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JUDICIAL NEGLECT OF THE STATUTORY BASIS FOR THE *ROSARIO** RULE: THE GENESIS OF THE POSSESSION OR CONTROL REQUIREMENT

David Blair-Loy**

INTRODUCTION

In 1961, the New York Court of Appeals, in *People v. Rosario*,¹ held that the prosecution must turn over to the defense certain prior statements by prosecution witnesses.² In 1979, the New York State legislature enacted section 240.45(1)(a) of the Criminal Procedure Law,³ which also requires production of prior statements by prosecution witnesses. Despite significant discrepancies in the language of the *Rosario* case and the controlling statute, the Court of Appeals has neglected the controlling statute in deciding a critical issue: whether a prosecutor is required to produce statements not in the actual possession of the prosecutor's office.

The *Rosario* court contemplated production only of statements made to the "police, district attorney or grand jury."⁴ However, the

* *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

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¹ 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

² *Id.*

³ See N.Y. CRIM. PROC. LAW § 240.45(1)(a) (McKinney 1993).

⁴ 9 N.Y.2d at 289, 173 N.E.2d at 882, 213 N.Y.S.2d at 450. Cf. 18 U.S.C. § 3500 (1994) (requiring federal prosecutors "to produce any statement . . . of [a witness called by the prosecution] in the possession of the United States which relates to the subject matter as to which the witness has testified"), *cited in*

legislature departed somewhat from that language when it enacted section 240.45. The statute requires the prosecution to produce “[a]ny written or recorded statement . . . 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.”⁵ Unfortunately, the Court of Appeals has not fully addressed the extent to which the statute should be construed to expand the prosecution’s obligation to produce pretrial statements of witnesses.

Since the enactment of section 240.45, the Court of Appeals has grappled with the scope of the prosecution’s obligation. The court’s efforts have culminated in the recent announcement that “[w]hile the statute speaks of ‘[a]ny written or recorded statement,’ its scope has been judicially interpreted as limited to circumstances when the trial prosecutor actually has possession or control of requested materials subject to the *Rosario* rule.”⁶ On that basis, the court held that prosecutors have no obligation to produce statements of witnesses made to parole officers.⁷ That ruling represents the latest in a series of decisions relying on the “possession or control” rubric to circumscribe the prosecution’s obligation to produce statements made by or to representatives of other governmental agencies.⁸

The notion of “possession or control” has become central to *Rosario* law without a sustained examination of its origins or justification, if any, in the language or purposes of the controlling statute. Whether by design or accident, the Court of Appeals has seized on it to limit the prosecution’s obligations more severely

Rosario, 9 N.Y.2d at 289, 173 N.E.2d at 882, 213 N.Y.S.2d at 450.

⁵ N.Y. CRIM. PROC. LAW § 240.45(1)(a) (emphasis added).

⁶ *People v. Kelly*, 88 N.Y.2d 248, 251-52, 666 N.E.2d 1348, 1349, 644 N.Y.S.2d 475, 476 (1996).

⁷ *See id.* at 253, 666 N.E.2d at 1350, 644 N.Y.S.2d at 477, *overruling* *People v. Fields*, 146 A.D.2d 505, 537 N.Y.S.2d 157 (1st Dep’t 1989).

⁸ *See, e.g., People v. Howard*, 87 N.Y.2d 940, 941, 663 N.E.2d 1252, 1253, 641 N.Y.S.2d 222, 223 (1996) (prison disciplinary hearing transcripts); *People v. Washington*, 86 N.Y.2d 189, 191, 654 N.E.2d 967, 968, 630 N.Y.S.2d 693, 694 (1995) (audiotapes made by medical examiners during autopsies); *People v. Flynn*, 79 N.Y.2d 879, 882, 589 N.E.2d 383, 385, 581 N.Y.S.2d 160, 162 (1992) (accident reports filed with Department of Motor Vehicles); *People v. Fishman*, 72 N.Y.2d 884, 886, 528 N.E.2d 1212, 1213, 532 N.Y.S.2d 739, 740 (1988) (untranscribed minutes of co-defendant’s guilty plea).

than the language of section 240.45(1)(a) appears to provide or the legislature may have intended. This Article examines the origins and evolution of the “possession or control” rule and suggests that it cannot be justified under the language or purposes of the governing statute. This Article then proposes an alternative interpretation of the statute: the prosecution should have the obligation to produce any prior written or recorded statement in the possession of any governmental agency, state or local. Such an interpretation is consistent with the language and purposes of the statute and avoids the pitfalls of the current scheme.

I. DEVELOPMENT OF THE POSSESSION OR CONTROL RULE

Ironically, the “possession or control” rule first emerged as a means to expand the prosecution’s obligation to turn over prior statements of witnesses. In *People v Perez*,⁹ the prosecutor recorded and transcribed several conversations between a prosecution witness and members of the defendant’s family concerning an alleged attempt to bribe the witness, but failed to provide transcripts of the conversations to the defense.¹⁰ The Court of Appeals held that the statements should have been produced and rejected the argument that the prosecution’s obligation should extend only to statements made to police, prosecutors or grand juries, as provided in *Rosario*.¹¹ The court found the suggested limitation “artificial” in part because “the conversations were prompted by the prosecutor and recorded by law enforcement personnel and were in their possession and control.”¹² The court also saw “no reason why defense counsel should be deprived of the opportunity to inspect a witness’ prior statement . . . simply because the witness made the statement to a person who is not involved in law enforcement or prosecution,” noting that section 240.45(1)(a) “makes no such distinction.”¹³

⁹ 65 N.Y.2d 154, 480 N.E.2d 361, 490 N.Y.S.2d 747 (1985).

¹⁰ *Id.* at 156, 480 N.E.2d at 362, 490 N.Y.S.2d at 748.

¹¹ *See id.* at 158, 480 N.E.2d at 363-64, 490 N.Y.S.2d at 749-50.

¹² *Id.*

¹³ *Id.* at 158-59, 480 N.E.2d at 364, 490 N.Y.S.2d at 750.

The *Perez* court recognized that the statute altered the obligation imposed by the court in *Rosario*. By requiring the production of any written or recorded statement, the legislature evidently intended to broaden the prosecution's obligation. Although the Court of Appeals noted that the statements at issue in *Perez* were in the "possession [or] control" of the prosecutor, the court found it "more fundamental" that the plain language of the statute mandated production of statements made to persons "not involved in law enforcement or prosecution."¹⁴ Under *Perez*, therefore, the fact that prior statements of a witness are in the "possession or control" of the prosecutor is sufficient, but perhaps not necessary, to trigger the prosecutor's obligation.

After *Perez*, however, the Court of Appeals drifted away from that position, holding in *People v. Reedy*¹⁵ that the prosecution was not required to produce a complainant's personal account of an alleged attempted rape because "it was not in their possession or control."¹⁶ Similarly, the court later held that the prosecution was not required to produce a report made by a private security guard to his employer because "the People did not know of the statement's existence or contents, and . . . the document was never in the People's possession or control."¹⁷ The court pushed the analysis even further in *People v. Fishman*,¹⁸ holding that the prosecution was not required to produce untranscribed minutes of a co-defendant's plea hearing, even though the prosecution had actual knowledge of the statements.¹⁹ The court stated:

The *Rosario* rule has no application in the circumstances of this case, where untranscribed plea minutes of a potential prosecution witness have been ordered but not received by the prosecution. Having had no immediate access of

¹⁴ *Id.*, 480 N.E.2d at 363-64, 490 N.Y.S.2d at 750.

¹⁵ 70 N.Y.2d 826, 517 N.E.2d 1324, 523 N.Y.S.2d 438 (1987).

¹⁶ *Id.* at 827, 517 N.E.2d at 1325, 523 N.Y.S.2d at 439.

¹⁷ *People v. Bailey*, 73 N.Y.2d 812, 813, 534 N.E.2d 28, 29, 537 N.Y.S.2d 111, 112 (1988).

¹⁸ 72 N.Y.2d 884, 528 N.E.2d 1212, 532 N.Y.S.2d 739 (1988).

¹⁹ *See id.* at 885-86, 528 N.E.2d at 1212-13, 532 N.Y.S.2d at 739-40.

their own to the statements, the People cannot be held responsible for a failure to turn them over to defendant.²⁰

In these two cases, the court elevated the “possession or control” issue to a critical position in the *Rosario* analysis.

Dissenting in *Fishman*, Judge Titone argued that the majority’s holding was “inconsistent with the express language and spirit of CPL 240.45(1).”²¹ Although the majority apparently took the position that “the statute was merely a codification of the *Rosario* rule,” Judge Titone contended that “the language and legislative history of CPL 240.45(1)(a) compel a contrary conclusion.”²² According to Judge Titone, the statute “[o]n its face” required disclosure of the co-defendant’s statement, and the legislative history of section 240.45 “indicates that it was designed to reduce the element of surprise, with its inherent unfairness, in criminal trials, as well as to broaden discovery.”²³ Specifically, the goal of section 240.45 “was to expand discovery in criminal cases beyond that provided for in *Rosario*.”²⁴ Although the majority relied on the fact that the plea minutes “were not in the control of the People,” Judge Titone believed that the “determinative factor” was “whether the statement might have been of use to the defense.”²⁵

In *People v. Tissois*,²⁶ the Court of Appeals identified the question “whether the material sought is in the possession or control of the People” as one of “certain factors . . . bearing upon the scope of the People’s obligation under *Rosario* to produce the

²⁰ *Id.* at 886, 528 N.E.2d at 1213, 532 N.Y.S.2d at 740 (citation omitted).

²¹ *Id.* (Titone, J., dissenting).

²² *Id.* at 887, 528 N.E.2d at 1213, 532 N.Y.S.2d at 740 (Titone, J., dissenting).

²³ *Id.*, 528 N.E.2d at 1213, 532 N.Y.S.2d at 740-41 (Titone, J., dissenting) (reviewing legislative history).

²⁴ *Id.*, 528 N.E.2d at 1213-14, 532 N.Y.S.2d at 741 (Titone, J., dissenting); *see id.* at 887 n.*, 528 N.E.2d at 1214 n.*, 532 N.Y.S.2d at 741 n.* (Titone, J., dissenting) (reviewing legislative history).

²⁵ *Id.* at 888, 528 N.E.2d at 1214, 532 N.Y.S.2d at 741 (Titone, J., dissenting). However, Judge Titone did not take issue with the result in *People v. Reedy*, distinguishing it on the ground that unlike a complainant’s personal account, the record of the co-defendant’s plea was the result of the prosecution’s active participation. *Id.* (Titone, J., dissenting).

²⁶ 72 N.Y.2d 75, 526 N.E.2d 1086, 531 N.Y.S.2d 228 (1988).

pretrial statements of prosecution witnesses.”²⁷ In *Tissois*, the defendant sought disclosure of statements made by the complainants to a registered social worker. The court held that the statements were not subject to disclosure because they were privileged by statute,²⁸ and in any event were not in the possession or control of the prosecution.²⁹

The Court of Appeals summarized its approach in *People v. Flynn*,³⁰ in which the defendant moved for disclosure of a “motor vehicle accident report filed by the complainant with the Department of Motor Vehicles.”³¹ The court stated:

We have consistently held that the People’s *Rosario* obligation to produce the pretrial statements of prosecution witnesses is limited to material which is within their possession or control. Material in the possession of a State administrative agency, such as the Department of Motor Vehicles, is not within the control of a local prosecutor; thus the court properly denied defendant’s request.³²

In *Flynn*, the court first extended the “possession or control” rationale to include materials in the possession of a governmental agency, rather than a private person.

The court refined its analysis somewhat in *People v. Washington*,³³ synthesizing the “possession or control” cases with cases holding that the prosecution is required to turn over materials in the possession of the police.³⁴ According to the court, statements must be produced if they are in the “actual possession of a law enforcement agency” or if they are “in the ‘control’ of

²⁷ *Id.* at 78, 526 N.E.2d at 1087, 531 N.Y.S.2d at 229.

²⁸ See N.Y. C.P.L.R. § 4508 (McKinney 1992).

²⁹ See *Tissois*, 72 N.Y.2d at 77-78, 526 N.E.2d at 1086-87, 531 N.Y.S.2d at 228-29.

³⁰ 79 N.Y.2d 879, 589 N.E.2d 383, 581 N.Y.S.2d 160 (1992).

³¹ *Id.* at 882, 589 N.E.2d at 385, 581 N.Y.S.2d at 162.

³² *Id.* (citations omitted).

³³ 86 N.Y.2d 189, 654 N.E.2d 967, 630 N.Y.S.2d 693 (1995).

³⁴ *Id.* at 192, 654 N.E.2d at 968, 630 N.Y.S.2d at 694. See, e.g., *People v. Martinez*, 71 N.Y.2d 937, 524 N.E.2d 134, 528 N.Y.S.2d 813 (1988); *People v. Novoa*, 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504 (1987); *People v. Ranghelle*, 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986).

the People.”³⁵ The court then held that the prosecution was not required to produce a copy of an audiotape made by a medical examiner during the course of an autopsy, finding that “the duties of [the medical examiner’s office] are, by law, independent of and not subject to the control of the office of the prosecutor, and . . . [the medical examiner’s office] is not a law enforcement agency.”³⁶ The court therefore held that a disclosure “obligation simply does not arise where, as here, the People lack control over the items in question and the entity in possession of them is not a law enforcement agency.”³⁷

After *Washington*, therefore, the only statements that must be produced are those actually “in or subject to the possession or control of the particular prosecution office” or “in the actual possession of what is primarily a law enforcement agency.”³⁸ For that reason, the Court of Appeals subsequently held that the prosecution is not required to produce statements made by witnesses at a prison disciplinary proceeding held by the Department of Correctional Services. According to the court, that department “has no duty to share such material” with the prosecutor’s office and in most respects is “an administrative rather than a law enforcement agency.”³⁹

Similarly, the court in *People v. Kelly*⁴⁰ noted that “records of the State Division of Parole should not generally be deemed to be in the control of 62 county prosecutors, nor of any other prosecutorial office subject to the *Rosario* rule.”⁴¹ Moreover, the court deemed the Division of Parole an “administrative” rather than a “law enforcement” agency, despite the “incidental law enforcement functions that parole officers are authorized to perform.”⁴²

³⁵ *Washington*, 86 N.Y.2d at 192, 654 N.E.2d at 968, 630 N.Y.S.2d at 694.

³⁶ *Id.*, 654 N.E.2d at 969, 630 N.Y.S.2d at 695.

³⁷ *Id.* at 193, 654 N.E.2d at 969, 630 N.Y.S.2d at 695.

³⁸ *People v. Kelly*, 88 N.Y.2d 248, 252, 666 N.E.2d 1348, 1350, 644 N.Y.S.2d 475, 477 (1996).

³⁹ *People v. Howard*, 87 N.Y.2d 940, 941, 663 N.E.2d 1252, 1253, 641 N.Y.S.2d 222, 223 (1996).

⁴⁰ *Kelly*, 88 N.Y.2d 248, 666 N.E.2d 1348, 644 N.Y.S.2d 475.

⁴¹ *Id.* at 252, 666 N.E.2d at 1350, 644 N.Y.S.2d at 477.

⁴² *Id.* (noting N.Y. CRIM. PROC. LAW § 2.10(23) (McKinney 1992); 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8004.2 (1996)).

According to the court, such agencies “do not represent ‘The People’ in the distinctive and customary usage of that term for prosecutorial purposes.”⁴³

In the cases following *Perez* and culminating in *Kelly*, the Court of Appeals transformed the “possession or control” requirement from a sufficient to a necessary predicate for triggering the prosecution’s duty to produce prior statements. To reconcile the “possession or control” requirement with the long standing rule that statements taken by the police must be disclosed, the court engrafted the alternative requirement that statements in the possession of what is primarily a law enforcement agency must also be produced. In *Kelly*, the Court of Appeals stated for the first time that the “possession or control” and law enforcement agency rubrics constitute a “judicial interpretation” of the controlling statute.⁴⁴

II. INTERNAL CONTRADICTIONS OF THE POSSESSION OR CONTROL RULE

The line of cases culminating in *Kelly* reveals that the Court of Appeals has little interest in significantly expanding the scope of the prosecution’s obligation to produce statements beyond the limits expressed in *Rosario*. The court has therefore construed section 240.45(1)(a) as coterminous with the rule announced in *Rosario*, with one exception. Under the court’s reading of the statute, the only statements the prosecution must produce are those made to the police, the district attorney’s office or the grand jury—as in *Rosario*—or other statements that happen to be in the actual possession of the police or district attorney’s office. The reasoning behind that result, however, is suspect and cannot necessarily be reconciled with the language or purposes of the controlling statute.

Initially, section 240.45(1)(a) did not merely “codif[y]”⁴⁵ the holding in *Rosario*. The Court of Appeals has recognized in other

⁴³ *Id.* at 253, 666 N.E.2d at 1350, 644 N.Y.S.2d at 477.

⁴⁴ *Id.* at 251-52, 666 N.E.2d at 1349, 644 N.Y.S.2d at 476 (referring to N.Y. CRIM. PROC. LAW § 240.45(1)(a)).

⁴⁵ *Id.* at 251, 666 N.E.2d at 1349, 644 N.Y.S.2d at 476; *People v. Washington*, 86 N.Y.2d 189, 191, 654 N.E.2d 967, 968, 630 N.Y.S.2d 693, 694 (1995).

contexts that the statute modified the prosecution's obligations. For example, although *Rosario* required disclosure of prior statements "only after direct examination" of the witness,⁴⁶ the statute "requires that disclosure be made before the prosecutor's opening address in a jury trial and 'before submission of evidence' in a nonjury trial."⁴⁷ The court has never advanced any reason why the statutory definition of what must be produced should parallel that of *Rosario*, when in other respects the statute departs from the requirements of *Rosario*.

More importantly, the court has never explained why the statute requires production of statements in the possession of the police department but not those in the possession of other agencies. In *People v. Ranghelle*,⁴⁸ where the police failed to provide a complaint report to the prosecution, the court rejected "the People's argument that the *Rosario* rule should not be applied where the prior statement of the prosecution witness is not in the sole custody of the People"⁴⁹ As the court stated:

Where, as here, the existence of a complaint report filed with a police precinct 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. As we observed in *Rosario*, "the State has no interest in interposing any obstacle to the disclosure of the facts", and society's interest in maintaining criminal trials as truth-finding processes requires that the burden of locating and producing prior statements of complaining witnesses, filed with police agencies, remain solely with the People.⁵⁰

The court has never suggested any reason why this rationale should not be extended to materials outside the possession of the police,

⁴⁶ *People v. Rosario*, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 451 (1961).

⁴⁷ *People v. Perez*, 65 N.Y.2d 154, 159, 480 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750 (1985) (quoting N.Y. CRIM. PROC. LAW § 240.45(1)).

⁴⁸ 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986).

⁴⁹ *Id.* at 64, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585.

⁵⁰ *Id.* (emphasis added).

the existence of which is also "readily ascertainable" by the prosecution.

In reality, the prosecution exercises no more control over documents in police hands than it does over documents in the hands of other agencies. Like the Department of Correctional Services in *People v. Howard*,⁵¹ and the Division of Parole in *People v. Kelly*, the police have no legal obligation to share information with the district attorney's office. Instead, police reports and other documents "are ordinarily made available to the People only by virtue of custom, practice and internal rules."⁵² In fact, it is not unknown for the police to fail to turn documents over to the district attorney's office, either by mistake in an individual case or as a matter of course in a series of cases.⁵³ Therefore, the police cannot be "considered to be peculiarly within the prosecutor's control,"⁵⁴ and the prosecution has no more "immediate access"⁵⁵ to police documents than it does to documents held by other agencies.

To say that the prosecution is required to produce only those materials held by "law enforcement" agencies is to beg the question. The police themselves play a multi-faceted role and perform multiple and complex tasks unrelated to law enforcement. Among other duties, the police are charged with "the maintenance of order, the control of pedestrian and vehicular traffic, the mediation of domestic and other noncriminal conflicts and

⁵¹ 87 N.Y.2d 940, 663 N.E.2d 1252, 641 N.Y.S.2d 222 (1996).

⁵² *People v. Washington*, 86 N.Y.2d 189, 195, 654 N.E.2d 967, 970, 630 N.Y.S.2d 693, 696 (1995) (Titone, J., dissenting).

⁵³ *See, e.g., People v. Young*, 79 N.Y.2d 365, 368 n.*, 591 N.E.2d 1163, 1165 n.*, 582 N.Y.S.2d 977, 979 n.* (1992) (noting that document not turned over to defendant "was one of many similar reports that had been generated by the Police Department but had never been disclosed to the trial assistants assigned to prosecute the cases").

⁵⁴ *People v. Fields*, 146 A.D.2d 505, 513, 537 N.Y.S.2d 157, 163 (1st Dep't 1989) (Sullivan, J., concurring), *overruled by People v. Kelly*, 88 N.Y.2d 248, 666 N.E.2d 1348, 644 N.Y.S.2d 475 (1996).

⁵⁵ *People v. Fishman*, 72 N.Y.2d 884, 886, 528 N.E.2d 1212, 1213, 532 N.Y.S.2d 739, 740 (1988).

supplying emergency help and assistance.”⁵⁶ As the Court of Appeals has said, “To consider the actions of the police solely in terms of arrest and criminal process is an unnecessary distortion. We must take cognizance of the fact that well over 50% of police work is spent in pursuits unrelated to crime.”⁵⁷

The distinction between “law enforcement” and “administrative” agencies is therefore artificial. The Court of Appeals has never defined what is “primarily” a law enforcement agency as opposed to what is “primarily” an administrative agency, and its approach in practice seems little more than arbitrary. Whether an agency’s administrative functions are primary and its law enforcement functions “incidental,”⁵⁸ or vice versa, appears to be purely in the eye of the beholder. The distinction between “law enforcement” and “administrative” agencies is therefore untenable as a matter of both theory and practice, as aptly demonstrated by Judge Titone’s dissent in *Washington*.⁵⁹

In *Flynn*, the Court of Appeals seemed to suggest that a local prosecutor should be excused from producing statements in the hands of state agencies because state and local governments are entirely separate entities. However, the distinction between state and local government, at least for law enforcement purposes, is fluid at best. Although district attorneys may be elected by the people of their particular counties, they enforce the law in the name of the state as a whole, not merely their local constituents. Moreover, the state government shares responsibility for law enforcement with district attorneys, as manifested in section 63 of the Executive Law, which authorizes the governor to order the

⁵⁶ *People v. DeBour*, 40 N.Y.2d 210, 218, 352 N.E.2d 562, 568, 386 N.Y.S.2d 375, 381 (1976).

⁵⁷ *Id.* The same could be said of the fire department, although it has been held that the notes of an investigating fire marshal are nonetheless *Rosario* material. See *People v. Schoolfield*, 196 A.D.2d 111, 118, 608 N.Y.S.2d 413, 418 (1st Dep’t 1994).

⁵⁸ See *Kelly*, 88 N.Y.2d at 252, 666 N.E.2d at 1350, 644 N.Y.S.2d at 477.

⁵⁹ See *People v. Washington*, 86 N.Y.2d 189, 195-96, 654 N.E.2d 967, 970-71, 630 N.Y.S.2d 693, 696-97 (1995) (Titone, J., dissenting). See also *Fields*, 146 A.D.2d at 509, 537 N.Y.S.2d at 160 (discussing why Division of Parole should be considered a law enforcement agency despite its administrative functions).

attorney general to appear in the place of any district attorney.⁶⁰ Moreover, even absent an executive order, the attorney general may “assist” in a local prosecution as long as the district attorney “retain[s] the ultimate prosecutorial authority” in the matter.⁶¹ For these reasons, local prosecutors must be considered representatives of the state, and state and local governments cannot be considered entirely separate for law enforcement purposes.

Ultimately, the reasoning behind the Court of Appeals’ construction of the scope of the prosecution’s obligation to produce statements collapses under the weight of its own contradictions. The court has never explained why police documents must be produced while documents of other governmental agencies need not be produced. The distinctions between “law enforcement” and “administrative” agencies and state and local government are unsustainable in theory or practice. More fundamentally, the statute does not support the position that only documents possessed by “law enforcement” agencies or “local” prosecutors must be produced. As a result, the court’s decisions on the scope of the prosecution’s *Rosario* obligation cannot be supported as a matter of either logic, reason or statutory construction.

III. BEYOND “POSSESSION OR CONTROL”: A NEW RULE AND ITS IMPLICATIONS

Because section 240.45(1)(a) requires the production of “[a]ny written or recorded statement” by a prosecution witness,⁶² it seems likely that the legislature meant to broaden the scope of the

⁶⁰ See N.Y. EXEC. LAW § 63(2) (McKinney 1993) (stating that when directed by governor, attorney general shall appear before “any term of the supreme court or . . . the grand jury thereof for the purpose of managing or conducting in such court or before such jury criminal actions or proceedings as shall be specified” by the governor). An attorney general exercising that power “steps into the shoes of the local District Attorney.” *In re Carey*, 68 A.D.2d 220, 224, 416 N.Y.S.2d 904, 907 (4th Dep’t 1979). In addition, the attorney general may prosecute any criminal violation of an anti-discrimination law that the district attorney cannot effectively prosecute or has erroneously failed to prosecute. N.Y. EXEC. LAW § 63(10).

⁶¹ *In re Haggerty*, No. 13, 1997 N.Y. LEXIS 102, at *7 (Feb. 6, 1997).

⁶² N.Y. CRIM. PROC. LAW § 240.45(1)(a).

prosecution's obligation to produce statements. This Article seeks to propose a reasonable construction of the statutory language that is consistent with the stated purposes of the *Rosario* rule and justifiable in both theory and practice. Given the legislature's evident intent to expand the prosecution's obligation, it seems reasonable to require the prosecution to produce any non-privileged statements in the possession of any state or local governmental agency, not merely those in the possession of the police.⁶³

As an initial matter, it is doubtful that the statutory language should be taken literally, since the legislature most likely did not intend to require the prosecution to produce statements that are held by private persons or agencies and that the prosecution had no role in creating. For that reason, *People v. Reedy* represents a reasonable interpretation of the statute.⁶⁴ However, it is not self-evident that the statute should otherwise be construed as narrowly as the court has suggested.

Many state and local agencies other than the police are charged with gathering information and may refer matters to a state or local prosecutor's office for criminal prosecution. At the state level such agencies include, for example, the Department of Motor Vehicles, the Department of Environmental Protection, the Department of Correctional Services and the Division of Parole. At the local level, such agencies can include the medical examiner's office and various housing, health and safety inspectors, among others. All of these agencies collect information relevant to criminal prosecutions. While they may not have a "duty" to share such information,⁶⁵ it

⁶³ This proposed rule does not strictly apply to statements in the possession of court reporters, which were the subject of the ruling in *People v. Fishman*, because court reporters are not employees of the court. However, such statements could be considered *Rosario* material under the alternative rationale that the prosecution was an "active participant" in creating the statements and should therefore be charged with actual knowledge of their existence. 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).

⁶⁴ 70 N.Y.2d 826, 517 N.E.2d 1324, 523 N.Y.S.2d 438 (1987).

⁶⁵ Compare *People v. Washington*, 86 N.Y.2d 189, 195, 654 N.E.2d 967, 970, 630 N.Y.S.2d 693, 696 (1995) (Titone, J., dissenting) (stating that the New York City Charter requires the medical examiner's office to "promptly deliver" records to district attorney's office in cases of death involving criminality) *with*

is unlikely that they would refuse to provide information requested by the police or a district attorney's office.

Indeed, *People v. Howard*⁶⁶ arose out of a murder committed in a prison, and the transcript of the disciplinary proceedings that the defendant sought "involv[ed] the same incident" for which the defendant was tried.⁶⁷ Evidently, the case was prosecuted because the Department of Correctional Services informed the police or district attorney's office of the incident. In practice, therefore, it appears that state and local agencies cooperate with prosecutors even though they may have no legal duty to do so, just as the police routinely cooperate with prosecutors, even in the absence of a legal duty to do so.

According to the Court of Appeals, the purpose of producing the prior statements of prosecution witnesses is to remove "any obstacle to the disclosure of the facts" and to promote the truth-seeking function of criminal trials.⁶⁸ That interest would be well served, at a relatively low cost, by requiring the prosecution to produce prior statements made by or to the representatives of any state or local governmental agency. While it has long been held that "[k]nowledge on the part of the police department would, of course, be imputed to the District Attorney's office,"⁶⁹ there is little reason not to extend that principle to other governmental agencies for purposes of *Rosario* analysis.

First, as the legal representative of the people, the prosecutor's office should be charged with knowing which agencies are required or authorized under state or local law to gather information about a particular occurrence. In many cases, it is self-evident which

People v. Howard, 87 N.Y.2d 940, 941, 663 N.E.2d 1252, 1253, 641 N.Y.S.2d 222, 223 (1996) (stating that the Department of Correctional Services has "no duty" to share information with District Attorney).

⁶⁶ 209 A.D.2d 1014, 619 N.Y.S.2d 993 (4th Dep't 1994), *aff'd*, 87 N.Y.2d 940, 663 N.E.2d 1252, 641 N.Y.S.2d 222 (1996).

⁶⁷ *Id.* at 1014, 619 N.Y.S.2d at 993.

⁶⁸ *People v. Rosario*, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 451 (1961) (quoting *People v. Walsh*, 262 N.Y. 140, 150, 186 N.E. 422, 425 (1933) and *People v. Davis*, 18 N.W. 362, 363 (1884)).

⁶⁹ *People v. Spruill*, 47 N.Y.2d 869, 871, 392 N.E.2d 1252, 1253, 419 N.Y.S.2d 69, 70 (1979) (quoting *People v. McLaurin*, 38 N.Y.2d 123, 126, 341 N.E.2d 250, 252, 378 N.Y.S.2d 692, 694 (1975)).

agencies other than the police are collecting information. For example, the medical examiner's office must "perform an autopsy in cases where a homicide is being investigated,"⁷⁰ and motorists must file accident reports with the Department of Motor Vehicles.⁷¹ Second, the existence of such statements is as "readily ascertainable"⁷² to a prosecutor as is the existence of statements made to the police. Absent a statutory privilege, there is no reason to presume that state and local agencies would be any less cooperative than the police in providing documents requested by a prosecutor's office.

Third, and perhaps most importantly, the current scheme frustrates the truth-seeking function of the *Rosario* rule and promotes strategic behavior. The present system encourages prosecutors not to obtain statements held by agencies other than the police, even if such statements might assist in the search for truth. Once such statements are obtained they must be turned over to the defense, resulting in a strategic disadvantage for the prosecution. As a result, prosecutors have a strong incentive to rely only on information gathered by the police as well as a corollary disincentive to seek out statements in the hands of other agencies. The present scheme therefore encourages the gamesmanship that the statute was designed to reduce at the expense of the fairness the statute was designed to promote. By contrast, a rule requiring the prosecution to produce non-privileged statements of witnesses held by any governmental agency would enhance the fairness and reliability of criminal trials and discourage strategic behavior at relatively minimal cost to the prosecution.

It is no answer to suggest that materials held by state or local governmental agencies are not within the "control" of a local prosecutor's office.⁷³ If "control" over documents by the

⁷⁰ *Washington*, 86 N.Y.2d at 192, 654 N.E.2d at 969, 630 N.Y.S.2d at 695.

⁷¹ See *People v. Flynn*, 79 N.Y.2d 879, 882, 589 N.E.2d 383, 385, 581 N.Y.S.2d 160, 162 (1992).

⁷² *People v. Ranghelle*, 69 N.Y.2d 56, 64, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986).

⁷³ See *People v. Kelly*, 88 N.Y.2d 248, 252, 666 N.E.2d 1348, 1350, 644 N.Y.S.2d 475, 477 (1996); *Flynn*, 79 N.Y.2d at 882, 589 N.E.2d at 385, 581 N.Y.S.2d at 162.

prosecutor's office is the touchstone, then the prosecution should not be required to turn over any materials not in its actual possession, including statements held by the police, a position the Court of Appeals has consistently rejected. Instead, the critical factor should be whether the existence of the statements in question is "readily ascertainable by the prosecutor,"⁷⁴ whether or not the statements are in the hands of the police.⁷⁵ As demonstrated, the prosecution can obtain such statements from any state or local agency as easily as it can from the police, subject only to the existence of a statutory privilege.

Likewise, it is irrelevant that the defense could, in theory, subpoena or otherwise obtain such documents.⁷⁶ The Court of Appeals has already recognized in the context of police documents that the defense's theoretical ability to obtain a statement is irrelevant to the prosecution's obligation to produce the statement, as long as the existence of the statement is "readily ascertainable by the prosecut[ion]."⁷⁷ The same reasoning applies to statements in the possession of other state and local agencies. Moreover, since the state is putting the defendant on trial, it is not unreasonable to place the burden of production on the state. As a practical matter, prosecutors are more likely than defense lawyers to obtain cooperation from state and local agencies, and the search costs of

⁷⁴ *Ranghelle*, 69 N.Y.2d at 64, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. See *People v. Haupt*, 71 N.Y.2d 929, 930, 524 N.E.2d 129, 130, 528 N.Y.S.2d 808, 809 (1988) (suggesting that the relevant factor is whether statements were in prosecution's "possession or within their power to produce") (emphasis added).

⁷⁵ *Cf. United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991). The court stated that in a *Brady* case, "non-disclosure is inexcusable where the prosecution has not sought out information readily available to it [T]he availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state." *Id.*; see *Brady v. Maryland*, 373 U.S. 83 (1963).

⁷⁶ See *People v. Fields*, 146 A.D.2d 505, 514, 537 N.Y.S.2d 157, 163 (1st Dep't 1989) (Sullivan, J., concurring) (stating that defendants subject to revocation of parole are entitled to access to Division of Parole files).

⁷⁷ See *Ranghelle*, 69 N.Y.2d at 64, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585.

obtaining information from such agencies can be prohibitive for indigent or near-indigent defendants.

Finally, the practical costs of the proposed rule do not necessarily outweigh its benefits in fairness and enhanced truth-seeking. Admittedly, it would impose an additional burden on the prosecution to require it to produce statements held by agencies other than the police. However, such a duty would be imposed only in those cases involving other governmental agencies. Many of those cases would require little more effort than is required to contact the appropriate police officers in a given case. For example, the police routinely notify the relevant parole officer when a parolee is arrested, and the arresting officer, who typically testifies at trial, often gives a statement to the parole officer. By obtaining a defendant's criminal history, as is done as a matter of course for impeachment and sentencing purposes, a prosecutor can see that the defendant was on parole at the time of the arrest and contact the parole officer, who can forward all appropriate materials to the prosecutor.⁷⁸ The administrative costs of such investigation are therefore not excessive compared to the benefits in terms of fairness and truth-seeking, especially when the prosecution "apparently has frequent contact" with other agencies.⁷⁹

However, a consideration irrelevant to the merits of the possession or control rule may have prevented the Court of Appeals from adopting the rule proposed in this Article, or even from expanding the definition of what is a law enforcement agency. Because a failure to comply with the obligation to produce prior statements usually requires reversal *per se*,⁸⁰ any slip by the

⁷⁸ In fact, this is precisely what occurred in *People v. Fields*, where the prosecutor "specifically requested the parole officer to send him whatever notes she might have made in interviewing witnesses intended to be called at defendant's bail revocation hearing." 146 A.D.2d at 509, 537 N.Y.S.2d at 160.

⁷⁹ *Id.*

⁸⁰ See, e.g., *People v. Banch*, 80 N.Y.2d 610, 618, 608 N.E.2d 1069, 1073-74, 593 N.Y.S.2d 491, 495-96 (1992); *People v. Jones*, 70 N.Y.2d 547, 550-51, 517 N.E.2d 865, 867, 523 N.Y.S.2d 53, 55 (1987). The Court of Appeals has recognized only three exceptions to the rule of *per se* reversal. First, when a defendant has exhausted the direct appeal process and pursues a *Rosario* claim in a collateral motion pursuant to section 440.10 of the New York Criminal Procedure Law, the defendant "must demonstrate a reasonable possibility that the

prosecution, however inadvertent, often carries the high cost of reversal and retrial. In addition, the prosecution might be held hostage by an agency's failure to comply with a request for documents, either deliberately or because of incompetence. In such a case, the prosecution might be forced to choose between going to trial without *Rosario* material, risking ultimate mistrial or reversal, or running the risk of dismissal for failure to be ready for trial within the required time.⁸¹ Therefore, the broader the scope of the prosecution's obligation, the more likely it is that a defendant's conviction must be reversed and the defendant retried. Fear of such a scenario may be the unspoken factor driving the Court of Appeals' decisions on the scope of the prosecution's obligation to produce documents. Whether or not such a fear represents a valid reason to re-examine the rule of *per se* reversal, it is not a valid reason to maintain a possession or control rule that is unsupported by the controlling statute and bedeviled by its own internal contradictions.

CONCLUSION

Once it has been established that the defense is entitled to production of certain prior statements, the question becomes which

failure to disclose the *Rosario* material contributed to the verdict." *People v. Jackson*, 78 N.Y.2d 638, 649, 585 N.E.2d 795, 802, 578 N.Y.S.2d 483, 490 (1991); see N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1994). Second, when *Rosario* material has been lost or destroyed, the trial court has discretion to determine an appropriate sanction, which should include dismissal only in extreme cases. *Banch*, 80 N.Y.2d at 616, 608 N.E.2d at 1072, 593 N.Y.S.2d at 494 (citing cases). Third, reversal *per se* is not required when the withheld material is the "duplicative equivalent" of material that was disclosed. *People v. Consolazio*, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 806, 387 N.Y.S.2d 62, 66 (1976). In addition, a delay in producing *Rosario* material, as opposed to a complete failure to produce, does not require reversal unless the defendant was substantially prejudiced. *Banch*, 80 N.Y.2d at 617, 608 N.E.2d at 1073, 593 N.Y.S.2d at 495 (citing cases).

⁸¹ See N.Y. CRIM. PROC. LAW § 30.30 (McKinney 1992 & Supp. 1997) (requiring the prosecution to be ready for trial of felony within six months of filing of accusatory instrument, not counting time excludable for various reasons, except in certain homicide cases and other specified circumstances).

statements must be produced. Aside from generalities concerning the search for truth and complete disclosure of facts, the function of a rule governing the scope of the obligation to produce is to allocate the risk of non-production of statements. Such an allocation should ultimately rest on a balancing of the various interests involved in a criminal prosecution, promoting efficiency while recognizing the fundamental interest in fairness to defendants.

Influenced by federal law, the Court of Appeals in *Rosario* assigned the risk of non-production to the defense for all statements except those made to the police, the district attorney or the grand jury. By requiring production of *any* prior written or recorded statements, the legislature appeared to shift some of the risk of non-production onto the prosecution, although the legislature probably did not intend to impose an absolute requirement to produce all prior statements of witnesses made to anyone under any circumstances.

In *People v. Perez*, the Court of Appeals began to explore a reallocation of the risk of non-production based on the plain language of the statute, suggesting that a defendant is no less entitled to production of a statement simply because it was not made to a prosecutor or law enforcement agent.⁸² However, in the cases that followed, the court neglected the statute and analyzed *Rosario* issues in essentially a common-law fashion, transforming the possession or control requirement from a sufficient to a necessary predicate for the duty to produce prior statements. Like many common-law analyses, the court's decisions often seem fact-driven and result-oriented rather than based on a sustained exposition of the relevant principles. When subjected to close analysis, the court's construction of the scope of the obligation to produce cannot be sustained, and in fact encourages precisely the kind of strategic behavior the statute was designed to prevent.

Over the last ten years, the Court of Appeals has insisted that the risk of non-production of almost all statements not covered by the original *Rosario* rule must remain with the defense. In contrast, the court has maintained its allegiance to the *per se* reversal rule,

⁸² 65 N.Y.2d 154, 158-59, 480 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750 (1985).

which has been criticized as needlessly technical and inconsistent with the statutory demand to “determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties.”⁸³ Nonetheless, the Court of Appeals has apparently made a policy judgment that the competing interests in criminal prosecutions are best served by imposing a *per se* reversal rule, while at the same time restricting the scope of the prosecution’s obligation to produce. However, neither aspect of that judgment is necessarily mandated or supported by the governing statute. Such a balancing of interests, wise or not, should not be struck by the courts.

⁸³ N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 1994). See *Jones*, 70 N.Y.2d at 554-57, 517 N.E.2d at 870-71, 523 N.Y.S.2d at 57-59 (Bellacosa, J., concurring).