REMEDYING *ROSARIO* VIOLATIONS UNCOVERED AFTER VERDICTS AND FOLLOWING PRE-TRIAL HEARINGS:

Has *Per Se* Become Passé?

By Mark M. Baker *

I. Introduction

There is hardly a criminal practitioner in this state, nor is there a law student who studies New York criminal procedure, who is unmindful of the almost 40 year old rule initiated by the New York Court of Appeals in People v. Rosario.[1] Specifically, in 1961 there began the evolvement of a well-entrenched, and seemingly impregnable rubric in New York Jurisprudence, which became known as the Rosario *per se* rule. In its ultimate form, it stated that in the event there is later determined a failure of the prosecution to have disclosed to the Defense prior statements of any prosecutorial witness which relate to the subject matter of that witness's testimony in a particular proceeding, then, absent any consideration of prejudice, a new trial or hearing will be ordered. This obligation of absolute disclosure was also codified in the Criminal Procedure Law with respect to the statements of prosecutorial witnesses that relate to the subject matter of their testimony at both trial[2] and pre-trial hearings.[3]

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* Mark M. Baker is of Counsel to the Manhattan law firm of Brafman & Ross, P.C., concentrating in criminal appeals and motion litigation, and is an adjunct Professor of Law at the Touro College Law Center. He was formerly a partner in the criminal defense firm of Slotnick and Baker, and before that, served as Special Assistant Attorney General, Chief of Appeals and Counsel, in the Office of the Special State Prosecutor Investigating the New York City Criminal Justice system and as an Assistant District Attorney, Kings County, New York. He has argued scores of appeals in the New York and federal courts, nationwide.

It now appears, however, that those who confidently believe that the *per se* rule will automatically right all wrongs in the event of the uncovering, post- trial or hearing, of Rosario violations, should guess again. The fact is that careful scrutiny of certain unheralded decisions of the Court of Appeals over the last few years attests to the verity that, ever so quietly but with calculated efficiency, the impact of the Rosario rule has been steadily eroded, and its lifeblood virtually depleted.

The purpose of this article is to demonstrate what appears to be the demise of the Rosario *per se* rule, at least in function, as to those situations where Rosario violations are not demonstrated in the pre-verdict record of trial, and in all instances when they were committed in pre-trial hearings. Hopefully, the criminal defense bar will thereby become sensitized to the reality that the New York Court of Appeals seems bent upon undoing some of its most notable landmarks of the last half century. Owing to such awareness, Counsel can take measures to protect the record with respect to pre-trial hearings, and seek to exploit earlier Rosario violations first discovered post-trial, all in an effort to safeguard their clients' rights to *de novo* proceedings. In the final analysis, the taking of no action will surely preclude relief even approximating the *per se* remedies available in years past.

II. The Rosario *per se* rule

A. Trial Violations

Fifteen years after the pronouncement of the rule in People v. Rosario, and in order to ensure that there was scrupulous adherence by prosecutors to its dictates, the original harmless error analysis was discarded in People v. Consolazio.[4] Instead, it became

the standard in New York that if documents which constitute Rosario material are later discovered to have been undisclosed by the prosecution, there will be an automatic nullification of a conviction and the ordering of a new trial, without the need to demonstrate prejudice. This doctrine was reiterated in such cases as People v. Poole;[5] People v. Perez;[6] People v. Ranghelle;[7] People v. Novoa;[8] People v. Jones;[9] People v. Young;[10] People v. Banch;[11] People v. Baghai-Kermani;[12] and People v. Machado.[13]

Indeed, in the event of the later demonstration of a Rosario violation, which, more specifically, involves the prosecution's failure to disclose prior statements, memoranda or other materials, in either its actual or constructive possession and control,[14] relating to the testimony of those witnesses whom it has called,[15] what came to be regarded as a *per se* rule mandated the reversal of the judgment of conviction following a direct appeal. Moreover, it also required the vacatur of such judgment upon a collateral challenge brought prior to the termination of the direct appellate process, pursuant to CPL 440.10,[16] again, without any consideration of prejudice to the defendant.

The rule was all encompassing. Indeed, even if, in the court's or the prosecution's view, the withheld materials "...'in no way affected the credibility of the... [witness] who testified at trial'," [17] or "...even if the non-disclosed materials would have been of limited impeachment value to the defense...," [18] any such consideration would be completely incompatible with the rule's application. For, as the Court of Appeals has "...stated over and over again, 'a judge's impartial determination as to what portions may be useful to the defense, is no substitute for the single-minded devotion of counsel for the

accused'..."[19]

In fact, so stringent was the *ratio decidendi* behind the *per se* rule, that even good faith "inadvertence" on the part of the People in failing to "locate, identify and discover all Rosario material does not excuse their failure to produce covered material..."[20] Further, even "...'substantial compliance' is not an exception to the rule of per se reversal for Rosario violations."[21]

In Jones, the Court of Appeals provided the governing rationale. As the Court explained:

> In Rosario, we emphasized that statements of prosecution witnesses are important not just as a source of contradictions, but that "[e]ven statements seemingly in harmony with [trial] testimony may contain matter which will prove helpful on cross-examination. They may reflect a witness' bias, for instance, or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony of the witness which might, perhaps, turn the scales in his favor. Shades of meaning, stress, additions or omissions may be found which will place the witness' answers upon direct examination in an entirely different light." ...[citation omitted]. It is **defense counsel alone** who has the responsibility for making the strategic judgments and doing the careful preparation required for planning and executing an effective cross-examination of the People's witnesses and deciding whether and how to use the statements. When, as a result of the prosecutor's violation of the Rosario rule, defense counsel has been deprived of material of which he or she is unaware or cannot otherwise obtain, there is no way, short of speculation, of determining how it might have been used or how its denial to counsel might have damaged defendant's case...[22]

In the final analysis, "...the very basis for the rule requiring the prosecutor to disclose a witness' prior statements is to afford the defendant a fair opportunity to test the witness' credibility."[23]

Unquestionably, the *per se* rule is perhaps the single most compelling

pronouncement to come out of the Court of Appeals in the area of modern criminal procedure. As one of New York's foremost criminal defense attorneys characterized it in a notable article appearing in this publication nine years ago, "[n]o decision in recent years has had more significant impact on criminal trials in New York...Put more dramatically, the Rosario rule is to cross-examination what gun powder is to warfare."[24]

Prior to 1997, there were only three exceptions to the application of the *per se* rule. First, as concerned Rosario violations supporting a CPL 440.10 collateral challenge to a judgment, **following** the exhaustion of the direct appellate process, a new trial was only required if there could be demonstrated a "reasonable possibility that the failure to disclose the Rosario material contributed to the verdict."[25]

Second, in the event of an inadvertent loss or destruction of Rosario material prior to its disclosure to the defense, if the defendant has thereby been prejudiced as a result of the prosecution's failure to take adequate care, then, instead of *per se* relief, the trial court, depending on the degree of prosecutorial fault, is vested with the discretion to impose an appropriate sanction. Such would include striking the witness's direct testimony or giving the jury an adverse inference instruction.[26] Subsequently, appellate review is limited to the determination of whether the action taken by the trial judge was within the bounds of discretion in determining the appropriate sanction.[27] Notably, it would certainly amount to an abuse of discretion if, in the face of clear prosecutorial carelessness, no sanction would be imposed.[28]

Third, where the defense had been provided what is characterizable as a

"duplicative equivalent" of the non-disclosed material, there has been "no deprivation at all."[29] Even then, "[s]tatements are not the 'duplicative equivalent' of previously produced statements, however, just because they are 'harmonious' or 'consistent' with them... [citations omitted]".[30] Accordingly, far from being inflexible and all encompassing, the "duplicative equivalent" exception, "...has been narrowly circumscribed."[31]

In addition to these exceptions, the Court of Appeals has noted that another category exists where there has been a delayed disclosure, as opposed to the absolute failure to turn over Rosario material. In such event, "reversal is not required unless the delay substantially prejudiced the defendant."[32]

B. Pre-trial Hearing Violations

Aside from the prosecutorial failure to disclose Rosario material at trial, in Banch,[33] the Court determined the remedy for a Rosario violation with respect to pre-trial proceedings. In Banch, wherein several witnesses had testified at a suppression hearing as to the voluntariness of the defendant's confession, it was later discovered at trial that the prosecutor had failed, *inter alia*, to provide the memo book of an officer who had been one of those hearing witnesses.

Solely addressing the prosecution's failure to have disclosed a prior statement of that witness **alone**, without regard to an additional Rosario hearing violation, the Court ordered an entirely new hearing to be conducted. Citing People v. Malinsky,[34] the Court declined to carve out an additional exception to the *per se* rule as regards pre-trial hearings. It thus re-affirmed the result in Malinsky, and held that "...a defendant is entitled to a new

hearing as a remedy for a pretrial Rosario violation, without inquiry into prejudice."[35] In doing so, it re-emphasized that "...the considerations that led us to adopt the per se rule when the People fail to turn over Rosario material in the context of a trial...[citations omitted] apply equally when the defendant is deprived of such material at a pre-trial suppression hearing...".[36]

Given these seemingly inviolate rules, the Banch Court "...conclude[d]... that in the circumstances before us defendant is entitled to a new suppression hearing."[37] Thus, just as a Rosario violation at **trial** requires a whole new trial to be ordered as the appropriate corrective action to be taken by an appellate court, and not just a re-opened cross-examination of the effected witness, so too, Banch concluded, a Rosario violation at a pre-trial hearing requires a *de novo* pre-trial proceeding following appellate review.[38]

As will become significant, thereafter, the First Department, in People v. Brantley,[39] applied the Banch remedy. There, upon the People's concession, it was held, that "...on constraint of ...Banch..., [the prosecution's] belated disclosure of Rosario material relative to the Mapp/Huntley suppression hearing requires that defendant be afforded a de novo hearing on his suppression motion." In fact, until recently, the First Department had been quite consistent in this regard.[40] Similarly, the Fourth Department, which has apparently addressed this issue rather frequently, repeatedly reached the identical result.[41]

Notably, in Banch, the majority recalled that the Rosario hearing violation in that case, regarding a single witness out of several who had testified, was first discovered during *voir dire* of the trial jury. Thus, no **trial** Rosario violation occurred, because

"...defense counsel had the benefit of the correct memo book for cross-examination of the witness at trial, and defendant has made no showing that his cross-examination was hampered by the untimely disclosure of the correct memo book."[42] In fact, defendant Banch did not assert that a new trial was required.

On the other hand, the Court went on to note, that,

> [d]efendant does claim, however -- and we agree -- that his request to reopen the suppression hearing should have been granted and that since the trial court failed to grant that relief, a new hearing must now be ordered.[43]

The Court then offered its reasoning behind the ordering of this relief. As explained:

> If the suppression hearing had been reopened as defendant requested when the mistake was discovered at trial, defendant would have had the opportunity to use the correct book in challenging Toto's hearing testimony. In that case, the Rosario violation would have amounted to a mere delay in disclosure and the appropriate inquiry would be whether defendant was substantially prejudiced by the delay...[citation omitted]. As it stands, however, defendant was never given the opportunity to cross-examine Toto's hearing testimony with the correct records. **Accordingly, with respect to the hearing, the violation must be viewed as a complete deprivation of Rosario material.**[44]

In short, while denying a whole new trial under such circumstances, the Court certainly did more than just direct that the pre-trial hearing be reopened (which, it agreed, should have been ordered by the lower court upon the earlier discovery of the violation at trial). What it specifically ordered was "...a **new** hearing as a remedy for a pretrial Rosario violation, without inquiry into prejudice."[45]

Similarly, in Ortega,[46] an application to reopen the pre-trial independent source hearing was made at trial, amidst the later revelation that a Rosario violation had occurred at the earlier proceeding. In the face of the prosecution's argument that, "[a]t most...defendant

is entitled to a **reopening** of the hearing, not a **de novo** hearing," the First Department nevertheless ordered a "**de novo** independent source hearing." Reliance was quite correctly placed on Banch.[47]

Contrastingly, in Bowers,[48] the Rosario violation was discovered subsequent to the hearing, but prior to any needed use of the withheld documents at trial. However, unlike in Banch and Ortega, the violation was then and there immediately remedied by the trial judge's reopening of the earlier concluded hearing. Upon those distinguishable circumstances, a whole new hearing was found to have been unnecessary.

The Banch Court specifically recognized that the remedy of simply continuing the hearing is no longer practicable once judgment has been entered, and the violation is only later first determined on appeal. As Banch noted, "[t]hat the fact finder is a judge...does not improve the trial court's ability, or ours, to reconstruct what might have happened if the violation had not occurred."[49] It is for this reason that Banch went much further, and, invoking a *per se* rule similar to that requiring a new trial in the face of Rosario **trial** violations, it did not simply order a "reopened" hearing (even though that is what the defendant had originally requested[50]); it ordered a whole "new" hearing -- *a remedy which the Banch Court enunciated at least six (6) times in the course of its discussion*.[51]

III. People v. Flores[52] -- First Blood Is Drawn

On July 7, 1994, the Court of Appeals, in a most indirect and subtle manner, began to chip away at the Rosario wall. The nominal and "dispositive" issue in Flores was whether that defendant had been deprived of effective assistance of counsel. Although the

Court determined therein that there had been no such violation as to that particular defendant, a more considered analysis reveals a far more expansive impact.

The salient facts are rather straightforward. Flores' attorney notified the judge at the close of the People's case that his requests for all Rosario material had not been satisfied. Notwithstanding this prosecutorial failure, Counsel opted to proceed with his cross-examination of all prosecution witnesses, absent Rosario objections. Following the verdict, but before sentencing, a police officer's memo book, containing statements of two persons who had testified at trial, was first disclosed. Upon Counsel's review of the notes, he indicated that they would have been of no utilitarian value. Moreover, neither sensitive to the fact that his client could have secured an automatic nullification of the verdict based on the *per se* rule, nor even aware that the memo book qualified as Rosario material, Counsel went so far as to state on the record that "there is absolutely nothing in the memo book that would have made any difference in terms of what I did or did not do, ask or did not ask and that's about it."[53]

In the Court of Appeals, Flores argued that such inexplicable conduct amounted to ineffective assistance of Counsel, in that it was "meaningless" *per se*, "because counsel gave away an allegedly sure-fire new trial."[54] Following a discussion of the governing principles,[55] the Court of Appeals disagreed. Noting that Flores had received a fair trial, the court concluded that the "totality" of his attorney's representation, examined at the time of such representation, was "meaningful."

Specifically, over the strong dissent of two judges, the Majority first claimed

that the Rosario rule, as originally designed, was based on a "...right sense of justice requiring defense counsels' personal examination to **determine for themselves** whether a document may be helpful for cross-examination purposes..."[56] Then, upon noting that such an examination was precisely what had occurred in that case upon Counsel's evaluation of the memo book and his finding that it lacked any value, the majority added that "[n]either the pre-verdict conduct of defense counsel nor his on-the-record evaluation and explanation prior to sentencing rise to the level of 'egregious and prejudicial' conduct, especially since there can be no certainty at this juncture that a new trial was an available remedy at those stages of the trial proceedings,[57] measured by the totality-of-meaningful-representation standard necessary to prevail on an ineffective assistance of counsel claim."[58] It was thus determined that since, "... Rosario was designed to insure that defense counsel, not Judges, should do the strategic viewing, weighing and exercising of the defendant's fair trial advocacy interests in this regard...,"[59] Flores was not entitled to a new trial, since that was precisely what occurred when Counsel had strategically determined not to protest the earlier non-disclosure.

The Dissent adamantly refused to accept this analysis. In its view, given the absolute right to a new trial which Flores would have otherwise possessed as a result of the Rosario *per se* rule, it was simply inexplicable that the rejection of such a windfall by counsel could be reconcilable with effective assistance. As explained, it was "...difficult to discern a valid 'strategic' advantage that this defendant, who had already been convicted of four counts of first degree sodomy, would have enjoyed by forgoing the new trial that would surely have followed from a properly made CPL 330.30 motion to set aside the verdict."[60]

The Dissent further observed that, "[w]hatever justification may have existed in counsel's mind for waiving an indisputably meritorious Rosario claim at that point in the proceedings, no similar justification could exist for counsel's entirely separate choice to make observations that could only redound to his client's detriment..."[61] With obvious incredulity, therefore, the Dissent lamented that "...the Court is now prepared to accept as 'reasonable' representation, a decision by defense counsel to handle the case in such a way as to assure his or her client swift and certain punishment. Manifestly, if that rationale can be invoked to explain an otherwise inexplicable act by defense counsel, there would be little professional misconduct left that could ever be considered 'ineffective assistance.'"[62]

All things considered, and given the fact that Flores' attorney literally destroyed his client's absolute right to have the conviction vitiated and be tried anew, it defies logic how the majority could have found no constitutionally deficient representation. The only rational explanation, therefore, is that the absoluteness of the Rosario *per se* rule, and its "catastrophic consequences,"[63] was starting to gnaw at the Court's patience.

IV. People v. Machado[64] -- The *Per Se* Rule hemorrhages

A. The Machado Holding

Three years later, on June 10, 1997, the Court of Appeals continued its descent down this slippery slope. In Machado, the Court dramatically retreated from its earlier holdings in Novoa[65] and Jackson,[66] thereby effectively negotiating a 180 degree away from those recent precedents.

The Machado Court held that in the event a Rosario claim was first aired in the

course of a post-judgment CPL 440.10(1) motion to vacate -- regardless of whether the direct appeal from judgment had not yet been exhausted -- the *per se* rule will **not** apply. Instead, given the need for "finality" of judgments, the Court ruled that in such a procedural posture involving a collateral challenge to the conviction, the "reasonable possibility" test, borrowed from Brady[67] claims under People v. Vilardi,[68] would be the governing standard.

This was no small feat -- certainly in light of the seemingly clear earlier rulings to the contrary with which the Court had to grapple. As noted, Novoa, and thereafter Jackson (which had been decided a mere 6 years earlier), specifically allowed that as long as the direct appeal from the judgment of conviction was not yet exhausted, the *per se* rule would still apply to CPL 440.10 motions. Moreover, only 3 years earlier, in Baghai-Kermani,[69] the Court had sustained, in part, the grant of a CPL 440.10 motion, amidst its reiteration of the unavailability of harmless error analysis in the face of Rosario violations. Ostensibly, therefore, the Court could not rule as it did in Machado without at least tacitly conceding that it had erred in deciding those relatively recent cases, which likewise had been sensitive to the collateral nature of CPL 440.10 applications. However, given the need for uniformity in the development of the law, and -- presumably -- the constraints of *stare decisis* which dictate that "[p]recedents involving statutory interpretation are entitled to great stability...,"[70] that far the Court was not willing to go.

Instead, faced with these rulings, which were diametrically inconsistent with the result about to be reached in the matter before it, and without even acknowledging the existence of its contrary Baghai-Kermani[71] holding, the Court simply concluded that,

> [w]hile defendant points to language in Jackson describing Novoa, the fact remains that the issue we now confront simply was not before us in Novoa or in Jackson. Resolving for the first time the question of the legal standard applicable to CPL 440.10 motions made before defendant's appeal has been exhausted, we decide in favor of uniformity for CPL 440.10 motions.[72]

The Court thereby determined that the "reasonable possibility prejudice" standard should now control, other than upon direct appeal.

In the final analysis, regardless of its facially limited application to post-appeal CPL 440.10 motions, there can be no serious question but that Machado presages the ultimate demise of at least practical application of the *per se* rule. Think about it: how many times, at this point in the evolution of Rosario jurisprudence, will a judge **decline** to order the disclosure of Rosario material which is found, in the midst of a trial, not yet to have been obtained by the Defense? Assuredly, unless that judge is a glutton for reversal, the material will be directed to be divulged forthwith. Hence, unlike the situations in cases such as Consolazio, Perez, Ranghelle, and Jones (where disclosure, **during trial**, of previously unavailable material was inexplicably denied), these days, the record on direct appeal will, more often than not, be bereft of such stark Rosario violations warranting *per se* relief by appellate courts.

Instead, at this juncture, most Rosario issues will invariably arise after verdict, where the record of trial on direct appeal, perforce, will probably not reflect the violation. In such instances, therefore, as a result of Machado, the chances of a reversal are now slim to none, since a complaining defendant, forced to resort to collateral relief pursuant to CPL 440.10, will have to demonstrate a "reasonable possibility" that the verdict would have been

different had the information been available at trial.

B. Procedural Ramifications of Machado

Given the prosecutorial mischief that Machado has the potential to spawn, juxtaposed against the unsettled law with respect to whether matters first arising between verdict and sentence can ever become part of the record, the full impact of that decision is yet to be gauged. At this juncture, however, the handwriting is certainly evident on the otherwise crumbling wall.

Consider the varying strategies of a prosecutor who discovers undisclosed Rosario material in the course of a trial. If the subject witness has not yet completed cross-examination, it is not really troublesome. As noted above, in such event the materials should be quickly disclosed, and depending on the degree of prejudice, the court will or will not impose any sanctions. In such event, the exercise of the court's discretion will later be subject to review upon direct appeal from any ultimate judgment of conviction.[73]

But what if the prosecutor first learns, **after the witness has completed testimony**, that Rosario material had not been disclosed? If such failure is brought to the court's and defense counsel's attention then and there, the *per se* rule will undoubtedly require either an immediate mistrial or, thereafter, an automatic reversal on appeal. On the other hand, given the fact that once the trial record is completed, Machado will now require a defendant to demonstrate prejudice in the course of a CPL 440.10 motion, regardless of the pendency of the direct appeal from the original judgment, the temptation on a prosecutor to conceal such material until after sentence would be quite difficult to resist.

And then there is the case where Rosario material is first disclosed between verdict and sentence. Is the record of trial still open at that juncture, so as to allow the application of the *per se* rule upon a motion to set aside the verdict pursuant to CPL 330.30(1), and thereafter, a review of such violation upon direct appeal from any resulting judgment? The answer is a definite maybe, and its determination requires an examination of certain procedural niceties.

In the main, a motion to set aside the verdict may be predicated only on those issues appearing in the record, which, "...if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."[74] Hence, since reversals as a matter of law can only be predicated on matters appearing in the record of pre-trial and trial proceedings, "[t]he power granted a Trial Judge is...far more limited than that of an intermediate appellate court...,"[75] which is authorized to determine not only questions of law but issues of fact.[76]

Notwithstanding this seemingly straightforward rule, there appears to be an open question, at present, as to whether a CPL 330.30(1) motion may be employed in a pre-sentence posture, in order to raise issues which, though not readily evident in the record, perhaps should have been, since they are not ripe for a CPL 440.10 motion, judgment not yet having been rendered. Indeed, in the 1997 supplement to the Practice Commentary in McKinney's Consolidated Laws of New York, Book 11A, CPL 330.30(1), p. 96, the author states the following:

> Note however that there still is an open question. as to whether the per se rule will apply where the Rosario material comes to light and a motion is made at

> some time after the jury retires but before sentence is imposed...In the case of a post verdict claim, the logical vehicle would be a motion to set aside the verdict (see CPL 330.30). There is however no **direct** Court of Appeals authority to support use of the motion in that context. The question was noted but not decided in People v. Flores, 84 N.Y.2d 184, 615 N.Y.S.2d 662 (1994). The majority there simply had observed: "assuming without having to decide in this case that a new trial was [at the post verdict stage] procedurally and merit-wise available based on a possible Rosario appellate point of argument" (id., at 187). Dissenting on another point in the case, Judge Titone took issue in a footnote with that observation, stating "there is no doubt that the failure to disclose Rosario material is per se reversible error when the disclosure occurs after the close of evidence (id., at 190 n. 1). But his primary citation for that was the majority's rationale underlying the Jackson dictum, now disavowed in Machado.
>
> It appears that the basic problem with the application of CPL 330.30 to claim a *per se* reversible error -- as opposed to a claim that the Rosario material is new evidence, for which a degree of prejudice greater than the Vilardi standard would have to be shown (see 330.30[3]) -- is that the only subdivision reasonably applicable requires the ground for the motion to appear on the record (subd. 1). **Thus some determination must be made as to what the record means in this context**. Judge Titone himself issue took with the practice of expanding the record on appeal from the judgment to include matter raised under the present section's post-judgment motion in his dissent in the Jackson case (this was noted as a problem with the now rejected Jackson dictum in the Practice Commentary in the main volume [see pages 441-442]). The use of material submitted on a post verdict motion would seem even more objectionable, as it is a direct expansion of the record.

Emphasis added.

The fact is that in "assuming without having to decide in this case that a new trial was [at the post-verdict stage] procedurally and merit-wise available based on a possible Rosario appellate point of argument,"[77] the Court of Appeals, in Flores, was merely following its precedent in People v. Kanefsky,[78] cited by Judge Titone in his Flores dissent.[79] In Kanefsky, the Court reviewed, **on the merits**, a *dehors* the record Rosario claim which had been raised in a post-verdict, but pre-sentence motion. The Court found that the withheld

material had not been relevant. The Second Department, in People v. Lopez,[80] is in accord with this inclusion of post-verdict issues in the original record.

On the other hand, the First Department appears to be internally in conflict on this point. Compare, People v. Wright[81] (*per se* reversal upon a Rosario violation, pursuant to a CPL 330.30[1] motion, based on an off the record claim) to People v. Whittman[82] and People v. Kronberg[83] (applying a prejudice standard to *dehors* the record Rosario contentions, as opposed to a *per se* rule, in the course of CPL 330.30[1] motions).

The issue was recently explored in depth in People v. Thompson.[84] Noting the restrictions that the Legislature has placed on a trial judge in determining CPL 330.30(1) motions, the Thompson court viewed the foregoing authorities in the following manner:

> The cases cited by defendant Kevin Thompson in the memorandum of law dated May 19, 1998 (Kanefsky, [supra]; Lopez, [supra]; Wright, [supra]) do not constitute binding precedent for the use of CPL 330.30(1) on this type of motion. In each case, a CPL 330.30(1) motion was made and entertained by the courts under similar circumstances. However, none of these courts discussed the propriety of such a motion. The court has examined the record on appeal of these cases and none of the parties briefed or argued the validity of using CPL 330.30(1).[85]

According to Thompson, therefore, "[t]he Legislature has created a vacuum for off-the-record claims not covered by CPL 330.30 and discovered between conviction and sentencing."[86] Another lower Court has agreed with this analysis.[87] But, aside from simplistically dismissing, as a *nisi prius* court, the Court of Appeals' precedent in Kanefsky, the Thompson Court took absolutely no cognizance of the high Court's further statement in Flores, as recalled above, where it "assum[ed] without having to decide in this case that a new trial was [at the post verdict stage] procedurally and merit-wise available based on a

possible Rosario appellate point of argument."[88] It would seem to be a least suggested by that passage, and certainly from Judge Titone's specific observation in dissent, that the issue is not as clear cut as the Thompson court found it to be.

Obviously, had Machado not altered the Novoa/Jackson holdings explicitly, let alone the determination in Baghai-Kermani implicitly, and had Machado not thereby expurgated the life-blood out of the *per se* rule when the discovery of a Rosario violation occurs post-judgement, this discussion would be academic. For then, even in that post-verdict time-frame, there would be no need to show prejudice in the course of a later CPL 440.10 motion. But since the far-reaching implications of the dramatic holding in Machado undoubtedly altered the entire procedural framework, at some point these questions must be addressed, if the great potential for prosecutorial abuse is to be properly curtailed.[89]

V. People v. Feerick[90] -- The Death knell Is Audible

Finally, having dramatically weakened the import of the *per se* rule with respect to trial Rosario violations in Flores and Machado, the Court of Appeals, on June 8, 1999, recently took aim at the *per se* remedy for pre-trial hearing violations, as earlier enunciated in People v. Banch.

In Feerick, in which the author represented two of the four defendant police officers, a pre-trial hearing was held in order to determine whether the defendants' Fifth Amendment rights had been violated, as enunciated in Kastigar v. United States.[91] It was argued on appeal to the Appellate Division, *inter alia*, that Rosario violations which occurred at that hearing, wherein the People had presented only one witness, warranted a "re-opened"

proceeding, with specific reliance on Banch and the First Department's own decision in People v. Brantley.[92] Of course, both Banch and Brantley had required completely new hearings under similar circumstances.

Acting upon this issue, the Appellate Division initially held the appeal in abeyance and remanded the matter in order for the hearing court to determine whether there had indeed been a violation of the officers' Rosario rights at the hearing.[93] Curiously, however, although citing Banch, the Appellate Division only instructed the *nisi prius* judge that "[i]f a Rosario violation is found to exist, the Kastigar hearing should be reopened to the extent of permitting cross-examination of the detective with respect to the undisclosed worksheets, followed by a de novo Kastigar ruling."[94]

After the Hearing judge determined that there had indeed been Rosario violations at the original pre-trial proceeding with respect to six undisclosed documents, and thereupon ordered the Kastigar hearing to be re-opened, the defendants repeatedly argued that Banch required a whole new proceeding, with the right to call additional witnesses. It was urged that the Appellate Division could not, literally, have meant to limit the re-opened proceeding to the one witness, since it had cited Banch in support of its remand. And in Banch, as shown above, although there had been several witnesses who had testified at the pre-trial proceeding, with a Rosario violation having been addressed with respect to only one of them, the Court of Appeals ordered a completely new proceeding as the appropriate remedy. However, the hearing court declined to do so, and, after conducting the limited proceeding, adhered to its earlier decision.

When the remittitur was returned to the Appellate Division, the defense renewed its contention that Banch had been violated by the restrictions placed on it at the remanded hearing. It was thus asserted anew that once it was determined that there had been a Rosario violation at the original proceeding, a whole new, or *de novo* hearing was required, not only on constraint of Banch, but by dint of the First Department's own precedents in Brantley,[95] Jennings,[96] and Ortega.[97]

Rejecting this contention, the Appellate Division affirmed, "...find[ing] no error in the manner in which the court conducted this hearing."[98] It then added that "...the hearing was conducted not only in accordance with our previous order but also with the request, as expressed by one defendant's brief, that the Kastigar hearing, 'at the very least, should be re-opened.'" However, in so stating that it only ordered the "re-opened" hearing which the Defendants had specifically requested, the Appellate Division inexplicably ignored that the defense had specifically cited Banch and Brantley in support of its request -- cases clearly requiring whole new proceedings.

Thereafter, in the Court of Appeals, the defendants again urged in their joint brief and at oral argument that Banch absolutely and unequivocally required a new, "full blown" proceeding. Likewise rejecting this contention, the High Court ultimately determined that "[d]efendants read Banch too broadly."[99] Expanding upon this view, a most interesting interpretation of "new" was offered in support of the Court's affirmance of the Appellate Division's order:

> Although Banch states a "new" hearing should be granted, more in line with the underlying rationale of Rosario was the Appellate Division's understanding

> of "new." That court required the hearing to be reopened to the extent necessary to explore the contents of the Rosario documents, and then required a "new" Kastigar ruling. The hearing court, allowing some leeway, permitted some needed background questions, and then limited the cross of Miller to the contents of the six Rosario documents. Then, after reviewing the transcript of the first Kastigar hearing, the court issued a "new" ruling. We perceive no error in such a procedure.[100]

Then, obviously sensitive to the fact that its support for the limited "reopen[ing] to the extent necessary to explore the contents of the Rosario documents" was seemingly in conflict with the dictates of Banch, and that precedent's articulated remedy of a whole new hearing, the Court of Appeals went further. Specifically, in seeking to harmonize its holding with the Banch precedent, the following was stated:

> Significantly, this understanding does no harm to our holding in Banch. The relative unavailability of a harmless error analysis for Rosario violations remains intact (see, People v. Banch, supra, 80 N.Y.2d, at 615-618; People v Young, 79 N.Y.2d 365, 369). Although some Rosario violations may require or lead to, in defendants' words, a "full blown" hearing, the hearing court here was well within Banch and its discretion, to reopen the Kastigar inquiry only to the extent necessary to cross-examine the People's witness as to the contents of the six Rosario documents.[101]

However, this conclusion is exceedingly difficult to reconcile with Banch, for the two cases are inherently incompatible. The fact is that in Banch, **several** witnesses had testified at the pre-trial suppression hearing, yet the *per se* grant of a new hearing was solely predicated on the finding of a Rosario violation with respect to one of them. Nonetheless, as noted above, the earlier Banch Court, no less than six times, had emphasized that the only appropriate remedy was a completely new hearing -- where, undoubtedly, **all** such witnesses would be recalled. Logically, the Court could have merely ordered the hearing to be re-opened with respect to the subject witness alone. But that was not what was done.

Contrastingly, in Feerick, only **one** witness had been called at the pre-trial Kastigar hearing. Surely, were a whole new hearing to have been directed, it would have been far less of a burden for the People in Feerick to recall that one individual than it was for the prosecutor in Banch, who was forced to examine anew the several persons who had originally testified.

It follows that Feerick can only be read as effecting a retreat from the absolute right to a *de novo* pre-trial hearing that was earlier sanctioned in Banch. There is simply no other way to understand it. Here again, therefore, in holding that "new" means something else entirely, viz., old but re-opened, the Court has virtually eviscerated a remedy that it had created only seven years earlier.

VI. Conclusion

Undoubtedly, as is its prerogative, the Court of Appeals giveth and the Court taketh away. In this vein, it now seems to be unquestionable that the *per se* rule, in the wake of Flores and Machado, as to later discovered trial Rosario violations, and Feerick, as to pre-trial hearing violations, no longer possesses the vitality which it had earlier enjoyed. Only future decisions will manifest whether this otherwise venerated doctrine, which now appears to be in a rather moribund state, is to be permanently interred.

Given this apparent state of the law, Counsel is best advised, upon the post-verdict discovery of uncorrected trial Rosario violations, not to anticipate automatic reversals. Instead, in the event of such a violation, an expanded record -- either by stipulation or appropriate motion -- should be saturated with reasons as to why an earlier disclosure

would necessarily have warranted a different result by the fact-triers. Likewise, the later discovery of violations that occurred at an earlier pre-trial hearing should invite an elaborate showing on the record as to why the hearing was tainted in its entirety by the absence of such Rosario material.

In the end, absent the demonstration that there is a "significant possibility" that the non-disclosure contributed to the ultimate determinations in either proceeding, a reversal will be an elusive remedy. For it is a sure bet that the appellate courts will no longer order new proceedings, *per se*.

1. 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), cert denied, 368 U.S. 866 (1961).

2. CPL 240.45 (disclosure of prior statements of all anticipated prosecutorial witnesses to be made after the jury is sworn).

3. CPL 240.44 (disclosure to be made following the direct-examination of each prosecutorial witness).

4. 40 N.Y.2d 446, 387 N.Y.S.2d 62 (1975), cert denied, 433 U.S. 914.

5. 48 N.Y.2d 144, 422 N.Y.S.2d 5 (1979).

6. 65 N.Y.2d 154, 160, 490 N.Y.S.2d 747 (1985)

7. 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986)

8. 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987)

9. 70 N.Y.2d 547, 523 N.Y.S.2d 53 (1987)

10. 79 N.Y.2d 365, 582 N.Y.S.2d 977 (1992)

11. 80 N.Y.2d 610, 615, 593 N.Y.S.2d 491 (1992)

12. 84 N.Y.2d 525, 531, 620 N.Y.S.2d 313 (1994)

13. 90 N.Y.2d 187, 191, 659 N.Y.S.2d 242 (1997)

14. Ranghelle, supra, See also, Perez, supra, 65 N.Y.2d at 158, 490 N.Y.S.2d at 750 [citing People v. Spruill, 47 N.Y.2d 869, 419 N.Y.S.2d 69 (1979); People v. McLaurin, 38 N.Y.2d 123, 126, 378 N.Y.S.2d 692 (1975); and People v. Simmons, 36 N.Y.2d 126, 136, 365 N.Y.S.2d 812 (1975)]; People v. White, 200 A.D.2d 351, 606 N.Y.S.2d 172 (1st Dept. 1994) (undisclosed DD5 in police possession was within prosecution's control). Cf., People v. Kelly, 88 N.Y.2d 248, 644 N.Y.S.2d 475 (1996) (Division of parole records not imputed to District Attorney); People v. Washington, 86 N.Y.2d 189, 630 N.Y.S.2d 698 (1995) (autopsy report of medical examiner not within the District Attorney's custody or control).

15. Perez, supra, 65 N.Y.2d at 159, 490 N.Y.S.2d at 750; Poole, supra, 48 N.Y.2d at 148, 422 N.Y.S.2d at 7.

16. Novoa, supra; People v. Jackson, 78 N.Y.2d 638, 578 N.Y.S.2d 483 (1991).

17. Young, supra, 79 N.Y.2d at 371, 582 N.Y.S.2d at 980-981.

18. see, e.g.,People v. Fields, 146 A.D.2d 505, 508, 537 N.Y.S.2d 157 (1st Dept. 1989).

19. Banch, supra, 80 N.Y.2d at 615, 593 N.Y.S.2d at 496; Young, supra 79 N.Y.2d at 371 , citing, Perez, supra 65 N.Y.2d at 160, 490 N.Y.S.2d 747; Jones, supra 70 N.Y.2d at 551-553, 523 N.Y.S.2d 53; and Novoa, 70 N.Y.2d at 490, 522 N.Y.S.2d 504.

20. Ranghelle, supra 69 N.Y.2d at 63, 511 N.Y.S.2d at 585.

21. see, e.g., People v. Dixon, 209 A.D.2d 274, 275, 618 N.Y.S.2d 710 (1st Dept. 1994).

22. 70 N.Y.2d at 551-552, 523 N.Y.S.2d at 56; emphasis in original.

23. Perez, supra 65 N.Y.2d at 159, 490 N.Y.S.2d at 750, quoting Rosario, supra, 9 N.Y.2d at 289, 290, 213 N.Y.S.2d 448; see also, People v. Rothman, 117 A.D.2d 535, 498 N.Y.S.2d 811 (1st Dept. 1986).

24. Herald Price Fahringer, The Rosario Rule -- Its History and Application, Criminal Justice Journal, Vol. 3, No. 1, p. 3 , Fall, 1990.

25. Banch, 80 N.Y.2d at 616, 593 N.Y.S.2d at 494, quoting Jackson, 78 N.Y.2d at 638, 578 N.Y.S.2d 483.

26. See, People v. Martinez, 71 N.Y.2d 937, 940, 528 N.Y.S.2d 813 (1988); People v. Haubt, 71 N.Y.2d 929, 528 N.Y.S.2d 808 (1988).

27. Banch, 80 N.Y.2d 616, 593 N.Y.S.2d 494; People v. Wallace, 76 N.Y.2d 953, 563 N.Y.S.2d 722 (1990).

28. Id.

29. Banch, 80 N.Y.2d at 616-617, 593 N.Y.S.2d at 495, Consolazio, 40 N.Y.2d at 454, 387 N.Y.S.2d 62.

30. Ranghelle, 69 N.Y.2d at 63, 511 N.Y.S.2d at 584.

31. Young, supra 79 N.Y.2d at 369, 370, 582 N.Y.S.2d at 979-980; see also, People v. Richardson, 203 A.D.2d 141, 610 N.Y.S.2d 509 (1st Dept. 1994).

32. Banch, 80 N.Y.2d at 617, 593 N.Y.S.2d at 495, citing Ranghelle, 69 N.Y.2d at 63, 511 N.Y.S.2d 580.

33. 80 N.Y.2d 610, 615, 593 N.Y.S.2d 491 (1992)

34. 15 N.Y.2d 86, 262 N.Y.S.2d 65 (1965).

35. Banch, supra, 80 N.Y.2d at 618, 593 N.Y.S.2d at 496.

36. Id.

37. Id., 80 N.Y.2d at 619, 593 N.Y.S.2d at 496.

38. Cf., People v. Bowers, 210 A.D.2d 795, 621 N.Y.S.2d 145 [3rd Dept. 1994]) (Hearing court, in having simply re-opened the suppression at the time when a Rosario violation was first discovered, one day before trial, comported with Banch).

39. 209 A.D.2d 272, 273, 618 N.Y.S.2d 342 (1st Dept. 1994).

40. See, People v. Ortega, 241 A.D.2d 369, 371, 659 N.Y.S.2d 883 (1st Dept. 1997); People v. Jennings, 217 A.D.2d 433, 434, 629 N.Y.S.2d 42 (1st Dept. 1995).

41. See, People v. Morris, 231 A.D.2d 911, 912, 647 N.Y.S.2d 893 (4th Dept. 1996) (citing Banch, "...the remedy for a pretrial Rosario violation is a new suppression hearing..."); People v. Gierszewski, 226 A.D.2d 1099, 641 N.Y.S.2d 766 (4th Dept. 1996) (same); People v. Butler, 192 A.D.2d 1126, 596 N.Y.S.2d 276 (4th Dept. 1993) (new Wade hearing ordered).

42. 80 N.Y.2d at 617, 593 N.Y.S.2d at 495.

43. Id.

44. 80 N.Y.2d at 617-618, 593 N.Y.S.2d at 495; emphasis added.

45. Id. 80 N.Y.2d at 618, 593 N.Y.S.2d at 496; emphasis added.

46. 241 A.D.2d at 371, 659 N.Y.S.2d 883.

47. See, 80 N.Y.2d at 615, 681, 593 N.Y.S.2d at 494.

48. 210 A.D.2d 795, 621 N.Y.S.2d 145 [3rd Dept. 1994]).

49. 80 N.Y.2d at 619, 593 N.Y.S.2d at 496.

50. 80 N.Y.2d at 617, 593 N.Y.S.2d at 495.

51. 80 N.Y.2d, 617 - 618, 593 N.Y.S.2d at 495-496.

52. 84 N.Y.2d 184, 615 N.Y.S.2d 662 (1994)

53. 84 N.Y.2d at 186, 615 N.Y.S.2d at 663.

54. Id.

55. See, People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893 (1981).

56. 84 N.Y.2d at 187, 615 N.Y.S.2d at 663 (internal quotes omitted; emphasis in original), citing Rosario, 9 N.Y.2d at 289, 213 N.Y.S.2d 448 and Ranghelle, 69 N.Y.2d at 62, 511 N.Y.S.2d 580.

57. see, Part IV(B), *infra.*

58. 84 N.Y.2d at 187-188, 615 N.Y.S.2d at 664.

59. Id.

60. 84 N.Y.2d at 190, 615 N.Y.S.2d at 665 (Titone, J., dissenting).

61. 84 N.Y.2d at 190-91, 615 N.Y.S.2d at 666 (Titone, J., dissenting).

62. Id.

63. People v. Ramos, 201 A.D.2d 78, 79, 614 N.Y.S.2d 977, 978 (1st Dept. 1994).

64. 90 N.Y.2d 187, 191, 659 N.Y.S.2d 242 (1997).

65. 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987).

66. 78 N.Y.2d 638, 578 N.Y.S.2d 483 (1991).

67. Brady v. Maryland, 373 U.S. 83 (1963).

68. 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990).

69. 84 N.Y.2d at 530-531, 620 N.Y.S.2d at 316.

70. People v., Hobson, 39 N.Y.2d 479, 489, 384 N.Y.S.2d 419, 426 (1976).

71. 84 N.Y.2d at 530-531, 620 N.Y.S.2d at 316.

72. Machado, 90 N.Y.2d at 193, 659 N.Y.S.2d at 246.

73. Banch, 80 N.Y.2d at 617, 593 N.Y.S.2d at 495; Ranghelle, 69 N.Y.2d at 63, 511 N.Y.S.2d 580.

74. CPL 330.30(1),

75. People v. Carter, 63 N.Y.2d 530, 536, 483 N.Y.S.2d 654 (1984).

76. CPL 470.15(3)(b) and (c); See, People v. Ventura. 66 N.Y.2d 693, 694, 496 N.Y.S.2d 416 (1985); see also, People v. Frias, 250 A.D.2d 495, 673 N.Y.S.2d 416 (1st Dept. 1998) (ineffective assistance of counsel claim not the proper subject of CPL 330.30[1] motion since issue not cognizable on the record); People v. Leka, 209 A.D.2d 723, 619 N.Y.S.2d 144 (1st Dept. 1994) (same).

77. Flores, 84 N.Y.2d at 187, 615 N.Y.S.2d at 663.

78. 50 N.Y.2d 162, 428 N.Y.S.2d 453 (1980)

79. In fact, specifically, relying on Kanefsky and the First Department's decision in People v. Wright, 197 A.D.2d 398, 602 N.Y.S.2d 378 (1st Dept. 1993), Judge Titone stated that "...any conclusion by this Court that CPL 330.30(1) is not available in these circumstances [i.e., disclosure following close of the evidence, but before sentence] would represent a dramatic change in the law...[citations omitted]." 84 N.Y.2d at 190, 615 N.Y.S.2d at 665, n. 1.

80. See, People v. Lopez, 196 A.D.2d 664, 601 N.Y.S.2d 708 (2nd Dept. 1993) (reviewing a *dehors* the record Rosario contention in a CPL 330.30 motion under the *per se* rule), rev'd. on other grounds 83 N.Y.2d 994, 618 N.Y.S.2d 334 (1994) .

81. 197 A.D.2d 398, 602 N.Y.S.2d 378 (1st Dept. 1993)

82. 254 A.D.2d 32, 678 N.Y.S.2d 100 (1st Dept. 1998).

83. 243 A.D.2d 132, 672 N.Y.S.2d 63 (1st Dept. 1998).

84. 177 Misc.2d 809, 678 N.Y.S.2d 845 (Sup. Ct. Kings Co. 1998).

85. 177 Misc.2d at 808, 678 N.Y.S.2d 845.

86. Id..

87. People v. Deblinger, 179 Misc.2d 35, 37, 683 N.Y.S.2d 814 (Sup. Ct. Kings Co. 1998).

88. Flores, 84 N.Y.2d at 187, 615 N.Y.S.2d at 663.

89. Of course, one vehicle which can be employed to avoid this whole procedural dilemma is that which is reflected in People v. Young, supra, 79 N.Y.2d at 368-369, 582 N.Y.S.2d at 979. There, the

existence of a previously undisclosed document was ascertained after judgment, and while the defendant's appeal was pending. To avoid procedural problems, "...the parties entered into a stipulation whereby it was agreed that the document had not been made available at trial, and that it would become part of the record on appeal. Defendant thereafter filed a supplemental brief in which he argued that his conviction should be reversed because his rights under CPL 240.45 and the Rosario doctrine had been violated." The Appellate Division, and thereafter, the Court of Appeals, entertained the issue on the merits as part of the direct appeal. However, in light of the stricter rule in Machado, which post-dated Young, a savvy prosecutor would not be too quick to enter into such a stipulation at this point in time.

90. 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999).

91. 406 U.S. 441 (1972).

92. 209 A.D.2d 272, 618 N.Y.S.2d 342 (1st Dept. 1994).

93. 230 A.D.2d 689, 690-691, 646 N.Y.S.2d 810 (1st Dept. 1996).

94. 230 A.D.2d at 691, 646 N.Y.S.2d 810, citing People v Banch, 80 N.Y2d at 618- 619, 593 N.Y.S.2d at 495-496.

95. 209 A.D.2d 272, 273, 618 N.Y.S.2d 342 (1st Dept. 1994).

96. 217 A.D.2d 433, 434, 629 N.Y.S.2d 421 (1st Dept. 1995)

97. 241 A.D.2d at 371, 659 N.Y.S.2d 883 (1st Dept. 1997).

98. 241 A.D.2d 126, 134, 671 N.Y.S.2d 13 (1st Dept. 1998).

99. 93 N.Y.2d at 451, 692 N.Y.S.2d 638.

100. Id.

101. Id., 93 N.Y.2d at 451-452, 692 N.Y.S.2d 638.