<u>THE *ROSARIO PER SE* RULE: Rest in Peace</u>

By Mark M. Baker[1]

Being the cagey appellate lawyer that you are, you have just reviewed the transcript of a criminal trial and determined that the record reflects a glaring failure of the District Attorney to have disclosed prior statements of a crucial prosecution witness to the defense. You sit back and smile, since you are confident that you are about to chalk up another rare appellate victory. The reason: You know from your vast experience that for over twenty-five years it has been the law in New York that, in the event of such error, there is mandated an automatic reversal on appeal.

So you thought! In fact, ever so quietly, and much to the obvious glee of the New York State District Attorneys' Association, this long-entrenched, seemingly inviolate rubric has been recently immolated and interred. Consequently, you are now best advised to go back through that record and find actual support for that new trial which, just days ago, would have been otherwise owing to your client merely for the asking.

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Just over a year ago, in January, 2000, I authored an elaborate article entitled, "Remedying *Rosario* Violations Uncovered after Verdicts and Following Pre-trial Hearings."[1] My thesis, in posing the question: "Has *Per Se* Become Passé?," was that, based on recent decisions of the New York Court of Appeals, it had become apparent that one of the most venerated doctrines of New York criminal jurisprudence, namely, the *Rosario per se* rule, was becoming the victim of a slow but ever so steady erosion by the State's highest Court. My objective was to caution criminal practitioners that greater care should be taken in protecting and scrutinizing the records of trials and pre-trial hearings in order to ensure that *Rosario* violations would not lose their potency as the basis

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for appellate reversals.

Contrary to my prognostication, however, the death blow has now come from other quarters. Specifically, buried deep in the gizzard of the Sexual Assault Reform Act of 2000 (known as "SARA"),[2] effective February 1, 2001, the Legislature has effectively eviscerated this doctrine. This new legislation will now preclude, forever more, any and all automatic reversals on appeal in the event of *Rosario* violations by prosecuting attorneys. The result will be a far greater need for scrutiny of the record by appellate counsel than has been required in this area of the law in over a quarter of a century.

The Rosario *per se* rule

In order to appreciate fully the overbearing import of this surprisingly obscure legislative enactment, it is necessary to recapitulate, from my earlier writing, the state of the law prior to February 1st. Fifteen years after the pronouncement of the rule in People v. Rosario,[3] and in order to ensure scrupulous adherence by prosecutors to its dictates, the original harmless error analysis provided in that decision 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 or hearing, without the need to demonstrate prejudice.

This doctrine, known as the *per se* rule, applied to the prosecution's failure to disclose prior statements, memoranda or other materials in either its actual or constructive possession and control,[5] relating to the subject matter of the testimony of those witnesses whom it has called.[6] The rule was reiterated in such cases as People v. Poole;[7] People v. Perez;[8] People v. Ranghelle;[9] People v. Novoa;[10] People v. Jones;[11] People v. Young;[12] People v. Banch;[13] People v. Baghai-Kermani;[14] and People v. Machado,[15] and was codified both for trial[16] and pre-trial hearings.[17]

In Jones, the Court of Appeals provided the governing rationale:

> 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.**..[18]

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."[19]

The *Rosario per se* rule, which ultimately had only three exceptions,[20] 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',"[21] or "...even if the non-disclosed materials would have been of limited impeachment value to the defense...,"[22] any such consideration would have been completely incompatible with the rule's application. For, as the Court of Appeals had "...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'..."[23]

In its purest form, 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 did not excuse their failure to produce covered material..."[24] Further, even "...'substantial compliance' was not an exception to the rule of *per se* reversal for Rosario

violations."[25] In short, there was simply no doubt that the *per se* rule amounted to one of the most important determinations of the Court of Appeals in the area of modern criminal procedure. As one of New York's foremost criminal defense attorneys characterized the underlying rule over ten 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."[26]

A Harbinger of Change

In People v. Jackson,[27] the Court of Appeals thereafter applied the *per se* rule even to require the vacatur of a judgment upon a collateral challenge pursuant to CPL §440.10(1), as long as the application was brought prior to the termination of the direct appellate process. Following the completion of direct appeals, the Jackson Court, in carving out one of the noted exceptions to the *per se* rule, required the showing of a "reasonable possibility" of prejudice resulting from the failure of disclosure before the relief of vacatur could be granted.[28] That standard of harm was borrowed from Brady[29] claims under People v. Vilardi.[30]

Around six years later, in a decision that proved to be the progenitor for the recent legislation, the Court of Appeals made this exception absolute. In People v. Machado,[31] the Court held that **whenever** 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 held that in such a procedural posture involving a collateral challenge to the conviction, the "reasonable possibility" test, earlier enunciated in Jackson with respect to post-appeal motions to vacate, would be the governing standard.

The New Statute

Effective February 1, 2001, the Jackson/Machado exception has been legislatively exalted, and is now the rule in **all** situations involving *Rosario* violations. Specifically, by virtue of Ch. 1, §48, of the Laws of 2000, there was added a newly enacted section 240.75 to the Criminal Procedure Law.[32] It provides:

> The failure of the prosecutor or any agent of the prosecutor to disclose statements that are required to be disclosed under subdivision one of section 240.44 or paragraph (a) of subdivision one of section 240.45 of this article shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a re-opened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

Owing to this startling legislation,[33] instead of an appellate court now being required to reverse, automatically, any conviction where a *Rosario* violation appears in the record, regardless of whether such would have effected the jury's determination (*viz.*, absent any consideration of prejudice and/or harmless error), the new rule requires a far more precise showing on appeal. Thus, as of February 1, 2001, as was earlier the case with respect to collateral challenges pursuant to CPL §440.10(1), there must be demonstrated a "reasonable possibility" that "the non-disclosure materially contributed to the result of the trial or other proceeding."

The new law will apply to all appeals and CPL §330.30(1) motions[34] heard after the effective date. At first blush, and absent a determination to the contrary, it does not appear that this will pose any *ex post facto* problem. CPL §240.75 is a procedural, as opposed to a substantive criminal statute, and "the Ex Post Facto Clause of the Constitution applies only to penal statutes which disadvantage the offender affected by them."[35]

<u>Conclusion</u>

Obviously, in one fell swoop, upon the Governor's signature, this legislation has

erased what had amounted to over twenty-five years of New York criminal jurisprudence. Henceforth, given this revised state of the law, it is clear that appellate counsel, in the face of uncorrected trial Rosario violations, can no longer anticipate automatic reversals. Instead, in the event of such a violation, it will become necessary for trial attorneys to appreciate the need to expand the record -- either by stipulation[36] or appropriate application -- so that proceedings at *nisi prius* will not only reflect the failure of disclosure, but, as well, the prejudicial impact of such violation on the conduct of the defense. The record should therefore be saturated with reasons as to why an earlier disclosure would have necessarily warranted a different result by the fact-triers, given the substance of the previously concealed materials. Likewise, the later discovery of violations that had occurred at an earlier pre-trial hearing, in the event of a denial of a motion to re-open,[37] should invite an elaborate showing on the record as to why the hearing was irreparably tainted by the absence of such *Rosario* material.

In the final analysis, no longer will a *Rosario* violation invite, *per se*, what the First Department once characterized as the "catastrophic consequences that can ensue upon the People's failure to fulfill their obligation in that regard."[38] Instead, given the dramatic break with past law which has now been effected by the newly enacted CPL §240.75, it will only be when trial counsel has taken more affirmative efforts to protect the record that, in the face of *Rosario* violations, appellate counsel will be empowered to advocate for relief on appeal.

1. Criminal Justice Journal, New York State Bar Association, Winter, 1999, Vol. 7, No. 2.

2. See Ch. 1 of the Laws of 2000, §48

3. 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), *cert. denied*, 368 U.S. 866 (1961).

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

5. People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986); see also, People v. Perez 65 N.Y.2d 154, 158, 490 N.Y.S.2d 747, 750 (1985) (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])

6. 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.

7. 48 N.Y.2d 144, 422 N.Y.S.2d 5 (1979).

8. 65 N.Y.2d 154, 160, 490 N.Y.S.2d 747 (1985)

9. 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986)

10. 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987)

11. 70 N.Y.2d 547, 523 N.Y.S.2d 53 (1987)

12. 79 N.Y.2d 365, 582 N.Y.S.2d 977 (1992)

13. 80 N.Y.2d 610, 615, 593 N.Y.S.2d 491 (1992)

14. 84 N.Y.2d 525, 531, 620 N.Y.S.2d 313 (1994)

15. 90 N.Y.2d 187, 191, 659 N.Y.S.2d 242 (1997)

16. CPL §240.45

17. CPL §240.44

18. 70 N.Y.2d at 551-552, 523 N.Y.S.2d at 56; emphasis in part in original and in part supplied.

19. 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

20. **First**, as concerned Rosario violations supporting a CPL §440.10(1) collateral challenge to a judgment, following the exhaustion of direct appeal, 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." People v. Jackson, 78 N.Y.2d 638, 578 N.Y.S.2d 483 (1991). **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, was vested with the discretion to impose an appropriate sanction. 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). **Third**,

where the defense had been provided what was characterizable as a "duplicative equivalent" of the non-disclosed material, there was "no deprivation at all." 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. In addition to these exceptions, the Court of Appeals provided for another category 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." 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.

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

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

23. 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.

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

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

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

27. 78 N.Y.2d 638, 578 N.Y.S.2d 483 (1991).

28. *Id.*

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

30. 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990).

31. 90 N.Y.2d 187, 191, 659 N.Y.S.2d 242 (1997).

32. Notably, newly enacted CPL §240.75 does not even appear in the 2001 Cumulative Supplementary Pamphlet to Book 11A of Mckinney's Consolidated Laws of New York.

33. There are no accompanying legislative memoranda explaining the reasons for, and genesis of this dramatic change in the law. Somehow, Section 48 appears to have been stealthily inserted into the middle of the SARA bill, under Chapter 1 of the laws of 2000, absent the slightest fanfare.

34. A motion pursuant to CPL §330.30(1) to set aside a 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." Thus, when determining such a motion, a trial judge has only such power as is vested in an appellate court in passing on preserved questions of law. See People v. Carter, 63 N.Y.2d 530, 536, 483 N.Y.S.2d 654 (1984).

35. Abed v. Armstrong, 209 F.3d 63, 66 (2d Cir.), *cert. denied*, 121 S.Ct. 229 (2000) (citations and internal quotes omitted). The Second Circuit added that "[t]o violate the Ex Post Facto Clause, therefore, a law must be retrospective--that is, it must apply to events occurring before its enactment -- and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Id.* (citations and internal quotes omitted).

36. See e.g., People v. Young, supra, 79 N.Y.2d at 368-369, 582 N.Y.S.2d at 979 ("...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.").

37. Banch, *supra.*

38. People v. Ramos, 201 A.D.2d 78, 79 (1st Dept. 1994)