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New York Court of Appeals Holds that Criminal Defendants Bringing Rosario Claims by Way of CPL § 440.10 Must Demonstrate that People's Failure to Deliver Rosario Materials Constituted Actual Prejudice

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New York Court of Appeals holds that criminal defendants bringing Rosario claims by way of CPL § 440.10 must demonstrate that People's failure to deliver Rosario materials constituted actual prejudice

The "Rosario" discovery rule, codified in CPL section 240.45,[1] requires prosecutors to provide defense counsel with any pre-trial statements made by a prosecution witness relating to that witness's testimony in court, regardless of whether these statements are inconsistent with the testimony.[2] When the rule was first enun-

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[1] *See* N.Y. CPL § 240.45 (1)(a) (McKinney 1988); 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). CPL § 240.45 requires mandatory disclosure of "[a]ny written or recorded statement . . . by any person whom the prosecutor intends to call as a witness at trial and which relates to the subject matter of the witness testimony." *Id.* The statute requires disclosure prior to the prosecutor's opening statement in a jury trial, and before other evidence is submitted in a non-jury trial. *Id.* The defendant's counsel must reciprocate by disclosing to the prosecution any prior out of court statements made by a defense witness, other than the defendant, that relate to that witness's testimony. CPL § 240.45 (2)(a). Mandatory disclosure of Rosario material is based upon "policy considerations" and a "right sense of justice." *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.2d at 450; *see also* People v. Jones, 70 N.Y.2d 547, 550, 517 N.E.2d 865, 866, 523 N.Y.S.2d 53, 54 (1987); People v. Ranghelle, 69 N.Y.2d 56, 62, 503 N.E.2d 1011, 1015, 511 N.Y.S.2d 580, 584 (1986); People v. Perez, 65 N.Y.2d 154, 158, 480 N.E.2d 361, 363, 490 N.Y.S.2d 747, 749 (1985); People v. Ross, 21 N.Y.2d 258, 263, 234 N.E.2d 427, 430, 287 N.Y.S.2d 376, 380 (1967). A "right sense of justice" does not require that a criminal defendant be given a copy of the victim's personal version of the crime. People v. Reedy, 70 N.Y.2d 826, 827, 517 N.E.2d 1324, 1325, 523 N.Y.S.2d 438, 439 (1987).

There are, however, two exceptions to the mandatory disclosure rule: (1) the defense does not have an unrestricted right to inspect all documents held by a prosecutor, only those that relate to the subject matter of the prosecution witness's testimony and do not necessitate disclosure, People v. Poole, 48 N.Y.2d 144, 149, 397 N.E.2d 697, 700, 422 N.Y.S.2d 5, 8 (1979), and (2) the People need not turn over to the defense any statements that are the "duplicative equivalents" of statements already delivered, People v. Consolazio, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 806, 387 N.Y.S.2d 62, 66 (1976).

[2] *See Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. In *Rosario*, the Court of Appeals refused to limit the scope of the rule to only prior statements that were actually inconsistent with trial testimony, because pre-trial statements of prosecution witnesses are valuable for purposes other than impeachment. *Id.* For example, "[t]hey may reflect a witness's bias . . . or . . . 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." *Id.* As long as there exists a nexus between the statement and the witness's testimony, and the statement is not protected by confidentiality, the People must proffer the statement to the criminal defendant. *Id.*

ciated,[3] the prosecution's failure to deliver Rosario material entitled a convicted defendant to a reversal and a new trial if the defendant proved that the withholding constituted more than harmless error.[4] Subsequent judicial refinements to the Rosario rule led to abandonment of the harmless error analysis[5] in favor of

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[3] *See Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. Prior to *Rosario*, New York law required that a trial judge initially make a determination as to whether or not the prior statement *actually* contradicted the witness's testimony. *See* People v. Walsh, 262 N.Y. 140, 149-50, 186 N.E. 422, 425 (1933) (emphasis added), *overruled by Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961). Once the trial judge was satisfied that an actual contradiction existed, it was at the judge's discretion whether or not the statement should be delivered to the defendant. *See id.* Prior law never mandated delivery, it merely permitted it. *See Rosario*, 9 N.Y.2d at 291, 173 N.E.2d at 884, 213 N.Y.S.2d at 452 (Froessel, J., concurring). Only that portion of the prior statement that the court felt contradicted the witness's trial testimony was given to the defendant. *See* People v. Bai, 7 N.Y.2d 152, 155, 164 N.E.2d 387, 389, 196 N.Y.S.2d 87, 89 (1959), *overruled by Rosario* 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961); *see also Decisions*, 28 BROOK. L. REV. 166, 167 (1961) ("[W]itness' prior statements which conflicted with his testimony . . . might . . . be partially released to the defense.").

The *Rosario* court was influenced by the Supreme Court's opinion in Jencks v. United States, 353 U.S. 657, 668 (1957). *See Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. In *Jencks*, the Court held that the defendant should not be required to show an actual conflict between the prosecution witness's prior statement and testimony, because "the interest of the United States in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.' " *Jencks*, 353 U.S. at 668 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The scope of the rule enunciated in the *Jencks* case was clarified by the Jencks Act. *See* 18 U.S.C. § 3500 (1957). Consequently, the Rosario rule is now broader than the Jencks rule in two respects: first, under the Jencks rule, disclosure is permitted only after the government's witness has testified on direct examination; second, the Jencks rule is understood to permit judicial screening of prior statements to determine their relevance to the subject matter of the witness's testimony. Act of September 2, 1957, Pub. L. No. 85-269 1957 U.S.C.C.A.N. (71 Stat.) 595.

[4] *See Rosario*, 9 N.Y.2d at 290-91, 173 N.E.2d at 883-84, 213 N.Y.S.2d at 451-52. A defendant raising a Rosario claim was granted a reversal and new trial if "there was a rational possibility that the jury would have reached a different verdict [had] the defense . . . been allowed the use of the witness's prior statements." *Id.* at 291, 173 N.E.2d at 884, 213 N.Y.S.2d at 451.

[5] *See Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. In *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66, the Court of Appeals first stated, in dicta, that the harmless error analysis would not be appropriate for Rosario claims. The *Consolazio* court rejected the argument that a "consideration of the significance of the content or substance of a witness's prior statements can result in a finding of harmless error." *Id.* The harmless error analysis had previously been considered necessary because of the prevalence of errors at trial and was applied to screen out those errors that were merely harmless. *See* People v. Kingston, 8 N.Y.2d 384, 387, 171 N.E.2d 306, 308, 208 N.Y.S.2d 956, 959 (1960).

Harmless error analysis differs depending upon whether the error implicates constitutional or non-constitutional issues. *See* People v. Crimmins, 36 N.Y.2d 230, 239, 326 N.E.2d 787, 792, 367 N.Y.S.2d 213, 220 (1975). In determining whether a non-constitutional error is harmless, the proper inquiry is whether "there is a significant probability, rather than only a

the less speculative per se error rule.[6] Under the per se rule, a defendant successfully interposing a Rosario claim was entitled to an automatic reversal and new trial.[7] It appeared that there was no distinction made as to whether the claim was raised on direct appeal[8] or by way of a post-judgment motion to vacate pursuant CPL section 440.10.[9] Recently, however, in *People v. Jackson*,[10] the New

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rational possibility, . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred." *Id.* at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222. Although *Rosario* involved non-constitutional error, *see Jones*, 70 N.Y.2d at 555, 517 N.E.2d at 870, 523 N.Y.S.2d at 58 (Bellacosa, J., concurring) (referring to Rosario violations as involving non-constitutional issues), the *Crimmins* harmless error analysis was not applied in *Rosario*, because *Rosario* was decided fourteen years prior to the articulation of the harmless error standard in *Crimmins*, *see Crimmins*, 36 N.Y.2d at 239, 326 N.E.2d at 892, 367 N.Y.S.2d at 220 (stating that individual cases were more significant than "particular formulations of . . . a rule").

[6] *See Ranghelle*, 69 N.Y.2d at 64, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. In *Ranghelle*, the court held that the failure to deliver Rosario material was per se reversible error, thus entitling the defendant to a new trial. *Id.* Harmless error analysis was considered inappropriate for application to Rosario claims because there was "no way, short of speculation, of determining how [the withheld material] might have been used or how its denial to counsel might have damaged [the] defendant's case." *Jones*, 70 N.Y.2d at 552, 517 N.E.2d at 868, 523 N.Y.S.2d at 56. This type of speculation would contravene the basis of *Rosario*. *See* People v. Perez, 65 N.Y.2d 154, 160, 48 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750-51 (1985) ("[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.").

Regardless of the prosecution's intent, negligence, or inadvertence, failure to deliver Rosario material constituted per se reversible error. *Jones*, 70 N.Y.2d at 553, 517 N.E.2d at 869, 523 N.Y.S.2d at 57. The per se error rule was applied only where the prosecution completely failed to disclose Rosario material to defense counsel. *See Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. Where the prosecution merely delayed in its delivery, the court inquired as to whether the delay constituted substantial prejudice. *Id.*

[7] *See Jones*, 70 N.Y.2d at 553, 517 N.E.2d at 869, 523 N.Y.S.2d at 57; *Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585; *Perez*, 65 N.Y.2d at 160, 480 N.E.2d at 364, 490 N.Y.S.2d at 750; *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66. Although *Jones*, *Ranghelle*, *Perez*, and *Consolazio* each involved Rosario claims brought on direct appeal, the Court of Appeals never indicated that the procedural mechanism was a factor in adopting the per se error rule. *See Jones*, 70 N.Y.2d at 552, 517 N.E.2d at 868, 523 N.Y.S.2d at 56. Rather, the main reason for the rule was the inability of the reviewing court to ascertain how the defense counsel would have used the material. *Id.*

[8] *See* CPL arts. 450-70 (dealing with appeals).

[9] *See* CPL § 440.10 (McKinney 1983). Section 440.10 represents New York's first codification of the common law writ of *coram nobis*. *See* HENRY B. ROTHBLATT, CRIMINAL LAW OF NEW YORK: THE CRIMINAL PROCEDURE LAW § 437, at 337 (1971). At common law, a writ of *coram nobis* allowed appellate courts to consider trial errors not appearing in the record. John C. Corbett, *Coram Nobis*, 29 BROOK. BARR. 147, 147 (1978). The effect of the writ was to vacate the trial court's judgment. Thomas V. Dadey, Note, *The Expanding Scope of Coram Nobis*, 13 SYRACUSE L. REV. 116, 117 (1962).

Section 440.10 outlines the various grounds upon which a motion to vacate will be granted. *See* CPL § 440.10. Pursuant to § 440.10(1)(f), a judge may vacate a judgment on the basis of "[i]mproper and prejudicial conduct not appearing in the record . . . resulting in

York Court of Appeals held that a defendant bringing a Rosario claim on a CPL section 440.10(1)(f) motion must demonstrate a prejudicial error,[11] while indicating that a Rosario claim raised on direct appeal would still enjoy the benefit of the per se error rule.[12]

In *Jackson*, the defendant, Erik Jackson, had been convicted of six counts of felony murder and one count of second-degree arson.[13] Several years after his direct appeal had been exhausted,[14] the defendant discovered that Rosario material had been withheld from him at his trial eleven years earlier.[15] Because the defendant had exhausted his direct appeal, his only recourse was to bring a Rosario claim by way of a post judgment motion pursuant to sec-

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the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom." CPL § 440.10(1)(f).

[10] 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

[11] *Id.* at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490. A defendant raising a Rosario claim on a section 440.10(1)(f) motion "must demonstrate a reasonable possibility that the failure to disclose the Rosario material contributed to the verdict." *Id.*

[12] *Id.* When a Rosario claim is the subject of both a direct appeal and a post-conviction motion pursuant to CPL 440.10, the per se rule applies. *Id.*; People v. Cecora, ___ A.D.2d ___, 587 N.Y.S.2d 748, 749 (2d Dep't 1992).

[13] *Jackson*, 78 N.Y. 2d at 640, 585 N.E.2d at 796, 578 N.Y.S.2d at 484. The defendant's conviction arose out of the highly publicized Waldbaum's supermarket fire in 1978. *Id.* Robert D. McFadden, *State Appeals Court Narrows Right to a New Trial when Other Evidence is Upheld*, N.Y. TIMES, Dec. 20, 1991, at B3. The Brooklyn fire resulted in the deaths of six firefighters. *Jackson*, 78 N.Y.2d at 640, 585 N.E.2d at 796, 578 N.Y.S.2d at 484; McFadden, *supra*.

[14] *Jackson*, 78 N.Y.2d at 640, 585 N.E.2d at 796, 578 N.Y.S.2d at 484. In his 1985 appeal, the defendant claimed, *inter alia*, that the people had failed to meet the reasonable doubt standard due to the insufficiency of the evidence. *See* People v. Jackson, 65 N.Y.2d 265, 270, 480 N.E.2d 727, 730, 491 N.Y.S.2d 138, 141 (1985). This complaint was based on the conflicting testimony of the prosecution's two arson expert witnesses concerning the cause of the fire. *Id.* at 268, 480 N.E.2d at 729, 491 N.Y.S.2d at 140. The court noted, that when "two or more witnesses give conflicting testimony . . . [it] simply creates a credibility question for the jury." *Id.* at 272, 480 N.E.2d at 730, 491 N.Y.S.2d at 144. The court held that there was sufficient evidence to support the conviction, and that the conflict between the arson experts' testimony was not substantial enough to conclude that the defendant's conviction was based on "pure speculation." *Id.* at 273, 480 N.E.2d at 730, 491 N.Y.S.2d at 144 (quoting Curley v. United States, 160 F.2d 229, 233, *cert. denied*, 331 U.S. 837 (1947)). Following this decision by the Court of Appeals, the defendant twice moved to vacate his conviction pursuant to CPL § 440.10. *Jackson*, 78 N.Y.2d at 642, 585 N.E.2d at 797, 578 N.Y.S.2d at 485 (1991). The first motion was based on ineffective assistance of trial and appellate counsel. *Id.* The second was the motion at issue in *Jackson*. *Id.*

[15] *See Jackson*, 78 N.Y.2d at 640, 585 N.E.2d at 796, 578 N.Y.S.2d at 484. The material that had been withheld consisted of a memorandum containing "a synopsis of an interview with a fire marshal." *Id.* at 642, 585 N.E.2d at 797, 578 N.Y.S.2d at 485. The fire marshal, who later testified against the defendant, had stated that the supermarket fire had not, in his opinion, been the result of arson. William Kunstler, *Perspective: Goodbye to 'Rosario'*, N.Y.L.J., Jan. 10, 1992, at 2.

tion 440.10(1)(f).[16] The trial court, rejecting the prosecution's argument that the defendant was required to demonstrate particularized prejudice, vacated the conviction.[17] The appellate division affirmed.[18]

In reversing the appellate division's order, the Court of Appeals concluded that the "improper and prejudicial conduct" requirement of section 440.10(1)(f) necessitates a showing of actual prejudice, even though the underlying claim is based on a Rosario violation.[19] More specifically, in order to satisfy this burden, a defendant must demonstrate "a reasonable possibility that the failure to disclose the Rosario material contributed to the verdict."[20] Writing for the court, Chief Judge Wachtler noted that this interpretation of section 440.10(1)(f) correctly effectuates the underlying legislative policy objectives, including society's interest in the "finality of judgments."[21] Chief Judge Wachtler further stated that the court, "[i]n originally adopting the *per se* error rule [with respect to Rosario claims brought on direct appeal], balanced the rights of the defendant against the rights of society."[22] However, Chief Judge Wachtler felt that this balancing did not control in *Jackson* because societal interests and the statutory language of section 440.10(1)(f) already prescribed the proper result.[23]

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[16] *See Jackson*, 78 N.Y.2d at 640, 585 N.E.2d at 796, 578 N.Y.S.2d at 484.

[17] *Id.* at 642, 585 N.E.2d at 797, 578 N.Y.S.2d at 486.

[18] *Id.*

[19] *Id.* at 647, 585 N.E.2d at 800, 578 N.Y.S.2d at 489.

[20] *Id.* at 649, 585 N.E.2d at 802, 578 N.Y.2d at 490. In support of this standard the *Jackson* court relied on the *Rosario* decision itself. *Id.* The *Jackson* court also stated that because this standard is also used for Brady material, "there will now be a certain congruence in the treatment of *Rosario* and *Brady* claims raised by way of CPL 440.10 motions after direct appeal has been exhausted." *Id.* Brady claims arise when the prosecutor was made aware by a specific discovery request that the defendant considered the material important to the defense, yet fails to disclose the information. *Id.* In *Jackson*, the court further noted that the Rosario rule standard would be the most equitable. *Id.* The court, although stating that the Rosario rule is not based on constitutional grounds, failed to apply the harmless error analysis for non-constitutional error articulated in People v. Crimmins, 36 N.Y.2d 230, 239, 326 N.E.2d 787, 792, 367 N.Y.S.2d 213, 220 (1975). *See supra* note 5 (discussing *Crimmins* non-constitutional harmless error analysis).

[21] *Jackson*, 78 N.Y.2d at 647, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

[22] *Id.* at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

[23] *Id.* at 645-47, 585 N.E.2d at 799-801, 578 N.Y.S.2d at 488-89. Under a writ of error *coram nobis*, a common law remedy correcting a judgment on the ground of error of fact, a defendant had to demonstrate prejudice. *See id.* at 646, 585 N.E.2d at 800, 578 N.Y.S.2d at 488. Courts mandated this in order to further "society's interest in the finality of judgments." *Id.* According to the *Jackson* court, the legislature carried over the prejudice requirement when it promulgated CPL § 440.10, which codified the common law remedy. *See*

In a compelling dissent, Judge Titone criticized the court's use of policy to alter a settled principle of law "when [its] consequences are, in the eyes of four members of th[e] Court, inconvenient or undesirable."[24] Judge Titone further noted that the court's unduly narrow construction of "prejudice"[25] would effectively promote, rather than deter prosecutorial misconduct.[26] In short, he viewed the majority's rationale as "nothing more than an exercise in result-directed statutory construction."[27]

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id. at 646-47, 585 N.E.2d at 800, 578 N.Y.S.2d at 488. Clearly, the legislature realized the problems that would arise if a per se error rule was applied to claims brought under CPL § 440.10, since this section has no time limitations for filing. *See id.* If applied, defendants would be entitled to a new trial years after the direct appeal was exhausted. *See id.* Inevitably, the state's ability to retry a defendant would be affected because evidence would be lost, witnesses would no longer be available, and memories of the crime would be lost. *See id.*

[24] *Id.* at 650, 585 N.E.2d at 803, 578 N.Y.S.2d at 491 (Titone, J., dissenting). The dissent disagreed with the court's assertion that the per se error rule had been adopted as the result of a balancing test. *Id.* at 651, 585 N.E.2d at 803, 578 N.Y.S.2d at 491-92. The dissent stated that the actual reason for adopting the per se error rule was that " 'a judge's impartial determination as to what portions [of a witness's pretrial statements] may be useful to the defense, is no substitute for the single-minded devotion of counsel for the accused.' " *Id.* at 652, 585 N.E.2d at 804, 578 N.Y.S.2d at 492 (citing People v. Perez, 65 N.Y.2d 154, 160, 480 N.E.2d 361, 366, 491 N.Y.S.2d 747, 753 (1985)).

[25] *Id.* at 653, 585 N.E.2d at 804, 578 N.Y.S.2d at 492 (Titone J., dissenting). The dissent indicated that the term "prejudice" is laden with ambiguity throughout the CPL. *Id.* Judge Titone asserted that sometimes errors in a trial are deemed prejudicial because they "either detract from the process or impair the defendant's ability to present a defense." *Id.* at 654, 585 N.E.2d at 804, 578 N.Y.S.2d at 493 (Titone, J. dissenting).

> For example, errors in the trial court's closing instructions that deprive the defendant of his right to jury consideration of the crime elements are deemed prejudicial "[n]o matter how conclusive the evidence." Similarly, errors affecting the jury's deliberative process have been held prejudicial to the extent they tend to "compromise" that process, without regard to the strength of the People's case."

Id. at 653, 585 N.E.2d at 804, 578 N.Y.S.2d at 492-93 (Titone, J., dissenting) (citations omitted). The dissent further argued that in originally imposing a per se error rule on Rosario claims, the court had determined that the failure to deliver Rosario material was always intrinsically prejudicial. *See id.* "Indeed, if 'prejudice' had not been present in *Jones*, *Ranghelle*, *Perez*, and *Consolazio*, [the court] would have been guilty of exceeding [its] powers as an appellate court," because section 470.05(1) requires that direct appeals be determined without regard to errors "which do not affect the substantial rights of the parties." *Id.* at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493 (Titone, J., dissenting).

[26] *Id.* at 659, 585 N.E.2d at 808, 578 N.Y.S.2d at 496 (Titone, J., dissenting). Judge Titone emphasized that under this standard, prosecutors have an incentive to postpone disclosure of Rosario material, discovered after trial, until after sentencing, so that a defendant's only remedy is to bring a Rosario claim under CPL § 440.10 because the defendant's direct appeal is barred. *Id.* Judge Titone further contended that this directly conflicts with Rosario's policy of prompt and full disclosure. *Id.*

[27] *Id.* at 652, 585 N.E.2d at 804, 578 N.Y.S.2d at 492 (Titone, J., dissenting). According to Judge Titone, the majority's rationale "simply does not withstand scrutiny." *Id.*

It is suggested that the Court of Appeals engaged in an unwarranted construction of "improper and prejudicial conduct."[28] By failing to focus on the language of section 440.10(1)(f) in its entirety, the court incorrectly required a showing of actual prejudice with respect to Rosario claims brought under section 440.10(1)(f). As a result, defendants who are relegated to a section 440.10(1)(f) motion because of a prosecutor's wrongful withholding of Rosario material may be unfairly punished.

Irrespective of the court's construction,[29] the plain language of section 440.10(1)(f) provides guidance as to what kind of "improper and prejudicial conduct" is required before a motion to vacate may be granted.[30] While the words of section 440.10(1)(f) do not explicitly define "improper and prejudicial conduct," the statute specifically requires a vacatur of judgment where the conduct would have resulted in a reversal had the claim been raised on direct appeal.[31] Thus, if the court applies the per se error rule to a

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[28] CPL § 440.10(1)(f).

[29] *See generally* STATUTES § 76 (McKinney 1971) (providing rules on interpreting statutes enacted by New York State legislature). There was no cause for the court to engage in the construction of "improper and prejudicial," because by their very words, certain statutes are free from ambiguity. *Id.* To interpret a statute that requires no interpretation is to infringe upon the sphere of the legislature. *See id.*

The *Jackson* court claimed that its construction reflected a policy consideration underlying § 440.10(1)(f), namely, society's interest in the "finality of judgments." *Jackson*, 78 N.Y.2d at 646, 585 N.E.2d at 799, 578 N.Y.S.2d at 488. The case cited by the *Jackson* court in support of this proposition involved a situation whereby the defendant neglected to bring an appeal. *See* People v. Howard, 12 N.Y.2d 65, 66, 187 N.E.2d 113, 114, 236 N.Y.S.2d 39, 41 (1962), *cert. denied*, 374 U.S. 870 (1963). The court, in *Howard*, reasoned "that an application in the nature of a writ of error *coram nobis* is to be treated as an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him." *Id.* In reaching this conclusion, the *Howard* court weighed the societal interest "in putting an end to litigation" with the interest in providing corrective measures for defendants, and concluded that the former should prevail. *Id.* However, in *Jackson*, the defendant had no other recourse but to file a section 440.10 motion to vacate, unlike the defendant in *Howard* who neglected to file an appeal. *Howard*, 12 N.Y.2d at 66, 187 N.E.2d at 114, 236 N.Y.S.2d at 41; *supra* text accompanying note 16. Therefore, it is asserted that under the *Howard* rationale, society's interest in finality of judgments cannot prevail over a defendant's interest in having a corrective measure available, when as in *Jackson*, the defendant's only recourse is a section 440.10 motion. *Id.*

[30] *See* CPL § 440.10(1)(f).

[31] *Id.*; *see* People v. D'Amico, 136 Misc. 2d 16, 28, 517 N.Y.S.2d 881, 890 (Oneida County Ct. 1987), *aff'd*, 148 A.D.2d 982, 538 N.Y.S.2d 965 (4th Dep't 1989). In *D'Amico*, the court did not attempt to determine whether "improper and prejudicial" required a showing of actual prejudice. *See id.* Whether "improper and prejudicial" means only actual prejudice or includes per se prejudice depends upon whether the underlying claim—in this case Rosario—requires a showing of actual prejudice when brought on direct appeal. *Cf. id.* (*D'Amico* court understood § 440.10(1)(f) as requiring that definition of "improper and prejudicial" be

Rosario claim raised on direct appeal, it should also apply the per se error rule to a Rosario claim brought by way of a section 440.10(1)(f) motion, because the conduct giving rise to the claim is the same in both situations.[32]

The *Jackson* court's holding also contravenes a common purpose of both the Rosario rule and section 440.10, namely, curbing prosecutorial misconduct.[33] The decision assures prosecutors that if they withhold precious Rosario material long enough, that is, until after direct appeals are exhausted, a defendant will not be entitled to a vacatur unless the defendant can prove actual prejudice.[34] The court's disregard for the decision's probable impact on prosecutorial misconduct is rooted in its antipathy toward the per se error rule's application to Rosario claims in general[35] and specif-

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same as definition of "prejudice" on appeal).

[32] *See* CPL § 440.10(1)(f). The *D'Amico* court saw no reason why a Rosario claim brought on a section 440.10(1)(f) motion should be treated differently than a Rosario claim raised on direct appeal. *D'Amico*, 136 Misc. 2d at 28, 517 N.Y.S.2d at 890. However, the *D'Amico* court was compelled with great reluctance to follow *Ranghelle* which "preclude[d] the application of the traditional 'prejudicial' analysis." *Id.* Therefore, the *D'Amico* court determined that in order for the court to apply harmless error analysis to Rosario claims brought on section 440.10 motions, a complete reversal of *Ranghelle* was essential. *See id.*

[33] *See generally* Barry Kamins, *Holding the Prosecutor More Accountable, An Increasing Trend*, 39 BROOK. BARR. 129 (1988). (Rosario per se error rule reaffirmed in *Jones* serves purpose of holding prosecutors accountable for their actions). The Rosario rule seeks to promote fairness during pretrial discovery. *See* Governor's Memorandum on Approval of ch. 411, N.Y. Laws (July 5, 1979), *reprinted in* [1979] N.Y. Laws 1800 (McKinney) (codification of Rosario rule will reduce "[t]he element of surprise . . . and it's inherent unfairness"). Additionally, the seminal case, *Rosario*, upon which the majority relies, states that it is a "right sense of justice" which entitles a defendant access to a prosecution witness's prior statements. *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450; *see also supra* note 1.

Section 440.10 provides a method of redress for unfairness which results from errors at trial not appearing on the record. *See* CPL 440.10(2); *see also* People v. Harris, 109 A.D.2d 351, 353, 491 N.Y.S.2d 678, 682, (2d Dep't. 1985) (stating that § 440.10 motions are impermissible if defendant is able to take appeal). A post-conviction motion to vacate, such as section 440.10, is an effective measure designed to curb the prosecutor who is not subject to civil liability for acts committed in his prosecutorial capacity. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (post-conviction collateral remedies insure that defendant receives fair trial).

[34] *See Jackson*, 78 N.Y.2d at 659, 585 N.E.2d at 808, 578 N.Y.S.2d at 496 (Titone J., dissenting). Since the timing of the disclosure is solely within the prosecutor's control, it is unfair to base the outcome of the defendant's claim upon the whim of the prosecutor. *See id.*; *see also* Kunstler, *supra* note 15, at 2 ("This one-sided approach . . . will result in increased prosecutorial misconduct . . . .").

[35] *See* People v. Jones, 70 N.Y.2d 547, 553, 517 N.E.2d 865, 869, 523 N.Y.S.2d 53, 57 (1987) (Bellacosa, J., concurring) (referring to cases which adopted per se error rule as "three errant footsteps"). *But see* People v. Young, 79 N.Y.2d 365, 371, 591 N.E.2d 1163, 1167, 582 N.Y.S.2d 977, 981 (1992). In *Young*, the court refused to apply a harmless error

ically to section 440.10 post-judgment collateral attacks.[36]

By improperly construing the "improper and prejudicial" language of section 440.10(1)(f), the *Jackson* court subverted the common policies underlying both the Rosario rule and section 440.10. The immediate effect of this "decision will be to make relief for Rosario violations virtually unavailable in post-conviction proceedings,"[37] while encouraging prosecutors who discover potential Rosario material to postpone disclosure until after direct appeals have been exhausted. Although *Jackson* only affects Rosario claims brought on a section 440.10 motion, this decision may signify the court's eventual overruling of the per se error rule with respect to Rosario claims, regardless of the manner by which they are raised.

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analysis to Rosario claims raised on direct appeal. *Id.* Writing for the court, Judge Titone stated that "[t]he decision in *Jackson*, which was premised on the unique policy considerations related to the finality of criminal judgments, thus was not intended to signal a more general retreat from the Court's ongoing 'commitment' to the . . . *per se* rule of reversal." *Id.* at 370-71, 591 N.E.2d at 1166, 582 N.Y.S.2d at 980.

[36] See CPL § 440.10 commentary at 319 (McKinney 1987). "The codification . . . [of the common law *coram nobis* writ] has not fulfilled one of its hoped for missions, i.e. curtailment of post-judgment collateral proceedings in the State . . . courts." *Id.*

[37] *Jackson*, 78 N.Y.2d at 651, 585 N.E.2d at 803, 578 N.Y.S.2d at 491 (Titone, J., dissenting).