To Be Argued by:
Joseph Mogelnicki
Time Requested: 15 Minutes

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

IN THE MATTER OF MADELINE SINGAS,

Appellant,

- against -

THE HONORABLE ANDREW M. ENGEL,

Defendant-Respondent,

and

EUGENE LI,

Defendant-Respondent.

A.D. No.:
2016-00468

Lower Court
No.: 15-008165

APPELLANT'S BRIEF

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STATEMENT PURSUANT TO CPLR § 5531

1. The Index Number in the Supreme Court, Nassau County, is 15-008165

2. The full names of the original parties are Madeline Singas, Andrew M. Engel, and Eugene Li.

3. This action was commenced in the Supreme Court, Nassau County.

4. The action was commenced on September 11, 2015, with the filing of an Article 78 petition, by order to show cause, seeking to enjoin enforcement of Nassau County District Court Judge Andrew M. Engel's order, dated July 28, 2015. That order was issued in the criminal prosecution of Eugene Li under Docket Number 2014NA023862, which commenced on November 4, 2014. Li is charged with violating Vehicle and Traffic Law § 1192.2 (driving while intoxicated; per se), and Vehicle and Traffic Law § 1192.3 (driving while

intoxicated), and with committing several traffic infractions. On September 28, 2015, the People refiled the Article 78 petition, by notice of petition, to cure a defect in their original papers.

5. In their Article 78 petition, the People sought to prohibit Judge Engel from enforcing an order of July 28, 2015, compelling the People to disclose to defendant Eugene Li all documents, records, and reports relating to the preparation and testing of simulator solution used to calibrate a breathalyzer instrument.

6. This appeal is from a judgment of the Supreme Court, Nassau County (Parga, J.), dated November 9, 2015, declining to enjoin Judge Engel from enforcing his July 28, 2015, order.

7. The appeal is being prosecuted by the appendix method, as authorized by 22 NYCRR § 670.9(b).

Supreme Court of the State of New York
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IN THE MATTER OF MADELINE SINGAS,

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The People of the State of New York appeal from a judgment of the Supreme Court, Nassau County (Parga, J.), dated November 9, 2015, denying the People's Article 78 petition. That petition sought to enjoin the enforcement of an order of the District Court, Nassau County (Engel, J.), dated July 28, 2015, which compelled the People to disclose simulator solution calibration records to the defense in a criminal

prosecution under Nassau County Docket Number 2014NA023862. Pursuant to an order of this Court dated February 25, 2016, the criminal proceedings against Eugene Li and the District Court's discovery and sanctions orders were stayed pending determination of this appeal.

QUESTIONS PRESENTED

1. Did the Supreme Court erroneously decline to find that the District Court exceeded its authority when it ordered disclosure of simulator solution testing records, created by the New York State Police in the exercise of an administrative function, that are not in the People's possession or control because the State Police refused to produce them?

2. Did the Supreme Court erroneously decline to find that the District Court exceeded its authority when it ordered the People to produce, pursuant to C.P.L. §§ 240.20(1)(c) and (k), simulator solution testing records that were not created in connection with this particular defendant's breath test?

3. Did the Supreme Court abuse its discretion in declining to grant Article 78 relief when the District Court's unauthorized discovery order subjects the Nassau County District Attorney's Office to burdensome production requirements and sanctions in multiple DWI prosecutions because the District Court is one of only two judges presiding over misdemeanor DWI cases in Nassau County and has issued the same order in other such cases?

STATEMENT OF FACTS

Introduction

This appeal arises as the result of the inability of the Nassau County District Attorney to comply with a constitutionally and statutorily unauthorized order of the Nassau County District Court. That order compelled the People to produce in a DWI case simulator solution testing records, to wit, headspace gas chromatography data ("GC data"), that they do not possess or control, and a subsequent order sanctioned the People for not producing the records. The records are in the exclusive possession of the New York State Police ("NYSP"), a non-local agency that has steadfastly refused to turn them over to the District Attorney. Moreover, the GC data records are not discoverable under C.P.L. § 240.20, the law authorizing discovery by a defendant in a criminal action, and, pursuant to C.P.L. § 240.20(2), the People are not required to subpoena them.

The GC data in question was generated by the Forensic Investigation Center of the NYSP Crime Laboratory, which provides statewide support to all state criminal justice agencies, when it tested a sample of simulator solution to verify the amount of ethyl alcohol it contained. The State Police routinely tests simulator solution samples at the request of the Division of Criminal Justice Services ("DCJS"), which purchases the solution from Guth Laboratories, a private company. After testing is completed,

the solution is distributed by DCJS to police departments across the State where it is used to calibration-check breath testing instruments.

The GC data is created in the course of State Police administrative activity that is unrelated to the criminal investigation of any particular defendant. The State Police has steadfastly refused to provide it to this or any other local District Attorney's Office for disclosure to the defense in the course of discovery. Moreover, the data is not discoverable as of right because C.P.L. §§ 240.20(1)(c) and (k) do not authorize the disclosure of second-tier discovery materials that are not created in connection with the testing of a particular defendant in a particular case, as their legislative history confirms. Nor is the data discoverable upon court order per C.P.L. § 240.40(1)(c). The People do not intend to introduce the GC data at trial and the data is not material to the preparation of the defense: a defendant has no right to challenge the accuracy of the certification confirming that the simulator solution contains a particular ethyl alcohol concentration because that certification is admissible at trial as a nontestimonial business record.

Because the District Court's order is non-appealable, and because the People were unable to comply with it, the People brought a petition in the Nassau County Supreme Court seeking Article 78 relief to prohibit enforcement of the order. To preserve the viability of the criminal prosecution against Eugene Li, the People sought a stay of those proceedings during the pendency of the Article 78 petition. That stay

was denied and, ultimately, so too was the petition. By order of this Court, the Li proceedings and the District Court's discovery and sanctions orders were stayed pending determination of this appeal.

Meanwhile, in response to defense discovery motions in other Nassau County criminal prosecutions, the District Court – one of only two Nassau County judges presiding over misdemeanor DWI cases – continues to order the People to disclose GC data and continues to sanction the People for not procuring it. Other Nassau County judges have followed suit.

The People have no remedy at law. Article 78 relief is their only recourse to put an end to this recurring controversy.

The Motion Papers To Compel Discovery

In a letter, dated March 19, 2015, defendant Eugene Li ("defendant") demanded, in language tracking C.P.L. §§ 240.20(1)(c) and (k), that the People disclose, *inter alia*, any "written report or document, or portion thereof, concerning a . . . scientific test or experiment, relating to the criminal action or proceeding" (defendant's 3/19/2015 letter requesting bill of particulars and discovery ["3/19/2015 letter"] at 3: A.12-13).[1] Defendant also requested "the most recent record of inspection, or calibration, or repair of machines or instruments utilized to perform

[1] "A." denotes the pages of the Appellant's Appendix.

such scientific tests or experiments" as well as "any laboratory analysis or field test or calibration report, including but not limited to such tests and/or reports done on any breath or blood testing equipment used by the police in this case for the period of six months" before and after the date of defendant's chemical breathalyzer test (*id.* at 4: A.13).

In a response dated April 2, 2015, the People stated that they had turned over voluntary disclosure forms ("VDFs") on December 5, 2014, and again to defendant's newly retained attorney on March 23, 2015 (People's 4/2/2015, response to defendant's discovery demand and request for bill of particulars ["4/2/2015 response"] at 1: A.17). Included in the VDFs were "any written report or document concerning a physical or mental examination, or scientific test or experiment relating to [defendant's] case," as well as the "most recent record of inspection, or calibration or repair of machines or instruments utilized" (*id.* at 2-3: A.18-19). Sixty-eight of the one-hundred seventy-four pages of the VDFs were records and documents concerning the calibration and proper functioning of the breathalyzer machine used in defendant's case (Exhibit 1 of 4/2/2015 response, beginning with page titled "Police Department, County of Nassau, N.Y. Intoxilyzer/Breathalyzer Maintenance Log" and ending with page titled "Nassau County Police Dept. Intoxilyzer – Alcohol Analyzer Model 5000EN SN 68-013837 12/02/2014 Diagnostic Test 04:28 EST": A.84-151). The People declined to respond to defendant's request for six months of records

before and after the date of his chemical breathalyzer test, because that request fell "outside the scope of material discoverable pursuant to C.P.L. § 240.20" (4/2/2015 response at 3: A.19).

In a motion, dated April 30, 2015, defendant moved to compel the People to disclose any and all documents concerning the preparation and testing of Simulator Solution Lot Number 14180 or, alternatively, to preclude the admission of defendant's breath test result at trial (defendant's 4/30/2015 motion to compel and preclude ["4/30/2015 motion"] at 1: A.26). Defendant stated that simulator solution "simulates a breath sample by introducing a reference standard into the Intoxilyzer .... [d]erived from gas injected into the sample chamber of the Intoxilyzer and is emitted from the headspace of a container" holding the solution (*id.* at 3: A.28). Simulator solution from Lot Number 14180 had been used to perform calibration checks of the Intoxilyzer 5000EN device that had been used to test defendant's breath (*id.*). Accordingly, defendant sought the GC data that was generated as a result of "testing and analysis" of Simulator Solution Lot Number 14180 performed by members of the New York State Police (*id.* at 3-4: A.28-29). Defendant alleged that he was entitled to the data pursuant to C.P.L. §§ 240.20(1)(c) and (k) (*id.* at 4-5: A.29-30). He argued that it was evidence of "whether the calibration and calibration checks [of the Intoxilyzer 5000EN] were performed correctly and the machine was working properly at the time of the test" (*id.* at 5: A.30).

In response papers dated June 9, 2015, the People explained that the simulator solution in question had been purchased from Guth Laboratories (People's 6/9/2015 affirmation in opposition to defendant's motion ["6/9/2015 response"] at 2: A.65). The solution was tested by Guth and then a second time by the NYSP laboratory, a public laboratory, "in the regular course of its business to assist the [DCJS] in providing simulator solutions to nearly every police agency across New York State," not for use in defendant's breath test (*id.*; *see also* Exhibit 8 to Article 78 [Witherell Affidavit] at ¶ 4: A.352). The simulator solution was not itself used to test defendant's breath (6/9/2015 response at 2, 5: A.65, 68). The agency that arrested defendant, tested his breath, and maintained the Intoxilyzer was the Nassau County Police Department ("NCPD"), not the NYSP (*id.* at 1, 10, 16: A.64, 73, 79). The People also explained that they had provided defendant with the (1) Record of Intoxilyzer 5000 Calibration and 60-day Instrument Verification for Intoxilyzer 13837, dated October 6, 2014 (A.86); (2) Record of Intoxilyzer 5000 Calibration and 60-day Instrument Verification of Intoxilyzer 13837, dated December 2, 2014 (A.89); (3) Intoxilyzer Maintenance Log (A.84); (4) Simulator Maintenance Log (A.92); and (5) 0.10% Simulator Solution Record (Lot Number 14180), dated August 6, 2014 (A.94-95) (*id.* at 2-3: A.65-66).[2]

[2] Intoxilyzer 5000 is the instrument's classification. Intoxilyzer 13837 is the particular Intoxilyzer used to test defendant's breath.

The People argued that defendant was not constitutionally entitled to discovery and was limited to the discovery authorized by C.P.L. § 240.20 (*id.* at 3: A.66). Section 240.20(1)(k) did not provide for discovery of the records concerning the NYSP testing of simulator solution because those records did not concern a test or experiment that was performed on defendant, but rather testing of the solution used to calibration-check the Intoxilyzer used, in turn, to test defendant's breath (*id.* at 4: A.67). Moreover, the Legislature did not intend to expand the scope of discovery when it passed C.P.L. § 240.20(k), but rather intended to clarify what materials were discoverable in response to a request for clarification by the State Magistrates' Association, because courts in DWI cases were not granting discovery of the material described in C.P.L. § 240.20(c), such as "'records of inspection, repair and operation of machines and equipment utilized for scientific tests'" (*id.* at 4-5: A.67-68) (quoting Peter Preiser, Practice Commentary to C.P.L. § 240.20, McKinney's Cons. Laws of N.Y., Book 11A) (citing Sponsor's Memorandum in Support, L. 1989, ch. 536). There was no indication that the Legislature intended to expand the scope of discovery to include "second tier" materials unrelated to the testing of a particular defendant (*id.* at 5: A.68). The records that courts have ordered discoverable under C.P.L. §§ 240.20(c) and (k) have been limited to "quality assurance records, or maintenance or calibration checks" of "the actual testing instrument itself" (*id.*).

The People additionally argued that defendant had failed to make a case for the items' disclosure in the court's discretion, even if they were not discoverable under C.P.L. § 240.20 (*id.* at 8: A.71).

Finally, the People explained that the NYSP had refused to provide the People with the GC data (*id.* at 13, 15: A.76, 78). The NYSP Laboratory, an agency independent of the Nassau County District Attorney's Office, tested the simulator solution in the exercise of its independent regulatory responsibilities and was not even the law enforcement agency involved in defendant's arrest and testing. It therefore was not under the People's control for purposes of this prosecution (*id.* at 15-16: A.78-79). Indeed, the NYSP did not even use simulator solution to calibrate its own DWI testing instruments, but rather a "dry gas reference standard" (*id.* at 16: A.79). Moreover, the People argued, C.P.L. § 240.20(2) made clear that they were not required to issue a subpoena in an attempt to compel the NYSP to produce the GC data (*id.* at 15-16: A.78-79).

In reply papers dated July 15, 2015, defendant reiterated that it was "essential" for him to have access to the GC data in order to challenge the accuracy of the Intoxilyzer used to test his breath (defendant's 7/15/2015 reply affirmation ["7/15/2015 reply"] at 2: A.153). He claimed that he could not determine whether the instrument was functioning properly without the records (*id.* at 3: A.154). Defendant also argued that the fact that he had provided two insufficient breath

samples for the test of his breath was evidence that the Intoxilyzer had not been functioning properly (*id.* at 5: A.156). Finally, defendant claimed that the certification provided by the NYSP was not incontrovertible evidence that an Intoxilyzer is functional (*id.* at 6: A.157).

The District Court's Discovery Decision

On July 28, 2015, the District Court granted defendant's motion (Judge Engel's 7/28/2015 decision ["7/28/2015 decision"]: A.162). The court found that the People were withholding documents concerning "when the instrument itself was calibrated, maintained, tested, and/or repaired" and that it was "most disingenuous for the People to say 'we will give you some, but not all of the materially relevant documents we have'" (*id.*). It held that defendant was entitled to the GC data pursuant to C.P.L. §§ 240.20(1)(c) and (k) (*id.* at 4-5: A.165-66).

The court also found that the People had been "intentionally selective in what documents they choose to disclose" (*id.* at 7-8: A.168-69). It determined that the People's discovery obligations should be controlled by cases concerning joint investigations (*id.* at 6-7: A.167-68).

The court therefore ordered the People to produce, "to the extent they are in the possession or control of the District Attorney of Nassau County, the Nassau County Police Department, and/or the New York State Police," "any and all

documents concerning the preparation and testing of the Simulator Solution Lot Number 14180" (*id.* at 8: A.169).

The People's Inability To Produce Records And The Sanctions Motion

The People did not disclose the GC data because the State Police refused to turn it over (*see* Exhibit 1 to People's 10/9/2015 affirmation in opposition to defendant's 9/18/2015 sanctions motion ["10/9/2015 sanctions response"] [letter from Amanda N. Nissen, Assistant Counsel to the NYSP ("NYSP Assistant Counsel Letter")]: A.299). In papers dated September 18, 2015, defendant moved for sanctions due to the People's non-compliance with the District Court's order. He sought, alternatively, dismissal of the charges, preclusion at trial of evidence related to his breath test results, or an adverse inference charge based on the People's nondisclosure of the GC data (defendant's 9/18/2015 sanctions motion ["9/18/2015 sanctions motion"]: A.170).

Defendant argued that, despite the copious amount of discovery he had already received concerning the functionality of the Intoxilyzer, he could not contest the measurement of alcohol that had been found in his blood (*id.* at 8: A.177). He claimed that the People had not shown that they had acted with good faith or diligence and that they "simply refuse[d] to provide" the GC data (*id.* at 8-9: A.177-78).

In opposition papers dated October 9, 2015, the People explained that New York courts have held that when imposing sanctions, the "overriding concern must be to eliminate any prejudice to the defendant." 10/9/2015 sanctions response at ¶ 8: A.281-82, citing *People v. Kelly*, 62 N.Y.2d 516, 520 (1984). The People argued that the imposition of sanctions was not appropriate because defendant had not demonstrated that he had been prejudiced by the nondisclosure of the GC data: he had cast no doubt on the integrity of the simulator solution or the Intoxilyzer (*id.* at ¶ 16: A.286). On the contrary, the People argued, they had overwhelmingly demonstrated why defendant could not demonstrate such prejudice (*id.* at ¶¶ 17-25: A.286-89).

The People explained that the NCPD receives simulator solution from DCJS (*id.* at ¶ 17: A.286). Simulator solution is produced in "lots" (*id.* at ¶ 20: A.287). First, Guth Laboratories, the company that manufactures the solution, uses an independent laboratory to certify the quality of the components used to create the solution (*id.* at ¶ 19: A.287). Next, both Guth and the NYSP verify the alcohol content of each lot using headspace gas chromatography (*id.* at ¶ 20: A.287). If the NYSP's test reveals that the simulator solution fails to meet the appropriate standards, the entire lot is rejected for use in New York State (*id.* at ¶ 21: A.287). Then, DCJS tests the same lot that the NYSP has tested using its own DataMaster instruments (*id.* at ¶ 22: A.287-88). The solution is then distributed across New York State, but DCJS recalls random samples of it to run one additional round of testing on the DataMaster (*id.* at ¶¶ 22-

24: A.287-88). DCJS runs five tests on each sample (*id.* at ¶ 24: A.288). In total, over thirty tests are conducted on the simulator solution before it is certified for use in New York (*id.*).

The People explained that this comprehensive system of testing and retesting the amount of alcohol present in the simulator solution makes it impossible for the certification to be erroneous (*id.* at ¶ 25: A.288-89). For the certification to be erroneous, the instruments used by Guth Laboratories, the NYSP, and DCJS over the course of all thirty tests would each have had to malfunction in exactly the same way to generate the same flawed result (*id.*). To clarify, the People explained that if a simulator solution lot was supposed to contain .10% alcohol, but was flawed and really only contained .05% alcohol, every single instrument used during the thirty separate tests would have had to incorrectly report that the solution contained .10% alcohol instead of .05% alcohol (*id.*). Defendant had not, and could not have, demonstrated such a defect in the testing and, accordingly, had not established that he would suffer any prejudice by not having access to the GC data (*id.*). On the other hand the People had already provided defendant with a wealth of calibration and maintenance records showing that the Intoxilyzer used to test his breath was in good working order (*id.*).

Moreover, the People argued, they did not act in bad faith because they never possessed the GC data, and the NYSP, which had the records and refused to provide

them to the People, was not a local law enforcement agency under the People's control (*id.* at ¶¶ 13, 16: A.284, 286). The People had therefore not "chosen" to withhold any document (*id.* at ¶ 15: A.285-86). In fact, they had provided defendant with "every document they [had] received from the NYSP" (*id.*). And, although defendant had referenced a decision from a Bronx case in which the Bronx District Attorney's Office appears to have somehow acquired GC data, a letter from Assistant NYSP Counsel Amanda Nissen to the Bronx District Attorney's Office regarding a different Bronx case indicated that the NYSP routinely declines to produce such records for discovery in criminal prosecutions (10/9/2015 sanctions response at ¶ 14: A.297; Exhibit 3, 10/9/2015 sanctions response: A.285).

Finally, the People argued, if defendant really wanted the GC data, he could have subpoenaed the records from the NYSP. He may have declined to do so for strategic reasons (*id.* at ¶ 27: A.289).

In reply papers dated October 23, 2015, defendant argued that the People had not shown that they had made a good faith effort to obtain the GC data from the NYSP (defendant's October 23, 2015, reply to the People's 10/9/2015 sanctions response ["10/23/2015 sanctions reply"] at 1: A.302). Notwithstanding the letter from Amanda Nissen, defendant claimed that the People should have supplied proof of their efforts to obtain the data (*id.* at 1-2, 4: A.302-03, 305). Defendant argued that the People sought a "loophole" in the discovery law whereby they could tell law

enforcement not to share records with the District Attorney's Office to prevent the records' disclosure (*id.* at 3: A.304). He accused the People of making a "winking request" for the materials (*id.* at 4: A.305). Defendant further argued that the rigorous nature of the testing performed on the simulator solution established his need to see the GC data (*id.* at 1, 8-9: A.302, 309-10). Defendant acknowledged, however, that he did not know what the data would show and could not explain how not having it would prejudice him (*id.* at 7: A.308). He acknowledged that the GC data would "either confirm or undermine" the Intoxilyzer's reliability (*id.*).

The District Court's Sanctions Decision

On November 23, 2015, the District Court granted defendant's sanctions motion (Judge Engel's 11/23/2015 sanctions decision ["11/23/2015 sanctions decision"]: A.319). Referencing case law concerning "joint cooperative investigations," the court found that the People had access to the NYSP's records because the NYSP is a law enforcement agency and was acting as an "arm of the prosecution (*id.* at 5-7: A.323-25). The court also found that because the result of the NYSP simulator solution testing might be used in some future criminal prosecution, it was discoverable pursuant to C.P.L. § 240.20 (*id.* at 6: A.324). The court ordered that defendant could "discuss with the fact finder the existence of, and the People's failure to provide, documents relating to the testing of simulator solution lot number 14180

by the New York State Police" and agreed to "give the jury a missing documents or adverse inference charge regarding these documents" (*id.* at 11: A.329).

The People's Article 78 Petition

In a petition pursuant to CPLR Article 78, dated September 28, 2015, the People sought to prohibit the District Court from enforcing its 7/28/2015 order compelling the People to disclose the NYSP GC data (People's 9/28/2015 Article 78 petition ["Article 78"]: A.330).[3] The People argued that the District Court had exceeded its authority by ordering the discovery of records that were not statutorily discoverable and were not in the People's possession or control (Article 78 at 1: A.337).

They explained that they had no control over the NYSP because it was not engaged in a joint investigation with the Nassau County District Attorney when it tested the simulator solution and had not even arrested or investigated defendant (*id.* at 5: A.341). The People explained that they had never possessed the GC data because the NYSP had refused to turn it over (*id.* at 6-7: A.342-43).

The People also argued that C.P.L. § 240.20 did not authorize discovery of the GC data because the simulator solution itself was not used to test defendant's breath

[3] The People's Article 78 contained a notice of petition, an amended verified petition, a verification, and a memorandum of law. All were separately paginated. Citations to the Article 78 papers refer to pages of the memorandum of law unless otherwise stated.

or blood alcohol content (*id.* at 8-9: A.344-45). C.P.L. § 240.20(1)(k) provides for discovery of only the most recent record of calibration for the Intoxilyzer used in a defendant's case (*id.*). Moreover, the People explained, subdivision (k) of C.P.L. § 240.20(1) was added at the request of the State Magistrate's Association to clarify that records of tests performed on instruments used to conduct scientific tests in DWI cases were discoverable under § 240.20(1)(c), not to expand the People's discovery obligations beyond those set forth in subdivision (1)(c) (*id.* at 9-10: A.345-46). The People confirmed that they had already disclosed every record that was statutorily discoverable (*id.* at 11: A.347).

The People concluded that because the District Court had ordered disclosure of materials outside the scope of C.P.L. § 240.20, because the GC data was not in their possession or control, and because they had no remedy at law since the District Court's order was non-appealable, the Supreme Court should grant their petition (*id.* at 13-14: A.349-50).

In response papers dated October 16, 2015, defendant claimed that the People had raised a mere error of law that could not be resolved in an Article 78 proceeding, had not demonstrated a "clear legal right to relief," and had not demonstrated harm sufficient to justify Article 78 relief (defendant's 10/16/2015 response to the People's Article 78 ["Article 78 response"] at 9-10: A.362-63). Defendant claimed that the

People should be required to obtain a "court order" against the NYSP (Article 78 response at 16: A.369).

The Supreme Court's Decision

In an order dated November 9, 2015, the Supreme Court denied the People's Article 78 petition (Judge Anthony L. Parga's 11/9/2015 order ["11/9/2015 order"]: A.376). It rejected the People's argument that the GC data was not in their possession or control and adopted the District Court's determination that the records were discoverable (*id.* at 2: A.377).

The instant appeal ensued.

ARGUMENT

The District Court Exceeded Its Authority By Ordering The People To Disclose Non-Discoverable Documents That Are Not In Their Possession Or Control And By Sanctioning The People For Not Complying With Its Order.

The District Court's order compelling the People to disclose all documents, records, and reports, relating to the preparation and testing of Simulator Solution Lot Number 14180, was not authorized under C.P.L. §§ 240.20(1)(c) or (k) for two reasons. The documents are not in the People's possession or control and are not discoverable under C.P.L. article 240. Therefore, and because the People have no remedy at law, the exceptional remedy of prohibition is warranted. The Supreme Court erred by not ordering it.

Prohibition lies when a court acts without jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction. CPLR §§ 7801, 7803; *Matter of Pirro v. Angiolillo*, 89 N.Y.2d 351, 355 (1996); *Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988); *Matter of Rush v. Mordue*, 68 N.Y.2d 348, 352-53 (1986). The remedy is unwarranted if the court makes a mere error of law; the error must implicate the court's very powers and thereby give the petitioner a clear legal right to relief. *Matter of Pirro v. Angiolillo*, 89 N.Y.2d at 355-56; *Matter of Holtzman v. Goldman*, 71 N.Y.2d at 569; *Matter of Rush v. Mordue*, 68 N.Y.2d at 353.

Prohibition is not available as of right, but only in the sound discretion of the reviewing court. *Matter of Holtzman v. Goldman*, 71 N.Y.2d at 569; *Matter of Rush v.*

Mordue, 68 N.Y.2d at 354. In exercising its discretion, the court may consider the gravity of the harm caused by the unauthorized act, whether the harm may be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity, and whether prohibition would furnish a more complete and efficacious remedy even when other methods of redress are available. *Matter of Rush v. Mordue*, 68 N.Y.2d at 354; *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 14 (1976); *La Rocca v. Lane*, 37 N.Y.2d 575, 579-80 (1975).

Here, by compelling the prosecutor to disclose documents concerning the preparation and testing of Simulator Solution Lot Number 14180, the District Court exceeded its statutory authority, improperly created a new class of discovery available to a criminal defendant in a DWI case, and left petitioner with no legal recourse other than this Article 78 proceeding.

I. The People Have Demonstrated A Clear Legal Right To Relief Under CPLR Article 78.

Under New York law, there is no constitutional right to discovery, and courts may not grant discovery applications absent statutory authorization. *Matter of Pirro v. LaCava*, 230 A.D.2d 909 (2d Dept. 1996). Discovery in criminal actions is governed by C.P.L. § 240.20. Items not enumerated in C.P.L. § 240.20 are not discoverable as a matter of right. *People v. Colavito*, 87 N.Y.2d 423 (1996); *Sackett v. Schoharie County Court*, 241 A.D.2d 909 (3d Dept. 1998). Moreover, "the People are not required to

obtain documents from sources beyond their control." *People v. Robinson*, 53 A.D.3d 63, 73 (2d Dept. 2008).

A. The New York State Police GC Data Records Are Not Under The Nassau County District Attorney's Control Because They Are Prepared As Part Of The State Police's Administrative Functions And Not In Connection With A Particular Criminal Investigation Or Prosecution.

The People are not in possession of the documents relating to the preparation and testing of Simulator Solution Lot Number 14180 and the New York State Police has refused to provide them to the People. *See* NYSP Assistant Counsel Letter: A.299. Therefore, because the documents are not under the People's control, the People cannot comply with the District Court's order.

Only "local" law enforcement agencies and their records are deemed to be under the prosecution's control. *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000). By contrast, Department of Motor Vehicles records, State Division of Parole records, social worker notes, personal written accounts of a victim, prison disciplinary transcripts, medical examiner reports, and untranscribed plea minutes, have been excluded from a prosecutor's presumptive control. *See People v. Kelly*, 88 N.Y.2d 240, 252 (1996); *People v. Washington*, 86 N.Y.2d 189, 192 (1995). Even when a law enforcement agency is presumptively under the People's control, a court cannot compel discovery of segregated materials that are not part of the criminal investigation in question. *Matter of County of Nassau v. Sullivan*, 194 A.D.2d 236, 237-38 (2d Dept.

1993). Moreover, the People may not be required to use a subpoena in order to obtain materials not in its possession or control that a defendant has demanded. C.P.L. § 240.20(2).

The New York State Police is headed by the "superintendent of state police," who is appointed "by the governor by and with the advice and consent of the senate." Exec. Law § 210. The NYSP's responsibilities include developing state-wide policies on law-enforcement matters such as child abuse prevention, family offense intervention, elder abuse awareness, and human trafficking, as well as maintaining several state-wide criminal justice information databases. Exec. Law §§ 214a-d, 221, 221a-c. The State Police also has independent authority to investigate crime and maintains a state crime laboratory. Exec. Law § 216, 216-a. The agency is "subject to the call of the governor" and "empowered," but not mandated, to cooperate with local authorities. Exec. Law § 223(1). Its geographic area of employment is the entirety of New York State. Exec. Law § 223(1). The NYSP has "broad . . . authority . . . to administer and operate" its own affairs, which has been "uniformly upheld by judicial precedent." *Wright v. Connelie*, 101 A.D.2d 902, 902 (3d Dept. 1984).

The Appellate Division has twice ruled that documents that the NYSP refused to provide to local district attorney's offices were beyond the control of those offices for the purposes of discovery in DWI cases. In *Matter of Shay v. Mullen*, a motorist was arrested in Cortland County, most likely by a New York State Trooper, and charged

with driving while intoxicated and speeding. *Matter of Shay v. Mullen*, 215 A.D.2d 935 (3d Dept. 1995). The court precluded the admission in evidence of the breathalyzer and radar results because the People had not turned over the training and operating manuals for both machines. *Id.* at 935-36. Those manuals were in the custody of the State Police, which refused to provide them to the People, as evidenced by a letter from an Assistant Counsel of the State Police. *Id.* at 936. The Appellate Division granted Article 78 relief and prohibited the County Court from enforcing the order. *Id.* at 937. It explained: "[W]hile it may be reasonable to infer that a prosecutor would have access to materials relevant to criminal investigations which are prepared by law enforcement agencies, such inference is well overcome when access is sought to documents which another public agency . . . zealously seeks to shield from disclosure." *Id.* at 936 (internal quotes and citation omitted).

Similarly, in *Phillips v. Ramsey*, a motorist was arrested by a New York State Trooper and charged with driving while intoxicated. *Phillips v. Ramsey*, 42 A.D.3d 456 (2d Dept. 2007). The City Court ordered the People to produce the trooper's training manual for an examination of whether it constituted *Brady* material, notwithstanding that the State Police had refused to provide it to the Orange County District Attorney. *Id.* at 457. The Appellate Division granted prohibition on the basis that the People were not in possession or control of the manual and therefore could not be compelled

to disclose it. *Id.* at 459. The court also noted that the judge had no authority to direct the nonparty trooper to produce the manual absent a subpoena. *Id.* at 458.

Shay and *Phillips* support the conclusion that the NYSP documents are not under the control of a local district attorney, even when the NYSP is the arresting law enforcement authority, when the documents in question are created not in connection with that arrest, but rather, in connection with the State agency's administrative functions. *See* Vincent C. Alexander, Practice Commentary to C.P.L.R. § 4518, McKinney's Cons. Laws of N.Y., Book 7B, at C4518:7, "Equipment testing and calibration" (New York courts have found that reports on testing and calibration of breathalyzers are prepared for administrative, not litigation, purposes). Not every act undertaken by a law enforcement agency constitutes crime detection activity. *See, e.g.*, *People v. Blake*, 39 A.D.3d 402, 404 (1st Dept. 2007) (taking DNA sample from inmate for inclusion in DNA database served a special need beyond ordinary law enforcement activity and therefore satisfied exception to prohibition against suspicionless searches) (citing *Nicholas v. Goord*, 430 F.3d 652, 668-69 [2d Cir. 2005]). *People v. Pealer*, 20 N.Y.3d 447 (2013), holding that the entry into evidence at trial of the simulator solution certification, as a business record, does not violate the Confrontation Clause, is instructive. The Court explained: "The fact that the scientific test results and the observations of the technicians might be relevant to *future*

prosecutions of unknown defendants was, at most, an ancillary consideration when they inspected and calibrated the machine." *Id.* at 455 (emphasis added).

The NYSP tested and certified the simulator solution used to calibrate the Intoxilyzer used to test defendant's breath on August 6, 2014 (6/9/2015 response at 2: A.65). Defendant was not arrested until November 1, 2014 (*id.* at 1: A.64). The NYSP tested the solution not in connection with any particular investigation or prosecution, nor even pursuant to any statutory law enforcement duty (*see* Exec. Law article 11), but in the course of its administrative functions pursuant to a voluntary agreement with DCJS (*id.* at 7; Witherell Affidavit at ¶ 4: A.353). This act no more transformed the NYSP into an arm of the prosecution than it did Guth Laboratories or DCJS, which also tested the solution. Even the District Court did not order discovery of records possessed by either of those agencies, although DCJS is as much a public law enforcement agency as the NYSP.

Significantly, NYSP employees who test the simulator solution do not know when or where the solution will ultimately be used. Indeed, the NYSP does not even use simulator solution to calibration-check its own breath-testing instruments (6/9/2015 response at 16: A.79). It merely voluntarily participates in the non-investigative testing process of a solution that itself is unrelated to crime investigation and detection. Accordingly, the NSYP was not under the control of the Nassau

County District Attorney's Office when it tested Simulator Solution Lot Number 14180. Neither are the documents associated with that test.

The People disclosed to defendant every record concerning the most recent calibration of the Intoxilyzer used to test defendant's blood alcohol content. Those records were generated by members of local law enforcement in connection with their crime detection duties and, thus, were in the People's control. The NYSP GC data records were not. *See* NYSP Assistant Counsel Letter: A.299. Therefore, the People were under no "obligation to locate and obtain" them. *Colavito*, 87 N.Y.2d at 428.

Defendant, however, could have sought to subpoena these documents from the State Police. *See id.* (counsel "could have sought a subpoena," but did not, "perhaps for his own strategic defense reasons"). This was his appropriate recourse. *See Phillips*, 42 A.D.3d at 459 (explaining that C.P.L. § 610.20 authorizes criminal defendants to subpoena documents from the State). Having already obtained from the People the most recent record of inspection for the Intoxilyzer, which showed that the instrument was in proper calibration, he may have elected not to subpoena the GC data documents out of concern that further discovery might strengthen the People's case. This possible "calculated lack of initiative should not be rewarded." *Colavito*, 87 N.Y.2d at 428.

The District Court concluded that the State Police were under the People's control because the two agencies were engaged in a joint investigation (7/28/2015

order at 6: A.167). There was, however, no joint investigation. State Troopers did not arrest defendant, nor did they conduct any investigation into the charges against him; only Nassau County police officers were involved. *See* 6/9/2015 response at 1-2, 17-18; A.64-65; *cf. People v. Rutter*, 202 A.D.2d 123, 131 (1st Dept. 1994) (New York and Philadelphia law enforcement authorities had "cooperated closely" when investigating a crime, and New York prosecutor had unrestricted access to Philadelphia police files). As discussed, the State Police tested the simulator solution used to calibrate the Intoxilyzer in question – and others across the state – on August 6, 2014 (6/9/2015 response at 2: A.65), months before defendant's November 1, 2014, arrest by Nassau County police officers (*id.* at 1: A.64). The NYSP is not engaged in a joint investigation with every local police agency across New York's sixty-two counties to which DCJS provides simulator solution that it has tested.

All of the cases cited by the District Court in support of its finding of control are distinguishable (*see* 7/28/2015 order at 6-7: A.167-68). Some of them do not concern the question of control in the context of the People's discovery obligations, much less joint investigations between local and non-local law enforcement agencies. *See People v. Garrett*, 23 N.Y.3d 878 (2014) (Suffolk prosecutor did not disclose federal civil lawsuit against Suffolk police officer witness); *People v. Wright*, 86 N.Y.2d 591 (1995) (Albany prosecutor did not disclose that key witness previously had been a

police informant for local Albany police department); *People v. Robinson*, 53 A.D.3d 63 (2d Dept. 2008) (Brooklyn prosecutor did not disclose source code of Intoxilyzer used by Brooklyn police officers). The remaining cases concerned true joint investigations where local law enforcement agencies worked collaboratively with non-local law enforcement agencies to investigate or arrest a suspect. *See People v. DaGata*, 86 N.Y.2d 40 (1994) (Suffolk prosecutor did not disclose FBI notes related to DNA testing that had been performed at prosecutor's request); *People v. Jackson*, 154 Misc. 2d 718 (Sup. Ct. Kings Co. 1992) (Brooklyn prosecutor did not disclose information learned by fire marshal during joint arson investigation).

The District Court distinguished *Matter of Shay v. Mullen*, 215 A.D.2d at 935, on the basis that the materials at issue – breathalyzer training and operating manuals – had been found in a previous decision to be confidential and therefore nondiscoverable (7/28/2015 at 5-6: A.166-67). This, however, was not the basis of the Court's holding in *Shay*. It was the refusal by the State Police to provide the materials, despite repeated requests from the prosecution, that removed them from the prosecution's possession and control. *Shay*, 215 A.D.2d at 936. The District Court also incorrectly distinguished *Phillips*, 42 A.D.3d at 456, on the basis that it concerned an "improper request for a State Trooper's personal copy of his training manual" (7/28/2015 order at 5-6: A.166-67). As in *Shay*, however, the Second Department granted Article 78 relief in *Phillips* on the basis that the training manual

was not in the People's control because the State Police had refused to disclose it. *Phillips*, 42 A.D.3d at 457-59. Here too, the State Police has refused to produce the GC data documents concerning the testing of Simulator Solution Lot Number 14180. Therefore, these documents are no more under the People's control than those in *Shay* and *Phillips*.

The District Court stated that the People's argument was undermined by their disclosure to defendant of the "0.10 Simulator Solution Record" for Lot Number 14180 – a certification that the solution contained the appropriate concentration of ethyl alcohol and is approved for use – that they obtained from the State Police, and that the People were selective about what they "chose" to withhold (7/28/2015 order at 6: A.167). The People, however, have not chosen to withhold any documents. On the contrary, they have provided defendant with every document that they have received from the State Police (10/9/2015 sanctions response at ¶ 15: A.285-86). It is the State Police that has chosen to provide the .10 simulator solution certification but not the August 6, 2014, testing documents. The People cannot disclose what they do not possess. *Badalamenti v. Office of Dist. Atty. Nassau County*, 89 A.D.3d 1019, 1020 (2d Dept. 2011).

In a recent Bronx County Supreme Court decision on this identical issue, the court declined to sanction the People for not disclosing GC data, even though it believed the data to be discoverable, because the documents were not within the

People's possession or control. *See People v. Ramrup*, 2016 N.Y. Slip. Op. 26006, 2016 WL 144123, at *5 (Crim. Ct. Bronx Cty. Jan. 12, 2016). It held that the records were "within the exclusive custody of the New York State Police, not . . . any other law enforcement agency over which the People maintain control." *Id.* at *2 (citing *Santorelli*, 95 N.Y.2d at 493). The court concluded that to sanction the People "would engender the implication that the People's non-compliance was of their own doing" when "the responsibility for the People's inability to procure the reports and documentation ordered falls squarely on the shoulders of the NYSP." *Id.* at *4.

The Bronx judge's conclusion is confirmed by the position taken by the NYSP in the Nassau County case of *People v. Annarumma*, 2014NA010994, in which a judge issued a subpoena directing disclosure of the GC data. The NYSP moved to quash the subpoena on the bases, amongst others, that the GC data is not statutorily discoverable, the defendant had not made the requisite factual showing for the issuance of a subpoena, and it was improper for a defendant to circumvent discovery provisions governing criminal actions through the use of a subpoena. *See* January 21, 2016, NYSP Motion to Quash, Memorandum of Law, at 6-15: A.433-40). The NYSP has taken a firm position on this issue and is willing to engage in litigation to defend it. Thus, even if the People here had, themselves, subpoenaed the GC data documents, they would not have obtained them. Instead, they would have become

engaged in protracted litigation with the State Police instead of with defendant, putting them, in essence, between Scylla and Charybdis.

Because the People do not possess or control the August 6, 2014, GC data documents, the District Court exceeded its statutory authority by compelling the prosecutor to disclose them. The Supreme Court erred by summarily adopting the District Court's conclusion that the People controlled these documents without independently analyzing the issue. The People had a clear legal right to have the Supreme Court prohibit the enforcement of the District Court's order.

B. The GC Data Generated During The Testing Of Simulator Solution Lot Number 14180 Is Not Discoverable.

The simulator solution used by the NCPD to calibrate its Intoxilyzer machines is created by Guth Laboratories in batches known as "lots" and is packaged in small bottles. 6/9/2015 response at 11: A.74. Each bottle is marked with the lot number. The New York State Police and Guth both verify the ethyl alcohol concentration of each lot using headspace gas chromatography. DCJS conducts thirty additional verification tests. *Id.* at 11-12: A.74-75. The solution is then shipped to labs across New York State. *Id.* The simulator solution is, thus, not used to test defendant's blood alcohol content. Rather, it is used to verify the functionality of the Intoxilyzer. *Id.* at 2: A.65.

In this case, pursuant to their discovery obligations, the People gave defendant the October 6, 2014, and December 1, 2014, calibration records of the Intoxilyzer that was used by the NCPD on November 1, 2014, to test defendant's blood alcohol content (6/9/2015 response at 1-2: A.64-65). Those were "the most recent records of . . . calibration" for the Intoxilyzer used in this case. *See* C.P.L. § 240.20(1)(k).

The New York State Police verified the ethyl alcohol concentration of Simulator Solution Lot 14180 on August 6, 2014, three months before defendant's breath test. 6/9/2015 response at 2: A.65. It is the GC data underlying this verification process that the District Court ordered disclosed. In other words, the District Court's order compelled disclosure of historic calibration records of a solution that, in turn, was used to calibrate the instrument used to perform a scientific test. It did not, per C.P.L. § 240.20(1)(k), limit disclosure to the most recent record of calibration of the instruments utilized to perform such scientific tests.

Discovery in New York is governed exclusively by statute, namely C.P.L. article 240. *See Colavito*, 87 N.Y.2d at 427. C.P.L. § 240.20 provides the sole authority for a trial court to order the People to produce pre-trial discovery. Items not enumerated in C.P.L. § 240.20 are not discoverable by the defense as of right. *Colavito*, 87 N.Y.2d at 427.

C.P.L. § 240.20(1)(k), which pertains exclusively to DWI testing, authorizes disclosure of only "the most recent *record* of inspection, or calibration, or repair of

machines or instruments used to perform such scientific tests . . . made by or at the request of a law enforcement agent" (emphasis added). Likewise, C.P.L. § 240.20(1)(c) authorizes disclosure of "any written *report* or *document*, or portion thereof, *concerning a* . . . *scientific test* or experiment, relating to the criminal action" (emphasis added). Neither authorizes disclosure of calibration or testing records of *solutions* used to calibrate these machines or instruments used to perform tests.

"[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." McKinney's Statutes § 240. Moreover, "[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended." McKinney's Statutes § 74.

Because there is no ambiguity in the statute, the District Court should have given effect to its plain meaning and should not have substituted its own understanding or a different meaning. *See People v. J.*, 61 N.Y.2d 985, 896 (1984) ("When the language of a statute is clear and unambiguous, the court is constrained to give effect to the plain meaning of the statute's words"); *Bright Homes v. Wright*, 8 N.Y.2d 157, 162 (1960) ("every phrase in a legislative enactment must be given its ordinary and consistent meaning" because "[c]ourts are not supposed to legislate

under the guise of interpretation"); McKinney's Statutes § 232 ("It is a general rule in the interpretation of statutes that the legislative intent is primarily to be determined from the language used in the act, considering the language in its most natural and obvious sense."). Moreover, the Legislature's use of the singular "record" (and "report" or "document" in C.P.L. § 240.20[1][c]) should also be given effect, not expansively interpreted by courts to encompass potentially endless numbers of documents.

It is true that subdivision (1)(k) does not identify every type of document that might be disclosable thereunder. It authorizes discovery of any report or document concerning a scientific test or experiment, "*including* the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments." C.P.L. § 240.20(1)(k) (emphasis added). Those "enumerated items are . . . mere examples" of discoverable documents. *Robinson*, 53 A.D.3d at 69. However, the word "including" modifies the clause of the sentence immediately following it, *i.e.*, it permits discovery of other types of records associated with the testing instrument. The non-exhaustive list of records must still, per the preceding clause of subdivision (1)(k), concern a scientific test or experiment conducted in connection with the particular prosecution. *See also* C.P.L. § 240.20(1)(c) (authorizing discovery of a test "relating to the criminal action"). Because the GC

data does not concern a test of the instrument used to perform defendant's breath test, it does not fall within the inclusionary provision of subdivision (1)(k).[4]

The legislative history of C.P.L. § 240.20 unequivocally confirms this construction of the statute. In September 1967, the Bartlett Commission, which was preparing a revision of the Code of Criminal Procedure, released a pamphlet containing the text of the proposed Criminal Procedure Law, with accompanying commission staff notes. *See* Proposed New York Criminal Procedure Law. McKinney's Proposed Crim. Procedure '67 Pamph. [Edward Thompson Co. 1967], p. VII ("Proposed C.P.L."): A.379. The brand new law setting forth prosecutorial discovery obligations was inserted into the proposed Criminal Procedure Law in Part Two, Title J, Section 125 – Discovery; when authorized. The precursor to C.P.L. § 240.20(1)(c) read as follows:

> "Subject to the provisions of subdivisions four and five, such discovery may be ordered with respect to property consisting of reports and documents, or copies or portions thereof, concerning physical or mental examinations or scientific tests and experiments *made in connection with the case* which are within the possession, custody or control of the district attorney, the existence of which is known, or by the exercise of reasonable diligence should become known, to such district attorney.

[4] Notably, although subdivision (1)(k) authorizes discovery of the "certification certificate . . . held by the operator of the [Intoxilyzer]," it does *not* expressly authorize discovery of the simulator solution certificate which was, in any event, disclosed because the People intended to introduce it at trial.

Proposed C.P.L. at 199: A.379 (emphasis added). The staff notes are also instructive:

> Subdivision 2 herein, authorizing discovery of the specified types of reports and examinations, is also equivalent to one of the categories defined in Federal Rule 16 (subd. [a 2]). Concerning this category, the federal commentators observed . . . . [w]ith respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government *is further limited to those made in connection with the particular case.*

Proposed C.P.L. at 201: A.381 (emphasis added); *see also* Advisory Committee Notes to F.R.C.P. 16(a)(1)(F) (requiring government disclosure of reports of scientific tests "made in connection with a particular case"). The NYSP GC data was not generated in connection with defendant's case. It is therefore not discoverable pursuant to C.P.L. § 240.20(1)(c).

Subdivision (1)(k) was added to § 240.20 in 1989, at the request of the State Magistrate's Association, because many courts were not granting discovery – already provided for by C.P.L. § 240.20(1)(c) – of the inspection records of "machines and equipment" used in the prosecution of Vehicle and Traffic Law offenses. *See* letter from Mary B. Goodhue, New York Senator, to Hon. Evan A. Davis, Counsel to the Governor, dated July 18, 1989, *available in* Bill Jacket, L. 1989, ch. 536, at 6: A.389; sponsor's memorandum in support of act to amend C.P.L. § 240.20, *available in* Bill Jacket, L. 1989, ch. 536, at 7: A.390; *see also* Peter Preiser, Practice Commentary to C.P.L. § 240.20, McKinney's Cons. Laws of N.Y., Book 11A. Nothing in the

legislative history of subdivision (1)(k), however, suggests an intent to further expand the People's discovery obligations. The intent was only to clarify them and ensure that defendants received what they were already entitled to under subdivision (1)(c).

Several New York courts have found that GC data is not discoverable for the foregoing reasons. For example, in *People v. White*, 45 Misc. 3d 695, 701 (Crim. Ct. N.Y. Cty. 2014), a Manhattan criminal court refused to compel the People to disclose GC data, explaining that "gas headspace chromatography reports . . . appear to be nothing more than tests of tests and are not a fundamental part of whether the machine was in good working order." And in *People v. Tejeda*, 47 Misc. 3d 1224(A), 2015 WL 3447221, at *8 (Crim. Ct. Bronx Cty. Feb. 4, 2015), a Bronx criminal court arrived at the same conclusion. The plain meaning of C.P.L. § 240.20 and its legislative history lead inexorably to the conclusion that discovery of the GC data here is not statutorily authorized. The data is not a calibration record of the instrument used to perform defendant's breath test. Indeed, it is not created in connection with *any* particular defendant's case. The data is not probative of whether the instrument used to test defendant's blood alcohol level was in proper working order.

In its discovery order, the District Court cited *Robinson*, 53 A.D.3d at 63, in support of its conclusion that the January 9, 2014, records are discoverable pursuant to C.P.L. § 240.20(1)(k) (7/28/2015 order at 4-5: A.165-66). However, the Appellate Division ultimately found meritless the *Robinson* defendant's contention that he was

deprived of the right to challenge the reliability of the Intoxilyzer by the prosecution's refusal to disclose its source code on the basis that the instrument's reliability was "well-established." *Robinson*, 53 A.D.3d at 70. Here, as in *Robinson*, defendant was "provided with all of the documentation associated with the Intoxilyzer machine that was used to measure and calculate his BAC, including field inspection reports, the certificate of calibration, and the certificate of analysis for the simulator solution." *Id.* at 72; *see also* 7/28/2015 order at 6: A.167. The calibration records of a solution used to calibrate a breath testing instrument, as opposed to those of the instrument itself, are simply beyond the authorization of C.P.L. § 240.20.

Nor do any of the decisions cited by the District Court on pages 4-5 of its decision suggest otherwise. Defendant has received the equivalent of every calibration record that the courts in those cases found was discoverable. *See Constantine v. Leto*, 157 A.D.2d 376, 379 (3d Dept. 1990) (finding that records showing instrument did not function, State Police breath test rules and regulations, and checklist and calibration records, were discoverable); *People v. Crandall*, 228 A.D.2d 794, 795 (3d Dept. 1990) (finding that defendant was entitled to examine ampoule and simulator solution analysis reports before trial); *People v. DiLorenzo*, 134 Misc. 2d 1000, 1003 (Co. Ct. Nassau Co. 1987) (finding that alcohol drug influence form, breathalyzer test record and operational check list, Central Testing Unit worksheet, simulator maintenance log, breathalyzer maintenance log, ampoule test record, police

officer certification for operation of breathalyzer, certification of calibration of breathalyzer, and simulator solution analysis certificate, were discoverable). The People need not produce in discovery records of an item not itself used to test a particular defendant's breath. *Cf. People v. Uruburu*, 169 A.D.2d 20, 25-27 (4th Dept. 1991) (irregular lot numbering practice used by Systems Innovation, Inc. to create the ampoules "utilized in the testing of defendant's breath" negated probative value of certificate attesting that chemicals were properly prepared); *see also People v. Sperber*, 177 A.D.2d 725, 727 (2d Dept. 1991) (same).

The District Court's decision impermissibly expands a prosecutor's discovery obligations because it directs disclosure of more than the most recent record of calibration of the Intoxilyzer used to perform a scientific test related to a particular case. It compels the disclosure of an entirely new, second tier of discovery – calibration records of solutions that are, in turn, used to calibrate the Intoxilyzer.

Here, defendant already received, pursuant to C.P.L. § 240.20(1)(k), the first-tier discovery proving that these tests were conducted and certifying that the Intoxilyzer was in good working order (Exhibit 1 of 4/2/2015 response, beginning with page titled "Police Department, County of Nassau, N.Y. Intoxilyzer/Breathalyzer Maintenance Log" and ending with page titled "Nassau County Police Dept. Intoxilyzer – Alcohol Analyzer Model 5000EN SN 68-013837 12/02/2014 Diagnostic Test 04:28 EST": A.87-151). Those documents included (1) a

random calibration check of the Intoxilyzer used to test defendant's breath using .18% simulator solution; (2) two calibration documents, each of which recorded five tests performed on that Intoxilyzer using .10% simulator solution from Lot Number 14180; (3) a sixty-day instrument verification of that Intoxilyzer describing thirty-two tests using .02%, .04%, .08%, .10%, .18%, .20%, .and 30% simulator solution; (4) alcohol-free calibration checks performed on that Intoxilyzer; (5) two mouth alcohol tests performed on that Intoxilyzer; (6) insufficient sample tests performed on that Intoxilyzer; (7) a test performed on that Intoxilyzer using an open bottle of mouthwash; (8) a test performed on that Intoxilyzer to verify that active cellular phone signals would not interfere with its functionality; and (9) a variety of records concerning additional calibration tests of that Intoxilyzer performed by the NCPD. *Id.*: A.85, 86-91, 96-103, 107, 108-09, 110, 115, 116, 121-51. Defendant also received the maintenance logs of the Intoxilyzer that was used to test his blood alcohol content. *Id.*: A.84.

In total, defendant received sixty-six pages of first-tier discovery records attesting that the Intoxilyzer was in good working order. Taken to its logical conclusion, however, the rationale underlying the District Court's second-tier discovery order would authorize the disclosure of any records relating to the calibration of these first-tier discovery items. This kind of discovery is far beyond that at issue in *DaGata*, where the Court of Appeals held that ten pages of laboratory notes

that were generated *while testing that defendant's DNA* were discoverable pursuant to C.P.L. § 240.20(1)(c). *DaGata*, 86 N.Y.2d at 44. The new discovery obligation imposed by the District Court could reach "every quality control, the supplier's certification and underlying supporting documentation, the methods and protocols of the NYSP Lab[, DCJS,] and Guth, as well as documentation from Guth for all of its instrumentation and its supplies" (6/9/2015 response at 13: A.76). This goes well beyond the intent evinced by the Legislature in enacting C.P.L. §§ 240.20(1)(c) and (k).

Moreover, the new discovery obligations would reach any instrument used to perform a scientific test in a DWI prosecution. Prosecutions that allege a violation of the Vehicle and Traffic Law, per C.P.L. § 240.20(1)(k), sometimes also involve Penal Law charges, particularly drug possession charges, that depend on chemical testing. The drugs that are the subject of those charges are scientifically tested in laboratories by instruments that require calibration. The rationale underlying the District Court's second-tier discovery order would authorize disclosure of all records relating to the calibration of any solutions that were, themselves, used to calibrate the instruments used to test the drugs. Such expansive discovery is not what the Legislature intended by enacting C.P.L. § 240.20(1)(k), the purpose of which was to ensure that judges were ordering discovery of materials already discoverable under C.P.L. § 240.20(1)(c). Any expansion of the People's discovery obligations is within the province of the Legislature, not the courts.

In addition to the many first-tier discovery documents disclosed pursuant to C.P.L. §§ 240.20(1)(c) and (k), defendant was also provided the certification of Jennifer F. Limoges, Associate Director of Forensic Sciences for the Forensic Investigation Center, attesting that the simulator solution was properly tested and approved for use. *See* Simulator Solution Certification: A.94-95. Although this is a second-tier document unrelated to the test performed in this particular case and, thus, not among the records required to be disclosed under § 240.20, it was turned over because the People intend to introduce it at trial, in lieu of live testimony, to establish that the solution used to verify that the Intoxilyzer was functioning properly and contained a known concentration of ethyl alcohol. *See* C.P.L. § 240.40(1)(c) (court "may" order discovery of items the People intend to introduce at trial upon a showing of materiality to the defense and reasonableness). This certification is admissible without the need for live testimony because, as the Court of Appeals has found, it qualifies as a business record under CPLR § 4518(a) and business records, "as a class, are generally deemed nontestimonial." *Pealer*, 20 N.Y.3d at 455. As the Court of Appeals explained, "breathalyzer testing certificates do not directly inculpate [a] defendant or prove an essential element of the charges against him," but merely "reflect[] objective facts that were observed at the time of their recording in order to establish that the breathalyzer would produce accurate results." *Id.*; *see also People v. Hulbert*, 93 A.D.3d 953, 953-54 (3d Dept. 2012) (same); *People v. Lebrecht*, 13 Misc. 3d

45, 49 (App. Term 9th & 10th Jud. Dists. 2006) (finding simulator solution certificates nontestimonial because *inter alia*, "they were not created at official request to gather incriminating evidence *against a particular individual* . . . and they did not constitute a direct accusation of an essential element of any offense" [internal citations omitted] [emphasis added]).

Since these certificates are nontestimonial, a defendant does not have the right to challenge them with their underlying data. *Pealer* establishes that they may be admitted without confrontation. Thus, the District Court's conclusion that defendant was entitled to the GC data so he could challenge the accuracy of his breath test results (7/28/2015 decision at 3-4: A.164-65) is incorrect.

It is also significant that the District Court denied defendant's request to expand its order to include C.P.L. § 240.40(1)(c) as a basis for its decision (11/23/2015 sanctions decision at 4: A.322). This is not surprising. In addition to the fact that the People did not intend to introduce the GC data records at trial, defendant merely speculated, rather than demonstrated, that the records were material to the preparation of his defense. He made no particularized showing that the simulator solution may have contained the wrong ethyl alcohol content, or that the data underlying the already-disclosed certification could have helped him prepare his defense. *See, e.g.*, *Leto*, 157 A.D.2d at 379 (without "requisite factual predicate" that an

item will contain material evidence, a defendant cannot "fish for impeaching material" relating to an Intoxilyzer's operation).

And he could not have. The NCPD obtains simulator solution from DCJS (10/9/2015 sanctions response at ¶ 17: A.286). Before DCJS distributes the solution, three different agencies perform over thirty tests on it (*id.* at ¶¶ 19-24: A.287-88). Guth uses an independent laboratory to certify the solutions used to create the solution (*id.* at ¶ 19: A.287). Both Guth and the NYSP verify the amount of alcohol present in the solution using headspace gas chromatography (*id.* at ¶ 20: A.287). DCJS performs thirty separate tests on the solution before and after it is distributed across New York State (*id.* at ¶¶ 22-24: A.287-88). The solution is used only after each of the agencies has completed its individual testing (*id.* at ¶ 25: A.288-89). If any of the tests were to reveal a flaw in the simulator solution, it could not be used in New York State (*id.* at ¶ 21: A.287).

Finally, defendant's due process rights have not been violated by the nondisclosure of nondiscoverable documents. *See People v. Pacheco*, 38 A.D.3d 686, 688 (2d Dept. 2007) (defendant not deprived of due process rights when a prosecutor does not disclose information for which there exists "no statutory basis to compel such disclosure"). Similarly, defendant's Sixth Amendment confrontation right is not implicated here because "[t]he Confrontation Clause protects only a defendant's trial rights, and does not compel pretrial discovery." *U.S. v. Ahmed*, No. 10 Cr. 131 (PKC),

2011 WL 4915005, at *3 (S.D.N.Y. Sept. 23, 2011) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 [1987]). And, as discussed, defendant's right to confront his accusers was not violated by the nondisclosure of the GC data underlying the simulator solution certificate because that certificate is a nontestimonial business record. *See Pealer*, 20 N.Y.3d at 455-56; *Hulbert*, 93 A.D.3d at 953-54; *Lebrecht*, 13 Misc. 3d at 49.

In view of this, and the sixty-eight pages of documents showing that the Intoxilyzer was in good working order, any suggestion that defendant should have received the simulator solution testing records pursuant to C.P.L. § 240.40(1)(c) should be rejected.

II. The Supreme Court Should Have Determined That Prohibition Was Appropriate In View Of The Gravity Of The Harm And The Lack Of An Alternative Remedy

Even upon a showing of a clear legal right to relief, the Supreme Court retained the discretion to grant or deny an Article 78 petition. *Matter of Holtzman v. Goldman*, 71 N.Y.2d at 569; *Matter of Rush v. Mordue*, 68 N.Y.2d at 354. As discussed earlier, the court's exercise of discretion should be informed by the gravity of the harm caused by the unauthorized act, whether the harm may be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity, and whether prohibition would furnish a more complete and efficacious remedy even when other methods of redress

are technically available. *Matter of Rush v. Mordue*, 68 N.Y.2d at 354; *La Rocca v. Lane*, 37 N.Y.2d at 579-80.

Here, the District Court's order compelled the District Attorney's Office to disclose items that it does not actually or constructively possess, and ultimately resulted in sanctions that will falsely suggest to the jury that the People's non-compliance with the court's order was volitional. Moreover, it places a significant burden on prosecutors' offices and the State Police. As explained in the Witherell Affidavit accompanying the People's Article 78 application, the production of GC data records would have generated, in 2014 alone, between 2,505,120 to 2,922,640 pages of discovery in all the DWI prosecutions statewide, each page of which would have to have been carefully compared with the original for accuracy, clarity of reproduction, and completeness (*see* Witherell Affidavit, Exhibit 8 to Article 78: A.353). For 2013, it would have generated between 2,633,280 to 3,072,160 pages (*id.*). Such an onerous burden could discourage the State Police from performing the quality assurance testing that it provides, as a courtesy, to DCJS. The gravity of the harm associated with the order thus cannot be overstated.

Furthermore, defense counsel in this case has sought discovery of GC data in multiple DWI prosecutions in the New York metropolitan area. *See, e.g., People v. Redmond*, 2015NA009802, *People v. Ali*, 2015NA018317, *People v. Torre*, 2014NA005100 *People v. Li*, 2014NA023862; *People v. Arbel*, 2014NA011449; *People v. Tejeda*,

2014BX020711; and *People v. Ramrup*, Bronx Ind. No. 3115-2013. Many defense attorneys have followed suit. *See, e.g., White*, 45 Misc. 3d at 695. The defense attorneys in these cases are aware that District Attorney's Offices do not have access to the GC data, but have nonetheless used C.P.L. § 240.20 to seek sanctions against the People to gain a litigation advantage, rather than subpoenaing the records from the State Police. Subdivision (1)(k) of C.P.L. § 240.20 was not designed to permit this gamesmanship. Sanctions should not be imposed on prosecutors who have no control over these records which do not even concern the functionality of the Intoxilyzer used to test a DWI defendant's breath.

In addition, without Article 78 relief, the Nassau County District Attorney's Office is doomed to repeatedly suffer sanctions for its inability to obtain GC data from the NYSP. The District Court's order carries with it repercussions for countless DWI prosecutions in Nassau County because Judge Engel sits in one of only two specialized misdemeanor DWI court parts in the County and has, in fact, issued identical orders in many other DWI cases. *See, e.g., Redmond, Ali, Torre, People v. Livingston*, 2015NA013348. Other Nassau County judges have as well. *See, e.g, Arbel* (O'Donnell, J.) and *People v. Feng Yang*, 2014NA013912 (McAndrews, J.).

Finally, petitioner has no adequate remedy at law because C.P.L. § 450.20 does not authorize a direct appeal by the People from a pre-trial order compelling discovery. *See People v. Myers*, 226 A.D.2d 557, 558 (2d Dept. 1996) (People may not

appeal from order precluding evidence pursuant to C.P.L. § 240.70[1]) (citing *People v. Laing*, 79 N.Y.2d 166 [1992]); *see also* Peter Preiser, Practice Commentary to C.P.L. § 450.20, McKinney's Cons. Laws of N.Y., Book 11A. Thus, this Article 78 proceeding is the People's only avenue of relief.

Accordingly, the extraordinary remedy of prohibition is not only appropriate, but necessary.

CONCLUSION

The Supreme Court's Decision Declining To Grant The People's Petition For Article 78 Should Be Reversed And An Order Should Be Issued Prohibiting The Enforcement Of The District Court's July 28, 2015, Order.

Dated: Mineola, New York
March 23, 2016

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR § 670.10.3(f)

JOSEPH MOGELNICKI does hereby certify as follows: This brief was prepared by computer; the body of the brief is double-spaced and utilizes a serifed, proportionally spaced typeface (Garamond) of 14-point size; the footnotes are single-spaced and utilize the same typeface of 12-point size; and, according to the word count of the word processing system used (Microsoft Word 2013), the brief contains 11,483 words, exclusive of any pages containing the table of contents, proof of service, and certificate of compliance.

Dated: Mineola, New York
March 23, 2016

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