134 (1st Dep't 1992).

Thus, contrary to the District Attorney's claim, *see* Petition, ¶ 18; District Attorney's Memo of Law at 4, 28-31, neither the impact of Judge Costa's discovery sanction on her nor her lack of appellate recourse provides a ground to review her claim of pretrial error by a collateral proceeding sounding in prohibition. *See Matter of State of New York*, 36 N.Y.2d at 63

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[2] Although a defendant may make a motion to dismiss more than 45 days after arraignment "upon grounds of which the defendant could not, with due diligence, have been previously aware," CPL 255.20(3), that exception arguably would not have applied here. Here, the defendants were clearly "aware" of the grounds for each motion—in Molina's case, Molina knew that the arresting officer had suffered disciplinary action in the past and therefore could have moved to dismiss in the interest of justice; in Serrano's case, Serrano knew the substance of the allegations underlying the accusatory instrument and could have moved to dismiss on facial sufficiency grounds due to their inadequacy. The belatedly disclosed evidence merely provided further support for those already known grounds, which would have strengthened the defendant's motion in each case or influenced the defendant in each case to actually make the motion.

("nonreviewability by way of appeal alone, does not provide a basis for reviewing error by collateral proceeding in the nature . . . of prohibition"); *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"); *Matter of Morgenthau*, 177 A.D.2d at 133-134 ("inasmuch as the court's ruling merely constitutes an error of law and not, as urged by petitioner, an act in excess of the court's powers, the extraordinary remedy of prohibition does not lie and nonreviewability by way of appeal, alone, does not provide a basis for reviewing error by a collateral proceeding in the nature of a writ of prohibition").

Matter of Johnson v. Sackett, 109 A.D.3d 427 (1st Dep't 2013), and *Matter of Cosgrove v. Ward*, 48 A.D.3d 1150 (4th Dep't 2008) are not to the contrary. In *Matter of Johnson*, the Supreme Court had precluded the testimony of the complaining witness in a robbery case because the witness refused to disclose records of his mental health treatment. *See* 109 A.D.3d at 428. The Appellate Division, First Department, addressed harm to the prosecutor and inability to appeal "in addition," only after concluding that "[i]t is well settled that neither the defendant nor the court has the authority to compel pretrial discovery in criminal cases that is unavailable pursuant to statute, and prohibition lies to prevent an attempt to do so." *Id.* at 429 (internal quotation marks omitted). Likewise, in *Matter of Cosgrove*, the Appellate Division, Fourth Department, held that the trial judge had "acted in excess of his authorized powers in granting that part of Watson's motion in limine to preclude the People from offering certain evidence at trial based on the alleged insufficiency of the bill of particulars." 48 A.D.3d at 1151. Only after that did the Court address the absence of an appellate remedy. *See id.* at 1151-1152.

Similarly, *Matter of Clark v. Neubauer*, 148 A.D.3d 260 (1st Dep't 2017) is inapposite. In

Matter of Clark, "the gun was the only evidence of force that was presented to the grand jury," and the People were therefore prohibited by statute—CPL 200.70—from presenting "different facts at trial in support of the indictment." *Id.* at 264. Put simply, the People were precluded by statute from presenting any other evidence. Here, in each case, there is no statutory limitation because there was no indictment that constrained the evidence the District Attorney could introduce.

But even if *Matter of Clark* did apply here, the District Attorney has failed to establish, or even to plead, that the predicate it arguably establishes for prohibition—that Judge Costa's decisions prevented her from proving her case. Although the petition alleges that "Respondent Costa terminated the prosecution of certain charges," *see* Petition, ¶ 18, the proof the District Attorney submits in the form of affirmations does not bear out that claim with regard to either case. The affirmation of Assistant District Attorney Brian R. Pouliot asserts, conclusorily, only that Judge Costa's orders "bar their most probative, if not only, evidence," *see* Pouliot Affirmation, ¶ 7, without any basis for that assertion. The affirmation of Assistant District Attorney Philip Mellea states only that "Respondent Costa precluded the most critical evidence showing the defendant was driving while intoxicated" and the "key evidence," *see* Mellea Affirmation, ¶ 6, without ever explaining why or providing specific information from which a court could conclude that those conclusory assertions were correct. Thus, even if the District Attorney's case was severely handicapped by Judge Costa's preclusion sanction, there is no competent evidence in this record that the District Attorney could not have presented other evidence, such as testimony from other officers who may have been present and observed each defendant exhibiting indicia of intoxication. Even *Matter of Clark* does not hold that prohibition lies, and the District Attorney can escape from her discovery violation, just because the preclusion made the District Attorney's

case more difficult.

The District Attorney's reliance on her lack of appellate recourse is particularly unavailing for an additional, more fundamental reason. "The right of review by appeal in criminal matters . . . is determined exclusively by statute." *Matter of State of New York*, 36 N.Y.2d at 63; *see* CPL 450.10; 450.15; 450.20. The policy underlying this practice is to "limit" the undue compounding of litigation caused "by protracted and multifarious appeals and collateral proceedings frustrating the speedy determination of disputes." *Matter of State of New York*, 36 N.Y.2d at 63. As is relevant here, the legislature has limited the District Attorney's right to appeal from an order imposing a discovery sanction pursuant to CPL 245.80 to those instances in which the imposed discovery sanction is dismissal of the accusatory instrument; indeed, the District Attorney has no right to appeal where, as here, the order imposes a discovery sanction of preclusion. *See* CPL 450.20(12).

The legislature's decision to exclude orders imposing a discovery sanction of preclusion from the types of orders from which the District Attorney may take an appeal is strong evidence of the legislature's intent for such orders not to be subjected to collateral review. *See* McKinney's Cons Laws of N.Y., Book 1, Statutes § 240 ("where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"). Accordingly, this Court should not sanction the District Attorney's attempt to impermissibly use an article 78 proceeding as a vehicle to bypass the nonappealability of Judge Costa's discretionary, statutorily authorized imposition of a discovery sanction of preclusion in each case. *See Matter of Nigrone v. Murtagh*, 36 N.Y.2d 421, 425 (1975) (denouncing "the impermissible use of the article 78 proceeding to bypass the nonappealability of a determination").

D. *The cases cited by the District Attorney are inapposite.*

Although the District Attorney cites several cases, see Petition ¶ 15; District Attorney's Memo of Law at 2-3, 16-17, 21-23, 25, none of them involve a CPLR article 78 proceeding sounding in prohibition, much less stand for the proposition that prohibition lies under the circumstances of this case.

All of the cases cited by the District Attorney involve a determination that the defendant failed to establish prejudice—some cases involve the failure to establish prejudice resulting from a violation of mandatory discovery under CPL article 245, and some cases involve the failure to establish prejudice resulting from *Brady* or *Rosario* violations.[3] Those cases are inapplicable for two reasons. First, the imposition of sanctions for *Brady* and *Rosario* violations requires a showing of "substantial" prejudice. *See People v. Martinez*, 71 N.Y.2d 937, 940 (1988); *Matter of Jzamaine E.M.*, 150 A.D.3d 738, 740 (2d Dep't 2017). The prejudice required for the discovery violations under CPL article 245 presented here does not have to rise to the level of being substantial. *See* CPL 245.80(1)(a). Second, putting aside the level of prejudice required, the fact that no prejudice existed under the particular circumstances in those cases has no bearing whatsoever on Judge Costa's conclusion that prejudice existed under the particular circumstances of the cases here.

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[3] *See People v. Cortijo*, 70 N.Y.2d 868, 870 (1987); *People v. Sanchez*, 144 A.D.3d 1179, 1180 (2d Dep't 2016); *People v. Robertson*, 192 A.D.2d 682, 682 (2d Dep't 1993); *People v. Burks*, 192 A.D.2d 542, 542 (2d Dep't 1993); *People v. Jateen*, 74 Misc. 3d 134(A), 2022 N.Y. Slip Op. 50280(U), *2 (App. Term, 2d Dep't, 9th & 10th Jud. Dists., Mar. 3, 2022); *Florez*, 74 Misc. 3d 1222(A) at *13; *People v. White*, 72 Misc. 3d 1002, 1007 (Sup. Ct., Bronx County [Ralph Fabrizio, J.], 2021). *People v. Kraten*, 73 Misc. 3d 1229(A), 2021 N.Y. Slip Op. 51147(U), *4 (Webster Just. Ct. [Thomas J. DiSalvo, J.], Dec. 8, 2021); *People v. Morocho-Morocho*, 71 Misc. 3d 1221(A), 2021 N.Y. Slip Op. 50455(U), *5 (Ossining Just. Ct. [Jeffrey W. Gasbarro, J., May 18, 2021); *People v. Cano*, 71 Misc. 3d 728, 740 (Sup. Ct., Queens County 2020); *People v. Lustig*, 68 Misc. 3d 234, 248 n.6 (Sup. Ct., Queens County 2020); *People v. Nelson*, 67 Misc. 3d 313, 315 (Franklin County Ct. [Robert G. Main, Jr., J., 2020).

CONCLUSION

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

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Dated: White Plains, New York
October 31, 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 6227 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 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 October 31, 2022, I served the within VERIFIED ANSWER and RESPONDENT MATTHEW J. COSTA'S MEMORANDUM OF LAW IN SUPPORT OF HIS VERIFIED ANSWER TO THE VERIFIED 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:

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Garden City, New York 11530

Joann LePore

Sworn to before me this
31st day of October, 2022

Notary Public

Angela Terilli
Notary Public, State of New York
No. 01TE6370366
Qualified in Westchester County
Commission Expires January 29, 20 26