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New York Supreme Court, Kings County, Holds that Audiotape Prepared by Office of City Medical Examiner During Autopsy Constitutes Rosario Material

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New York Supreme Court, Kings County, holds that audiotape prepared by Office of City Medical Examiner during autopsy constitutes Rosario *material*

In 1961, "a right sense of justice"[1] motivated the New York Court of Appeals to require that a prosecutor provide defense counsel with all pre-trial statements made by a prosecution witness relating to the subject matter of the witness' testimony.[2] Over the past thirty years, this requirement, commonly called the *Rosario* rule and subsequently codified in CPL section 240.45,[3] has been limited to material that is within the prosecution's "possession or control."[4] With little guidance from the New York

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[1] People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450, *cert. denied*, 368 U.S. 866 (1961).

[2] *Id. Rosario* also held that a defendant is entitled to a prior statement regardless of whether the statement contradicted or otherwise varied from the witness' testimony during trial. *Id.* The court reasoned that the defense attorney was in a better position than the trial judge to determine whether the statements would be helpful. *Id.* at 290, 173 N.E.2d at 883, 213 N.Y.S.2d at 451. This holding overruled prior case law which held that a defendant was only entitled to statements that were inconsistent with the witness' testimony. *See* JEROME PRINCE, RICHARDSON ON EVIDENCE § 468 (10th ed. 1973 & Supp. 1985) (stating that pre-*Rosario* rule only required that inconsistent witness statements be delivered to defendants); *see also* People v. Walsh, 262 N.Y. 140, 149-50, 186 N.E. 422, 425 (1933) (stating that prior statement made by witness in criminal case may be used for cross-examination purposes if statement contains "contradictory matter").

[3] *See* CPL § 240.45(1)(a) (McKinney 1993). CPL § 240.45(1)(a) provides:

> 1. After the jury has been sworn and before the prosecutor's opening address, or in the case of a single judge trial after commencement and before submission of evidence, the prosecutor shall, subject to a protective order, make available to the defendant:
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> (a) Any written or recorded statement, including any testimony before a grand jury and an examination videotaped pursuant to section 190.32 of this chapter, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony.

Id. This codification clarified the deadline by which the prosecutor must deliver the prior statements to the defendant. *See* PRINCE, *supra* note 2, § 468. There is a reciprocal obligation requiring a defendant to turn over statements of defense witnesses after the prosecution's direct case, unless the statements are subject to a protective order. *See* CPL § 240.45(2)(a) (McKinney 1993); PRINCE, *supra* note 2, § 468.

[4] *See, e.g.*, People v. Flynn, 79 N.Y.2d 879, 882, 589 N.E.2d 383, 385, 581 N.Y.S.2d 160, 162 (1992) (holding that accident report filed with Department of Motor Vehicles was not *Rosario* material); People v. Tissois, 72 N.Y.2d 75, 78, 526 N.E.2d 1086, 1087,

Court of Appeals, trial courts have attempted to interpret the phrase "possession or control," only to achieve disparate results.[5] Recently, in *People v. Jones*,[6] the New York Supreme Court, Kings County, held that a prosecutor's access to an audiotape prepared by the Office of the City Medical Examiner ("OCME") constituted sufficient control over the material to invoke the *Rosario* rule, even though the OCME is an independent agency and the audiotape was never actually in the possession of the district attorney.[7]

In *Jones*, the evidence adduced at trial established that the defendant, while driving a stolen vehicle at an excessive speed to evade the police, struck and killed a four-year-old child who was riding a bicycle on the sidewalk.[8] The Appellate Division, Second

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531 N.Y.S.2d 228, 229 (1988) (concluding that statements made to social worker were not *Rosario* material); People v. Fishman, 72 N.Y.2d 884, 886, 528 N.E.2d 1212, 1213, 532 N.Y.S.2d 739, 740 (1988) (determining that untranscribed plea minutes were not *Rosario* material); People v. Reedy, 70 N.Y.2d 826, 827, 517 N.E.2d 1324, 1325, 523 N.Y.S.2d 438, 439 (1987) (finding that personal notes taken by victim were not *Rosario* material).

[5] *See* Cerisse Anderson, *Autopsy Issue Divides Trial Judges in State*, N.Y. L.J., Feb. 8, 1994, at 1 [hereinafter *Autopsy Issue*]; Cerisse Anderson, *Tug of War over Autopsy Notes, Tapes*, N.Y. L.J., Jan. 6, 1994, at 1 [hereinafter *Tug of War*]. A majority of the trial courts have held that materials produced by medical examiners are not subject to *Rosario*. *See, e.g.*, People v. Mines, N.Y. L.J., Feb. 8, 1994, at 26, col. 1 (Sup. Ct. Queens County) (stating in dicta that district attorney's office does not control Office of Chief Medical Examiner ("OCME")); People v. McCullough, N.Y. L.J., Jan. 7, 1994, at 29, col. 3 (Sup. Ct. Kings County) (determining that work product of medical examiner's office was not in constructive possession of district attorney); People v. Railey, 159 Misc. 2d 393, 399, 604 N.Y.S.2d 680, 683 (Sup. Ct. N.Y. County 1993) (defining OCME as independent agency, not law enforcement agency). For decisions applying the *Rosario* rule to statements made by the OCME, see People v. Jones, N.Y. L.J., Feb. 8, 1994, at 23, col. 3, 24, col. 5 (Sup. Ct. Kings County) (holding that prosecutor's access to OCME documents constitutes constructive possession); People v. Wright, N.Y. L.J., Dec. 10, 1993, at 27, col. 3 (Sup. Ct. Bronx County) (finding that OCME worksheet, which stated immediate cause of death, was *Rosario* material because autopsy report lacked this information and, therefore, was not its "duplicative equivalent").

[6] N.Y. L.J., Feb. 8, 1994, at 23, col. 3. *See Autopsy Issue*, *supra* note 5, at 1 (commenting that *Jones* holding continues controversy facing New York courts regarding autopsy tapes).

[7] *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 4-5. There is no requirement that the statement be in the "sole custody" of the prosecutor. People v. Ranghelle, 69 N.Y.2d 56, 64, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d, 580, 585 (1986) (holding that police report filed at precinct, and readily accessible to prosecutor, is *Rosario* material). The *Jones* court concluded that "the prosecution is responsible for all the documents in their actual or *constructive* possession or control." *Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5 (emphasis added).

[8] *See Jones*, N.Y. L.J., Feb. 8, 1994, at 23, col. 4. During rush hour, the defendant drove his vehicle at a rate of approximately 69 miles per hour in a 30 mile per hour

Department, affirmed the conviction of manslaughter in the second degree.[9] The defendant made a post-judgment motion to vacate the conviction under CPL section 440.10,[10] arguing that the prosecutor's failure to provide him with a copy of an audiotape made by the medical examiner during the autopsy violated the *Rosario* rule.[11] A prosecution witness, Associate Medical Examiner Dr. Eddy Lilavois, had conducted the autopsy and testified concerning the cause of death.[12] Although defense counsel received

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zone. *Id.* He ignored a red light and drove onto a sidewalk crowded with pedestrians. *Id.* To avoid another vehicle, Jones drove on the sidewalk a second time. *Id.* Tragically, the car struck and then carried the child for approximately 15 feet until it came to a halt at a supermarket. *Id.*

9 *See* People v. Jones, 198 A.D.2d 436, 604 N.Y.S.2d 145 (2d Dep't 1993), *appeal denied*, 82 N.Y.2d 926, 632 N.E.2d 488, 610 N.Y.S.2d 178 (1994). The Second Department also affirmed the convictions of criminal possession of stolen property in the third degree and leaving the scene of an accident. *Id.*; *see Jones*, N.Y. L.J., Feb. 8, 1994, at 23, col. 4.

10 *See Jones*, N.Y. L.J., Feb. 8, 1994, at 23, col. 4; *see also* CPL § 440.10(1) (McKinney 1994). CPL § 440.10(1) states in part:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
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> . . .
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> (f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom . . . .

Id. CPL § 440.10 codified the common-law doctrine of *coram nobis*. *See* HENRY B. ROTHBLATT, CRIMINAL LAW OF NEW YORK: THE CRIMINAL PROCEDURE LAW § 437, at 337 (1971). *Coram nobis* enabled appellate courts to consider errors, regardless of whether they had been raised by the defendant at the trial court level. John C. Corbett, *Coram Nobis*, 29 BROOK. BARRISTER 147, 147 (1978).

11 *See Jones*, N.Y. L.J., Feb. 8, 1994, at 23, col. 3. In reviewing the defendant's motion to vacate judgment, the New York Supreme Court did not address the defendant's two other convictions, because the autopsy audiotape was only relevant to the manslaughter conviction. *See id.* at 24, col. 6.

12 *Id.* at 23, col. 4. In one trial, Dr. Lilavois stated that it was his practice to take notes during the autopsy, which he would later dictate into a tape recorder. *See* People v. Huggins, N.Y. L.J., Dec. 23, 1993, at 34, col. 5 (Sup. Ct. Kings County). A typist would then transcribe the audiotape to produce the written autopsy report, and Dr. Lilavois would check the autopsy report for errors. *Id.* In *Huggins*, the assistant medical examiner could not recall if the audiotape had been destroyed. *Id.* This fact is often relevant because different standards exist for *Rosario* material that has been lost or destroyed. *See* People v. Martinez, 71 N.Y.2d 937, 940, 524 N.E.2d 134, 136, 528 N.Y.S.2d 813, 815 (1988). If such material has not been produced because it has been lost or destroyed, the trial judge, in his or her discretion, will sanction the prosecution for its lack of care in preserving the material. *Id.*

Dr. Lilavois' autopsy report through the discovery process,[13] the prosecutor failed to include the audiotape.[14]

The New York Supreme Court, New York County, in a decision written by Justice Kreindler,[15] concluded that portions of the audiotape pertained to the "subject matter" of the witness' testimony[16] and were not the "duplicative equivalent" of the autopsy report.[17] Further, the court dismissed the theory used by other

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[13] *Jones*, N.Y. L.J., Feb. 8, 1994, at 23, col. 4; *see* People v. Solomon, 160 Misc. 2d. 945, 946-47, 612 N.Y.S.2d 779, 780 (Sup. Ct. Kings County 1994) (holding that autopsy report is discoverable scientific report, and falls under *Rosario* rule if medical examiner who prepared report testifies at trial); *see also* CPL § 240.20(1)(c) (McKinney 1993). CPL § 240.20(1)(c) provides:

> [T]he prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:
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> . . .
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> (c) Any written report or document, or portion thereof, concerning a physical or mental examination, . . . relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

Id.

[14] *See Jones*, N.Y. L.J., Feb. 8, 1994, at 23, col. 4.

[15] *See id.* at 23, col. 3.

[16] *See id.* at 24, col 2; People v. Perez, 65 N.Y.2d 154, 158-59, 480 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750 (1985). Statements that do not pertain to the "subject matter" of the testimony are not *Rosario* material. *Id.*; *see also* People v. Poole, 48 N.Y.2d 144, 148, 397 N.E.2d 697, 699-700, 422 N.Y.S.2d 5, 8 (1979) (concluding that trial court should hold *in camera* inspection to determine whether subject matter constitutes *Rosario* material). The *Jones* court compared the audiotape prepared by Dr. Lilavois with his trial testimony, and concluded that four of the nine alleged discrepancies between the autopsy report and the audiotape pertained to the subject matter of the testimony. *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 2. These discrepancies included the victim's name, which was stated as "Angel Serrano" on the audiotape and "Luis Angel Serrano" in the autopsy report. *Id.* In the written report, Dr. Lilavois described the victim's body as exhibiting "needle" puncture wounds, but failed to record this observation on the audiotape. *Id.* The audiotape specifically referred to certain wounds as "two gaping lacerations," yet, in the report, the number two merely indicated the second in a list of wounds. *Id.* Finally, Justice Kreindler found a discrepancy between the report and the audiotape concerning the descriptions of the lacerations. *Id.* Although the court held that these four items pertained to the subject matter of the testimony, only the last two compelled further review under *Rosario* because they were not duplicative equivalents of the written autopsy report. *Id.* at 24, col. 4; *see also infra* note 17 and accompanying text (describing duplicative equivalent material).

[17] *Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 4; *see, e.g.*, People v. Consolazio, 40 N.Y.2d 446, 454-55, 354 N.E.2d 801, 806, 387 N.Y.S.2d 62, 66 (1976) (holding that prosecutor's worksheets not made available to defense counsel did not constitute *Rosario* material because worksheets were duplicative equivalent of statements provided to defendant), *cert. denied*, 433 U.S. 914 (1977); People v. Banch, 80 N.Y.2d 610,

trial courts[18] and the New York Appellate Division[19] which regards a prosecutor's control over the *agency* as the standard for possession or control.[20] Although the court agreed that whether the individual in possession of the material is engaged in law enforcement is a factor to be considered, the court determined that a prosecutor's control over the *material*, rather than control over the agency, governs whether it falls under the *Rosario* rule.[21] Finally, the court consulted the relevant sections of the Administrative

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616-17, 608 N.E.2d 1069, 1073, 593 N.Y.S.2d 491, 495 (1992) (stating that material that is duplicative equivalent of material provided to defendant is not subject to *Rosario* considerations). The New York Court of Appeals has interpreted the phrase "duplicative equivalent" to mean that there are no discrepancies, however minor, between the document the defendant has in his or her possession and the document the defendant has not yet received. *See* People v. Ranghelle, 69 N.Y.2d 56, 65, 503 N.E.2d 1011, 1017, 511 N.Y.S.2d 580, 586 (1986) (holding that undiscovered police memo books containing victim's statements and police incident reports detailing victim's statements were not duplicative equivalents due to minor inconsistencies).

[18] *See, e.g.*, People v. France, 159 Misc. 2d 869, 871, 877, 608 N.Y.S.2d 1006, 1007-08, 1011 (Sup. Ct. Kings County 1994) (focusing on fact that medical examiner is independent from district attorney and holding that autopsy tapes are not *Rosario* material); People v. Farrel, 159 Misc. 2d 992, 995, 607 N.Y.S.2d 557, 559 (Sup. Ct. Richmond County 1994) ("The nature of the entity or individual retaining the evidentiary material is determinative."); People v. Railey, 159 Misc. 2d 393, 399, 604 N.Y.S.2d 680, 683-84 (Sup. Ct. N.Y. County 1993) (holding that OCME is independent agency not controlled by district attorney).

[19] *See* People v. Smith, 206 A.D.2d 102, 110-11, 618 N.Y.S.2d 649, 655 (1st Dep't 1994) (holding that OCME is independent agency with no law enforcement powers and that mere access to records does not constitute control); People v. Washington, 196 A.D.2d 346, 351, 612 N.Y.S.2d 586, 588 (2d Dep't) (concluding that district attorney's access to medical examiner's records "does not rise to the level of control required under the *Rosario* rule"), *appeal granted*, 83 N.Y.2d 1008, 640 N.E.2d 157, 616 N.Y.S.2d 489 (1994), *aff'd*, 86 N.Y.2d 189, 654 N.E.2d 967, 630 N.Y.S.2d 693 (1995).

In *Smith*, the Appellate Division, First Department, consolidated and heard four appeals in which the defendants argued that the failure of the prosecution to produce the medical examiner's audiotapes required reversal of their murder convictions. *Smith*, 206 A.D.2d at 103-04, 618 N.Y.S.2d at 650-51. Steven Smith, a squatter in Bellevue Hospital, sodomized, raped, and strangled a pregnant doctor employed by the hospital. *Id.* at 104, 618 N.Y.S.2d at 651. The court described the strong evidence presented against the defendant, including admissions, blood stains, and DNA evidence. *Id.* The court also addressed the appeal of Pasqual Carpenter, who was involved in the murder of Brian Watkins, a tourist from Utah. *Id.* at 107-08, 618 N.Y.S.2d at 653. It is suggested that the court was unwilling to contemplate a possible *Rosario* violation if to do so would entail overturning such highly publicized convictions. *See* Emily Suchar, *4 Guilty in Slay of Utah Tourist*, NEWSDAY, Dec. 11, 1991, at 3.

[20] *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5 ("Control of the material is the standard, not control over the agency.").

[21] *Id.*

Code of the City of New York[22] and the New York City Charter[23] and concluded that the prosecutor's access to material in the OCME was tantamount to constructive possession of the audiotape.[24]

In holding that the *Rosario* rule was applicable in the case of a medical examiner's audiotape, Justice Kreindler also faced the

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22 NEW YORK, N.Y., ADMIN. CODE tit. 17, § 17-205 (1993). The Code provides, in pertinent part: "The appropriate district attorney and the police commissioner of the city may require from the chief medical examiner such further records, and such daily information, as they may deem necessary." *Id. But see* People v. McCullough, N.Y. L.J., Jan. 7, 1994, at 29, col. 3 (Sup. Ct. Kings County). In *McCullough*, Justice Aiello disagreed with the argument that the New York City Administrative Code in and of itself creates a *Rosario* obligation regarding medical examiners' records. *Id.*; *see Tug of War*, *supra* note 5, at 1.

23 NEW YORK CITY CHARTER § 557(g) (1993) states in part: "The chief medical examiner shall keep full and complete records in such form as may be provided by law. He shall promptly deliver to the appropriate district attorney copies of *all* records relating to every death as to which there is . . . any indication of criminality." *Id.* (emphasis added).

One judge has suggested that if the medical examiner follows the procedure required by the Charter, the prosecutor should be the one in possession of the audiotapes. *See Smith*, 206 A.D.2d at 114, 618 N.Y.S.2d at 657 (Murphy, P.J., dissenting). The fact that the prosecutor did not receive all of the records should not excuse a possible *Rosario* violation. *See id.* at 116-17, 618 N.Y.S.2d at 658.

24 *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5. Justice Kreindler stated:

> The court concludes that while the Medical Examiner's office is an independent investigatory department of the New York City Department of the New York City Department of Health, the prosecution has access to and some control over the Medical Examiner's records. Although the control over the records is not total, it is sufficient for the purposes of the Rosario rule.

Id. (citations omitted).

It is argued that the proper focus is upon access to the material. *See* People v. Fishman, 72 N.Y.2d 884, 886, 528 N.E.2d 1212, 1213, 532 N.Y.S.2d 739, 740 (1988) ("Having had no immediate access of their own to the statements, the People cannot be held responsible for a failure to turn them over to defendant.") (citation omitted); *see also* People v. Solomon, 160 Misc. 2d 945, 947, 612 N.Y.S.2d 779, 781 (Sup. Ct. Kings County 1994) (reasoning that "the prosecutor has sufficient access to and control over the Medical Examiner's records to render such records potential *Rosario* material") (citation omitted). The New York Court of Appeals has indicated that when the existence of a document is "readily ascertainable by the prosecutor, there is no reason to dilute the *Rosario* obligation by holding that defense counsel should have himself subpoenaed the document." People v. Ranghelle, 69 N.Y.2d 56, 64, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986). In *Jones*, the court considered the following factors in concluding that the prosecutor had possession or control over the audiotapes: (1) the OCME is an independent unit of the Department of Health; (2) the OCME is generally an investigatory agency rather than strictly an administrative agency; (3) the medical examiner can act as a quasi-judicial officer, with power to subpoena witnesses and conduct hearings; (4) the prosecution has access to and some control over OCME records under the New York City Charter and the Administrative Code of the City of New York; and (5) the medical examiner's testimony is essential to homicide trials. *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5.

critical issue of whether this decision should operate retroactively.[25] Because the defendant had not exhausted his direct appeal, a retroactive application would result in per se reversible error.[26] Justice Kreindler, considering both the repercussions that would follow such a holding and the policy reasons behind the *Rosario* rule, determined that his decision created a "new rule."[27] Since a new rule may be applied prospectively, as opposed to retroactively,[28] the court denied the defendant's motion to vacate his conviction.[29]

It is submitted that the *Jones* court, in considering the underlying objectives of the *Rosario* doctrine, reached the correct interpretation of a prosecutor's "possession and control" of witnesses' prior statements. *Rosario* and its progeny promote fairness to the defendant while creating guidelines that avoid unduly burdening the prosecutor.[30] Generally, the boundaries of the *Rosario*

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25 *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 6. Retroactivity is based on the principle that all cases before a court should be decided on the law as it currently stands. *See* People v. Pepper, 53 N.Y.2d 213, 219-20, 423 N.E.2d 366, 368, 440 N.Y.S.2d 889, 891, *cert. denied*, 454 U.S. 967 (1981). Retroactivity also represents "the credo that our government is one of laws and not of men, a concept which depends heavily on a sense of continuity." *Id.* at 220, 423 N.E.2d at 368, 440 N.Y.S.2d at 891. If no constitutional issues are involved, courts need only consult state law to determine whether a rule will be applied retroactively. *See* People v. Mitchell, 80 N.Y.2d 519, 527, 606 N.E.2d 1381, 1385, 591 N.Y.S.2d 990, 994 (1992) (applying New York principles of retroactivity). *Rosario* was based on "policy considerations" and fairness, rather than on constitutional principles, and, therefore, would not require constitutional analysis. *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 6.

26 *See Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. The *Ranghelle* court held that the prosecution's failure to deliver *Rosario* material to defense counsel constituted per se reversible error, whereas a delay in the delivery would be reversible error only if "the defense was materially prejudiced by the delay." *Id.* A defendant who has exhausted the appeal process must prove improper conduct and must establish that the prosecutor's failure to provide *Rosario* material resulted in prejudice. *See* People v. Jackson, 78 N.Y.2d 638, 649, 585 N.E.2d 795, 802, 578 N.Y.S.2d 483, 490 (1991) (requiring defendant to demonstrate reasonable possibility that failure to disclose *Rosario* material contributed to guilty verdict); *see also supra* note 10 (discussing CPL § 440.10(1)).

27 *Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 6; *see infra* notes 50-51 and accompanying text.

28 *See Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 891.

29 *Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 6.

30 People v. Grissom, 128 Misc. 2d 246, 248, 490 N.Y.S.2d 110, 112-13 (N.Y.C. Crim. Ct. N.Y. County 1985). One judge has suggested that the argument presented by prosecutors against deeming medical examiners' audiotapes *Rosario* material because the OCME is not a law enforcement agency is an argument "of convenience." People v. Smith, 206 A.D.2d 102, 119, 618 N.Y.S.2d 649, 659-60 (1st Dep't 1994) (Murphy, P.J., dissenting).

rule[31] exclude from its application documents that require confidentiality[32] and materials to which a prosecutor has no greater access than does defense counsel.[33] Although documents created by the OCME are not subject to public review,[34] they are accessible to both the prosecutor and defense counsel. Defendants, however, may be required to subpoena records from the OCME,[35] whereas records pertaining to deaths in which criminality is suspected must be delivered to the prosecution,[36] and prosecutors need only make a request for "such further records . . . as they may deem necessary."[37] As a result, prosecutors are in a far better position to obtain relevant documents that are essential to de-

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31 *See* People v. Ranghelle, 69 N.Y.2d 56, 63, 503 N.E.2d 1011, 1015, 511 N.Y.S.2d 580, 586 (1986).

32 *See* People v. Tissois, 72 N.Y.2d 75, 78, 526 N.E.2d 1086, 1087, 531 N.Y.S.2d 228, 229 (1988) (holding that statements made to social worker were confidential and therefore not in possession or control of prosecutor); *Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1015, 511 N.Y.S.2d at 584 (stating that breadth of *Rosario* doctrine does not include confidential documents or duplicative equivalents).

33 *See* People v. Fishman, 72 N.Y.2d 884, 886, 528 N.E.2d 1212, 1213, 532 N.Y.S.2d 739, 740 (1988). In *Fishman*, the prosecutor had ordered, but not received, untranscribed plea allocution minutes from a court stenographer at the time defense counsel requested the minutes. *Id.* at 885, 528 N.E.2d at 1212, 532 N.Y.S.2d at 739. The court held that the prosecutors had "no immediate access of their own to the statements." *Id.* at 886, 528 N.E.2d at 1213, 532 N.Y.S.2d at 740; *see also* People v. Bailey, 73 N.Y.2d 812, 813, 534 N.E.2d 28, 28-29, 537 N.Y.S.2d 111, 112 (1988). In *Bailey*, the court held that a statement concerning the crime charged made by a prosecution witness was not *Rosario* material because the statement had been made to the witness' employer, rather than to the prosecutor, and the prosecutor did not have any knowledge, possession, or control of the employer's records. *Id.*

34 NEW YORK CITY CHARTER § 557(g) (1993) (providing that "[s]uch records shall not be open to public inspection").

35 *See* People v. France, 159 Misc. 2d 869, 878, 608 N.Y.S.2d 1006, 1012 (Sup. Ct. Kings County 1994). *But see* People v. Ramsay, N.Y. L.J., Jan. 19, 1994, at 25, col. 3 (Sup. Ct. Kings County) (noting statement by defense attorney in *Jones* that medical examiner's audiotape was provided after request by letter). The defendant's access to material within the prosecution's possession or control, however, does not relieve prosecutors of the *Rosario* obligation. *See Ranghelle*, 69 N.Y.2d at 64, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585.

36 NEW YORK CITY CHARTER § 557(g) (1993); *see supra* note 23 (discussing § 557(g)).

37 NEW YORK, N.Y., ADMIN. CODE tit. 17, § 17-205 (1993). Justice Kreindler viewed this provision as giving the prosecution some control over the agency. *See* People v. Jones, N.Y. L.J., Feb. 8, 1994, at 23, col. 3, 24, col. 6 (Sup. Ct. Kings County). *But see* People v. McCullough, N.Y. L.J., Jan. 7, 1994, at 29, col. 3 (Sup. Ct. Kings County) (mere fact that OCME must allow district attorney access to its files does not render such files in possession of prosecution).

fense counsel's ability to cross-examine prosecution witnesses effectively.[38]

While many courts confronted with a *Rosario* issue have focused on whether the possessor of the material was a law enforcement agency to determine whether the prosecutor had possession or control of prior statements,[39] the *Jones* court properly noted that this is only one factor to be considered.[40] The *Rosario* rule is not limited to statements made or solicited by law enforcement agencies or agencies controlled by the prosecutor.[41] *Rosario*, without qualification, permitted the defendant to review a witness' prior statements.[42] The New York Legislature, by enacting CPL

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[38] *See* People v. Rosario, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 451, *cert. denied*, 386 U.S. 886 (1961). The *Rosario* court feared that "there is always a danger that something will be withheld from defense counsel which may assist him in impeaching the prosecution's witness." *Id.*

The importance of the opportunity to cross-examine the medical examiner should not be underestimated. *See* People v. Smith, 206 A.D.2d 102, 114-15, 618 N.Y.S.2d 649, 657 (1st Dep't 1994) (Murphy, P.J., dissenting). "[E]ffective cross-examination of the pathologist will in many cases be vital to the defendant's prospects for acquittal." *Id.* A jury might question the credibility of the witness if there are discrepancies in the audiotapes and the autopsy report.

[39] *See, e.g.*, People v. Mines, N.Y. L.J., Feb. 8, 1994, at 26, col. 1, col. 2 (Sup. Ct. Queens County); People v. Railey, N.Y. L.J., Dec. 6, 1993, at 29, col. 4, col. 6 (Sup. Ct. N.Y. County) (refusing to extend *Rosario* to case in which prosecutor did not have constructive possession of material). In *Jones*, Justice Kreindler reasoned that, although the district attorney's office does not control the police department, documents produced by the police department are subject to the *Rosario* rule. *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5.

[40] *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5.

[41] *See* CPL § 240.45 (McKinney 1993); *supra* note 3 (providing language of CPL § 240.45(1)(a)); *Jones*, N.Y. L.J., Feb. 8 , 1994, at 24, col. 4 (observing that "material in the actual possession of the prosecution but not generated by 'institutionally controlled' agencies" is subject to *Rosario*); *see also* People v. Ranghelle, 69 N.Y.2d 56, 64, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986) (rejecting prosecutor's argument that *Rosario* should be limited to situations in which prosecution has sole custody of material); People v. Payne, 52 N.Y.2d 743, 745, 417 N.E.2d 564, 565, 436 N.Y.S.2d 271, 272 (1980) (affirming conviction for murder in first degree over defense objection to prosecutor's failure to turn over police notes of witness' prior statements); People v. Gilligan, 39 N.Y.2d 769, 770, 349 N.E.2d 879, 879, 384 N.Y.S.2d 778, 778 (1976) (finding error in denial of defense request to inspect police officers' notes and reports); People v. Malinsky, 15 N.Y.2d 86, 90-91, 209 N.E.2d 694, 697, 262 N.Y.S.2d 65, 70 (1965) (requiring that detective's notes be turned over to defense counsel); *cf.* People v. Fields, 146 A.D.2d 505, 510, 537 N.Y.S.2d 157, 161 (1st Dep't) (finding that parole officer's notes constituted *Rosario* material, despite fact that they were not in possession of prosecution, because they were in possession and control of law enforcement agency), *appeal decided*, 156 A.D.2d 225, 548 N.Y.S.2d 488 (1st Dep't 1989), *appeal denied*, 75 N.Y.2d 918, 554 N.E.2d 74, 555 N.Y.S.2d 37 (1990).

[42] *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. An overly broad reading of *Rosario*, however, which would entitle a defendant to any statement

section 240.45, intended to further broaden the scope of the *Rosario* holding.[43] While the OCME may not by definition constitute a law enforcement agency or an agency controlled by the prosecutor, the district attorney's access to OCME records created sufficient control to warrant a *Rosario* obligation.[44] The OCME must provide the prosecutor with all records of crime-related death,[45] and, conversely, the district attorney may request any documents deemed necessary to the prosecution of a defendant.[46] Additionally, the two agencies share a common goal—to establish the cause of death—which is an essential element prosecutors must prove in a homicide trial.[47]

It is further suggested that courts have resisted enforcing the *Rosario* rule in this area because they fear that retroactive application of the rule will disrupt presumptively valid[48] homicide convictions.[49] The New York Court of Appeals, however, recognizing

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that "might [be] of use to the defense" is not advocated. *See* People v. Fishman, 72 N.Y.2d 884, 888, 528 N.E.2d 1212, 1214, 532 N.Y.S.2d 739, 741 (1988) (Titone, J., dissenting).

43 *See Fishman*, 72 N.Y.2d at 887, 528 N.E.2d at 1213, 532 N.Y.S.2d at 740-41 (Titone, J., dissenting). The legislature sought to take "a reasonable and balanced step forward in broadening pre-trial discovery." *Id.* at 887 n.*, 528 N.E.2d at 1214 n.*, 532 N.Y.S.2d at 741 n.* (quoting letter submitted by District Attorneys' Association).

44 *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5; *see also supra* note 24 and accompanying text (discussing factors court considered in determining whether prosecution had possession or control of audiotapes).

45 *See* NEW YORK CITY CHARTER § 557(g) (1993); *see also supra* note 23.

46 *See* NEW YORK, N.Y., ADMIN. CODE tit. 17, § 17-205 (1993); *see also supra* note 22.

47 *See Jones*, N.Y. L.J., Feb. 8, 1994, at 24, col. 5; NEW YORK, N.Y., ADMIN. CODE tit. 17, § 17-203 ("If the medical examiner . . . has reason to suspect that a homicide has been committed, [an] autopsy shall be performed . . . ."); N.Y. PENAL LAW §§ 125.00-.60 (McKinney 1987). "Homicide means conduct which causes the death of a person . . . ." *Id.* § 125.00.

48 People v. Session, 34 N.Y.2d 254, 255-56, 313 N.E.2d 728, 729, 357 N.Y.S.2d 409, 410 (1974) (stating that convictions are presumed to be valid).

49 *See Autopsy Issue*, *supra* note 5, at 1 (stating that approximately 200 defendants have made motions to vacate convictions based on prosecution's failure to provide defense with autopsy tapes).

Addressing a similar dilemma, the New York Court of Appeals recently held that the rule requiring a defendant to be present at a side bar during voir dire is not retroactive. *See* People v. Mitchell, 80 N.Y.2d 519, 529, 606 N.E.2d 1381, 1386, 591 N.Y.S.2d 990, 995 (1992); *see also* Sidney H. Stein, *Retroactivity of* 'Sandoval' *Rights*, N.Y. L.J., Nov. 30, 1993, at 3. The court also decided in a later case, however, that a defendant's right to be present during a *Sandoval* hearing is retroactive. *See* People v. Favor, 82 N.Y.2d 254, 266-67, 624 N.E.2d 631, 639, 604 N.Y.S.2d 494, 502 (1993); Stein, *supra*, at 3.

It is possible that a court would find the rule characterizing autopsy audiotapes as *Rosario* material to be "another point in a continuum of cases explaining and ap-

the potential harm that absolute retroactivity may create, provided an exception permitting prospective application of a "new rule."[50] A new rule, such as that created by the *Jones* court, is established when a court's holding "represent[s] a dramatic shift away from customary and established procedure."[51] Prior to the recent attention focused on the existence of the medical examiner's audiotapes, prosecutors were not obligated to supply them to defendants, nor did defense attorneys specifically request them. Accordingly, any retroactive application of the law requiring prosecutors to deliver material produced by the OCME would unfairly penalize the prosecutor for having followed accepted practices.[52]

Further, in determining whether retroactivity is applicable, a court examines the purpose of the new rule, reliance upon the old rule, and the effect that the new rule would have on the "administration of justice."[53] Although the policies promoting disclosure of

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plying [a] statutory right . . . ", and, therefore, deny prospectivity. *See Favor*, 82 N.Y.2d at 265, 624 N.E.2d at 637, 604 N.Y.S.2d at 500. In *Favor*, the court rejected the argument that retroactivity of the *Sandoval* rule would result in widespread reversals. *Id.* at 266, 624 N.E.2d at 638, 604 N.Y.S.2d at 501. Indeed, the results were not as disastrous as predicted. *See* Gary Spencer, *Review Ordered on Defendant's Hearing*, N.Y. L.J., Jan. 12, 1994, at 1.

In *Mitchell*, the court determined that reconstructive hearings would be necessary and would therefore impose a burden upon the administration of the court system. *See Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 992. The court in *Favor*, however, found that a reconstructive hearing would not be required and, therefore, retroactivity was appropriate. *See Favor*, 82 N.Y.2d at 266, 624 N.E.2d at 638, 604 N.Y.S.2d at 501. Although reconstructive hearings would not be necessary in cases such as *Jones*, courts would be required to review each and every prior statement to determine if it pertained to the "subject matter" of the testimony or was the duplicative equivalent of the material already submitted to defendant. *See supra* notes 16-17 (discussing terms "subject matter" and "duplicative equivalent").

[50] *See Favor*, 82 N.Y.2d at 266, 624 N.E.2d at 638, 604 N.Y.S.2d at 501 (noting that "special factors . . . that would have a serious deleterious effect on the administration of justice" might warrant prospectivity); Stein, *supra* note 49, at 3 (observing that retroactive approach reflects legal realist view that judges do more than "discover" law).

[51] *Favor*, 82 N.Y.2d at 263, 624 N.E.2d at 636, 604 N.Y.S.2d at 499.

[52] Traditionally, when the prosecutor did not know of the existence of the material, there was no *Rosario* violation. *See, e.g.*, People v. Bailey, 73 N.Y.2d 812, 813, 534 N.E.2d 28, 28-29, 537 N.Y.S.2d 111, 112 (1988); *see also supra* text accompanying notes 31-33 (stating that *Rosario* rule excluded materials that prosecutor had no greater access to than defendant).

[53] *See* People v. Pepper, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892 (1981). The United States Supreme Court developed these three factors. *Id.*; *see also* Desist v. United States, 394 U.S. 244, 249 (1969). Other factors to be considered in determining if a decision constitutes a new rule are: (1) whether the holding overrules precedent, and (2) whether the holding causes a "sharp break in the continuity of law." *Favor*, 82 N.Y.2d at 263, 624 N.E.2d at 636, 604 N.Y.S.2d at 499.

documents to defendants could support retroactive application of the *Jones* holding, it is submitted that the reliance of prosecutors and courts on the absence of a *Rosario* obligation in such situations required that the rule in *Jones* be applied prospectively.[54] Additionally, the considerable number of CPL section 440.10 motions that have been filed to date seeking to vacate convictions on the ground that autopsy audiotapes were not given to the defense foreshadow an overwhelming burden on the court system if the holding were to be applied retroactively.[55] Thus, the "new rule" doctrine provides a plausible remedy to the risk of widespread reversals.

By characterizing the audiotape as discoverable material and subsequently identifying the decision as a "new rule," the court reached a compromise that furthered the policy goals of *Rosario* without penalizing prosecutors. A defendant should be entitled to material that is readily available to the prosecutor and may aid in his or her defense without the added consequence of "wreak[ing] . . . havoc in society" by retroactively upsetting well established principles of law.[56]

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[54] *See* People v. Mitchell, 80 N.Y.2d 519, 528-29, 606 N.E.2d 1381, 1386, 591 N.Y.S.2d 990, 995 (1992) (concluding that these were "substantial reasons" to apply new rule regarding jury selection prospectively).

[55] *See Tug of War*, *supra* note 5, at 1 (approximately 150 motions filed in New York City, 85 in Brooklyn alone); *Autopsy Issue*, *supra* note 5, at 1 (approximately 200 defendants moved to vacate convictions). The New York Law Journal reported that defendants convicted of notorious crimes have made § 440.10 motions based on the prosecution's failure to provide the defense with medical examiners' audiotapes, including the defendant in the Happy Land Social Club case and the defendant convicted of murdering Brian Watkins. *See Tug of War*, *supra* note 5, at 1; *supra* note 49 (discussing numerous motions made pursuant to CPL § 440.10).

[56] *Favor*, 82 N.Y.2d at 263, 624 N.E.2d at 636, 604 N.Y.S.2d at 499.