
IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

In the Matter of the Application of
TIMOTHY D. SINI as District Attorney of the County of Suffolk,

Petitioner,

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

against

HON. CHRIS ANN KELLEY, Justice, Suffolk County Supreme Court and FIDEL
PORTILLO,

Respondents.

**AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENTS**

The Legal Aid Society
Brooklyn Defender Services
Neighborhood Defender Service of Harlem
New York County Defender Services

By:

The Legal Aid Society
199 Water Street, 6th Floor
New York, New York 10038
Jennvine Wong
646-522-9083
jwong@legal-aid.org

Brooklyn Defender Services
177 Livingston Street, 7th Floor
Brooklyn, New York 11201
Lisa Schreibersdorf
646-787-3317
lschreibersdorf@bds.org

New York County Defender Services
100 William Street
New York, New York 10038
Casey Dalporto
Bernadette Rabuy
917-304-7943
cdalporto@nycds.org

Neighborhood Defender Service of
Harlem
317 Lenox Ave., 10th Floor
New York, New York 10027
Meghna Philip
212-876-5500
mphilip@ndsny.org

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STATEMENT OF INTEREST

Petitioner in this case initiated these proceedings to evade compliance with the new procedures promulgated by the Legislature in 2019 in enacting discovery reforms. The Legal Aid Society, Brooklyn Defender Services, New York County Defender Services, and Neighborhood Defender Service of Harlem submit this brief as *amicus curiae* in support of Respondents, the Honorable Justice Chris Ann Kelley and Fidel Portillo. *Amicus curiae* are the primary public defenders of low-income people prosecuted in the New York court system in all five New York City boroughs. Collectively, *amicus curiae* regularly use police and correction officer disciplinary records in our direct representation of clients. The enforcement and interpretation of the automatic discovery provisions are matters of direct concern to *amici* organizations and the clients they serve. Transparency of potential police misconduct and disciplinary records is of paramount importance, especially in criminal cases, precisely because police officers hold so much power and authority to affect the prosecution of an accused person.

In April 2019, the Legislature passed sweeping reforms of criminal discovery practice, an essential component of which was to lift the discovery “blindfold” imposed for decades against criminal defendants, to rein in the power of prosecutors and to protect New Yorkers from mass criminalization and wrongful convictions. A year later, on June 12, 2020, in the wake of national racial justice demonstrations,

the Legislature repealed the confidentiality privilege and procedural requirements of Civil Rights Law § 50-a, removing special protections afforded to law enforcement disciplinary records and making them available for public inspection. In doing so, the Legislature expressed an intent to increase systemic accountability and integrity through transparency.

Ignoring this express legislative mandate, some prosecutors' offices in New York have interpreted their new discovery obligations narrowly, denying criminal defendants' access to information that the Legislature intended to make available. In keeping with that pattern, Petitioner seeks to subvert state legislative prerogatives by withholding records of misconduct relating to officers involved in the underlying prosecution and disclosing limited information in the form of summaries of such misconduct.

Respondent Justice Kelley's order requiring the disclosure of records of police misconduct and rejecting the adequacy of mere summaries of such records is consistent with the plain language of Criminal Procedural Law Article 245 and common sense. Petitioner's arguments about undue burden are dubious and, if logistical difficulties in procuring these records do exist, the Legislature considered and addressed those difficulties in the statute itself, by designing it to promote changes in procedure without diminishing the statute's mandate of disclosure.

ARGUMENT

Respondent Justice Kelley’s interpretation of the law is soundly based on the plain language of the statute as well as relevant case law. Because Justice Kelley did not act without jurisdiction or in excess of her authorized powers, Petitioner’s collateral attack under CPLR Article 78 must be denied. *See Matter of Mulvaney v Dubin*, 55 NY2d 668 (1981); *Matter of Singas v Engel*, 155 AD3d 877 (2d Dept 2017)

POINT I

New York’s Discovery Law Requires Broad Disclosure of Records of Police Misconduct as Potential Impeachment Material

New York’s discovery statute requires disclosure of “[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government’s behalf in the case, that tends to” be favorable in seven specified ways. *CPL § 245.20(1)(k)*. Those specified ways include all evidence or information that tends to “impeach a testifying prosecution witness.” *CPL § 245.20(1)(k)(iv)*. For testifying officers, this encompasses disciplinary records, including investigations for purposes of assessing disciplinary action, for factually unrelated prior bad acts – even if the allegations of misconduct go only to the “collateral” issue of the officers’ general credibility. *CPL § 245.20(1)(k)(iv)*. The broad right to cross-examine testifying police officers about their possible prior misconduct makes this conclusion inescapable; because there is a right to use such

information to impeach, there is, *a fortiori*, a right to disclosure of that information from the prosecution and police.¹

The Legislature used the term “tends to” in CPL § 245.20(1)(k) to communicate that, unlike constitutional obligations under *Brady v Maryland*, 373 US 83 (1963), there is no “materiality” limitation on disclosure of favorable information. Commentators and courts have recognized this point. See William C. Donnino, Practice Commentary, McKinney’s Cons. Laws of NY, CPL Article 245.10. (“The listing (in 245.20(1)(k)) helps make clear to prosecutors the type of favorable information that must be disclosed regardless of their judgment as to whether it is ‘material’ or ‘credible’”); *People v Rosario*, 70 Misc3d 753, 767, 139 NYS3d 498 (Sup. Ct., Albany County 2020) (“Additionally, the People’s attempt to limit their present-day CPL 245.20 (1)(k)(iv) Brady/Giglio disclosure obligations solely to ‘materially’ exculpatory information is contradicted by the New York Assembly Legislative Memorandum in Support of Bill Number A1431, which includes summaries for the proposed subsections of automatic discovery now contained in CPL 245.20

¹ Any acts suggesting “willingness to advance self-interest ahead of principle” can be used on cross examination. See, e.g., *People v Rouse*, 34 NY3d 269 [2019]; *People v Smith*, 27 NY3d 652 [2016]; *People v Walker*, 83 NY2d 455 [1994]; *People . Allen*, 50 NY2d 898 [1980], *aff’g on opinion at 67 AD2d 558* [2d Dept. 1979]; *People v Sorge*, 301 NY 198 [1950]. Under this standard, even relatively minor types of “misconduct” or infractions are proper grist for impeachment. Of course, a few extremely minor technical infractions of departmental rules might *not* qualify as “misconduct” that can be used to impeach (e.g., untidy squad cars and lockers; white sock violations; personal grooming lapses; etc.). But setting that aside, prosecutors must disclose possible bad acts broadly as even mere violations of departmental rules could implicate an officer’s credibility and may tend to impeach.

(1)"); *People v Edwards*, 73 Misc3d 1206(A), at *4 (Crim. Ct., New York County 2021) (“CPL 245.20(1)(k)(iv) clearly goes well beyond the People’s *Brady/Giglio* obligations”).

The same point is clear based on a comparison of CPL § 245.20(1)(k) to its predecessor provision, former CPL § 240.20(1)(h). The old provision stated that the prosecutor’s statutory obligation was merely to disclose “[a]nything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.” That was a direct way to convey that it required no more than the *Brady* rule. But when the Legislature enacted Article 245, it abandoned that provision entirely, delinked the disclosure obligation from the constitution, and used broad terms such as “all” and “tends to” in reference to clear categories of “evidence and information” that prosecutors must obtain and provide. One of the basic principles of statutory construction is that “[t]he Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law.” McKinney’s Statutes § 193 (“Significance of change in language”). There is no way to examine the differences between these two provisions and conclude that the Legislature merely wanted to continue the rule of former § 240.20(1)(h) when it enacted § 245.20(1)(k). Instead, the Legislature exercised its prerogative to enact a statutory rule that is independent of and broader than the constitutional minimum.

That the words “all” and “tends to” denote a broader disclosure obligation than *Brady* can hardly be challenged. The United States Supreme Court itself interpreted them that way in *Kyles v. Whitley*. The court was comparing its rule with the ABA Standards for Criminal Justice, which at the time required prosecutors to disclose “all evidence or information which *tends to* negate the guilt of the accused or mitigate the offense charged.” *Kyles v Whitley*, 514 US 419, 437 (1995) (emphasis added). The Supreme Court declined to adopt that standard, concluding that under its precedents the *Brady* rule “requires less of the prosecution than the ABA Standards.” *Kyles*, 514 US at 437. Thus, the Supreme Court itself has already definitively construed the same wording used in New York’s statute. By employing the “tends to” phrase, the Legislature was using well-known differences in language to reject, not codify, the *Brady/Kyles* standard and construct a separate and parallel statutory authority.²

² It is important to explain *why* the Legislature would want to eliminate the *Brady* “materiality” criterion. As countless commentators and New York State Discovery Task Forces (whose proposals the Legislature considered) have pointed out, a main problem with the “materiality” criterion is that it is an *appellate* standard: whether, in light of all the evidence in the case, the undisclosed information was significant enough to “undermine confidence” in the conviction or create a “reasonable probability” that the result would be different. (*Kyles*, 514 U.S. at 434). A key element is that the non-disclosed evidence must be “considered collectively, not item-by-item.” (*Kyles*, 514 U.S. at 436). Thus, while a particular item alone may not be significant enough, it may meet the *Brady* standard in combination with other suppressed evidence, or with other weaknesses in the case. This standard makes sense on appeal, because an appellate court can assess all the evidence and the outcome and evaluate the potential effect of the non-disclosure in that context. But prior to the trial, even the most fair-minded of prosecutors might have trouble determining the effect of a single piece of evidence on the likely outcome. Indeed, as more pieces of evidence are discovered during an investigation, the import of a particular item could change – something that

Since the new CPL § 245.20(1)(k) is a separate statutory rule, there is no basis to apply case-law limitations on *Brady* disclosures to the plain language of the statutory command. Instead, courts must apply the statute plainly as written.

POINT II

Summaries of Police Disciplinary Records Do Not Satisfy Prosecutors’ Obligations to Disclose Impeachment Information

Prosecutors are required to disclose the records of police misconduct and not merely summaries thereof. There is no statutory basis for prosecutors to substitute misconduct summaries for “all evidence and information” in their possession related to that misconduct. A growing chorus of courts across the state have recognized this fact, finding that such summaries are insufficient to discharge discovery obligations pursuant to CPL § 245.20(1)(k)(iv). *See People v Cooper*, 71 Misc3d 559 (Sup Ct Erie County 2021) (recognizing that the new discovery law does not allow for information to be filtered by the prosecution’s assessment of its credibility or

could also happen during trial. Thus, in the years prior to the 2019 reforms, the *Brady* “materiality” criterion had been criticized not only as too narrow, but *unworkable* at the trial level, providing an invitation to violation. *See, e.g.*, NYSBA, “Report of the Task Force on Criminal Discovery” (2015), p. 22 (“New York’s discovery statute should explicitly reject any ‘materiality’ limitation on *Brady* disclosure”), <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Criminal%20Discovery%20Final%20Report.pdf>; “Press Release – Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases” (11/8/2017), Attachment, p. 13 (“The order should not contain any reference to materiality”); N.Y.C. Bar Ass’n Committee of Professional Ethics, “Formal Opinion 2016-3: Prosecutors’ Ethical Obligations to Disclose Information Favorable to the Defense” (8/29/16). The logical legislative solution was to take out the guesswork, and require disclosure of *all* favorable evidence and information, including all information that tends to impeach a prosecution witness.

usefulness); *People v Williams*, 72 Misc3d 1214(A) (Crim Ct, New York County 2021) (rejecting summaries based on “[t]he plain meaning” of the new statute); *People v Ingramminors*, No. CR-020938-20NY at *8-10 (Crim Ct, New York County Apr. 14, 2021) (“Since the statute contemplates ‘all evidence and information’ a summary will not suffice.”) (annexed as Exhibit C); *People v Kelly*, 71 Misc3d 1202 (A) (Crim Ct, New York County 2021); *People v Yizar*, Ind. 2105-2019 (Crim Ct, Bronx County Mar. 2, 2021) (“[E]vidence includes underlying documents that detail such things as witnesses’ statements and physical evidence. Thus, the People’s prepared summaries do not suffice for this purpose.”) (annexed as Exhibit E); *People v Green*, Ind. 1709-2019 (Crim Ct, Bronx County Feb. 4, 2021) (annexed as Exhibit B); *People v Rosario*, 70 Misc3d 753 (Sup Ct, Albany County 2020) (“[I]f the People intend to call a member of law enforcement as a witness at trial, they must disclose all evidence and information, including that which is known to police or other law enforcement agencies acting on their behalf in the case, that impeaches the credibility of that law enforcement witness irrespective of whether they credit the information pursuant to CPL 245.20 (1)(k)"); *People v Porter*, 71 Misc3d 187, 190 (Crim Ct, Bronx County 2020) (“In enacting the revised discovery procedures for 2020, the Legislature urged that the statutory framework be interpreted with ‘a presumption in favor of disclosure.’”); *People v Porter*, 71 Misc3d 187, 190 (Crim Ct, Bronx County 2020).

The reason for this conclusion is common sense: summaries by their nature leave things out. As the court noted in one such case:

A summary that gives only a general description of that misconduct is not sufficient. Summaries, certainly the ones at issue here, lack any significant substance or detail about the nature or extent of the misconduct. Defendants are entitled to more. Defendants are entitled to detailed information so they can understand the specific nature and degree of the misconduct, determine its relevance to a particular defense, and prepare arguments as to its use on cross-examination at hearing and trial.

People v Castellanos, 72 Misc3d 371, 375 (Sup Ct, Bronx County 2021)

Other cases interpreting the new statute provide vivid illustrations of the dangers of allowing prosecutors to filter information into summaries. In *People v Charles Spence*, 2019BX033069 (Crim Ct, Bronx County Sept. 29, 2021) (annexed as Exhibit D), the court reviewed the underlying records relating to what the prosecution's summary characterized simply as a violation of department rules: improperly filling out a memo book and failing to follow other departmental rules or procedures. Upon inspection, the court was able to determine that the officer in question failed to document a vehicle stop in which another officer drew his firearm and pointed it at the vehicle operator. The officer also changed the details regarding his tour of duty from that same day to an earlier time without authorization, arguably implicating the officer's truthfulness and credibility. Clearly, the summary omitted relevant details of a serious allegation that might otherwise have been overlooked as a mere minor infraction.

In another case, *People v Edwards*, 73 Misc3d 1206(A) at *6 (Crim Ct, New York County 2021) the trial court rejected the prosecution’s contention that summaries of misconduct allegations were sufficient after reviewing the underlying records, noting that whoever prepared the summary “certainly was not looking at the evidence through the eyes of a defense attorney” and acknowledging that limited disclosures impinge on defense counsel’s ability to represent the accused. *Id.* at *15. Indeed, summaries require the prosecution to inquire further to ascertain whether other discoverable material exists because of the limited information encompassed therein. Prosecutors may not merely assume that disclosing a summary from the police department is sufficient. *See People v Perez*, 71 Misc3d 1214(A) (Crim Ct, Bronx Co. 2021) (“[T]he withholding of [disciplinary records] by law enforcement agencies cannot excuse the People of their discovery obligation”).

The risk that summaries will elide important information is particularly acute where prosecutors rely on summaries created by police departments for those departments’ own internal purposes – as was the case here and is often the case in New York City. Such summaries are not designed to assess whether information is impeachment material or favorable to the defense – the critical inquiry for purposes of criminal disclosure – but rather are usually designed for a police department’s internal supervision or disciplinary purposes. Moreover, police departments may apply their own internal so-called “sealing” rules for certain disciplinary findings

and charges. But these are not “sealing” laws or statutory confidentiality privileges, and courts may not treat them as such – especially in criminal cases, given legal obligations under CPL § 245.20(1)(k)(iv) and *Brady* to disclose specific information that a department’s internal rules may omit from summaries created for their own purposes. Because police-created summaries, like the one at issue here, do not reflect the full universe of discoverable information, the underlying records themselves must be disclosed.³

Where prosecutors themselves create the summaries, courts have also recognized the risk that they may deprive the defense of relevant information based on a tendency to improperly conflate discovery with admissibility at a hearing or

³ Indeed, prosecutors already have constitutional and ethical duties to examine the materials anyway, in order to ascertain if they are discoverable pursuant to *Brady* or RPC Rule 3.8(b). Claims that it is an “undue burden” to even look, therefore, should be rejected as unsound for this obvious reason as well. For example, this Court recently disciplined a prosecutor for merely delegating review of potential discovery or *Brady* information to a detective. Under *Kyles* and its progeny, it is the prosecution’s ultimate responsibility to perform the review. *See Matter of Kurtzrock*, 192 AD3d 197, 214, 218 [2d Dept 2020] (“the respondent [prosecutor] suppressed the materials by his admitted failure to conduct *any* *Brady* review or analysis of the materials in his possession and to which he had access... We condemn as well the respondent’s actions in purporting to delegate his own ethical obligations to a police detective”); *see also Kyles v Whitley*, 514 US 419, 437 [1995]. These are tangible records held by the police and accessible to prosecutors – so the situation is totally unlike the lawsuit databases, and secret knowledge of misconduct possessed by an officer, at issue in *People v Garrett*, 23 NY3d 878, 890 [2014]. *See also Fraser v City of New York*, 2021 WL 1338795 [SDNY 2021] (critiquing this aspect of *Garrett* and ruling that “police officers who are key prosecution witnesses in a criminal trial are obligated under *Brady* to disclose the existence of civil lawsuits or other allegations of misconduct filed against them that bear on their credibility”). Moreover, disclosure of specific *details* underlying prior misconduct allegations – not merely a summary – is constitutionally required, because favorable information must be disclosed in a form *useable* by the defense and which permits adequate and timely investigation and presentation of the underlying evidence. *See US v. Rodriguez*, 496 F3d 221, 226-228 [2d Cir 2007]; *People v Cortijo*, 70 NY2d 868, 870 [1987].

trial. *See People v Salters*, 72 Misc3d 1219(A), *4 (Sup Ct Nassau County 2021) (“It is not for the People to decide, in the first instance, if a particular item from a disciplinary record might be admissible or might impeach a witness.”). Prosecutors may not usurp the trial court’s discretion at the discovery stage in determining to limit disclosures of disciplinary histories, especially since the Legislature has now said that they are not confidential. *See generally People v Combest*, 4 NY3d 341, 346 (2005). In a criminal case, defendant’s interest in nonconfidential material weighs heavy.”). To be clear, this is the law even where the prosecutor genuinely believes that a misconduct allegation is false, would be non-probative, is too ambiguous or minor, or otherwise should not be used on cross examination. *See* CPL § 245.20(1)(k). The prosecution is still required to disclose all possible impeachment information in the files – and can then make any arguments opposing its use at the time of trial. *See, e.g., People v Hunter*, 11 NY3d 1 (2008) (prosecutor was required to disclose *Brady* information where trial judge had discretion either to forbid its use for impeachment or to permit it); *see also* CPL § 245.20(1)(k) (“Information under this subdivision shall be disclosed . . . irrespective of whether the prosecutor credits the information”); *People v Rouse*, 34 NY3d 269, 277 (2019) (“A ‘good faith basis’ [to cross-examine] requires only that counsel have some reasonable basis for believing the truth of things about which counsel seeks to ask”).

Moreover, because the new discovery statute was meant to reduce discovery delays, it does not make sense to limit the required disclosure to a summary and subsequently “shift the burden to the defense to attempt to learn the specifics” of misconduct complaints through a subpoena or FOIL request, particularly when the statute expressly requires the putative recipients of such subpoenas or FOIL requests to turn over that exact information to the prosecution. *See People v Castellanos*, 72 Misc3d 371, 377 (Sup Ct, Bronx County 2021) (“If any citizen can now file a Freedom of Information Law (FOIL) request for these records and (eventually) obtain them, it makes no sense that, in a criminal proceeding, the People’s obligations do not extend to providing records which are potential impeachment material for the police witness.”). That is inconsistent with the “automatic discovery” language of CPL § 245.20(1)(k)(iv) and CPL § 245.20(2), and it ignores the “presumption in favor of disclosure” that applies when courts interpret those sections under CPL § 245.20(7). The procedural requirements of third-party subpoenas and FOIL submissions are onerous, and often require subsequent

litigation.⁴ Unlike criminal discovery, they are not subject to constitutional speedy trial provisions.⁵ See CPL § 30.30, CPL § 245.20.

Furthermore, nothing within CPL § 245.20(2) creates an exception to the prosecution's automatic discovery obligations when the defense is also able to subpoena or FOIL the records. The sentence in question states:

The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under §245.20(1) and to cause such material or information to be made available for discovery where it exists *but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain.*

⁴Indeed, The Legal Aid Society submitted numerous FOIL requests to NYPD for disciplinary records following the repeal of CRL § 50-a that still remain outstanding for responsive documents. "Some police departments are still finding ways to make conduct inaccessible, like when the Town of Manlius Police Department in New York attempted to charge the non-profit organization MuckRock \$47,504 to access their records." Kallie Cox and William H. Freivogel, *Analysis of Police Misconduct Record Laws In All 50 States*, AP News, (May 12, 2021), <https://apnews.com/article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c>; see, e.g., an Article 78 proceeding was initiated by the NY Post against NYPD for refusing to perform its duty of disclosure under FOIL following the repeal of 50-a. @createcraig, Twitter (Oct. 6, 2021, 12:30) <https://twitter.com/createcraig/status/1445788514809901068>; Will Cleveland and Sean Lahman, *NYCLU Seeks to Intervene in Locust Club Suit Over Release of Disciplinary Records*, Democrat & Chronicle (Dec. 16, 2020) <https://www.democratandchronicle.com/story/news/2020/12/16/nyclu-files-suit-against-rochester-ny-police-department-over-records/3904340001/>; "The civil rights group made the request after the NYPD in March launched a searchable database on uniformed officers, which it claimed wrongfully withhold records "related to unsubstantiated allegations" Priscilla DeGregory and Craig McCarthy, *NYCLU Claims NYPD Withholding Officers' Disciplinary Records Database*, NEW YORK POST (Sept. 30, 2021) <https://nypost.com/2021/09/30/nypd-withholding-officers-disciplinary-records-nyclu/>

⁵ "The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the discovery provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant." Comm. On Open Gov't, Adv. Op. No. FOIL-AO-11934 (Feb. 2, 2000) available at <https://docs.opengovernment.dos.ny.gov/coog/ftext/fl1934.htm>

CPL § 245.20(2) (emphasis added). This language does not apply to the police department’s personnel records because they are “within the prosecutor’s . . . control.” The very next sentence of the discovery statute expressly states that, for purposes of criminal disclosure, prosecutors’ offices are in possession of police disciplinary records. CPL § 245.20(1) (requiring disclosure of “[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government’s behalf in the case”). The Legislature also mandated that, upon the prosecution’s request, the police make their files available to the prosecution. CPL § 245.55(2). In other words, the automatic discovery statute accounts for ensuring “that what the Legislature has provided in law—the prosecution’s being deemed in possession of evidence in the police files—also becomes true in fact.” *People v Edwards*, 73 Misc3d 1206(A) (Crim Ct, New York County 2021).

In short, requiring the defense to issue subpoenas or make FOIL requests following the exchange of summaries risks exactly the delay and inefficacy the discovery reforms intended to avoid – and which the District Attorneys now claim to be worried about. Any suggestion that the defense must subpoena or make FOIL

requests for the underlying records relating to testifying officers' prior misconduct is untenable.⁶

POINT III

Any Burden Imposed By Fulfilling the Obligation to Disclose Records of Police Misconduct Is Temporary and Diminishing, and In Any Event Is a Matter of Legislative Prerogative

Petitioner's contentions focusing on "burdens" and "resources" are not pertinent, because the Legislature has full scope to determine the contents of discovery. *See People v Colavito*, 87 NY2d 423, 427 (1996). Such policy choices are not within this Court's purview.

Indeed, the statute itself addresses the issue of possibly "burdensome" requirements, showing the Legislature considered the issue and chose to address it in a particular way without diluting the mandate of disclosure. For instance, where materials are "exceptionally voluminous" or are not in the prosecutor's actual possession despite "diligent, good faith efforts," all time periods in CPL § 245.10(1) are stayed an additional 30 days, without need for a motion. CPL § 245.50(3) includes a provision that allows prosecutors to state ready for trial under CPL § 30.30 without filing a certificate of compliance where they can show "special

⁶ Prior to the reforms, prosecutors had argued that defendants should not be *allowed* to use FOIL requests during criminal proceedings, and this Court agreed. *See, e.g., Matter of Pittari v Pirro*, 258 AD2d 202, 206 [2d Dept 1999] ("If a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL Article 240").

circumstances in the instant case.” Additionally, CPL §30.30(4)(g), which was amended in the same legislation, allows prosecutors to seek excludable time periods where they make a showing of “exceptional circumstances.” Thus, the Legislature has weighed burden against transparency, and passed a statute requiring robust disclosure.

Even if they could be considered by this Court, which they cannot, many of Petitioner’s claims about burden are dubious at best. For instance, Petitioner’s argument presupposes without evidentiary support that every officer involved in every criminal case must have extensive disciplinary histories that require many hours of manual review through thousands of pages of investigations. This proposition is questionable. This Court should consider an analysis by the New York City Civilian Complaint Review Board (CCRB) that finds that most active NYPD officers do not receive any complaints and even fewer receive multiple complaints.⁷ Moreover, few criminal cases involve the testimony of more than a small handful of officers, much less many dozens of officers that each have extensive disciplinary histories.

Moreover, Petitioner’s burden argument ignores the fact that legislative change requires bureaucratic adaptation. CPL §245.55(1) requires prosecutors and

⁷ See CCRB Data Transparency Initiative, available at <https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-mos.page> (last accessed Oct. 7, 2021)

police departments to establish procedures “to ensure that a flow of information is maintained” to enable all discoverable information to be disclosed from their collective files. While there may be an initial challenge in creating systems to ensure that flow of information, that difficulty will continually diminish as agencies adjust to comply with the repeal of CRL § 50-a and the new discovery law, in responding not only to discovery obligations in criminal cases, but FOIL requests from members of the public as well. Indeed, for example, NYPD received substantial additional resources in order to facilitate such compliance. *See, e.g.*, FY2021 NYPD Executive Report, May 14, 2020, available at <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/05/FY21-NYPD-Executive-Report-1.pdf>. (allocating \$39.2 million in funds to comply with state changes to discovery law.) Additionally, funding has been allocated by the New York City Council to all five District Attorneys’ offices to support additional positions needed for discovery and bail reform. *See* Report of the Finance Division on the Fiscal Division on Fiscal 2022 Preliminary Plan for the District Attorneys and Special Narcotics Prosecutor, 12-13, Mar. 22, 2021, available at <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/03/901-906-DAs-and-SNP.pdf>. Even further, agencies will have to adjust pursuant to discovery in civil cases as well, where police personnel and disciplinary records may be ordered produced. *See Junmei Zhang v City of New York*, __ AD3d __, 2021 NY Slip Op 05659 (1st Dept Oct. 14, 2021).

As the U.S. Supreme Court stated in the seminal constitutional decision in this area, *Kyles v Whitley*, “neither is there any serious doubt that procedures and regulations can be established to carry the prosecutor’s burden and to insure communication of all relevant information on each case to every lawyer who deals with it.” 514 US at 438.

Changes in the law will inevitably prompt new procedures – several of which are already being undertaken. To illustrate, over the past 12 months, the NYPD has launched an online dashboard containing a narrow set of curated disciplinary histories and records of officers including department trial findings of guilt.⁸ The New York City CCRB has created a new database that is searchable and open to the public that provide allegation histories for members of service.⁹ And, following the repeal of CRL § 50-a, CCRB began proactively and routinely providing investigator closing reports on all substantiated cases to the *Giglio* Units at the various New York City District Attorneys’ offices.¹⁰

Nor should the Court be swayed by arguments that privacy concerns require burdensome redactions of disciplinary records. As an initial matter, exemptions for such material from the Freedom of Information Law (FOIL) do not apply to the

⁸ NYPD Online, <https://nypdonline.org/link/13> (last accessed Oct. 10, 2021)

⁹ CCRB NYPD Member of Service Histories, <https://www1.nyc.gov/site/ccrb/policy/MOS-records.page> (last accessed Oct. 10, 2021); see also *Uniformed Fire Officers Ass’n v De Blasio*, No. 20-2789-CV, 2021 WL 561505 (2d Cir Feb. 16, 2021)

¹⁰ See annexed Exhibit A, Civilian Complaint Review Board, Production of CCRB Closing Reports to New York City District Attorney Offices (Mar 17, 2021).

prosecution’s automatic discovery obligations for law enforcement disciplinary records under CPL § 245.20(1)(k)(iv). By their own terms, those exemptions apply only to “requests” submitted to “law enforcement agencies,” which they define as “authorities or agencies maintaining police forces.” Public Officers Law §§ 87(4)(a) &(b), 86(8). Automatic discovery under Article 245 does not involve a FOIL “request,” so there is no mandatory redaction requirement, and thus no consequent burden.

CONCLUSION

For the forgoing reasons, the petition must be dismissed.

Respectfully submitted,



Jennvine Wong
The Legal Aid Society
199 Water Street, 6th Floor
New York, New York 10038
646-522-9083
jwong@legal-aid.org

Dated: New York, New York
October 29, 2021

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCCRR 1250.8(j) that the foregoing brief was prepared by a computer in double-spaced, fourteen-point Times New Roman typeface and that the brief is 5,043 words long – excluding the title page, table of contents, table of authorities, and the present page – as determined by the word count function of Microsoft Word.

A handwritten signature in black ink, appearing to read "Jennvine Wong", is positioned above a horizontal line. The signature is written in a cursive style with a long horizontal stroke extending to the right.

JENNVINE WONG, ESQ.

EXHIBIT A



BILL DE BLASIO
MAYOR

CIVILIAN COMPLAINT REVIEW BOARD
100 CHURCH STREET 10th FLOOR
NEW YORK, NEW YORK 10007 ♦ TELEPHONE (212) 912-7235
www.nyc.gov/ccrb



FREDERICK DAVIE
CHAIR

March 17, 2021

Jennvine Wong, Esq.
Staff Attorney
Cop Accountability Project, Special Litigation Unit
Legal Aid Society
199 Water Street
New York, New York 10038

Re: Production of CCRB Closing Reports to New York City District Attorney Offices

Ms. Wong,

The Civilian Complaint Review Board (CCRB) has provided the following records to all New York City District Attorney offices, the Office of the Special Narcotics Prosecutor, and the Law Department Family Court Division:

- CCRB Allegation Histories for all NYPD Members of Service (MOS) who were active in or after the year 2015;
- For NYPD MOS who were active in or after the year 2015 - Closing Reports for cases with substantiated CCRB allegations and/or Other Misconduct notations that were closed in or after the year 2001.

Please note:

- The data contained in the above-referenced records is current as of February 10, 2021.
- Closing Reports for cases that were closed prior to the year 2000 were not included, as the CCRB does not have a digital record of these cases in its Complaint Tracking System.
- There are some substantiated complaints that were closed in the year 2000 for which the CCRB does not have a digital record of the Closing Report in its Complaint Tracking System. Accordingly, only some Closing Reports from the year 2000 were included in this production.

Sincerely,

/s/ Matthew D. Kadushin
Matthew Kadushin, Esq.
General Counsel
100 Church Street, 10th Floor
New York, NY 10007
212-912-2013
mkadushin@ccrb.nyc.gov

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 78

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

- against -

DECISION AND ORDER
INDICTMENT NO. 1709/19

DANTE GREEN,

DEFENDANT.

----- X
MARCUS, J.:

The defendant was indicted by the Grand Jury of Bronx County, under indictment 1709/19, and charged with Assault in the First Degree and related charges. On February 14, 2020, the People filed a Statement of Readiness and a Certificate of Compliance. The Certificate of Compliance asserted that:

after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the People have disclosed and made available to the defendant all known material and information that is subject to discovery under CPL § 245.20 (1), except for discovery that is lost or destroyed, any information and material that is the subject of a protective order issued by a court pursuant to CPL § 245.70 ..., and/or any information and material that is exempt from disclosure by a protective mandate.

By motion dated November 20, 2020, the defendant filed a motion asking the Court to deem the February 14th Certificate of Compliance invalid. In a response dated December 18, 2020, the People submitted an affirmation in opposition to the defendant's motion. The defendant submitted a reply, dated December 24, 2020.

On October 19, 2020, the People filed a supplemental Certificate of Compliance, making an assertion identical to that in the original Certificate and indicating that additional discovery had been provided to defense counsel as of October 19, 2020. On December 4, 2020, the People filed an additional supplemental Certificate of Compliance, asserting,

again in identical language, that they had complied with their discovery obligations. In that Certificate of Compliance, the People also indicated that additional discovery had been provided to defense counsel on November 16, 2020 and December 4, 2020, including the memo book of Police Officer Timothy Burke, and that the memo books of Sergeant Roberto Bermudez and Police Officer James Lindquist were lost or destroyed.

The outstanding discovery material the defendant claims were not turned over at the time the People's February 14th Certificate of Compliance was filed are: 1) "all proficiency tests and results administered or taken within the past ten years" and "all reports prepared by" Dr. Ronald McLean or "if no report is prepared, a written statement of the facts and opinions to which [Dr. McLean] is expected to testify and a summary of the grounds for each opinion;" 2) CCRB and IAB reports for the testifying police officers, including "unsubstantiated," "unfounded," and "exonerated" complaints; and 3) memo books of Sergeant Bermudez, Officer Lindquist and Officer Burke. For the reasons set forth below, I find that the February 14, 2020 certificate was invalid.¹

Expert Witness Information

The People contend, and the defense does not dispute, that prior to filing the February 14, 2020 Certificate of Compliance they had provided to defense counsel the medical records of the complaining witness and the name and curriculum vitae of Dr. McLean, who treated the complainant at St. Barnabas Hospital. The People further state that they are unaware of any proficiency tests for Dr. McLean, or of any written reports made by the doctor pertaining to this case. The complainant's medical records satisfy the

¹ The defendant did not move to have the October 19 or December 4, 2020 Certificates of Compliance deemed invalid.

CPL § 240.20(1)(f) requirement of providing a written statement of the facts and opinions to which Dr. McLean is expected to testify. Accordingly, the People satisfied their discovery requirements with respect to the expert witness.

Civil Lawsuits, CCRB and IAB Records

The defendant argues that the People's Certificate is invalid because they failed to provide IAB and CCRB records as to the arresting officer, Officer Moncion, as well as Officers Lindquist and Burke. The People argue, relying on People v. Davis, 70 Misc.3d 467 (Crim. Ct. Bx. Co. 2020), that they are not required to provide complete IAB and CCRB records, and that a summary, such as the NYPD Central Personnel Index ("CPI") is sufficient. They also assert that they are only obligated to provide information about substantiated matters. Notably, here, the People did not provide the defense with the CPI, and instead created their own two-page summary of lawsuits, CCRB and IAB investigations for substantiated allegations as to Officer Moncion and Detective Investigator Tashana Phelps. See defendant's exhibit B.

The People are required to provide to the defense all "evidence and information, including that which is known to police ... that tends to : ... (iv) impeach the credibility of a testifying prosecution witness." CPL § 265.20(1)(k). In People v. Randolph, 69 Misc.3d 770 (Sup. Ct. Suffolk Co. 2020), the court held that the plain language of CPL § 245.20(1)(k) requires them to turn over both substantiated and unsubstantiated allegations. The court reasoned that there can be a good faith basis to cross-examine police witnesses as to allegations that are "substantiated where it is determined that the facts clearly support the allegation," and "unsubstantiated when the allegation cannot be resolved because sufficient evidence is not available," but not for "exonerated where the act was legal, proper

and necessary and unfounded when there is evidence to establish that the act did not occur.” Randolph, 69 Misc.3d at 772 (internal quotation marks omitted). Further, the Court ordered the People to provide the underlying documents, subject to any protective order the People may obtain, not just a summary. Id., but see Davis, 70 Misc.3d at 628 (“the plain language of the new discovery statute only requires the People to disclose the information that is favorable to the defendant, but not necessarily the underlying material as well”); People v. Knight, 69 Misc.3d at 550 (“The court rejects defendant's claim that the prosecution must produce underlying records in addition to the disclosures they made”).

I find the reasoning of the Randolph court persuasive. Allegations that are unsubstantiated, as opposed to those which have been declared to be “unfounded” or of which the officer has been exonerated, are analogous to allegations of misconduct in a pending civil lawsuit, which must be disclosed even though the lawsuit is unresolved. See People v. Smith, 27 N.Y.3d 652, 661 (2016) (“civil allegations of misconduct in a federal lawsuit filed against a law enforcement agent were favorable to defendant as impeachment evidence, thereby necessarily determining that such allegations can bear on a law enforcement officer's credibility as a witness”) (citation and internal quotation marks omitted). And what must be disclosed is not merely “information” concerning such matters, but “evidence” as well. CPL §265.20(1)(k). For these purposes, evidence includes underlying documents that detail such things as witnesses’ statements and physical evidence. Thus, the People’s prepared summaries do not suffice for this purpose.

Accordingly, the People are ordered to provide the defense with the information and evidence (as described immediately above) in the possession of the People or the Police Department concerning substantiated and unsubstantiated CCRB and IAB complaints for

any police witnesses they intend to call at trial, including Officers Lindquist and Burke if they are intended witnesses. The information provided as to the civil lawsuits, however, is sufficient, and the People need only provide such information as to any other police witnesses they intend to call at trial as required by CPL § 245.20(1)(k); see People v. Lustig, 68 Misc3d. at 418.

Nonetheless, the disclosure of “evidence and information” contained in IAB and CCRB reports is an obligation imposed upon the People as part of the new discovery law. Issues surrounding what materials the People must disclose is being litigated in the courts of this state, and, as indicated above, different lower courts have come to different conclusions on these issues, and there is no appellate authority yet available. Accordingly, I find the People acted in good faith and provided discovery based on their understanding of their duty, and, as a result, their failure to provide the information and evidence set forth above does not invalidate the February 14, 2020 Certificate of Compliance. See CPL § 245.50(1); Randolph, 69 Misc. 3d 770 at 773 (“Since the People have been acting in good faith and have provided discovery in harmony with their understanding of the requirements, at this juncture there is no basis to strike the certificate of compliance or impose other sanctions”) (footnote omitted).

Memo Books

In the People’s February 14, 2020 Certificate of Compliance, they stated that they had been unable to obtain to obtain the memo books of Officer Lindquist and Sergeant Bermudez despite their efforts to do so. The People made the same representation in the October 19, 2020 Supplemental Certificate of Compliance. In their December 4, 2020 Supplemental Certificate of Compliance, the People again noted they had not been able to

obtain the memo books, and they assert they have been lost or destroyed. The People argue that they “exercised reasonable due diligence to obtain all discoverable materials prior to the filing” of the February 14th Certificate, “communicat[ing] extensively with police officers, both in person and over the phone” to obtain and disclose memo book entries.” According to the People, beginning on December 4, 2019, they were in contact with the arresting officer to obtain the memo books of Sergeant Bermudez and Officer Lindquist. The People state that they notified Officer Lindquist to appear at the District Attorney’s Office on December 11, 2020 with his memo book and although he appeared, he did not bring his memo book, and on February 11, 2020 they emailed the arresting officer and Officer Lindquist regarding Officer Lindquist and Sergeant Bermudez’s memo books and were assured they would be received the next day, but they were not. The People again contacted the arresting officer on February 13, 2020 because the memo books were still not received.

Based on the People’s representations, I find that the People exercised good faith in disclosing that they had been unable to obtain those memo books on or before the date of their Certificate of Compliance. I also find that they “exercise[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of” the memo books of Officer Lindquist and Sergeant Bermudez, and I accept their assertion that they were lost or destroyed. Since “[n]o adverse consequence to the prosecution or prosecutor shall result from the filing of a certificate of compliance in good faith,” CPL § 245.50(1), the failure to provide the memo books at the time the Certificate was filed does not affect its validity. See id.; People v. Lustig, 68 Misc.3d 234 (Sup. Ct. Queens Co. 2020); People v. Knight, 69 Misc.3d 546 (Sup. Ct. Kings Co. 2020).

In the December 4, 2020 Supplemental Certificate, the People stated that the memo book of Officer Timothy Burke was “provided to defense counsel electronically via email on December 4, 2020.” They assert that they first attempted to obtain the memo book on December 14, 2019, prior to the filing of the February 14th Certificate. Although they were thus aware of its (at least possible) existence at the time they filed the Certificate, the Certificate does not mention it among the memo books the People were unable to obtain. Moreover, the October 19, 2020 Supplemental Certificate also makes no mention of Officer Burke’s memo book.

The People have provided no information concerning their efforts to secure Officer Burke’s memo book beyond stating that they notified Officer Burke to appear at the District Attorney’s Office on December 12 2019, but he did not do so, and that on December 14, 2019, they asked the arresting officer to assist them in obtaining it. Unlike the memo books of Officer Lindquist and Sergeant Bermudez, Officer Burke’s memo book was neither lost nor destroyed. In contrast with the information they have provided with regard to their efforts to obtain the memo books of Officer Lindquist and Sergeant Bermudez, they provide no information concerning any efforts made to obtain Officer Burke’s memo book in the two months after requesting the arresting officer’s assistance and before the Certificate was filed.

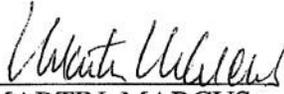
Because the People have thus failed to demonstrate that they exercised good faith in disclosing the existence of the memo book in their February 14th Certificate, or that they “exercise[ed] due diligence and ma[de] reasonable inquiries to ascertain [its] existence”

and to obtain and provide it to the defense on or before the Certificate was filed, see CPL § 245.50(1), I deem the February 14th Certificate of Compliance invalid.²

Since the defendant has not challenged the People's December 4, 2020 Certificate, and because it is apparently valid,³ the defendant has 30 calendar days from the date of this decision to file and serve his reciprocal certificate of compliance.

This constitutes the decision and order of the Court.

DATED: February 4, 2021


MARTIN MARCUS
J.S.C.

HON. MARTIN MARCUS

² In his reply, the defense claims the February 14, 2020 Certificate was also invalid because of the failure to provide the defendant with DD5s turned over for the first time on November 16, 2020. The People have not responded to this additional claim. Since I find the Certificate invalid in any case, this claim need not be addressed for purposes of deciding the defendant's motion.

³ Officer Burke's memo book was provided to the defense before the December 4, 2019 Supplemental Certificate. However, the People's October 19, 2020 Supplemental Certificate was filed before the People supplied it to the defense. Thus, although not specifically challenged by the defendant, the October 19, 2020 Certificate, like the February 14, 2019 one, is invalid.

EXHIBIT C

CRIMINAL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY: **PART D**

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

PAUL INGRAMMINORS,
Defendant.

DECISION and ORDER

Docket No. CR-020938-20NY

HON. NESTOR DIAZ, J.

Defendant, Paul Ingramminors, is charged by information with Assault in the Third Degree (Penal Law § 120.00[1]), Petit Larceny (Penal Law § 155.25), Aggravated Harassment in the Second Degree (Penal Law § 240.30[4]), and Attempted Assault in the Third Degree (Penal Law § 100/120.00[1]). Pursuant to Criminal Procedure Law § 245.50(4), defendant moves the Court to find the People’s Certificate of Compliance (“COC”), filed on January 5, 2021, invalid. The People oppose defendant’s motion, arguing that their COC was valid because it was made in good faith and they exercised due diligence and made reasonable inquiries to find and provide all necessary discovery under the statute prior to certifying compliance. For the reasons stated below, the defendant’s motion is DENIED.

BACKGROUND

According to the accusatory instrument, on or about November 12, 2020, in the county of state of New York, the defendant struck the complainant multiple times in the face with a closed fist, causing a laceration, swelling and substantial pain. Defendant is also alleged to have taken the complainant’s cell phone without her permission.

Defendant was arrested and arraigned on November 17, 2020. The case was adjourned to February 8, 2021 in Part D for supporting deposition.

On January 5, 2021, the People filed and served a supporting deposition, Rosario/discovery list, Automatic Discovery Form (“ADF”), COC and Certificate of Readiness (“COR”) off-calendar.

On the next court date of February 8, 2021, defendant objected to the validity of the People’s January 5th COC. Judge Gaffey ordered the parties to confer pursuant to CPL § 245.35. Defense counsel and the assigned assistant had numerous discussions to resolve these discovery issues and engaged in a conference with the court attorney regarding these matters. The People served additional discovery on defense on February 26, 2021 and filed a supplemental ADF, supplemental COC and COR on March 11, 2021. Despite these attempts, certain discovery issues remain unresolved. On March 12, 2021, at defense counsel’s request, the Court granted a motion schedule regarding the instant matter.

Defendant moves to invalidate the People’s January 5, 2021 COC, arguing that at the time it was filed, certain discovery was outstanding. Specifically, defendant contends that the People failed to turn over the following material: (1) names and adequate contact information for civilian witnesses; (2) names, tax ID numbers, precinct, memobook notes and body-worn camera footage for all NYPD officers who responded to the incident location on November 12, 2020; (3) surveillance footage referenced in police reports; (4) the complainant’s medical records from Mt. Sinai Hospital from the date of the incident; (5) any EMT reports from the date of incident; and (6) any and all substantiated and unsubstantiated reports of police misconduct contained in the law enforcement personnel files.

On February 26, 2021, the People turned over some of the requested discovery and some new items, including surveillance footage, a voicemail that the complainant received on November 12, 2020 and an updated disclosure for Detective Mejia, one of the police officer-witnesses, which was a one-page summary created by the DA's Office relating to a substantiated misconduct claim by the CCRB.

On March 17, 2021, the People disclosed to defense counsel the complainant's Mt. Sinai medical records and an email from the complainant to the assigned assistant dated March 15, 2021.

DISCUSSION

CPL § 245.20(1) provides that, as part of initial discovery, the "prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, all items and information that relate to the subject matter of the case." This statute then provides a non-exhaustive list of categories of materials that are subject to disclosure. The COC "shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery." CPL § 245.50.

The People have a corresponding obligation regarding their COR, as a "statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of section 245 of this chapter and the defense shall be afforded an opportunity to be heard on the record as to whether the disclosure requirements have been met." CPL § 30.30[5].

The People have a continuing duty to disclose material and, if they subsequently learn of material that should have been turned over, they are required to turn it over "expeditiously" pursuant to CPL § 245.60. The court, in its discretion, has a vast array of remedies or sanctions for

failure to comply with discovery, including preclusion of evidence, an adverse instruction to the jury or dismissal (see CPL § 245.80[2]). When material is disclosed belatedly, the court shall impose an appropriate sanction if the party entitled to disclosure makes a showing of prejudice (see CPL § 245.80[1]). Additionally, “no adverse consequence ...shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances; but the court may grant a remedy or sanction for a discovery violation as provided in section 245.80.” CPL § 245.60.

In his motion to invalidate the COC, defendant delineates a list of items that the People failed to disclose prior to the filing on January 5, 2021. The Court will address each specific claim in turn.

Names and Adequate Contact Information for Civilian Witnesses

Defendant’s initial motion alleged that the People failed to comply with CPL § 245.20(1)(c) which requires the People to turn over the “names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged.” The People’s ADF stated that the witness information was provided through Witcom but defense counsel was unable to find the case or the contact information on that portal. The People maintain that when they filed and served the January 5, 2021 COC, they had uploaded the relevant contact information to Witcom. It was only after they later conferenced the case with defense counsel, however, that they realized the witness information was not available to defendant and surmise that this may have been due to the fact that one of the witness’s phone numbers was a landline instead of a cellular phone number. That same day, they provided an email address for the complaining witness and a phone number for the other witness.

Here, the People quickly remedied this unintentional error and no prejudice was suffered by defendant as a result. Moreover, these type of errors were contemplated by the provisions of CPL § 245.35(1) which allows a court to require the parties to “diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court.” Given the People’s explanation and their quick action to rectify the mistake, the Court finds that, as to this material, their initial COC was made in good faith and therefore was not invalid (see CPL § 245.509[1]; People v. Adrovic, 69 Misc 3d 563 [Crim. Ct., Kings Co., 2020]).

Names, Tax ID Numbers, Memobook Notes and Body-worn Camera Footage for all responding NYPD Officers on November 12, 2020

Defendant moves to invalidate the COC on the grounds that the People failed to provide the identifying information, memobooks, body-worn camera footage (“BWC”), police reports, and any other written or recorded materials for officers, other than Detective Mejia, who responded to the complaining witness’s apartment or canvassed the area on November 12, 2020. The People argue that they acted diligently and in good faith in seeking this footage before and after they filed their January 5, 2021 COC, including making multiple requests to Detective Mejia, unsuccessfully attempting to notify the officer who took the complaint report (who was out on sick leave) and seeking the assistance of the District Attorney’s Office BWC Unit. Ultimately, the People were able to identify the officers involved by reaching out directly to the 32nd Precinct and providing screen shots of the officers on scene.

The People are required to disclose the (1) the name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any charged offense or any potential defense thereto; and (2) all written and recorded statements, notes or police reports pursuant to CPL §§ 245.20(1)(d) & (e). Before filing their COC, the People

must exercise due diligence and make reasonable inquiries to ascertain the existence of material and information” and this obligation extends to “*all known material and information* subject to discovery” CPL § 245.50 (*emphasis added*).

At the time the People filed their initial COC, despite numerous, continued efforts, they had no way of knowing the identity of the unknown officers or whether any of these officers activated their BWC or otherwise had discoverable information. This information is deemed in the People’s possession pursuant to CPL § 245.20(2) and the People informed defendant in their initial COC that this material remained outstanding. In any event, after filing the COC, the People worked diligently to gather this information and disclosed it to defendant. Upon obtaining this information, they promptly supplied to it defendant who makes no allegation of suffering any prejudice due to the belated disclosure. Under the facts here, since the People acted in good faith in seeking out this information prior to and after filing their January 5, 2021, this Court declines to invalidate the COC based on this belated disclosure.

Surveillance Footage Referenced in Police Reports

Defendant moves to invalidate the COC on the grounds that the People failed to provide video surveillance footage before filing the January 5, 2021 COC. The People respond by asserting that they made multiple requests to the case detective to obtain a copy of the footage, only to later learn that a different officer retrieved the footage and that the case detective had not saved a copy to his case file because it was believed that the video did not show anything related to the subject matter of the case. When the People finally obtained the footage they were unable to review it since only the video player software (and not the video itself) had been shared. They have since obtained another copy but have not at present viewed it; they rely on the detective’s representations that it does not show anything relevant to the charged incident. Defense counsel has not indicated

that they are unable to view this video. Should defendant, after watching the video, dispute the People's contention that it does not contain anything related to the subject matter of the case, the Court will entertain further motions as to this specific item. If defense counsel is unable to view the video, the Court will entertain a motion to deem it "lost or destroyed" pursuant to CPL § 245.80(1)(b) and may consider sanctions, if appropriate.

The Complainant's Medical Records and EMT Records from the Date of the Incident

Defendant contends that the January 5, 2021 COC is invalid because pursuant to CPL § 245.20(1)(j), the People failed to include the complainant's medical records from Mt. Sinai Hospital. While conceding that this type of discovery is outside of the People's control, defendant claims that the People's COC was invalid because they only acted to produce these records after defense counsel raised the issue after the COC was filed. The People maintain that they were initially unaware that the complainant sought treatment at the hospital and acted quickly to obtain these records after it was brought to their attention by defense counsel.

While CPL § 245.20(1)(j) requires the People to disclose "physical or mental examinations...relating to the criminal action," this obligation is limited to material and information that is in the People's "possession, custody or control." CPL § 245.20(1). Since the medical records could not be obtained without a subpoena, they cannot be said to have been in their possession or control when the People filed the January 5, 2021 COC and as such, their omission from the initial discovery disclosure did not render the COC invalid. As to defendant's claim that the People should have ordered them without a request from counsel, while that may be true, the fact that they were ordered later does not invalidate the COC. Indeed, discussions between the litigants regarding ongoing discovery is contemplated by the CPL's "flow of information," "continuing duty to disclose" and "court-ordered procedures to facilitate compliance" provisions

(see CPL §§ 245.55, 245.60 and 245.35). Moreover, defendant has not alleged, let alone shown, any prejudice suffered by this disclosure occurring after the January 5, 2021 COC (see CPL § 245.80).

Similarly, the reports made by a responding emergency medical technician were not in the People's custody or control when they filed the initial COC, notwithstanding defendant's claim that he may be entitled to them as exculpatory material under CPL § 245.20(1)(k)(i) & (ii) and Brady v. Maryland. At present, the People have acted diligently in obtaining the records and that they were not turned over prior to the filing of the January COC does not render it invalid.

Any and All Substantiated and Unsubstantiated Reports of Police Misconduct

Finally, defendant contends that the prosecution's summary disclosure of Detective Mejia's one substantiated CCRB complaint does not comply with CPL §245.20(1)(k)(iv) because it failed to include the underlying CCRB complaint and report, or other documents relied upon to craft the summary. The Court agrees. Under this provision, the People must disclose "*all evidence and information*, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case that tends to:...(iv) impeach the credibility of a testifying prosecution witness." CPL §245.20(1)(k)(iv) (*emphasis added*). The scope of the People's obligations regarding disclosure must also be viewed in light of the recent repeal of Civil Rights Law §50-a which resulted in public access to police misconduct files and further eroded asserted claims of confidentiality in police personnel files (see People v. Kelly, 2021 N.Y. Misc. LEXIS 1334 [NY Co. Crim. Ct. March 19, 2021 Gaffey, J.][*internal citation and quotation omitted*]). Since the statute contemplates "all evidence and information" a summary will not suffice.

Here, the parties indicate that the information sought deals with substantiated allegations, the use of which "for impeachment must be determined by the hearing/trial judge, based *inter alia*,

on the good faith basis on cross-examination relevant to the credibility of the witness.” People v. Randolph, 69 Misc 3d 770, 772 (Sup. Ct. Suffolk Co. 2020). The People may seek an *in limine* ruling to preclude any cross examination regarding this material where the “nature of the conduct or the circumstances in which it occurred does not bear logically and reasonably on the witness’ credibility or there is no good faith basis for the inquiry.” Id. Accordingly, the Court directs that the People provide all underlying materials, or make them available to defendant, for any substantiated or unsubstantiated cases. Ultimately, any use of these materials for cross examination will be left to the discretion of the trial judge (see Kelly, supra, citing People v. Smith, 27 NY3d 652 [2016]).

While the Court now directs the People to turn over these additional materials, it finds that the People’s failure to turn over the entire file previously was not in bad faith (id.). These discovery laws were recently enacted, appellate courts have yet to analyze the issue and some lower courts have held that the People are not required to turn over the underlying disciplinary files (id.). Consequently, the Court finds that the People acted in good faith in turning over a summary of the detective’s substantiated allegations.

Defendant’s Motion to Invalidate the Certificate of Compliance

Defendant moves the Court to invalidate the People’s previously filed COC based on their failures to provide discovery. As discussed above, the People have complied with the requirements of CPL § 245.20, with the exception of the police disciplinary records noted above. As such, the Court finds that their January 5, 2021 COC was filed in good faith, were reasonable under the circumstances and not illusory (see CPL§ 245.60). To the extent that they have failed to comply with their discovery obligations, this Court declines to impose any sanctions because defendant

has failed to allege, let alone show, any prejudice as required by CPL § 245.80 (see People v. Nelson, 67 Misc 3d 313 [Sup. Ct. Franklin Co. 2020]).

CONCLUSION

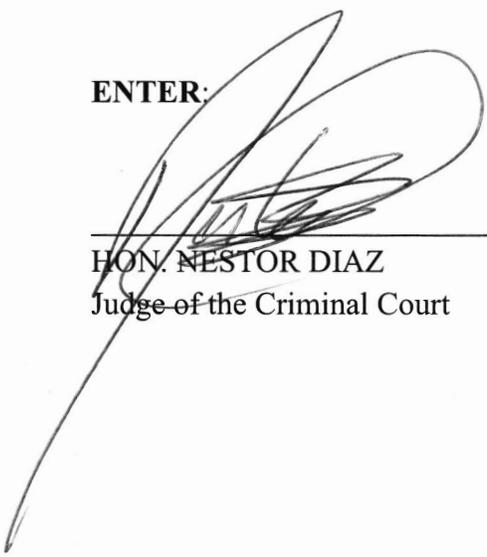
Accordingly, defendant's motion to invalidate the People's certificates of compliance is DENIED.

The People must provide defendant with the additional discovery materials as soon as possible but no later than May 5, 2021.

This constitutes the decision and order of the Court.

Dated: April 14, 2021
New York, New York

ENTER:

A large, stylized handwritten signature in black ink, appearing to read 'Nestor Diaz', is written over a horizontal line. The signature is highly cursive and loops around itself.

HON. NESTOR DIAZ
Judge of the Criminal Court

EXHIBIT D

**CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART AP2**

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

-against-

CHARLES SPENCE,

Defendant.

DECISION AND ORDER

Docket 2019BX033069

-----X
MARGARET W. MARTIN, J.C.C.:

Facts of the Case

On December 28, 2019, the defendant was arraigned in Bronx Criminal Court on a charge of Operating a Motor Vehicle While Under the Influence of Drugs or Alcohol and related charges, (VTL §§ 1192[1, 2, 3]). The People filed their Certificate of Compliance (“COC”) on February 13, 2020. On February 11, 2021, the defendant moved in writing to challenge the validity of the People’s COCs and to dismiss the accusatory instrument pursuant to CPL §§ 30.30(1)(b) and 170.30(1)(e). The People responded on March 19, 2021 opposing defendant’s motion and the defendant filed their reply on March 26, 2021.

The crux of the defendant’s argument is that the People failed to file the underlying documents for a substantiated IAB claim against the arresting officer in this case. The People contend that the law does not require them to turn over this information and that their COC was valid. The Court has reviewed the defendant’s motion, the People’s response and the defendant’s reply in addition to the court documents and the COC filed by the People on February 11, 2021.

Relevant Case Law

In order to validly state ready for trial, the People must serve a “certificate of good faith compliance with the disclosure requirements of section 245.20”. (*CPL* § 30.30[5]). A COC is valid when the prosecutor discloses “all known material and information subject to discovery”, after “exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery”. (*CPL* § 245.50[1]). There are two exceptions to this rule outlined in *CPL* § 245.50. Particularly, the statute makes clear that the non-disclosure of information that is “lost or destroyed as provided by paragraph (b) of subdivision one of section 245.80” or information that is subject to a protective order pursuant to *CPL* § 245.70 does not invalidate an otherwise duly filed COC. (*Id.*) *CPL* § 245.50(1) allows for a supplemental certificate of compliance to be served when additional discovery is provided pursuant to *CPL* § 245.60, specifically where the prosecutor “*subsequently learns* of additional material or information” that must be disclosed under their discovery obligations. (*CPL* § 245.60[1] [emphasis added]). The Court finds this language instructive. It is clear that the statute contemplates the filing of a supplemental COC in a well-defined scenario; namely, when “despite the People’s diligent and reasonable inquiries” the People, nevertheless, subsequently become aware of the existence of additional material to be disclosed. (*People v. Adrovic*, 69 Misc3d 563 [2020]). The Court does not believe that § 245.60(1) encompasses the scenario where a prosecutor is aware of outstanding material at the time they file their initial COC, nor does it include a situation where the People intend to disclose material or information but have not done so. Instead, when the People are aware of outstanding discovery, but do not yet have such in their possession, the law requires them to affirmatively move the Court for additional

time if they cannot provide the discovery in accordance with the time periods delineated in Article 245. (*CPL* § 245.70[2]; *People v. Adrovic*, 69 Misc3d 563 [2020]).

CPL § 245.20(1)(k)(iv)

Described as Automatic Discovery, *CPL* § 245.20(1)(k) is clear that the People *must* turn over “*all evidence and information*, including that which is known to police or other law enforcement agencies acting on the government’s behalf in the case that tends to: (iv) impeach the credibility of a testifying prosecution witness”. (*CPL* § 245.20[1][k][iv]). Further, *CPL* § 245.55(1) mandates a flow of information between law enforcement and the People to ensure that the People disclose “any evidence or information discoverable under paragraph (k) of subdivision one of section 245.20 of this article”. (*CPL* § 245.55[1]). Pursuant to *CPL* § 245.55(2), law enforcement must turn over a complete copy of its complete records and files if it relates to the “investigation of the case” or “the prosecution of the defendant.” (*CPL* § 245.55[2]). Clearly, disciplinary records of police officers who will provide testimony and were involved in the arrest of the defendant would relate to the “prosecution of the defendant.” (*People v. Castellanos*, 72 Misc.3d 371 [2021]). As such, the records are subject to the requirement of completeness contained in *CPL* § 245.55(2). The language of these statutes, especially when read together, requires full disclosure of information that tends to impeach a testifying law enforcement witness for the People. Notably, this Court interprets the term “all” to mean “in its entirety.” Accordingly, the entire file and underlying documents of the claims at issue here must be turned over to the defendant. (*People v. Adrovic*, 69 Misc3d 563, FN 4 [Crim Court, Kings Co Sept 3, 2020]).

The defendant states he received a summary of a substantiated claim against the arresting officer, Officer Jean Pierre in this matter from the People. The summary indicated as follows:

Internal investigation: 03/05/2016

Alleged: Memobook Incomplete/Improper/other dept rules proc. Violation

Dispo: Substantiated/minor proc

Closed: 09/23/2016

The People indicate on their COC that they turned over *Giglio* information to defense counsel, but they did not indicate specifically what was contained in this disclosure. At first blush, the disclosure made by the People on the instant matter specifies that the substantiated claim against Officer Jean Pierre involved a failure to properly fill out his memo book. However, defense counsel came to learn of the contents of this IAB file when a colleague on a different matter, also involving Officer Jean Pierre, received the underlying documents from another member of the Bronx District Attorney's office. The underlying, redacted documents in that case provided a fuller picture of the nature of the substantiated finding against Officer Jean Pierre. Officer Jean Pierre failed to document the stop of an ATV by another officer, possibly his partner. Video viewed by IAB showed that this other officer drew his firearm and pointed it at the operator of the ATV. Officer Jean Pierre failed to write in his memo book that this stop occurred. Additionally, Jean Pierre was found to have changed his tour to an earlier time without authorization. IAB was unaware of this incident until five months after it occurred.

Obviously, this information tends to impeach the credibility of Jean Pierre. (*CPL 245.20(1)(k)(iv)*). The People will no doubt call him to testify in the prosecution of the defendant, as he was the arresting officer. *CPL § 245.55(1)* requires law enforcement to turn over its complete files to the People with respect to *CPL § 245.20(1)(k)* so that the People can be in compliance with their discovery obligations. It appears that NYPD has provided the underlying documents to the Bronx District Attorney's Office. Additionally, it is obvious the Bronx District Attorney's Office has this documentation in their possession as they turned it over

on another matter. Finally, with the repeal of CRL § 50-a, the law that shielded law enforcement from disclosing the underlying documents in disciplinary records, and CPL § 245.20(1)(k), the Court finds that the defendant is entitled to all information relating to substantiated and unsubstantiated claims at issue in this case. (*People v. Randolph*, 69 Misc3d 770 [2020]; *People v. Adrovic*, 69 Misc3d 563, FN 4 [Crim Court, Kings Co Sept 3, 2020]). Therefore, the Court finds the COC filed on February 14, 2020 to be invalid.

CPL § 30.30 Calculation

In a motion to dismiss pursuant to CPL §30.30, the initial burden rests on the defendant to allege that his right to a speedy trial has been violated (*See People v. Luperon*, 85 NY2d 71, 77-78 [1995]). Then, the burden shifts to the People to identify “the exclusions on which they intend to rely” (*id.* at 78). If the defendant disagrees, he “must identify any legal or factual impediments to the use of these exclusions” (*id.*).

A criminal action commences with the filing of an accusatory instrument with the court (CPL §§1.20[17]; 100.15). Pursuant to Penal Law § 100.40(1)(c), a valid accusatory instrument exists when “[n]on-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.” Once an action is commenced, the People must be ready for trial within a statutorily defined period (CPL §§30.30[1][a]–[d]). Their failure to do so results in dismissal of the charges (*id.*). A valid statement of readiness must satisfy two requirements “(1) either statement of readiness by the prosecutor in open court, transcribed by a stenographer, or recorded by the clerk or a written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerks, and (2) the People must in fact be ready to proceed at the time they declare readiness” (*People v. Chavis*, 91 N.Y.2d 500, 505 [1998], citing *People v. Kendzia*, 64

NY2d 331, 337 [1985]). A statement of readiness for trial is valid when the People have removed all legal impediments to the commencement of their case (*People v. England*, 84 NY2d 1, 4 [1994]). Once the People have announced their readiness to proceed to trial they have satisfied their obligation under the statute (*People v. Giordano*, 56 NY2d 524 [1982]) and are chargeable only with delay they have caused which directly implicates their ability to proceed to trial (*People v. Cortes*, 80 NY2d 201, 210 [1992]). Any statement of readiness made by the People must be accompanied or preceded by a valid certification of compliance that indicates they have complied with their discovery obligations as set forth in CPL § 245.20 (*CPL* § 30.30[5]). Additionally, pursuant to CPL § 245.50(3), the prosecution cannot answer ready for trial “for purposes of section 30.30. . . until it has filed a proper certificate pursuant to subdivision one of this section.” (*CPL* § 245.50 [3]).

In this case, the defendant is charged with a top count of Operating a Motor Vehicle while Under the Influence of Alcohol (VTL §§1192(2, 3). Operating a Motor Vehicle while Under the Influence of Alcohol is an A misdemeanor punishable by a sentence of imprisonment up to one year. Accordingly, the People must be ready for trial within ninety days of the commencement of the criminal action (CPL §30.30[1][b]). Based on a review of the official court file, the submissions of the parties, and the foregoing analysis the Court finds as follows:

December 28, 2019 – February 10, 2020

On December 28, 2019 the defendant was arraigned and the case was adjourned to February 10, 2020 for the People to file a COC. On January 1, 2020 the new Discovery Reforms took effect. For purposes of Speedy Trial, time became chargeable to the People under the new laws beginning January 1, 2020 until they filed a valid COC and SOR. (*People v. Villamar*, 69 Misc3d 842 [2020]). On February 10, 2020 the People did not file their COC. The case was

adjourned to March 17, 2020 for this purpose. Therefore, beginning January 1, 2020, the People are charged with **41 days**.

February 10, 2020 – March 17, 2020

The People filed their COC on February 14, 2020. Subsequently, they filed their Statement of Readiness, (“SOR”) on February 25, 2020. As stated earlier, the COC is invalid in this case. As such, the People’s SOR is also invalid.

Beginning March 16, 2020, court operations within New York State were significantly curtailed due to the Covid-19 pandemic. As a result, time limits contained in the CPL were suspended by Executive Order 202.8 issued on March 20, 2020, and remained so until Executive Order 202.67 rescinded the suspension on October 4, 2020. Therefore, beginning March 20, 2020, CPL § 30.30 time limits were not in effect. Accordingly, **36 days** are chargeable to the People for this adjournment.

October 4, 2020- November 18, 2020

Since March 20, 2020, this case has been administratively adjourned multiple times by the Court due to the pandemic. As stated above, Executive Order 202.67 rescinded the suspension of CPL § 30.30 time limits on October 4, 2020. The first appearance in this case occurring after October 4, 2020 was on November 18, 2020. As of November 18, 2020, the People still had not filed a valid COC and SOR. On November 18, 2020 a motion schedule was set for defense to challenge the COC and the case was adjourned to January 26, 2021. The case has remained in motion status to date. Therefore, the entire adjournment of **46 days** is charged to the People.

Conclusion

Based on the foregoing, the People are charged with a total of **123 days**. Accordingly, the defendant's motion is **GRANTED**.

This constitutes the decision and order of this Court.

Dated: September 29, 2021
Bronx, New York



Margaret Martin, J.C.C.

HON. MARGARET W. MARTIN

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 78

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

- against -

DECISION AND ORDER
INDICTMENT NO. 2105/19

KAYJON YIZAR,

DEFENDANT.

----- X
MARCUS, J.:

The defendant was indicted by the Grand Jury of Bronx County, under indictment 2501/19, and charged with Criminal Possession of a Weapon in the Second Degree and related charges. On February 13, 2020,¹ the People filed a Statement of Readiness and a Certificate of Compliance. The Certificate of Compliance asserted that:

after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the People have disclosed and made available to the defendant all known material and information that is subject to discovery under CPL § 245.20 (1), except for discovery that is lost or destroyed, any information and material that is the subject of a protective order issued by a court pursuant to CPL § 245.70 ..., and/or any information and material that is exempt from disclosure by a protective mandate.

By motion dated October 23, 2020, the defendant filed a motion asking the Court to deem the February 13th Certificate of Compliance invalid. Instead of filing a response to the defendant's motion, the People filed a Supplemental Certificate on November 24, 2020.²

¹ The People's Certificate of Compliance is dated February 10, 2020, and the defendant states in his motion it was filed and served on February 10, 2020, however, the People in their response assert it was filed on February 13, 2020. Court records also indicate it was filed on February 13, 2020. In this decision I will treat the Certificate as having been filed on February 13th. The discrepancy in the filing date does not impact this Court's decision, since, for the reasons set forth in this decision, I deem this Certificate to be invalid.

² The Supplemental Certificate of Compliance is dated February 10, 2020, but that appears to be an error. The People state in their response that the Supplemental Certificate was filed on November 24, 2020 and it lists discovery not provided in the People's original February 10, 2020 Certificate. The defendant states in

On December 7, 2020, the defendant filed a second motion, challenging the validity of the original and supplemental Certificate. The People filed another Supplemental Certificate on December 15, 2020. The November and December 2020 Supplemental Certificates make assertions identical to those in the original, quoted above, but indicate additional discovery was provided on February 13, 2020, October 7, 2020, November 18, 2020, November 23, 2020, November 24, 2020 and December 11, 2020. In a January 8, 2021 reply, the defendant requested that a hearing be ordered to resolve any factual disputes, and he challenged the validity of the all three Certificates. For the reasons set forth below, I deem the February 13th Certificate of Compliance and the November 24th and December 15th Supplemental Certificates to be invalid.³

Memo Books

The defendant claims that at the time the People filed the three Certificates, they had received only one memo book, that of arresting officer Police Officer Chad Kirk. In their response, the People name seven other police officers, sergeants and detectives who were in some way involved in the defendant's case, some of whom they categorize as being "ancillary" for various reasons. The People list the multiple dates they attempted to obtain the memo books, in person, by text and phone call, and through email. According to the People's timeline, their last attempt before filing the February 2020 Certificate was approximately six weeks before filing it, and they did not make another inquiry until nearly

his motion the Supplemental Certificate was filed and served on November 24, 2020. Court records indicate it was filed on November 27, 2020. In this decision I will refer to the supplement as having been filed on November 24th. The discrepancy in the filing dates does not impact this decision since, for the reasons set forth in this decision, I deem this Supplemental Certificate to be invalid.

³ The People filed a fourth Supplemental Certificate and Statement of Readiness on January 8, 2021 which is not at issue in the present motion.

a year later, the day before filing their November 2020 Supplemental Certificate. In their response, the People simply assert they “are unaware if these ancillary police officers have any memo book entries,” without detailing what, if any, responses they received from their multiple requests for memo books. Notably, the dates of the requests appear to have been generalized discovery requests, since the People use identical language in addressing other alleged missing discovery and do not describe specific inquiries they made into memo books for the officers involved in the defendant’s arrest.

According to the defendant, on December 21, 2020, the People turned over the memo book of Officer’s Kirk’s partner, Officer Jonathan Hernandez. In the People’s response, they note it was Officer Hernandez who recovered the firearm from the defendant – clearly not an “ancillary” officer. Officer Hernandez is not listed among the officers the People attempted to obtain memo books from, and they offer no explanation as to why they were unable to obtain it until after the filing of their original Certificate of Compliance and the two Supplemental Certificates. Furthermore, the defendant specifically points out that two police officers responded to the scene before the arresting officer, but the People do not state who these officers are, if they are among the officers listed in their response from whom they sought discovery information, what, if any, attempts were made to obtain their memo books and why they were unsuccessful.

Based on this record, the People have failed to demonstrate that they “exercise[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of” the memo books of Officer Hernandez and other officers, including the two who arrived on the scene first, and to obtain and provide them to the defense on or before the original and two supplemental Certificates were filed, as required by CPL § 245.50(1). Nor do I find the

People's argument that they need not disclose the memo books of officers who were "ancillary" to the case to be responsive to or consistent with the CPL § 245.20(1)(e) requirement that they disclose "[a]ll statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto." Accordingly, I deem the February 13th Certificate and November 24th and December 15th Supplemental Certificates invalid.

Body Worn Camera Footage

The defendant contends that prior to the filing of the People's original Certificate of Compliance, he had received body worn camera footage of only one officer, and that he had not received the Body Worn Camera Checklist or NYPD inventory of officers involved and whether they were wearing body worn cameras. The defendant states the People provided body worn camera footage from the first two officers who arrived at the scene on January 6, 2021. However, only one of the videos provided was actually from the instant incident; the other was apparently from a different case.

The People list the same officers, sergeants, detectives, and dates of contact in their response to the challenge to the body worn camera footage as they did with the challenge to the memo books. Although the People were recently able to obtain the body worn camera footage of at least one of the two initially-responding officers, their response does not meaningfully explain what efforts were made to obtain them prior to filing their initial Certificate and the first two Supplement Certificates and why they were not able to obtain them. It is not even clear if these officers are among those listed in their response. As for the missing body worn camera footage from the arresting officer, Officer Kirk, the People state that Officer Kirk informed them he has been unable to obtain the footage because,

due to a change in the devices used, he no longer has access to the body worn camera he wore during the incident, and because he is no longer stationed at the precinct he was assigned to at the time of the defendant's arrest. Notably, the People obtained this information from Officer Kirk on December 7, 2020. However, defense counsel contends that in a December 21, 2020 email, the People represented that Officer Kirk's body worn camera was broken and there was therefore no recording of the incident.

The People were able to obtain the body worn camera footage from Officer Kirk's partner prior to filing their original Certificate, yet they offer no explanation for the failure to obtain Officer Kirk's footage (or the information that it does not exist) prior to filing that Certificate or the November 24th Supplemental Certificate, though it seems clear they were aware of its possible existence. Likewise, the People provided the body worn camera footage for one of the two officers who first responded to the scene in January 2021, with no explanation for the belated disclosure.

Based on the record set forth above, I cannot find that the People "exercise[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of" body worn camera footage, or that they exercised good faith in disclosing on or before the date of their February 13th Certificate and November 24th and December 15th Supplemental Certificates all of the body worn camera footage of which they were aware. Accordingly, I deem all three Certificates invalid.⁴

⁴ While there is a dispute surrounding Officer Kirk's body worn camera footage, it is unnecessary to resolve it for purposes of this motion since the February 13th Certificate and November 24th and December 15th Supplemental Certificates have been deemed invalid.

I accept the People's representation from Officer Kirk, in the December 7, 2020 email from him, that he was unaware of a body worn camera checklist being filled out or produced in this case, and thus the People's failure to provide it is not a basis for invalidating the Certificates.

DD5s

The defendant contends he did not receive any DD5s until December 2020. There is no mention of DD5s in the People's February 13th Certificate or the November 24th Supplemental Certificate. The People's December 15, 2020 Supplemental Certificate lists "DD5s w/ Attachments." The People note in their response that they "passed DD5s in this case on 12/11/20" to the defense. The People list the same dates they made requests for DD5s as they did for the memo books and body worn camera footage, but they indicate their first conversations regarding DD5s took place on November 23, 2020 and December 7, 2020, when Officer Kirk told them he did not generate any DD5s. The People also state that in a November 24, 2020 conversation with Detective Kevin Pausz, he informed them that he did not generate any DD5s, and that in a December 10, 2020 conversation with Detective Jeffrey Santana he told them the DD5s would be sent to them on December 11, 2020. The People appear to have made generalized requests for discovery in this case on multiple occasions yet did not have substantive correspondence with relevant police personnel until November 23, 2020, after filing their original Certificate. Moreover, the People filed their November 24, 2020 Supplemental Certificate before speaking to all the detectives they were aware of that might have generated DD5s.

Based on the People's failure to provide the DD5s prior to filing the February 13th Certificate and the November 24th Certificate, I deem those Certificates invalid.

911 Caller Contact Information

The defendant argues the People's failure to provide the contact information for the 911 caller invalidates their Certificates. The People argue that pursuant to the amendment to CPL § 245.20(1)(c), passed on April 3, 2020, they were permitted to withhold the identity of the 911 caller and redact their identity from discovery materials without seeking a protective order. The amendment to CPL § 245.20(1)(c) that exempts 911 caller identification and contact information from automatic disclosure became effective on May 3, 2020, after the People's February 13th Certificate was filed, and the People did not seek a Protective Order excluding that information from discovery before that. Accordingly, I deem the February 13th Certificate invalid based upon their failure to provide the 911 caller information or seek a protective order. In light of the amendment, however, they were and are not required to provide it for any subsequent Supplemental Certificates.

Civil Lawsuits, CCRB and IAB Records

The defendant argues that at the time the People filed their February 13th Certificate they had provided no lawsuit information or IAB or CCRB records for any police officers. Emails dated October 9 and 21, 2020 from the prosecutor to defense counsel state the People requested the NYPD Central Personnel Index ("CPI")⁵ in February 2020, and again on October 8, 2020, and had not received it as of October 9, 2020. See defendant's exhibit D, appended to December 7, 2020 motion. According to the defendant, the first such information was provided on September 3, 2020 when the People emailed a one-page document, dated February 13, 2020, with a summary of a partially substantiated incident

⁵ The CPI is a summary and does not include the underlying materials.

involving Police Officer Manuel Gonzalez. Defense counsel notes that the wrong case name is listed on this document. See defendant's exhibit C, appended to December 7, 2020 motion. Additionally, Officer Manuel Gonzalez is not among the officers listed in the People's response from whom they sought discovery information, nor is he listed among the officers for whom the People provided contact information in the November 24th and December 15th Supplemental Certificates. In a document dated November 18, 2020, the People provided summaries of substantiated incidents involving Officer Kirk and Criminalist Jason Berger. See defendant's exhibit E, appended to December 7, 2020 motion.

The People argue, relying on People v. Davis, 70 Misc.3d 467 (Crim. Ct. Bx. Co. 2020), that they are not required to provide complete IAB and CCRB records, and that a summary is sufficient. They also assert that they are only obligated to provide information about substantiated matters, and that pending federal litigation prohibits them from disclosing anything other than substantiated matters. The People, in their response, only refer to the November 18, 2020 disclosure, and not to the one dated February 13, 2020.

The People are required to provide to the defense all "evidence and information, including that which is known to police ... that tends to : ... (iv) impeach the credibility of a testifying prosecution witness." CPL § 265.20(1)(k). In People v. Randolph, 69 Misc.3d 770 (Sup. Ct. Suffolk Co. 2020), the court held that the plain language of CPL § 245.20(1)(k) requires them to turn over both substantiated and unsubstantiated allegations. The court reasoned that there can be a good faith basis to cross-examine police witnesses as to allegations that are "substantiated where it is determined that the facts clearly support the allegation," and "unsubstantiated when the allegation cannot be resolved because

sufficient evidence is not available,” but not for “exonerated where the act was legal, proper and necessary and unfounded when there is evidence to establish that the act did not occur.” Randolph, 69 Misc.3d at 772 (internal quotation marks omitted). Furthermore, the court ordered the People to provide the underlying documents, and not just a summary, subject to any protective order the People may obtain. Id., but see Davis, 70 Misc.3d at 628 (“the plain language of the new discovery statute only requires the People to disclose the information that is favorable to the defendant, but not necessarily the underlying material as well”); People v. Knight, 69 Misc.3d at 550 (“The court rejects defendant's claim that the prosecution must produce underlying records in addition to the disclosures they made”).

I find the reasoning of the Randolph court persuasive and find that the People’s discovery obligations extend to unsubstantiated, as well as substantiated, CCRB allegations.⁶ Allegations that are unsubstantiated, as opposed to those which have been declared to be “unfounded” or of which the officer has been exonerated, are analogous to allegations of misconduct in a pending civil lawsuit, which must be disclosed even though the lawsuit is unresolved. See People v. Smith, 27 N.Y.3d 652, 661 (2016) (“civil allegations of misconduct in a federal lawsuit filed against a law enforcement agent were favorable to defendant as impeachment evidence, thereby necessarily determining that such

⁶ The People’s bare assertion that they and the Police Department are barred by a federal temporary restraining order from disclosing information and evidence concerning unsubstantiated allegations is unconvincing. The case to which they refer was removed to federal court, and the order, as extended and modified by the issuing court stated that “pending the issue of an Interim Stay before the United States District Court for the Southern District of New York, the Defendants/Respondents, and those acting in concert with them, are Stayed from publicly disclosing any records concerning Unsubstantiated and Non-Final Allegations or settlement agreements” Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 45, n.6 (2d Cir. 2020). Disclosing to the People and defense counsel material for possible cross-examination of a witness in a criminal case does not appear to constitute “publicly disclosing” that information.

allegations can bear on a law enforcement officer's credibility as a witness”) (citation and internal quotation marks omitted). And what must be disclosed is not merely “information” concerning such matters, but “evidence” as well. CPL §265.20(1)(k). For these purposes, evidence includes underlying documents that detail such things as witnesses’ statements and physical evidence. Thus, the People’s prepared summaries do not suffice for this purpose.

Accordingly, the People are ordered to provide the defense with the information and evidence (as described immediately above) in the possession of the People or the Police Department concerning substantiated and unsubstantiated CCRB and IAB complaints for any police witnesses they intend to call at trial.

Since the People do not reference the February 13, 2020 summary provided to defense counsel in their response, it is not referenced in their February 13th Certificate, and that documents lists a different case name and an officer not mentioned in the People’s response or in the November and December 2020 Supplemental Certificates, I find the People provided no CPL § 245.20(1)(k)(iv) disclosures prior to filing the February 13th Certificate. Therefore, I deem that Certificate invalid.

While I find the November 18th summary was insufficient, that insufficiency does not invalidate the November 24th and December 15th Supplemental Certificates. The disclosure of “evidence and information” contained in IAB and CCRB reports is an obligation imposed upon the People as part of the new discovery law. Issues surrounding what materials the People must disclose is being litigated in the courts of this state, and, as indicated above, different lower courts have come to different conclusions on these issues, and there is no appellate authority yet available. Accordingly, I find the People acted in

good faith and provided discovery based on their understanding of their duty, and, as a result, their failure to provide the information and evidence set forth above does not invalidate the November 24th and December 15th Supplemental Certificates. See CPL § 245.50(1); Randolph, 69 Misc. 3d 770 at 773 (“Since the People have been acting in good faith and have provided discovery in harmony with their understanding of the requirements, at this juncture there is no basis to strike the certificate of compliance or impose other sanctions”) (footnote omitted).

DNA Information

The People maintain that they fulfilled their discovery obligation with respect to the DNA evidence in that they provided the defense with the “certified forensic biology file, the certified forensic biology suspect file, the raw data, the STRmix data, a list of proficiency test results for the past ten years for the criminalist, and the laboratory information management system (“LIMs”) audit trail request form” that allows defense counsel the ability to view the LIMs data at the OCME. The People state they provided this information via Microsoft OneDrive on multiple dates, beginning on January 13, 2020 and ending on November 24, 2020. They do not specify what information was provided on each date. The February 13th Certificate lists among the discovery provided “OCME Certified Forensic Biology File /w Discovery Packet.” The November 24th Supplemental Certificate added “OCME Manuals/Protocols,” “OCME Audit Trail Request Form,” and the Discovery Packet included “Proficiency Test Summary + Key and CV.” Also added, under the bullet point “Tangible Property/Trial Evidence Notice,” was “OCME laboratory

reports.” According to the defendant, he did not receive the certified OCME FBS report until November 24, 2020, and he points out that the “request date” on the report is November 23, 2020. The defendant also argues that the People are required to provide the LIMs data, not just the audit trail request form.

While it is unclear based on the People’s response what DNA discovery was requested from OCME when, and what discovery was turned over when, what is clear is that at the time the February 13th Certificate was filed, the People were aware of the existence of evidence that they had either not yet obtained or not yet requested, which is not mentioned in the Certificate or adequately explained in the People’s response to the instant motion. Accordingly, I deem the People’s February 13, 2020 Certificate invalid, but not the November and December 2020 Supplemental Certificates. I accept the People’s representation that due to the voluminous nature of the LIMs audit trail, the OCME requests that the defense submit a request form and view the LIMs audit trail information at the OCME. See People v. Adams, 66 Misc3d 918, 924 (Sup. Ct Queens Co. 2020) (“because such records do not actually exist and cannot be provided by the OCME without imposing an undue burden on them, the discovery requirements of CPL § 245.20(1)(j) can be met by requiring the OCME to make the LIMS system/audit trail as it pertains to the evidence in this case available for review and inspection by counsel for the defendant and/or any expert for which the defendant designates”). I, therefore, find the People satisfied their discovery obligation by providing the request form.

Crime Scene Manual

The defendant argues that the People improperly provided a redacted copy of the Crime Scene Manual in the absence of a request for a Protective Order. The People claim

that the Crime Scene manual is not discoverable and was accidentally turned over, and in the alternative argue that they are allowed to redact such material. The defendant has not stated pursuant to what automatic discovery provision he is entitled to the Crime Scene Manual. The People do not explain why they believe the crime scene manual is not discoverable or, if it is, why the redactions they made were appropriate. Neither have they submitted the manual, with or without redactions, for review. The defendant has also not supplied the court with a copy of the redacted manual. Accordingly, this aspect of the defendant's motion is deferred for further submissions, first by the defense, and then by the People, according to a schedule to be set by the Court when the case is next called on March 4, 2021.

This constitutes the decision and order of the Court.

DATED: March 2, 2021


MARTIN MARCUS
J.S.C.

Honorable Martin Marcus